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CASES ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

226, 227, 228, 229, 230, U. S.

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BY

THE PUBLISHERS' EDITORIAL STAFF

---

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# JUSTICES

OF THE

# SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

---

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HON. OLIVER WENDELL HOLMES,
HON. WILLIAM R. DAY,
HON. HORACE H. LURTON,
HON. CHARLES EVANS HUGHES,
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HON. CHARLES HENRY BUTLER.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

[1] Commission ordered recorded, March 10, 1913.
[2] Commission ordered recorded, October 15, 1912.

ALLOTMENT, ETC., OF THE

# JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

**March 18, 1912.**

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENTS OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 56 L. ed. Appendix XL., p. 1208.

| Names of Justices, and Whence Appointed. | By Whom Appointed. | Circuits. 1902–1903. | Commissioned. | Sworn in. |
|---|---|---|---|---|
| Associate Justice OLIVER WENDELL HOLMES, Massachusetts. | President Roosevelt. | First. Me., N. H., Mass., R. I. | 1902. (Dec. 4.) | 1902. (Dec. 8.) |
| Associate Justice CHARLES E. HUGHES, New York. | President Taft. | Second. Vermont, Conn., New York. | 1910. (May 2.) | 1910. (Oct. 10.) |
| Associate Justice MAHLON PITNEY, New Jersey. | President Taft. | Third. New Jersey, Pa., Del. | 1912. (Mar. 13.) | 1912. (Mar. 18.) |
| Chief Justice EDWARD D. WHITE, Louisiana. | President Taft. | Fourth. Md., Va., N. C., W. Va., S. C. | 1910. (Dec. 12.) | 1910. (Dec. 19.) |
| Associate Justice JOSEPH R. LAMAR, Georgia. | President Taft. | Fifth. Ga., Ala., Fla., Miss., La., Tex. | 1910. (Dec. 17.) | 1911. (Jan. 3.) |
| Associate Justice WILLIAM R. DAY, Ohio. | President Roosevelt. | Sixth. Ky., Tenn., Ohio, Mich. | 1903. (Feb. 23.) | 1903. (Mar. 2.) |
| Associate Justice HORACE H. LURTON, Tennessee. | President Taft. | Seventh. Ind., Ill., Wis. | 1909. (Dec. 20.) | 1910. (Jan. 3.) |
| Associate Justice WILLIS VAN DEVANTER, Wyoming. | President Taft. | Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., Oklahoma, New Mex. | 1910. (Dec. 16.) | 1911. (Jan. 3.) |
| Associate Justice JOSEPH McKENNA, California. | President McKinley. | Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona, Hawaii.* | 1898. (Jan. 21.) | 1898. (Jan. 26.) |

*Territories assigned to circuits by order of the Supreme Court.

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IN THE

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OF THE

# UNITED STATES

AT

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# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1912.

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1]*WILLIAM E. BREESE and Joseph E. Dickerson
v.
UNITED STATES.

(See S. C. Reporter's ed. 1-11.)

**Indictment — presentment.**

1. The presentment of an indictment by the grand jury in a body is not demanded by the requirements of U. S. Const., 5th Amend., governing criminal prosecutions, and the failure so to present it does not go to the jurisdiction of the Federal court.

[For other cases, see Indictment, I., in Digest Sup. Ct. 1908.]

**Criminal law — presentment of indictment — waiver.**

2. Any right to have an indictment quashed on motion because the foreman of the grand jury delivered it to the court in the absence of the other grand jurors was lost by the failure to raise the question until after the term, and after the denial of a previous motion to quash on other grounds, in which it was admitted that the indictment had been duly returned into open court by the grand jury, although the plea of not guilty was entered pursuant to an order providing that such plea should not operate to prevent defendants from taking advantage upon motion in arrest of judg-

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NOTE.—Necessity that grand jury be present when indictment is presented.

To the intimation in BREESE v. UNITED STATES, that the reasons for requiring an indictment to be presented by the grand jury in a body were no longer persuasive, may be opposed several decisions holding that the return of the indictment must be made in the presence of the grand jury. Robinson v. State, 33 Ark. 180; People v. Blackwell, 27 Cal. 65; State v. Gainus, 86 N. C. 632; State v. Bordeaux, 93 N. C. 560.

And in Cachute v. State, 50 Miss. 169, the rule in Mississippi is said to be that the indictment must be brought into court by the grand jury as a body, or through the foreman, accompanied by the other jurors.

And this view is strongly upheld in Renegar v. United States, 26 L.R.A.(N.S.) 683, 97 C. C. A. 172, 172 Fed. 646, 19 Ann. Cas. 1117, where the foreman of the grand jury had handed a paper indorsed "A True Bill," to the clerk of the court, when the court was not in session, and when none of the grand jurors, except the foreman, were present. The court held that this was not sufficient to *place the accused on trial for* an infamous crime under the provision of the Federal Constitution that no person shall be held to answer for such a crime unless by an indictment of the grand jury, and that to constitute a valid indictment, the paper must be brought publicly into court by the grand jury as a body. The court said: "The foreman is not the representative of the grand jury. He is authorized to speak for it in its presence, when called on by the court to say whether the grand jury has any presentments to make. Any other rule would put it in the power of an individual who happened to be foreman of the grand jury, to gratify personal or other malice by presenting in the form of an indictment for an infamous offense a person innocent of all crime, and subject him to the annoyance, expense, and infamy attendant upon such accusation. It is not enough to say that such a thing is improbable; that it is possible is sufficient reason for adhering to those rules which have the sanction of time and immemorial usage. . . . We have been extremely reluctant to set aside the judgment in this case upon grounds which may appear technical, and for that reason have given unusual time to its consideration and to an investigation of

ment, or on motion for new trial, of all matters and things which could be taken advantage of by motion to quash, or demurrer.

[For other cases, see Criminal Law, 134-138, in Digest Sup. Ct. 1908.]

Indictment — formal defect — presentment.

3. The delivery of an indictment to the court by the foreman of the grand jury in the absence of the other jurors, if a defect at all, is "in matter of form only," within the meaning of U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720, providing that no indictment presented by a grand jury shall be deemed insufficient nor the trial, judgment, or other proceeding thereon be affected by any such defect which shall not tend to the prejudice of the defendant, it not being disputed but that the indictment was found and returned into court as a true bill.

[For other cases, see Indictment, I., in Digest Sup. Ct. 1908.]

[No. 476.]

Argued October 15, 1912. Decided October 28, 1912.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit, presenting questions as to the right to quash an indictment delivered to the court by the foreman of the grand jury in the absence of the other grand jurors. Answered in the negative.

The facts are stated in the opinion.

Mr. Charles A. Douglas argued the cause, and, with Messrs. John S. Adams, Thomas Ruffin, James H. Merrimon, Gibbs L. Baker, and Hugh H. Obear, filed a brief for Breese and Dickerson:

The entire grand jury must return an indictment in open court; otherwise it is void, and the court has no jurisdiction to try the accused.

(a) This is the common-law doctrine and was the law at the time of the adoption of the Constitution.

1 Chitty, Crim. Law, 324; 4 Bl. Com. 306; 1 Bishop, New Crim. Proc. § 869a; Thomp. & M. Juries, § 696; Com. v. Cawood, 2 Va. Cas. 541; State v. Heaton, 23 W. Va. 778; White v. Com. 29 Gratt. 824; Simmons v. Com. 89 Va. 156, 15 S. E. 387; Price v. Com. 21 Gratt. 846; 22 Cyc. 210; Renegar v. United States, 26 L.R.A.(N.S.) 683, 97 C. C. A. 172, 172 Fed. 646, 19 Ann. Cas. 1117; Gardner v. People, 20 Ill. 430; Goodson v. State, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738.

(b) This was the law of the state of North Carolina.

State v. Cox, 28 N. C. (6 Ired. L.) 445; State v. Bordeaux, 93 N. C. 563.

(c) It was the law of North Carolina until the year 1889, when a statute was required to change it.

(d) The crime with which the plaintiffs in error were charged is that of conspiracy, under U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, and is an infamous crime.

2 Fed. Stat. Anno. 247; Mackin v. United States, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; Cooley, Principles of Const. Law, 318.

(e) Accordingly, this became the law of the Constitution of the United States by adoption.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 275, 279, 15 L. ed. 372, 374, 376; Hagar v. Reclamation

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the practice in every state where the institution of the grand jury is preserved. Nothing is more clear than that the 'established mode of procedure' is for the grand jury to make its presentments publicly in open court, all of the grand jurors being present and answering to their names. It follows that a paper purporting to be an indictment handed by the foreman to the clerk when the court is not in session, and in the absence of the grand jury, is no indictment. This is not a question of irregularity, but of substantive law, based upon the direct terms of the constitutional guaranty that no man shall be 'held to answer' for an infamous offense except on an indictment by a grand jury. The indictment—and that means, of course, a valid indictment found and presented according to the settled usage and established mode of procedure—is a prerequisite to the jurisdiction of the court to try the person accused, —an indispensable condition and requirement, the absence of which renders the proceedings not simply voidable, but absolutely void."

In People v. Herrmans, 69 Misc. 303, 125 N. Y. Supp. 143, an indictment was held not to have been legally found because less than sixteen grand jurors (the number made necessary by law for the transaction of any business) were present in court at the time the indictment was presented.

But it is not essential that all of the grand jurors present an indictment, where it is presented by a larger number than the Constitution requires to concur in an indictment. State v. Griggsby, 117 La. 1046, 42 So. 497.

Statutes exist in some jurisdictions which require that indictments be presented to the court by the foreman in the presence of the grand jurors. Letcher v. State, 159 Ala. 59, 48 So. 805, 17 Ann. Cas. 716; State v. Quarles, 13 Idaho, 252, 89 Pac. 636.

Generally, as to necessity, mode, and record of bringing indictment into court, see note to Renegar v. United States, 26 L.R.A. (N.S.) 683.

Dist. No. 108, 111 U. S. 701, 707, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Ex parte Wall, 107 U. S. 265, 288, 27 L. ed. 552, 562, 2 Sup. Ct. Rep. 569; Lowe v. Kansas, 163 U. S. 81–88, 41 L. ed. 78–80, 16 Sup. Ct. Rep. 1031; Lewis v. United States, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; Hopt v. Utah, 110 U. S. 574, 578, 28 L. ed. 262, 264, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Schwab v. Berggren, 143 U. S. 442, 36 L. ed. 218, 12 Sup. Ct. Rep. 525; Cooley, Const. Law, 241; McGehee, Due Process of Law, pp. 1, 51; Hallinger v. Davis, 146 U. S. 314, 322, 36 L. ed. 986, 991, 13 Sup. Ct. Rep. 105.

(f) And, accordingly, it became a constitutional right or privilege of the accused to be placed on trial only after an indictment presented in open court by at least twelve of the grand jurors.

(g) A North Carolina statute could not affect Federal constitutional law nor the constitutional privilege of the accused.

Erwin v. United States, 2 L.R.A. 229, 37 Fed. 488; Trafton v. United States, 78 C. C. A. 79, 147 Fed. 514; United States v. Reid, 12 How. 361, 13 L. ed. 1023; Logan v. United States, 144 U. S. 263, 299, 36 L. ed. 429, 442, 12 Sup. Ct. Rep. 617; Martin v. Hunter, 1 Wheat. 304, 363, 4 L. ed. 97, 111; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

(h) The failure of the grand jury as a body to return the indictment was not "a matter of form only," to be cured by U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720; nor could any waiver of accused affect their constitutional right, or confer jurisdiction upon the court.

United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; Joyce, Indictments, § 31; Ex parte McClusky, 40 Fed. 74; Renigar v. United States, 26 L.R.A. (N.S.) 683, 97 C. C. A. 172, 172 Fed. 646, 19 Ann. Cas. 1117; Lewis v. United States, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; Hopt v. Utah, 110 U. S. 574, 578, 28 L. ed. 262, 264, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

A motion or plea of the character mentioned in the second question certified by the court may be made at any time before the accused is required to plead in bar.

Crowley v. United States, 194 U. S. 462, 48 L. ed. 1077, 24 Sup. Ct. Rep. 731; McQuillen v. State, 8 Smedes & M. 587; 12 Cyc. 357.

While in the certificate the court below refers to the pleading as a motion to quash, the point was made in the trial court by plea in abatement; although, under the practice prevailing in the trial court, a motion to quash would have amounted to a plea in abatement, the ancient distinction between the two having been ignored.

Breese v. United States, 74 C. C. A. 388, 143 Fed. 252.

Strictly speaking, a plea based upon the ground that no valid indictment was in court is one to the jurisdiction, for the accused thereby denies the jurisdiction of the court to try him.

Starkie, Crim. Pl. p. 342.

According to the plain terms of the order of the court, found in this case, the plaintiffs in error have the clear right to move in arrest of judgment on account of the failure of the grand jury to present the bill.

Breese v. United States, supra.

The trial court in its discretion would have the right to permit the second plea or motion to be made, either as a new motion or by way of amendment; and having done so in this case, and having found the facts therein raised, and having decided as a matter of law upon those facts that the indictment was valid, the question as to whether it was proper to consider the points so raised has been foreclosed; and the only question left for the appellate court at this time to determine is whether or not, on the facts found, the indictment as a matter of law was valid.

State v. Eason, 70 N. C. 88; State v. Jones, 88 N. C. 671; State v. Sheppard, 97 N. C. 401, 1 S. E. 879; State v. Miller, 100 N. C. 543, 5 S. E. 925; State v. Gardner, 104 N. C. 739, 10 S. E. 146; Mills v. State, 76 Md. 277, 25 Atl. 229; Com. v. Smith, 162 Mass. 508, 39 N. E. 111; Mentor v. People, 30 Mich. 91; People v. Judson, 11 Daly, 47; Com. v. Ramsey, 1 Brewst. (Pa.) 422; Richards v. Com. 81 Va. 110.

Assistant Attorney General Denison argued the cause, and, with Mr. Louis G. Bissell, filed a brief for the United States:

We recognize the fact that the local state practice is not binding on the Federal courts in criminal cases, but it is a matter to which weight may properly be given (United States v. Richardson, 28 Fed. 66), and a court of first instance which adopts it should not be lightly reversed merely because the bulk of other states still continue to follow the ancient English practice.

Especially is it desirable to allow this latitude in adaptation of the Federal district practice to the local state practice, where, as here, the historical reasons for the old English practice have substantially disappeared.

Danforth v. State, 75 Ga. 620, 58 Am. Rep. 480; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586.

The objection does not go to the jurisdiction, but is purely technical, and involves

no prejudice to the defendant. It is therefore no ground for quashing the indictment, especially in view of the provisions of U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720.

Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; Caha v. United States, 152 U. S. 211, 221, 38 L. ed. 415, 419, 14 Sup. Ct. Rep. 513; Bram v. United States, 168 U. S. 532, 566–568, 42 L. ed. 568, 581, 582, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; Ledbetter v. United States, 47 C. C. A. 191, 108 Fed. 52; United States v. Clark, 46 Fed. 638; United States v. Bornemann, 35 Fed. 824; United States v. Molloy, 31 Fed. 19; Crowley v. United States, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731; Rodriguez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617; United States v. McKee, 4 Dill. 10, Fed. Cas. No. 15,687; United States v. Cobban, 127 Fed. 716; United States v. Benson, 31 Fed. 896; United States v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550; United States v. Ewan, 40 Fed. 453; Miller v. Texas, 153 U. S. 535, 537, 38 L. ed. 812, 813, 14 Sup. Ct. Rep. 874; United States v. Terry, 39 Fed. 364; Texas & P. R. Co. v. Kirk, 111 U. S. 486, 28 L. ed. 481, 4 Sup. Ct. Rep. 500; Long v. Farmers' State Bank, 9 L.R.A. (N.S.) 585, 77 C. C. A. 538, 147 Fed. 362; Alaska United Gold Min. Co. v. Keating, 53 C. C. A. 655, 116 Fed. 561; Townsend v. Jemison, 7 How. 706, 719, 12 L. ed. 880, 885; Linder v. Lewis, 1 Fed. 380.

It would be queer indeed for a court of equity to destroy an indictment merely because a precaution, intended solely to prevent the destruction, had been omitted. That would be for the court to use the form for the overwhelming of the substance, and thereby greatly to "enhance the abuses of criminal practice."

Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138.

Irrespective, however, of the provisions of U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720, the motion to quash was properly denied under the thoroughly established general rule that such motions must show some real prejudice to the defendant.

Agnew v. United States, 165 U. S. 36, 44, 41 L. ed. 624, 627, 17 Sup. Ct. Rep. 235; McInerney v. United States, 77 C. C. A. 411, 147 Fed. 183; United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; United States v. Tallman, 10 Blatchf. 23, Fed. Cas. No. 16,429; United States v. Reed, 2 Blatchf. 449, Fed. Cas. No. 16,134; State v. Mellor, 13 R. I. 666; Cox v. People, 80 N. Y. 500; People v. Petrea, 92 N. Y. 143; State v. Mertens, 14 Mo. 94; Waukon-chaw-neek-kaw v. United States, Morris (Iowa) 335; Danforth v. State, 75 Ga. 620, 58 Am. Rep. 480.

Renigar v. United States, 26 L.R.A. (N.S.) 683, 97 C. C. A. 172, 172 Fed. 646, 19 Ann. Cas. 1117, and Angle v. United States, 97 C. C. A. 184, 172 Fed. 658, decided by the court below, might with some plausibility be deemed to have involved a jurisdictional question because the indictments there were not presented to the court, but to the clerk. Even those cases seem to us unsound, because in fact and substance the indictments did reach the court, the clerk receiving them officially on its behalf and placing them in its files. A similar line of argument was advanced in Bryan v. Ker, 222 U. S. 107, 56 L. ed. 114, 32 Sup. Ct. Rep. 26, where it was urged that a writ under which a marshal had seized a vessel was absolutely void, because it had been issued not by the clerk of the court, but by an unofficial person (pp. 112, 113). The court looked through to the substance of the transaction, which was that the writ had issued from the office of the clerk under the authority of the clerk, and bore the seal of the court, and therefore was not void, but at most voidable.

Also especially pertinent from this point of view are Kaizo v. Henry, 211 U. S. 146, 149, 53 L. ed. 125, 126, 29 Sup. Ct. Rep. 41, and Harlan v. McGourin, 218 U. S. 442, 451, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849, where the court held that disqualification of grand jurors was not a defect going to the jurisdiction of the trial court; and United States v. McKee, 4 Dill. 9, Fed. Cas. No. 15,687, where Judge Dillon and Judge Treat denied a motion in arrest of judgment, based upon the contention that the circuit court was without jurisdiction because it had tried the defendant, not on the original indictment, but on a certified copy thereof which had been remitted from the district court.

The motion to quash was made too late.

United States v. Breese, 172 Fed. 769; Agnew v. United States, 165 U. S. 36, 44, 45, 41 L. ed. 624, 627, 628, 17 Sup. Ct. Rep. 235; Hyde v. United States, 225 U. S. 347, 373, 56 L. ed. 1114, 1128, 32 Sup. Ct. Rep. 793; Lowdon v. United States, 79 C. C. A. 361, 149 Fed. 673; McInerney v. United States, 77 C. C. A. 411, 147 Fed. 183; United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; Kerr v. State, 36 Ohio St. 623, Jinks v. State, 5 Tex. App. 68; Caldwell v. State, 41 Tex. 86; Douglass v. State, 8 Tex. App. 529; State v. Mann, 83 Mo. 592; Patterson v. Com. 86 Ky. 313, 5 S. W. 387; Ex parte Winston, 52 Ala. 421; 1 Bishop, Crim. Proc. § 886; 12 Cyc. 766; State v. Ledford, 133 N. C. 714, 45

S. E. 944; Powers v. United States, 223 U. S. 303, 312, 56 L. ed. 448, 452, 32 Sup. Ct. Rep. 281; Re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870; Carter v. Texas, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; Re Lane, 135 U. S. 443, 34 L. ed. 219, 10 Sup. Ct. Rep. 760; State v. Gibson, 50 La. Ann. 23, 23 So. 320.

If the order of the court was really intended to relieve the defendant from the rules of law established for imperative reasons of public policy, the order was beyond the power of the court and void.

Kelsey v. Forsyth, 21 How. 85, 16 L. ed. 32; 1 Bishop, Crim. Proc. § 124; Murphy v. People, 3 Colo. 147; Spencer v. State, 34 Tex. Crim. Rep. 238, 30 S. W. 46, 32 S. W. 690; Re Brown, 98 C. C. A. 211, 174 Fed. 339; Spaulding v. Hill, 115 Ky. 1, 72 S. W. 307; Whiskey Cases, 99 U. S. 594, 25 L. ed. 399; United States v. Hinz, 35 Fed. 279; Queenan v. Oklahoma, 190 U. S. 548, 552, 47 L. ed. 1175, 1178, 23 Sup. Ct. Rep. 762.

The objection did not survive the first motion to quash.

People v. Strauch, 153 Ill. App. 554.

Mr. Justice Holmes delivered the opinion of the court:

This case comes here on a certificate which may be summed up as follows: The defendants were indicted in 1897 under Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p 3676, for a conspiracy to embezzle funds of a national bank. In the following term, on November 6, 1897, they were ordered to plead, and pleaded not guilty; but the order provided that the plea should not "prevent their taking advantage upon motion in arrest of judgment, or on motion for a new trial, of all matters and things which could be taken advantage of by motion to quash or *]demurrer; upon motion in arrest of *judgment or for a new trial, all such matters and things shall be heard and determined as if the same were being heard upon motion to quash or demurrer." After the trial of another case, this one was called for trial at the May term, 1908. The defendants then pleaded in abatement and moved to quash on the ground of the disqualification of three grand jurors, but the plea and motion were not maintained by the facts. 172 Fed. 761. The case was put down for trial again on June 21, 1909. The defendants again pleaded in abatement and moved to quash on the ground that the foreman of the grand jury delivered the indictment to the judge during the session of the court, but in the absence of the other grand jurors. The court denied the plea and overruled the motion. A jury was sworn, the defendants were tried and found guilty, *and after a motion for* a new trial had been made on the same ground as above, and overruled, they were sentenced. 172 Fed. 768. The question is whether the last-mentioned plea and motions should have been sustained.

The facts are "that more than twelve grand jurors voted to find the indictment a true bill. That when this action had been taken, the grand jury was in session in a room adjoining the court room, on the same floor, with a door opening into the court room. The foreman left the grand jury, went into the court room with the bill of indictment, and handed it to Judge Purnell, the presiding judge, in person, the judge being then on the bench and the court open, and that the judge looked over the indictment and handed it to the clerk in open court, and that the foreman then returned to the grand jury room and proceeded with the business of the grand jury there assembled; that the grand jury did not accompany him when he brought the bill of indictment into the court room and handed it to the court." The mode of proceeding was the same as that prescribed by the laws of North Carolina. The clerk filed *the[9 indictment and made the following entry: "United States v. W. E. Breese, W. H. Penland, and J. E. Dickerson, Indct.: Conspiracy and embezzlement, Oct. Term, 1897. 'A true bill. J. M. Allen, foreman.' In the above-entitled cause it is ordered by the court, upon motion of the district attorney, that the said cause, together with all the papers therein, be transferred to Asheville, to be there tried at the next term of the said court, to be held on the 1st Monday in November next."

Six questions are certified, which are intended to present in detail whether, in the circumstances stated, the indictment should have been quashed.† It is enough to *say that we are of opinion that the[10 indictment was not void, and that if there ever was anything in the objection to it, the plea and motion came too late.

We do not think it necessary to discuss the contention that the 5th Amendment to the Constitution requires the indictment to be presented by the grand jury in a body, or that their failure so to present it goes to the jurisdiction of the court. See Kaizo

†1. Is such an indictment absolutely void?

2. Should such indictment be quashed on motion of the defendants, first made after the expiration of the term at which the indictment was found, and after the final discharge of the grand jury which found it, the defendants not having, at or before the time of moving to quash, pleaded to said indictment?

3. Should such indictment be quashed on motion of the defendants, first made after

v. Henry, 211 U. S. 146, 149, 53 L. ed. 125, 126, 29 Sup. Ct. Rep. 41; Harlan v. McGourin, 218 U. S 442, 451, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 2 Ann. Cas. 849; United States v. McKee, 4 Dill. 1, 9, Fed. Cas. No. 15,687. The reasons for the requirement, if they ever were very strong, have disappeared, at least in part, and we have no doubt that Congress, like the state of North Carolina, could have done away with it, if it had seen fit to do so instead of remaining silent. See Danforth v. Georgia, 75 Ga. 614, 620, 621, 58 Am. Rep. 480; United States v. Butler, 1 Hughes, 457, 461, Fed. Cas. No. 14,700; Frisbie v. United States, 157 U. S. 160, 163, 39 L. ed. 657, 658, 15 Sup. Ct. Rep. 586. But it would be going far to say that the record does not import an indictment duly presented and "publicly delivered into court" (4 Bl. Com. 306), or that on the findings the indictment was not duly presented in fact, even according to the supposed rule requiring the presence of all the grand jurors. It appears by a certified plan that they could have seen the foreman's actions, if they desired, from at least a part of the room where they were. It fairly is implied that they knew what the foreman was about. We may compare the decisions as to the witnessing of wills. Riggs v. Riggs, 135 11]*Mass. 238, 46 Am. Rep. 464; Mendell v. Dunbar, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402.

At all events, objections of this sort are not to be favored when no prejudice to the defendants is shown; and on the contrary, the fact that the indictment was found and presented to the court is not disputed. As the defendants had no constitutional right to the presence of the grand jury, they were bound to take the first opportunity in their power to object to its absence, and by their failure to do so, as heretofore set forth, they lost whatever rights they may have had. United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; Agnew v. United States, 165 U. S. 36, 44, 41 L. ed. 624, 627, 17 Sup. Ct. Rep. 235; Hyde v. United States, 225 U. S. 347, 373, 56 L. ed. 1114, 1128, 32 Sup. Ct. Rep. 793. The rule is implied in Crowley v. United States, 194 U. S. 461, 474, 48 L. ed. 1075, 1081, 24 Sup. Ct. Rep. 731, cited by the defendants. See also Rodriguez v. United States, 198 U. S. 156, 164, 49 L. ed. 994, 997, 25 Sup. Ct. Rep. 617. The order made by the court, saving rights, created no new ones, and the right to this plea was lost irrespective of the plea of not guilty, entered in pursuance of the order of the court. In the first plea it was admitted that the grand jury "returned the said bill of indictment into court as a true bill."

The same result follows from Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720, providing that no indictment presented by a grand jury shall be deemed insufficient nor the trial, judgment, or other proceeding thereon be affected by any defect in matter of form only, which shall not tend to the prejudice of the defendant. As we already have intimated, this indictment was presented in fact by the grand jury, and the defect, if any, was a defect in the matter of form only. The section should be construed to apply to the case (see Crowley v. United States, 194 U. S. 461, 474, 48 L. ed. 1075, 1081, 24 Sup. Ct. Rep. 731; Rodriguez v. United States, 198 U. S. 156, 165, 49 L. ed. 994, 997, 25 Sup. Ct. Rep. 617; United States v. Molloy, 31 Fed. 19, 23), and, even if it did not, it indicates a policy favoring the conclusion previously expressed that the objection had been waived. We answer the first and sixth questions, "No."

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the expiration of the term at which the indictment was found, and after the final discharge of the grand jury which found it, and after the overruling of an earlier verified motion to quash, made by the defendants on other grounds, in which said earlier motion to quash they had alleged that said indictment had been duly returned into open court by the grand jury, said second motion to quash having been made before the defendants had otherwise pleaded to the indictment?

4. Should such indictment be quashed on motion of the defendants, first made after the expiration of the term at which the indictment was found, and after the final discharge of the grand jury which found it, and after the defendants had pleaded not guilty to such indictment, but before a jury was sworn upon the issue joined upon such plea?

5. Would the defendants be entitled to have judgment arrested upon a verdict of guilty, returned upon such indictment?

6. Would defendants, who had pleaded not guilty to such an indictment under an order of court, by the terms of which such plea of not guilty should not operate or have the effect to prevent their taking advantage, upon motion in arrest of judgment or on motion for a new trial, of all matters and things which could be taken advantage of by motion to quash or demurrer, be entitled to have such indictment quashed on motion made by them after the expiration of the term at which the indictment had been found, and after the final discharge of the grand jury which found it, and after the denial by the court of a previous motion to quash, made by the defendants on other grounds, in which first motion to quash they had alleged that said indictment had been duly returned into open court by the grand jury?

12] *MGR. JEREMIAH J. HARTY, Appt. and Plff. in Err.,
v.
MUNICIPALITY OF VICTORIA.

(See S. C. Reporter's ed. 12–14.)

**Appeal — mode of review.**

1. Writ of error, and not appeal, is the only method by which a review may be had in the Federal Supreme Court of a judgment of the supreme court of the Philippine Islands in favor of a municipality in a suit brought against it to recover a tract of land which is declared by that court to constitute the public square or plaza of the town, devoted to public uses, since such suit is like an ordinary action at law.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

**Appeal — amount in dispute.**

2. The value of the real estate in controversy in a suit brought by the archbishop of Manila to recover a square in the municipality of Victoria, in which stand a church and its parish house, is not shown to exceed $25,000, so as to sustain a writ of error from the Federal Supreme Court to the supreme court of the Philippine Islands to review a judgment holding the land not occupied by the buildings to constitute the public square, the value of which in itself, it is admitted, does not exceed that sum, by affidavits which proceed upon the theory that the church edifices, valued at $30,000, are deprived of free egress and ingress by the decision.

[For other cases, see Appeal and Error, I. f, in Digest Sup. Ct. 1908.]

**Appeal — review of facts.**

3. A writ of error from the Federal Supreme Court to the supreme court of the Philippine Islands to review a judgment in favor of the municipality in a suit brought against it to recover a parcel of ground which is declared by that court to constitute the public square or plaza of the town, devoted to public uses, must be dismissed where the evidence is contradictory and there is no question of law involved.

[For other cases, see Appeal and Error, III. d, 5, in Digest Sup. Ct. 1908.]

[No. 13.]

Argued October 30, 1912. Decided November 11, 1912.

APPEAL from and in error to the Supreme Court of the Philippine Islands to review a judgment which, reversing the judgment of the Court of First Instance of Tarlac, in a suit brought by the archbishop of Manila to recover a square in the municipality of Victoria, in which stand a church and its parish house, held that the land occupied by the buildings constituted the public square or plaza of the town, devoted to public uses. Dismissed.

See same case below, 13 Philippine, 152.

The facts are stated in the opinion.

Mr. **Frederic R. Coudert** argued the cause and, with Mr. Henry W. Van Dyke, filed a brief for appellant and plaintiff in error.

Mr. **Felix Frankfurter** argued the cause and filed a brief for appellee and defendant in error:

The value of the land involved in this action does not exceed $25,000, and the case should therefore be dismissed.

Enriquez v. Enriquez, 222 U. S. 123, 56 L. ed. 122, 32 Sup. Ct. Rep. 62; Enriquez v. Enriquez, 222 U. S. 127, 56 L. ed. 124, 32 Sup. Ct. Rep. 64.

In any event the appeal must be dismissed. The case is reviewable only by writ of error, and the disposition of questions of fact by the court below is not open to consideration here.

Cariño v. Philippine Islands, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334; Tiglao v. Philippine Islands, 215 U. S. 410, 54 L. ed. 257, 30 Sup. Ct. Rep. 129; Jover y Costas v. Philippine Islands, 221 U. S. 623, 635, 55 L. ed. 884, 890, 31 Sup. Ct. Rep. 664; Santos v. Holy Roman Catholic & Apostolic Church, 212 U. S. 463, 53 L. ed. 599, 29 Sup. Ct. Rep. 338; Ker & Co. v. Couden, 223 U. S. 268, 56 L. ed. 432 32 Sup. Ct. Rep. 284.

Mr. Justice **Holmes** delivered the opinion of the court:

This suit was brought by the Archbishop of Manila to recover a square in the municipality of Victoria. The church of the town and its parish house stand in this square, and they are admitted to be church property, but the land not occupied by them was declared by the supreme court to constitute the public square or plaza *of the[13 town, devoted to public uses. The plaintiff brought a writ of error and appealed. The appeal must be dismissed. Jover y Costas v. Philippine Islands, 221 U. S. 623, 635, 55 L. ed. 884, 890, 31 Sup. Ct. Rep. 664; Cariño v. Philippine Islands, 212 U. S. 449, 456, 53 L. ed. 594, 595, 29 Sup. Ct. Rep. 334. The suit is like an ordinary action at law, and can be brought to this court only by writ of error, as was done in Santos v. Holy Roman Catholic & Apostolic Church, 212 U. S. 463, 53 L. ed. 599, 29 Sup. Ct. Rep. 338, and Ker & Co. v. Couden, 223 U. S. 268, 56 L. ed. 432, 32 Sup. Ct. Rep. 284.

There is a motion to dismiss the writ of error also, on the ground that the value of

NOTE.—As to appellate jurisdiction of Federal Supreme Court over supreme court of Philippine Islands—see note to Martinez v. International Bkg. Corp. 55 L. ed. U. S. 438.

the real estate in controversy does not exceed $25,000. Affidavits to that effect are offered, and the order allowing the writ purports to do so on affidavits of the plaintiff and two others, "notwithstanding the fact that, by admission of counsel for plaintiff, it appears that the value of the parcel of land for which judgment was rendered in favor of the defendant municipality, exclusive of the value of the adjoining parcel of land with the church and convent situated thereon, title to which is recognized to be in the plaintiff, and damages thereto resulting from the aforesaid judgment, does not exceed $25,000." We doubt whether the affidavits do not imply the same admission, and whether the action should not be dismissed on that ground. The affidavit of the plaintiff puts the value of the land in controversy at over $25,000 on the manifestly untenable ground that the church edifices are deprived of free egress and ingress by the decision, and the others seemingly mean that the parcel of land with the church buildings included is worth $30,000, the buildings being valued at $25,000, leaving $5,000 for the land in dispute.

But the result is the same if we go further. The evidence was contradictory, and although we were invited to consider it on the one side in the light of the relation of the church to the community, and on the other in that of the custom by which 14]the plaza is of the essence of a *town, we can do neither. There is no question of law before us, for it hardly was argued, and could not be with any seriousness, that the supreme court was not authorized to review the evidence under § 497 of the Philippine Code, or that this court can consider whether it was right in finding the preponderance of evidence to be on the defendant's side.

Appeal and writ of error dismissed.

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UNITED STATES OF AMERICA, Cincinnati & Columbus Traction Company, and Interstate Commerce Commission, Appts.,

v.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY and Norfolk & Western Railway Company.

(See S. C. Reporter's ed. 14–20.)

**Carriers — switch connections — lateral branch line.**

1. The words "lateral branch line" in the act to regulate commerce of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 1, as amended by the act of June 18, 1910 (36 Stat. at L. 539, 547, chap. 309, U. S. Comp. Stat. Supp. 1911, p. 1288), § 7, requiring carriers subject to the act to establish switch connections with such lines on certain conditions, and permitting owners of such lines, as well as shippers, to make complaint to the Interstate Commerce Commission in case of the carrier's failure upon written application, and authorizing such Commission to hear, investigate, and determine whether such conditions exist, and to make an order directing the carrier to comply with the act, do not refer to what the applicant line may become or be made by the order of the Commission, but to what it already is when it applies.

[For other cases, see Carriers, III. h, in Digest Sup. Ct. 1908.]

**Carriers — switch connections — lateral branch line — electric railway.**

2. An interurban electric railway for passengers and some freight, running under a state charter between points in the state through the middle of a diamond-shaped area inclosed by two steam railways, and in its general course parallel to and more or less competing with the steam roads, and working on a different plan, is not a "lateral branch line of railroad," within the meaning of the act to regulate commerce of February 4, 1887, as amended by the act of June 18, 1910, requiring carriers subject to the act to establish switch connections with such lines on certain conditions, and permitting owners of such lines as well as shippers to make complaint to the Interstate Commerce Commission in case of the carrier's failure upon written application, and authorizing such Commission to hear, investigate, and determine whether such conditions exist, and to make an order directing the carrier to comply with the act.

[For other cases, see Carriers, III. h, in Digest Sup. Ct. 1908.]

[No. 648.]

Argued October 25 and 28, 1912. Decided November 11, 1912.

APPEAL from the United States Commerce Court to review a decree setting aside an order of the Interstate Commerce Commission, directing certain steam railroads to establish switch connections with an interurban electric railway, and to maintain through routes to and from points on that road. Affirmed.

See same case below, 195 Fed. 962.

The facts are stated in the opinion.

Mr. Charles W. Needham argued the cause and filed a brief for the Interstate Commerce Commission:

The commerce court erred in holding that the traction company was not a lateral branch line railroad, within the meaning of § 1 of the act to regulate commerce.

Keeling v. Griffin, 56 Pa. 305; 1 Wood, Railway Law, § 189; Biles v. Tacoma, O. &. G. H. R. Co. 5 Wash. 509, 32 Pac. 211; Newhall v. Galena & C. U. R. Co. 14 Ill. 273; Chicago & E. I. R. Co. v. Wiltse, 116

Ill. 449, 6 N. E. 49;; Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co. 149 Ill. 272, 37 N. E. 91; McAboy's Appeal, 107 Pa. 558; Volmer's Appeal, 115 Pa. 166, 8 Atl. 223; Wheeling Bridge & Terminal R. Co. v. Camden Consol. Oil Co. 35 W. Va. 205, 13 S. E. 369; Greenville & H. R. Co. v. Grey, 62 N. J. Eq. 768, 48 Atl. 568; Baltimore & O. R. Co. v. Waters, 105 Md. 396, 12 L.R.A.(N.S.) 326, 66 Atl. 685; Blanton v. Richmond, F. & P. R. Co. 86 Va. 618, 10 S. E. 925; Howard County v. Central Nat. Bank, 108 U. S. 314, 27 L. ed. 738, 2 Sup. Ct. Rep. 689; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 537, 54 L. ed. 605, 607, 30 Sup. Ct. Rep. 415.

Assistant Attorney General Denison argued the cause, and, with Mr. Thurlow M. Gordon, Special Assistant to the Attorney General, filed a brief for the United States:

If either of the petitioning roads were attempting to build the line of the traction company under a charter provision permitting it to build lateral branch roads, the construction could not be enjoined as *ultra vires*.

Newhall v. Galena & C. U. R. Co. 14 Ill. 274; McAboy's Appeal, 107 Pa. 548; Volmer's Appeal, 115 Pa. 166, 8 Atl. 223; Baltimore & O. R. Co. v. Waters, 105 Md. 396, 12 L.R.A.(N.S.) 326, 66 Atl. 685; Greenville & H. R. Co. v. Grey, 62 N. J. Eq. 770, 48 Atl. 568; Florida, A. & G. C. R. Co. v. Pensacola & G. R. Co. 10 Fla. 145; Blanton v. Richmond, F. & P. R. Co. 86 Va. 618, 10 S. E. 925.

This broad interpretation of the words "lateral branch line" not only accords with the statutory significance incrusted upon these words at the time of their adoption by Congress, but it is necessary to the accomplishment of the remedial purposes of the act.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 537, 54 L. ed. 607, 30 Sup. Ct. Rep. 415.

The order is not void because as to the physical condition of the traction company's line, the Commission supplemented the testimony of witnesses by independent investigations.

Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625; Sutherland, Damages, § 441, note, 1; Wigmore, Ev. §§ 1150–1168; People v. Delaware & H. Canal Co. 165 N. Y. 362, 59 N. E. 138; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Boston Fruit & Produce Exch. v. New York & N. E. R. Co. 3 Inters. Com. Rep. 493, 4 I. C. C. Rep. 664; Missouri & K. *Shippers' Asso. v. Missouri, K.*



& T. R. Co. 12 Inters. Com. Rep. 483; Origet v. Hedden, 155 U. S. 228, 237, 39 L. ed. 130, 133, 15 Sup. Ct. Rep. 92; Tang Tun v. Edsel, 223 U. S. 673, 677, 56 L. ed. 606, 608, 32 Sup. Ct. Rep. 359; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 342, 53 L. ed. 1013, 1023, 29 Sup. Ct. Rep. 671; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 194, 54 L. ed. 435, 442, 30 Sup. Ct. Rep. 356; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; United States ex rel. West v. Hitchcock, 205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Mr. C. B. Matthews filed a brief for appellant the Cincinnati & Columbus Traction Company.

Messrs. R. Walton Moore, Edward Barton, and Theodore W. Reath argued the cause and, with Messrs. Joseph I. Doran and F. Markoe Rivinus, filed a brief for appellees:

What other conceivable definition of a lateral branch railroad, as the term is used in the clause, can be adopted than that it is a line of railroad, naturally tributary to the line of the common carrier, and entirely dependent upon it for an outlet to the markets of the country?

See Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415; Blanton v. Richmond, F. & P. R. Co. 86 Va. 618, 10 S. E. 925.

The order of the Commission is invalid because the foundation of the order was the independent investigation of the Commission, not contemplated or permitted by the commerce act.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Atlantic Coast Line R. Co. v. Interstate Commerce Commission 194 Fed. 457; Saratoga Springs v. Saratoga Gas, Electric Light, Heat & P. Co. 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; People ex rel. Bath & H. R. Co. v. Public Service Commission, 127 App. Div. 480, 112 N. Y. Supp. 133; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108.

Mr. Edward Barton also filed a separate brief for the Baltimore & Ohio Southwestern Railroad Company:

The line of the traction company is

strictly within the definition of a parallel and competing road.

Com. v. Louisville & N. R. Co. 144 Ky. 324, 138 S. W. 291; East St. Louis Connecting R. Co. v. Jarvis, 34 C. C. A. 639, 92 Fed. 735.

Congress must have had in contemplation as a lateral branch line something different from the ordinary description of railroad.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 535, 54 L. ed. 605, 606, 30 Sup. Ct. Rep. 415; Baltimore & O. R. Co. v. United States, 215 U. S. 481 54 L. ed. 292, 30 Sup. Ct. Rep. 164, 154 Fed. 108, 91 C. C. A. 147, 165 Fed. 113.

Lateral branch lines, which are in many respects only plant facilities, and so rather themselves to be classed as private side tracks than as trunk lines or railroads proper, are common throughout the country, and have been for many years. Their status as shipping facilities rather than common carriers has been recognized by the Interstate Commerce Commission time and again.

Crane R. Co. v. Philadelphia & R. R. Co. 15 Inters. Com. Rep. 248; Crane Iron Works v. Central R. Co. 17 Inters. Com. Rep. 514.

The traction company is so organized, constructed, maintained, operated, and equipped under the laws of Ohio as that it cannot be deemed a lateral branch line of railroad with respect to appellees.

Cosmopolitan Shipping Co. v. Hamburg-American Packet Co. 13 Inters. Com. Rep. 266; Re Exchange of Free Transportation, 12 Inters. Com. Rep. 39; Wylie v. Northern P. R. Co. 11 Inters. Com. Rep. 145.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to set aside an order of the Interstate Commerce Commission, directing the appellees to establish switch connections with the road of the appellant, and also through routes to and from points 18]on that road. 20 *Inters. Com. Rep. 486. The commerce court made a decree as prayed (195 Fed. 962), and an appeal was taken to this court. The facts material to our decision are as follows: The Baltimore & Ohio Southwestern Railroad and the Norfolk & Western Railway are trunk lines of steam railroads running east and west across the state of Ohio. After almost touching each other at Norwood, a suburb of Cincinnati, they draw apart, the former in a northerly, the latter in a southerly, direction, but come together again at Hillsboro, about 53 miles further to the east. The line of the Traction Company is an "interurban" electric railway, for passengers and some freight, running under a state charter between Norwood and Hillsboro, through the middle of the diamond inclosed by the steam roads, and authorized to go on to Columbus. For a number of miles easterly from Norwood to Stonelick, near Boston, the last-mentioned road is very near and almost parallel to the tracks of one or the other of the steam roads, as it is again for the last 5 miles before reaching Hillsboro. In the intervening space, between Boston and Dodsonville, the towns and villages on the electric line are from 5 to 10 or 12 miles by wagon distant from the nearest station on one of the steam roads. The Traction Company applied to the Commission for switch connections, and they were ordered as we have said.

Some technical objections were raised, but the substantial question is whether the Traction Company is a "lateral branch line of railroad" within the meaning of the 1st section of the act to regulate commerce, amended by act of June 18, 1910, chap. 309, § 7, 36 Stat. at L. 539, 547. That section requires carriers subject to the act to establish switch connections with such lines on certain conditions; and, as amended, permits owners of such lines as well as shippers to make complaint to the Commission in case of the carriers' failure upon written application, and authorizes the Commission to hear, investigate, and *determine whether the conditions exist,[19 and to make an order directing the carrier to comply with the act. It will be seen without much argument that, unless the Traction Company is a lateral, branch line of railroad, the trunk line carriers, the appellees, are not subject to the requirement of the statute, so far as the Traction Company is concerned.

The words "lateral branch line" do not refer to what the applicant may become or be made by order of the Commission, but to what it already is when it applies. The power of the Commission does not extend to ordering a connection wherever it sees fit, but is limited to a certain and somewhat narrow class of lines. The most obvious examples of such lines are those that are dependent upon and incident to the main line,—feeders, such as may be built from mines or forests to bring coal, ore, or lumber to the main line for shipment. We agree with the commerce court that the Traction Company is not within this class. It is an independent venture, in its general course parallel to, more or less competing with, the steam roads, and working on a different plan. Presumably and so far as appears it was built and would have been run without regard to the

existence of the steam roads. The cases cited on behalf of the appellants as to the power of railroad companies to construct branch roads under their charter do not apply. There the determination of the company fixes the character of the branch; it builds the branch from the beginning as incident to the purposes of the company. But here, as we have said, this determination of the Commission that the applicants shall be a branch is not enough; the applicant must be a branch before it applies. That is the absolute and reasonable condition. That some shippers would be accommodated by a switch connection is not enough.

The order to maintain through routes was incident to the requirement of switch con-
20]nections and falls with it. *We understand that it was based on the assumption that the connections were to be made, and therefore do not go into the question of power under § 15.

It is unnecessary to consider objections to the conclusion of the Commission that it was safe and reasonably practicable, etc., to establish the switch. We remark that it is stated in the Commissioner's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them. See Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 525, 56 L. ed. 863, 868, 32 Sup. Ct. Rep. 535. Such an investigation is quite different from a view by a jury, taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record, and the facts thus noticed are specified, so that matters of law are saved.

Decree affirmed.

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## STANDARD SANITARY MANUFACTURING COMPANY et al., Appts.,
## v.
## UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 20–52.)

**Monopoly — manufacturers and dealers — patented device.**

1. Agreements embracing 85 per cent of the manufacturers of, and 90 per cent of the jobbers in, enameled ironware, which, in addition to a provision against the marketing of *"seconds," intended to carry out* the ostensible object of the agreements, also provide for regulating prices through the instrumentality of a price and schedule committee, fix preferential discounts, confining them to sales to jobbers only, authorize rebates if the agreements shall be faithfully observed, and forbid all sales to jobbers not in the combination, making a condition of their entry a promise not to resell to plumbers except at the prices determined by the manufacturers, and not to deal in the products of manufacturers not in the combination,—cannot escape condemnation under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3,200), because the agreements take the form of licenses from the owner of a patent for a device used in the enameling process.

[For other cases, see Monopoly, 20–23, in Digest Sup. Ct. 1908.]

**Monopoly — corporation engaged in interstate commerce.**

2. A corporation manufacturing its product in New Jersey, and buying also from other manufacturers and jobbers, which ships from there to its warehouses in Massachusetts and New York, from which sales are made in those states and in Connecticut, is engaged in interstate commerce, and as such is subject to the prohibitions of the Sherman anti-trust act of July 2, 1890, against restraints of trade and monopolies.

[For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.]

**Monopoly — manufacturers or dealers — culpability.**

3. The culpability of a party to a combination of manufacturers and jobbers which accomplishes a restraint of trade condemned by the Sherman anti-trust act of July 2, 1890, is not removed because it was restricted in less degree than the other jobbers, enjoying a certain freedom of competition to meet local conditions.

[For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.]

**Appeal — discretion below — continuance or adjournment.**

4. The trial court did not abuse its discretion in denying a motion by defendants in a civil suit brought by the government under the Sherman anti-trust act of July 2, 1890, for an enlargement of time to take testimony, based upon the ground that they had been prevented by the action of the government in instituting criminal proceedings from properly presenting their defense, in that the government, apprehending that the witnesses for the defense were called to give them immunity from the criminal prosecution then pending, notified them that if they testified, they would do so at their peril, as immunity could only

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NOTE.—As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act—see note to Loewe v. Lawlor, 52 L. ed. U. S. 488.

As to illegal trusts under modern anti-trust laws generally—see note in Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

be claimed by witnesses for the government, whereupon, on the advice of counsel, they refused to testify, leaving the defendants without the benefit of the evidence which they could have given.

[For other cases, see Appeal and Error, VIII. 1, 2, in Digest Sup. Ct. 1908.]

[No. 554.]

Argued October 15, 16, and 17, 1912. Decided November 18, 1912.

APPEAL from the District Court of the United States for the District of Maryland to review a decree in favor of the government in a suit to enjoin violations of the Sherman anti-trust act. Affirmed.

See same case below, 191 Fed. 172.

The facts are stated in the opinion.

Mr. Herbert Noble argued the cause, and, with Messrs. Henry D. Estabrook and Hartwell P. Heath, filed a brief for appellants:

If what was done was legal, the question of motive on the part of anybody is clearly immaterial.

Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278; Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599; 20 Harvard L. Rev. 253, 345, 429.

The owner of letters patent can control unpatented articles used in connection with the machine embodying his invention.

Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364; Bloomer v. McQuewan, 14 How. 539, 548, 14 L. ed. 532, 536; United States v. American Bell Teleph. Co. 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 358; Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. 92 C. C. A. 183, 166 Fed. 431; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365; United States Consol. Seeded Raisin Co. v. Griffin & S. Co. 61 C. C. A. 334, 126 Fed. 364; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730; New Jersey Patent Co. v. Schaeffer, 101 C. C. A. 540, 159 Fed. 171, 178 Fed. 276; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; Fonotipia Limited v. Bradley, 171 Fed. 951; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733; Edison Phonograph Co. v. Pike, 116 Fed. 863; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; The Fair v. Dover Mfg. Co. 92 C. C. A. 43, 166 Fed. 117; Commercial Acetylene Co. v. Autolux Co. 181 Fed. 387; Aeolian Co. v. Harry H. Jacobs Co. 86 C. C. A. 205, 155 Fed. 119; Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co. 172 Fed. 225; Crown Cork & Seal Co. v. Standard Brewery, 174 Fed. 252; Crown Cork & Seal Co. v. Standard Stopper Co. 69 C. C. A. 519, 136 Fed. 841; Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005; Cortelyou v. Carter's Ink Co. 118 Fed. 1022; Cortelyou v. Charles Eneu Johnson & Co. 138 Fed. 110, 76 C. C. A. 455, 145 Fed. 933; Brodrick Copygraph Co. v. Roper, 124 Fed. 1019; A. B. Dick Co. v. Milwaukee Office Specialty Co. 168 Fed. 930; B. V. D. Co. v. Wolf & Co. (Oct. 20, 1911; Cir. Ct. Cinn.); Indiana Mfg. Co. v. Nichols & S. Co. 190 Fed. 579; Automatic Pencil Sharpener Co. v. Goldsmith Bros. 190 Fed. 205; Edison v. Ira M. Smith Mercantile Co. 188 Fed. 925; Waltham Watch Co. v. Keene, 191 Fed. 855; Fuller v. Berger, 65 L.R.A. 381, 56 C. C. A. 588, 120 Fed. 274; Brodrick Copygraph Co. v. Mayhew, 131 Fed. 92, affirmed in 70 C. C. A. 557, 137 Fed. 596.

The agreements in the case at bar are not within the Sherman act. The agreements were purely economic arrangements for the purpose of manufacturing and distributing economically and systematically in strict and normal compliance with modern trade progress, sanitary enameled ironware.

United States v. Winslow, 195 Fed. 592.

They were open upon the same terms to all who chose to take advantage of them.

United States v. Terminal R. Asso. 224 U. S. 383, 398, 410, 56 L. ed. 810, 815, 819, 32 Sup. Ct. Rep. 507.

They were, moreover, based upon patents which created a true monopoly, a grant from the sovereign,—the Constitution,—so that to hold that this monopoly was violative of the Sherman act would be judicial legislation and an attack upon the whole patent system.

Henry v. A. B. Dick Co. 224 U. S. 1, 16, 27, 35, 56 L. ed. 645, 651, 655, 658, 32 Sup. Ct. Rep. 364.

Consequently, it has been held that the Sherman act and the patent laws were passed under separate grants of constitutional power, and do not affect each other.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 91, 46 L. ed. 1058, 1068, 22 Sup. Ct. Rep. 747; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 358.

The true construction of the so-called anti-trust act, and one that is not in conflict with any of the decisions, is that it does not condemn a fair and reasonable attempt to avoid loss by means of trade agreements which are intended to prevent nothing but the cutting of rates below the reasonable expense of production and rea-

sonable profit thereon; nor is the monopolization referred to in said anti-trust act simply the complete occupation of a certain field, if that occupation may be fairly accomplished.

Fonotipia Limited v. Bradley, 171 Fed. 951.

United States v. Trans-Missouri Freight Asso. 168 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, did not hold that the act applied whether the contract was reasonable or unreasonable.

United States v. Winslow, 195 Fed. 587.

The decision in the Standard Oil Case holds that the test to determine whether or not a given contract or combination is in restraint of interstate trade and commerce is the standard of reason as applied to like contracts at common law.

United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289.

Statutes are not to be interpreted to change the common law except so far as a purpose so to do is necessarily implied.

United States v. Winslow, 195 Fed. 578; Northern Securities Co. v. United States, 193 U. S. 197, 361, 48 L. ed. 679, 710, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 51, 59, 60, 55 L. ed. 641, 644, 645, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734.

While the expressions of opinion during debate upon a bill are not evidence by which the bill is to be construed, still the fact that a bill contains a provision with reference to competition, and is then enacted leaving out all reference to competition, and using phrases which had an ascertained meaning at the time of the enactment of the bill, does bear very materially upon the construction to be given to the act.

United States v. E. I. du Pont de Nemours & Co. 188 Fed. 127.

The Sherman act has no application, because the agreements were an economic arrangement to meet the demands of the market.

Ibid; United States v. John Reardon & Sons Co. 191 Fed. 454; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598, affirmed in [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; United States v. Joint Traffic Asso. 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; Standard Oil Co. v. United States, 221 U. S. 51, 55 L. ed. 641, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Fonotipia, Limited, v. Bradley, 171 Fed. 959; United States v. American Tobacco Co. 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

Restraint is often mere regulation, or temporary obstruction, for the purpose of clearing out the channel and letting the stream flow at full tide.

United States v. Winslow, 195 Fed. 586.

Both the Standard Oil Case and the Tobacco Case are in accord with all the previous decisions of the court, as will appear from a careful examination of the other decisions in connection with the facts of each case, which were before the court.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 729; Camors-McConnell Co. v. McConnell, 140 Fed. 412, 72 C. C. A. 681, 140 Fed. 987; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Prame v. Ferrell, 92 C. C. A. 374, 166 Fed. 702; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 433, 52 L. ed. 865, 875, 28 Sup. Ct. Rep. 572.

It is "the dominant purpose" of the parties which determines the character of the agreements.

Darius Cole Transp. Co. v. White Star Line, 108 C. C. A. 165, 186 Fed. 63.

The Sherman act has no application to agreements under the patent law.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 362; Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. 92 C. C. A. 183, 166 Fed. 431; Indiana

Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365; Johns-Pratt Co. v. Sachs Co. 176 Fed. 739; Otis Elevator Co. v. Geiger, 107 Fed. 131; National Folding-Box & Paper Co. v. Robertson, 99 Fed. 985; Bonsack Mach. Co. v. Smith, 70 Fed. 383; Strait v. National Harrow Co. 51 Fed. 819; Brown Saddle Co. v. Troxel, 28 Fed. 620; American Soda-Fountain Co. v. Green, 69 Fed. 333; Edison Electric Light Co. v. Sawyer-Man Electric Co. 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. 592; Columbia Wire Co. v. Freeman Wire Co. 71 Fed. 306; Henry v. A. B. Dick Co. 224 U. S. 1, 31, 33, 56 L. ed. 645, 657, 658, 32 Sup. Ct. Rep. 364; Davis Electrical Works v. Edison Electric Light Co. 8 C. C. A. 615, 21 U. S. App. 74, 60 Fed. 280; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 72 Fed. 1016; United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289.

We do not contend here that Mr. Wayman could limit his licensees' power or right to sell an unpatented article. That is a question by itself. What we do claim is that his right to exclude others from using the invention empowers him to prescribe the conditions on which an article made by the use of his invention should be sold, which is an entirely different proposition.

Henry v. A. B. Dick Co. 224 U. S. 1, 24, 56 L. ed. 645, 654, 32 Sup. Ct. Rep. 364.

Contracts not to disclose trade secrets are valid because the public has no right thereto (Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Jarvis v. Peck, 10 Paige, 118; Vickery v. Welch, 19 Pick. 523; Tode v. Gross, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; O. & Q. Thum Co. v. Tloczynski, 114 Mich. 149, 38 L.R.A. 200, 68 Am. St. Rep. 469, 72 N. W. 140; Bryson v. Whitehead, 1 Sim. & Stu. 74, 1 L. J. Ch. 42; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 311); which cases are not inconsistent with the decision in Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, because there it was the sale of the article made by the use of the trade secret, and the distinction analogous to that between the invention and the patented article was recognized.

It may be conceded that there are limitations upon the right of vending and using a patented article if it belongs to a class which, on account of its inherent danger to the public safety or health, cannot be sold or used because prohibited by an exertion of the police power of the state (Henry v. A. B. Dick Co. 224 U. S. 1, 29, 56 L. ed. 645 656, 32 Sup. Ct. Rep. 364; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Webber v. Virginia, 103 U. S. 344, 348, 26 L. ed. 565, 566; Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137; United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289); but that does not include bath tubs, which the same theory commends, and refers to the article, not the invention, overlooking the distinction pointed out in Henry v. A. B. Dick Co. 224 U. S. 1, 29, 56 L. ed. 645, 656, 32 Sup. Ct. Rep. 364.

In United States v. Winslow (195 Fed. 594), the court said, referring to the contention that the parties to the combination controlled 90 per cent of the trade, "We do not attach much importance to this percentage because that, standing alone, is like one term of an algebraic equation, which of itself is nonefficient."

The "underlying atmosphere," referred to in his argument by one of the government's counsel below, is what is spoken of by Judge Severens in Darius Cole Transp. Co. v. White Star Line, 108 C. C. A. 165, 186 Fed. 69, as "suspicious, . . . that the parties intended something wrong;" and, as he says, "cannot impeach" a contract if its provisions "are not unlawful, and their due performance is not unduly prejudicial to the public," so long as the proof "does not go to any act or fact extraneous to the contract."

Mr. Robert B. Honeyman argued the cause, and, with Mr. A. Parker Smith, filed a brief for appellant the Colwell Lead Company:

Covenants in partial restraint and ancillary to some principal contract will be upheld when the restraint imposed is necessary or proper to protect a retained business.

John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Re Greene, 52 Fed. 111.

The Standard Sanitary Manufacturing Company, as the owner of a patented tool or process of great value in the trade, could license competitors to use it upon such terms as the Standard Company deemed to be for its interest, both for the benefit of the invention as well as of the trade generally, and for the protection of its own business. To deny that the Standard Company had such a right is not only to deny the fundamental right at common law of the owner of property from disposing of it for his own advantage, but is also a denial of the rights secured by the patent laws of the United States. The general right of the owner of a patent to exclude

the public or to permit a use upon any terms which he may impose is derived not alone from the common law, but from the statute.

Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364; United States v. American Bell Teleph. Co. 167 U. S. 249, 42 L. ed. 157, 17 Sup. Ct. Rep. 809.

A seller's act in delivering merchandise to a common carrier is not any part of the interstate transportation, and does not make the goods the subject of interstate commerce. The fact that the sale is made with a view to the goods being transported after the sale does not make the sale interstate.

Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Intera. Com. Rep. 232, 9 Sup. Ct. Rep. 6; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

Mr. Edwin P. Grosvenor, Special Assistant to the Attorney General, argued the cause, and, with Attorney General Wickersham, filed a brief for appellee:

Applying the rule of reason to the facts of this case, it is manifest that defendants, by means of the license agreements, unduly and unreasonably restrained commerce and attempted to monopolize commerce in enameled ware.

Standard Oil Co. v. United States, 221 U. S. 1, 66, 55 L. ed. 619, 647, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Northern Securities Co. v. United States, 193 U. S. 197, 347, 48 L. ed. 679, 704, 24 Sup. Ct. Rep. 436; United States v. American Tobacco Co. 221 U. S. 106, 183, 55 L. ed. 663, 695, 31 Sup. Ct. Rep. 632; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; E. Bement & Sons v. National Harrow Co. *186 U. S. 70, 46 L. ed. 1058,* 22 Sup. Ct. Rep. 747; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; United States v. E. I. du Pont de Nemours & Co. 188 Fed. 127; Union Castle Mail S. S. Co. v. Thomsen, 111 C. C. A. 368, 190 Fed. 536; Steele v. United Fruit Co. 190 Fed. 631; United States v. Standard Sanitary Mfg. Co. 191 Fed. 172; Steers v. United States, 112 C. C. A. 423 192 Fed. 1.

Wayman incorporated in the license and purported to grant what was not his to convey. He did not own any patented processes, and therefore could not grant a nonexclusive license to practise in the manufacture of sanitary enameled ironware the processes patented in said several patents. Wayman's patent was on a machine; it was not a patent on a process.

Corning v. Burden, 15 How. 252, 267, 14 L. ed. 683, 690; Cochrane v. Deener, 94 U. S. 780, 787, 24 L. ed. 139, 141; Burr v. Duryee, 1 Wall. 531, 570, 17 L. ed. 650, 657; Telephone Cases, 126 U. S. 1, 532–534, 31 L. ed. 863, 988, 989, 8 Sup. Ct. Rep. 778.

A patentee who grants a license to make and use the patented machine has no control, by virtue of his patent, over the article made with the help of the patented machine.

Keplinger v. De Young, 10 Wheat, 358; 6 L. ed. 341; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235.

New articles of commerce are not patentable as new manufactures unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production. (Mr. Justice Clifford in Union Paper Collar Co. v. Van Dusen, 23 Wall. 530, 563, 23 L. ed. 128, 133.) By what principle of law may the owner of the Arrott patent project his monopoly so as to embrace articles upon which letters patent could never have been issued?

The patent laws and the Sherman law are not conflicting, but in their respective domains are mutually exclusive of each other.

United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289.

The right conferred by the patent laws is not the right to make, use, and vend the thing patented, for this right exists by virtue of the common law and independently of the patent statutes; this right to make, use, and sell the patented device in a nat-

ural right. The only right which the letters patent grant is the right to exclude all other persons from making, using, or vending the thing patented without the permission of the patentee.

Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532, 536; Patterson v. Kentucky, 97 U. S. 501, 506, 24 L. ed. 1115, 1117.

This right to sell a patented article is subject to the police regulations of the state.

Patterson v. Kentucky, 97 U. S. 501, 505, 24 L. ed. 1115, 1117; Webber v. Virginia, 103 U. S. 344, 347, 26 L. ed. 565, 566; Re Brosnahan, 4 McCrary, 1, 18 Fed. 62, 4 Am. Crim. Rep. 16; United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289.

By means of their combination, the appellants brought under one ownership three competing patents relating to automatic dredgers; those were the only automatic dredgers on the market. This act of itself was a violation of the Sherman law.

Blount Mfg. Co. v. Yale & T. Mfg. Co. 166 Fed. 555; Strait v. National Harrow Co. 18 N. Y. Supp. 224; National Harrow Co. v. Quick, 67 Fed. 130; National Harrow Co. v. Hench, 76 Fed. 667, 39 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36, 84 Fed. 226; National Harrow Co. v. Hench, 29 C. C. A. 681, 39 U. S. App. 765, 85 Fed. 991; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Gamewell Fire Alarm Teleg. Co. v. Crane, 160 Mass. 50, 22 L.R.A. 673, 39 Am. St. Rep. 458, 35 N. E. 98; 1 Page, Contr. 445.

Mr. Justice McKenna delivered the opinion of the court:

Suit by the government against appellants for a violation by them of the act of July 2, 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], commonly known as the Sherman anti-trust act.

A decree was entered in favor of the government, from which appellants (designated herein as defendants) have prosecuted this appeal. 191 Fed. 172.

There are sixteen corporate and thirty-four individual defendants, the latter, with the exception of Edwin L. Wayman, being the officers, presidents, or secretaries, of the companies.

35] *The corporate defendants were alleged to be the manufacturers of enameled ironware in various places in the United States, manufacturing 85 per cent of such ware, and engaged in interstate commerce in such ware throughout the United States and with foreign countries, in competition with one another and with certain other manufacturers of such ware, and that in 1909, or early in 1910, they entered into and engaged in a combination and conspiracy to restrain such trade and commerce.

The defendants denied the charges against them, Wayman doing so in a separate answer. The Colwell Lead Company denied that it was engaged in interstate commerce.

A great deal of testimony was taken and the case quite elaborately argued, but in the view we take of it it is in comparatively narrow compass, depending upon the application of well-settled principles.

The corporate defendants are manufacturers of sanitary enameled ironware, such as bath tubs, wash bowls, drinking fountains, sinks, closets, etc. The enameling consists in applying opaque white glass to iron utensils, first in the condition of a liquid, and, second, in the form of a powder. The process consists in heating the utensils to a red heat and then sifting upon it the enameling powder. The powder is fused by the high temperature, and forms on the utensil a hard, impenetrable, insoluble, smooth, and glossy surface.

Prior to the invention of James W. Arrott, Jr., covered by letters patent issued September 26, 1899, the enameling powder was applied by a sieve attached to a long handle, which was held by the workman with one hand, and the sieve made to vibrate by the workman striking the handle with his other hand, thereby sifting the powder over the surface of the ironware. The implement was an imperfect one, not easily handled, and by its use the workmen were subjected to intense heat and physical strain. The *flow of the pow-[36 der, beside, was not continuous; it was cast upon the metal in intermittent puffs, causing in many instances an unequal distribution of the powder and producing defective articles which either had to be thrown away or sold as "seconds." With Arrott's invention these evil results are lessened or disappear. The sieve is mechanically vibrated very rapidly, causing, instead of an intermittent flow of the powder as in the hand process, a practically continuous flow. Both hands of the workman may be used to guide and direct the sieve. The advantages of the instrument over the hand process are decided. It is more efficient and more economical. It makes a better article and in less time. There is no waste in defects or "seconds." The workman is relieved to some extent from "fierce heat conditions," to quote from the answers.

At the time of the contracts which are

attacked by the government the Standard Sanitary Manufacturing Company was the owner of the patent and manufacturer of 50 per cent of the ware, and used in its production the patented device. Some of the other manufacturers were infringing and controversies existed. Some yielded to its validity, others contested it. It was sustained by the courts in several cases.

We have gone through this detail to exhibit the conditions, as asserted by defendants, which confronted them and induced their contracts. In further display of it we quote Wayman's answer, as follows:

"For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user of such means open to a suit for infringement, by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention were unable to successfully compete with those using the Arrott in-
37 ]vention, and, moreover, produced a *disproportionate number of defective, unsightly and substantially unsalable articles. The consumer was deceived and defrauded and the use of sanitary enameled ironware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective."

On the situation thus asserted to exist, the defendants build their defense, contending that Wayman saw its evils and conceived the way to correct them; and insist that the following facts are established by the evidence: Wayman was familiar, through his connection with another enameling company, called the Seamless Steel Bath Tub Company, with the enamel ware trade, and had become convinced of the advantages, indeed, necessity, of the use of the Arrott invention. He tried to secure it, but the Standard Company seemed unwilling at that time to confer its utility upon other companies, and pending the negotiations the Seamless Company failed and Wayman turned to other plans, one of which resulted in the contracts under review.

As early as 1908, impressed with the importance of the Arrott patent, he endeavored to have the Standard Company grant licenses to other companies in order to improve trade conditions, and to this end he tried to interest other gentlemen in the project. The Standard Company was unwilling to grant, and other manufacturers were equally disinclined to accept, them. He then conceived the idea of a holding company, but this failed also, the Standard still being unyielding, stating by one of its officers that "*his company was unwilling* either to sell the Arrott patent or to enter into any arrangement which would lessen the advantage which it had by reason of the ownership of the Arrott patent." The plan was therefore abandoned.

In August, 1909 (we are still following the version of the testimony given by counsel for defendants), it was suggested to Wayman by a person connected with one *of the manufacturing companies that[38 he (Wayman) apply for the position of secretary of the Association of Sanitary Enameled Ware Manufacturers which was about to be reorganized. The position, it was said, would give Wayman an excellent opportunity to continue his efforts to buy the Arrott patent, and establish such relation with the manufacturers of enameled ware as would enable him to present in the most favorable manner his ideas in regard to the advantages of patent licenses under the Arrott patent. This association was a pure trade organization, and not formed to control or regulate prices. Wayman applied for and obtained the position, and commenced again negotiations for the Arrott patent, and persisted, against the apparent reluctance of the Standard Company to give up the advantages of the patent. Finally he impressed the manager of the Standard factories with the greater advantages which would come to his company by the elimination of "seconds," and removing them as competitors of the better articles of the Standard, confining the competition to such articles, of which the Standard produced 50 per cent. The manager of the Standard and that company yielded to the representation of these advantages.

These advantages are dwelt on and made much of by counsel and they quote testimony to display their extent. "Seconds," as we have said, were articles of inferior or defective manufacture, and as their inferiority was not apparent, they could be represented and sold as of standard quality. Such deception, it is asserted, was frequently practised, and the articles turning out defective discredited enamel ware, gave it a bad reputation, and there was a growing difficulty to maintain or extend its sale. With "seconds" out of the way, it may be conceded, as it is contended, that only honest articles were available to plumbers, jobbers, and builders.

The Standard Company fixed a price upon the Arrott patent and gave Wayman an option upon it. He, in the *following[39 December, secured also an option from the J. L. Mott Iron Works upon a patent called the Dithridge, and from the L. Wolff Manufacturing Company an option upon the Lindsay patent. These patents were in-

registered label (except where otherwise specified) owned by the licensee, and in addition thereto a license tag or label approved by the licensor, placed in a visible position thereon.

The provision for prices was as follows:

"The licensor agrees that he will employ a commission of six persons, of which he is to be one, and to act as chairman thereof, five of whom shall be designated by a majority of the parties holding licenses similar to this license, which commission shall have supervision of all the relations and transactions between the parties hereto under this agreement; but it is understood that where a member of said commission, or his company, shall be directly interested in any question of a violation of the license to be decided by the said commission, said member shall be disqualified and a temporary member shall be appointed in his place by the remaining members of the commission.

"All terms and conditions relative to prices and discounts now established by the 45]licensor and set forth in *the annexed schedules and made a part hereof shall remain in force and effect until other terms, conditions, and preferential discounts are substituted therefor by the licensor, which substitution can only be made by him with the approval of a majority of the members of the commission, hereinbefore prescribed. Notice of such changes and substitutions shall be given from time to time in writing by the licensor to the licensees. The licensee covenants to adhere to and maintain such terms, conditions, regulations, prices, and preferential discounts as may be established by the licensor from time to time, *and the licensee further agrees to sell no 'seconds' or 'B's' covered by schedules 4, 4½, 5, and 6.*" (Italics ours.)

The restrictions as to prices at which the goods were to be sold did not apply to those sold and exported to foreign countries. Such sales were required, however, to be proved to the licensor.

There was a provision for the return of 80 per cent of the royalties paid if the agreement should be complied with. These royalties, called in the agreement "royalty rebates," were forfeited if the provisions of the agreement should be violated in any particular.

The foregoing constitute the essential provisions of the manufacturer's agreements, and it will be observed what little space is given to "seconds," though it is asserted in the argument, as we have seen, that to get rid of the evils of their production and sale was the chief impulse to the agreements. The covenant as to *"seconds" was expressed* by the words which we have italicized in the provision relating to prices and discounts, quoted above. The schedules referred to are found in the paragraph providing for preferential discounts, and cover all articles but baths, these being described in schedules 1, 2, and 3.

There was also a jobber's license agreement that bore at the top the note that it "must be executed by the purchaser in order to purchase licensed sanitary enameled *ware." It conveyed to the jobber[46 the right to buy and sell such ware, provided for certain discounts and details as to shipments and deliveries, and that the sales were to be made "by the purchasers at prices to be established and prevailing in the various zones into which the goods were shipped, regardless of the point of purchase." There was a provision for the payment of the purchase price at certain rebate periods if the agreement should be complied with. The resale prices as established from time to time were required to be maintained by all jobbers and dealers, and sales could not be made from one jobber to another for any better prices than "established by the sheets," and the purchaser agreed to "observe and strictly maintain . . . the selling prices as they are set forth in the schedules, and observe and adhere to the rules and regulations as embodied in the price sheets," or embodied in price sheets which might be issued by or under the authority of the licensor. Articles might be added to or removed from the schedules at any time. The purchaser also agreed during the life of the contract not to purchase, sell, advertise, or solicit orders for, or in any way handle or deal in, sanitary enameled ironware of any manufacturer not licensed under the letters patent enumerated in the agreement, except with the express written permission of the licensor. A breach of any of the conditions subjected the contract and all unfilled orders to cancelation, the forfeiture of rebates, and the power to obtain the ware manufactured under the letters patent from any of the licensed manufacturers. The purchaser further agreed not to sell any goods on hand manufactured in accordance with the patents, irrespective of by whom manufactured, except in accordance with the prices, conditions, and regulations of sale established by the licensor.

The price list contained a notice to the jobbers' salemen that the agreements executed by their companies *required them[47 to resell the various licensed products at no better prices, terms, or other regulations than therein established. And further, as changes, additions, and eliminations oc-

curred, new sheets would be issued promptly.

These are the main outlines of the agreements, and, as emphasizing them, Wayman directed the manufacturers at the time they sent out the jobbers' agreements to also send with them a letter containing the following: "It is necessary for you [the jobbers] to execute these contracts before we [the manufacturers] can sell you licensed sanitary enameled ware." This provision was enforced, as indicated by letters in the record. It was also the condition expressed by Wayman in his correspondence with other manufacturers whom he tried to induce to accept licenses and become parties to the agreements. In a letter to a jobber Wayman expressed the hope that the jobber could see his way clear to execute the agreement, as it covered "a matter entirely for the jobbers' benefit." He further stated: "The Cedar Rapids Pump Company of your city have executed the agreement, and I hope you will co-operate immediately with your local competitors, which will be much more advantageous than a continuous cut market."

In this statement certain things are prominent. Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the 48]condition of entry *was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent of the manufacturers, and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument, "cash bail." The royalty for each furnace was $5, 80 per cent of which was to be returned if the agreement was faithfully observed; it was to be "forfeited as a penalty" if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent of the jobbers in number and more than 90 per cent in purchasing power joined the combination.

The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the Bement Case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established, and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364, which contravenes the views herein expressed.

The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers *and dealers in tiles com-[49 bined them in W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, which combination was condemned by this court as offending the Sherman law. The added element of the patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights for which the government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman law is a limitation of rights,—rights which may be pushed to evil consequences, and therefore restrained.

This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that, in the very latest of them, the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection." United States v. American Tobacco Co. 221 U. S. 106, 181, 55 L. ed. 663, 694, 31 Sup. Ct. Rep. 632. Nor can they be evaded by good motives.

The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548; Armour Packing Co. v. United States, 209 U. S. 56, 62, 52 L. ed. 681, 684, 28 Sup. Ct. Rep. 428.

The Colwell Lead Company asserts the legality of the license agreements as the other defendants do, and, besides, urges that it was not engaged in interstate commerce, but that it only sold to plumbers, and that none of the price restrictions was 50]applicable to it, nor was it *at any time in any relations whatsoever with the other defendants. It asserts that it was itself a jobber, and therefore had no occasion to deal with jobbers, and that it was not present nor represented at any of the meetings preceding the license agreements.

It does appear, however, that the company was a member of the association of manufacturers,—an association which, we have seen, passed the first resolution in regard to the license agreement,—and the president of the company, when addressed on the subject of the agreement, expressed an appreciation of it provided all manufacturers should "sign up." He, however, reserved final judgment until he could go over the matter in detail with Wayman, who had addressed him, and declared that he would "be greatly influenced by what other manufacturers do."

There is a letter in the record, about which, however, there is some dispute, purporting to have been written by the president of the company to Wayman, in which the latter's interpretation of a previous letter was said to be "entirely correct," and which contained the following: "We will not require any preferentials below the lowest price made by the Standard Sanitary Manufacturing Company." There can be little doubt of the genuineness of the letter, and it is certain that the company asserted on the 25th of May, 1910. Its license, however, was modified in order that it might meet local competition in New York, its business being, it is contended, mostly local.

It appears from the testimony that the company was a manufacturer and a jobber, manufacturing about one half of what it sold. As a jobber it bought goods from other manufacturers, but it denies there was an agreement as to prices with such manufacturers.

The testimony as to the state or interstate character of its business is that it manufactures at Elizabeth, New Jersey, *and buys also from other manufactur-[51 ers and jobbers. It ships from there to its warehouses in New York, Worcester, Massachusetts, and Brooklyn. The trade of its Worcester branch covers about 200 miles around Worcester, its efforts being to localize its business. It is doubtful, it is testified, if the trade goes beyond Massachusetts, the trade there being circumscribed. Sales in Connecticut are made through the New York office from the warerooms.

It is manifest that the Colwell Company was a party to the combination and was also engaged in interstate commerce. The fact that its trade was less general than that of the other manufacturers and jobbers does not take from it the character of an interstate trader. The fact that it was restricted in less degree than the other jobbers, given a certain freedom of competition to meet local conditions in New York, diminishes only the degree of culpability, but does not entirely remove it. Indeed, it may be said that such freedom does not even diminish culpability. It is a concession which may be made a means of crushing competition where it is most formidable.

Error is assigned on the action of the circuit court in not granting a motion made by defendants for an enlargement of time to take testimony, on the ground that they had been prevented, by the action of the government in instituting criminal proceedings, from properly presenting their defense.

The question arose upon the action of witnesses who were subpœnaed and called by the Colwell Lead Company, they being officers of some of the other manufacturers. The government apprehending, and as it now contends, that the witnesses were called to give them immunity from a criminal prosecution which was then pending in Michigan, notified them that if they testified they would do so at their peril, as immunity could only be claimed by *wit-[52 nesses for the government. The witnesses thereupon, upon the advice of counsel, refused to testify, leaving, as it is contended, the Colwell Company particularly, and the other defendants as well, without the evidence such witnesses could have given, and which, it is said, they did give subsequently in the criminal trial.

Whether the testimony, if given, would have conferred immunity, we are not called upon to determine. The only question is as to the extent of the court's discretion in such circumstances. The Sherman act provides for a criminal proceeding to punish violations, and suits in equity to restrain

such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard-and-fast rule, or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the government, there may be an action for damages by a "person injured by reason of anything forbidden by the act." Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs, the danger of incrimination cannot be said to have passed. It is manifest, therefor, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar.

Decree affirmed.

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52] *ORMOND G. SMITH, George C. Smith, and Cora A. Gould, Trading under the Firm Name of Street & Smith, Appts.,

v.

FRANK H. HITCHCOCK, Postmaster-General of the United States. (No. 31.)

FRANK TOUSEY, Publisher, a Corporation, Appt.,

v.

FRANK H. HITCHCOCK, Postmaster-General of the United States. (No. 32.)

(See S. C. Reporter's ed. 53–61.)

**Postoffice — second-class postal rates — periodicals or books.**

1. Books, being expressly embraced in mail matter of the third class by the act of March 3, 1879 (20 Stat. at L. 359, chap. 180, U. S. Comp. Stat. 1901, p. 2648), § 17, cannot be removed from that class and given the benefit of second-class postal rates accorded by § 14 to periodical publications, by the simple device of publishing them in a series, at regular intervals of time, whether such publications be reprints of well-known works or new matter.

[For other cases, see Postoffice, V., in Digest Sup. Ct. 1908.]

**Postoffice — second-class postal rates — periodicals or books.**

2. Weekly *32-page publications, each containing a single story, complete in itself, which are generally by the same author, and carry the same character through the series, and leave the reader to expect further tales, but which contain nothing else except a roll of honor, some laudatory letters with insignificant comment, and a page or two containing answers to inquiries, are not "periodical publications" entitled to second-class postal rates, under the act of March 3, 1879, § 14, but are "books," which, by § 17, take the higher third-class rate.

[For other cases, see Postoffice, V., in Digest Sup. Ct. 1908.]

**Postoffice — revoking second-class privileges — hearing.**

3. Persons whose second-class mail privileges have been revoked on the ground that their publications were not periodicals, but books, have no cause to complain as to the sufficiency of the hearing before the Department, although, beyond the submission and acceptance of a printed brief upon the question, which was purely one of law, nothing further was done, the Department assigning no reasons for its ruling, and evincing no desire to discuss the matter, where not even by manner or indirection was the offer of any material evidence prevented.

[For other cases, see Postoffice, V., in Digest Sup. Ct. 1908.]

[Nos. 31 and 32.]

Argued November 5 and 6, 1912. Decided November 18, 1912.

APPEALS from the Court of Appeals of the District of Columbia to review decrees which reversed decrees of the Supreme Court of the District, enjoining the Postmaster-General from revoking certain second-class mail privileges. Affirmed.

See same case below, No. 31, 34 App. D. C. 521; No. 32, 34 App. D. C. 535.

The facts are stated in the opinion.

Messrs. J. J. Darlington and H. H. Glassie argued the cause and filed a brief for appellants:

There was not "a hearing," in the sense of the statute.

Lewis Pub. Co. v. Wyman, 152 Fed. 787; Weybridge v. Addison, 57 Vt. 569; Payne v. United States, 20 App. D. C. 581; United States ex rel. Wedderburn v. Bliss, 12 App. D. C. 485; Garfield v. United States, 32 App. D. C. 154.

The relegation of appellants' publications from the second to the third class postage rate (whereby they are indirectly destroyed) cannot be justified upon the pretext of a personal literary and moral censorship unknown to the law.

Where it appears that Congress knew how certain terms in the previous law had been construed, the repetition of those same terms in a subsequent statute indicates that the construction was adopted along

with the terms, and that "a like construction was intended, and was expected, to be given" to them. *Repetitio verborum indicat acceptationem in eodem sensu.*

Mason v. Fearson, 9 How. 248, 258, 13 L. ed. 125, 129; Reiche v. Smythe, 13 Wall. 162, 164, 20 L. ed. 566, 567; The Abbotsford, 98 U. S. 440, 444, 25 L. ed. 168, 169; Claflin v. Commonwealth Ins. Co. 110 U. S. 90, 93, 28 L. ed. 79, 80, 3 Sup. Ct. Rep. 507; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 402, 50 L. ed. 515, 525, 526, 26 Sup. Ct. Rep. 272; United States v. G. Falk & Bro. 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 1, 14, 52 L. ed. 655, 660, 28 Sup. Ct. Rep. 319, 14 Ann. Cas. 628; Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 103, 55 L. ed. 384, 387, 31 Sup. Ct. Rep. 368.

Just as in the case of previous judicial construction, a known construction made by the officers charged with the enforcement of the statute is treated as if read in the subsequent statute.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 402, 50 L. ed. 515, 525, 526, 26 Sup. Ct. Rep. 272; United States v. G. Falk & Bro. 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191.

But in the case at bar we have something more than mere conscious repetition. We have, in the first place, an attempt to amend the law into the effect or sense in which it is now sought to be construed, and a deliberate rejection of that amendment. This should be conclusive.

United States v. Press Pub. Co. 219 U. S. 1, 10, 55 L. ed. 65, 67, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942.

This court has never failed to take into consideration "the genesis and development of the legislation" which the act in question embodies. It seeks to place itself in the light of "the situation as it existed and as it was pressed upon the attention of the legislative body." Church of the Holy Trinity v. United States, 143 U. S. 463, 36 L. ed. 229, 12 Sup. Ct. Rep. 511. In so doing the amendments to which an act has been subjected before it reached its final legislative form are deemed to afford "a specially efficacious means for discerning its intent and purpose."

United States v. Press Pub. Co. 219 U. S. 1, 11, 13, 55 L. ed. 65, 67, 68, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 242, 46 L. ed. 1144, 1146, 22 Sup. Ct. Rep. 881; Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 464, 36 L. ed. 226, 229, 230, 12 Sup. Ct. Rep. 511; Coosaw Min. Co. v. South Carolina, 144 U. S. 559, 561, 36 L. ed. 541, 542, 12 Sup. Ct. Rep. 689; Platt v. Union P. R. Co. 99 U. S. 48, 64, 25 L. ed. 424, 429; Blake v. National City Bank, 23 Wall. 307, 319, 23 L. ed. 119, 120.

We have, in the second place, the additional fact that the words as repeated in the new act of 1879 were immediately given the same construction as under the prior law, by the officers charged with their enforcement, notwithstanding that these officers had themselves endeavored to have the law changed. This is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.

Schell v. Fauché, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376; United States v. Hill, 120 U. S. 169, 180, 182, 183, 30 L. ed. 627, 631, 632, 7 Sup. Ct. Rep. 510; Hahn v. United States, 107 U. S. 402, 406, 27 L. ed. 527, 528, 2 Sup. Ct. Rep. 494; Butterworth v. United States, 112 U. S. 50, 67, 68, 28 L. ed. 656, 661, 662, 5 Sup. Ct. Rep. 25; United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 44, 45, 39 L. ed. 601, 614, 15 Sup. Ct. Rep. 508; United States v. Healey, 160 U. S. 136, 141, 145, 40 L. ed. 369, 371, 372, 16 Sup. Ct. Rep. 247; Hewitt v. Schultz, 180 U. S. 139, 157, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309; Midway Co. v. Eaton, 183 U. S. 602, 609, 46 L. ed. 347, 352, 22 Sup. Ct. Rep. 261; United States v. Finnell, 185 U. S. 236, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633.

An expression of opinion in debate is not appropriate evidence of legislative intent.

United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; United States v. Trans-Missouri Freight Asso. 166 U. S. 293, 318, 41 L. ed. 1011, 1019, 17 Sup. Ct. Rep. 540.

The refusal of Congress to accept the repeated recommendation of the Postoffice Department to restrict the second-class mailing privileges was equivalent to affirmative action in maintaining the *status quo.*

Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 76, 54 L. ed. 936, 938, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; Welton v. Missouri, 91 U. S. 275, 282, 23 L. ed. 347, 350.

If, as we submit, the action of Congress shows conclusively what it intended the term to include, it would seem to follow that the decision in Houghton's Case, infra,

cannot be taken in subsequent cases as authoritatively ascertaining the intent of Congress to be the reverse.

Barden v. Northern P. R. Co. 154 U. S. 288, 322, 38 L. ed. 992, 1000, 14 Sup. Ct. Rep. 1030; Kilbourn v. Thompson, 103 U. S. 176, 196, 199, 200, 26 L. ed. 388, 389, 390; Legal Tender Cases, 12 Wall. 457, 554, 20 L. ed. 287, 313.

In any event, the decision in Houghton v. Payne, 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. Rep. 590, should be rigidly limited to the precise facts of that case, and should not be extended by analogies to cases not strictly within its scope.

Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 574, 39 L. ed. 759, 816, 15 Sup. Ct. Rep. 673.

Self-completeness is no bar to periodical character, and it would be mere stultification for the Postmaster General so to assert, in view of the publications admitted by him as periodicals without question.

The positive authority of a decision is coextensive only with the facts on which it is made.

Ogden v. Saunders, 12 Wheat. 213, 233, 6 L. ed. 606, 612; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 574, 39 L. ed. 759, 816, 15 Sup. Ct. Rep. 673; Brooks v. Marbury, 11 Wheat. 78, 91, 6 L. ed. 423, 426; Carroll v. Carroll, 16 How. 275, 287, 14 L. ed. 936, 941; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 509, 33 L. ed. 687 694, 10 Sup. Ct. Rep. 341; Hans v. Louisiana, 134 U. S. 1, 20, 33 L. ed. 842, 849, 10 Sup. Ct. Rep. 504; Cross v. Burke, 146 U. S. 82, 87, 36 L. ed. 896, 898, 13 Sup. Ct. Rep. 22; United States v. Wong Kim Ark, 169 U. S. 649, 679, 42 L. ed. 890, 901, 18 Sup. Ct. Rep. 456; Downes v. Bidwell, 182 U. S. 244, 259, 45 L. ed. 1088, 1095, 21 Sup. Ct. Rep. 770; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493.

Such a discrimination as is here sought to be made by mere administrative officers, between things substantially alike, would be even beyond the power of Congress itself.

Public Clearing House v. Coyne, 194 U. S. 497, 507, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789.

The right of a citizen to post his mail matter at the rates established by Congress is a fixed legal right which he cannot be deprived of by the act of an administrative officer.

Payne v. United States, 20 App. D. C. 597; Smith v. Powdich, 1 Cowp. 182; Stock v. Harris, 5 Burr. 2711; Rowning v. Goodchild, 2 Wm. Bl. 907, 3 Wils. 413; Barnes v. Foley, 4 Burr. 2149; Jones v. Walker, Cowp. pt. 2, p. 624; Teal v. Felton, 12 How. 284, 13 L. ed. 990; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Payne v. United States, 20 App. D. C. 581.

The Postoffice Department is not, in strictness, a political department.

Public Clearing House v. Coyne, 194 U. S. 497, 506, 48 L. ed. 1092, 1097, 24 Sup. Ct. Rep. 789.

Any discretion, therefore, which may remain to the officials of the postal service in the classification of the mail, is not analogous in any way to the political discretion lodged in the head of the political department as such.

Payne v. United States, 20 App. D. C. 581.

In so far as the judgment rests simply upon a comparison of the publications themselves with the requirements of the statute, that is a question of law.

Bates & G. Co. v. Payne, 194 U. S. 106, 107, 110, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595.

While there may be a discretion in an administrative officer to determine the existence and weight of matters of fact upon which his judgment may depend (all requirements as to hearing being, of course, complied with), there is no discretion to misconstrue the terms of a statute, or to amend it by reading into it limitations not already there.

Payne v. United States, 20 App. D. C. 581; Morrill v. Jones, 106 U. S. 466, 467, 27 L. ed. 267, 268, 1 Sup. Ct. Rep. 423; Teal v. Felton, 12 How. 284, 291, 13 L. ed. 990, 992; American School v. McAnnulty, 187 U. S. 109, 47 L. ed. 96, 23 Sup. Ct. Rep. 33; Sanford v. Sanford, 139 U. S. 642, 647, 35 L. ed. 290, 291, 11 Sup. Ct. Rep. 666; Quinby v. Conlan, 104 U. S. 420, 426, 26 L. ed. 800, 802; Moore v. Robbins, 96 U. S. 530, 535, 24 L. ed. 848, 850; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424, 427; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138.

It is Congress, and not the Postmaster General, who determines what shall constitute second-class matter and what third-class matter.

Payne v. United States, 20 App. D. C. 597.

The citizen and the court are both entitled to require the administrative officer to state the rule of law which he is acting on, in order to compare that rule with the statute on which it purports to be based.

American School v. McAnnulty, 187 U. S. 109, 47 L. ed. 96, 23 Sup. Ct. Rep. 33.

The mere fact that any officer must read the law, and therefore, in a certain sense,

construe it, in order to form a judgment from its language as to the duty it directs, does not give the officer a discretion to read the statute as he pleases.

Roberts v. United States, 176 U. S. 221, 231, 44 L. ed. 443, 447, 20 Sup. Ct. Rep. 376; United States ex rel. West v. Hitchcock, 19 App. D. C. 333; Payne v. United States, 20 App. D. C. 581; Garfield v. United States, 211 U. S. 249, 261, 262, 53 L. ed. 168, 174, 175, 29 Sup. Ct. Rep. 62.

The definition of a word of common speech used as a statutory term is a pure question of laaw.

M'Culloch v. Maryland, 4 Wheat. 316, 413, 418, 4 L. ed. 579, 603, 604; State v. Stevens, 69 Vt. 413, 38 Atl. 80; Taylor v. Horst, 52 Minn. 303, 54 N. W. 734; Com. v. Sullivan, 146 Mass. 142, 15 N. E. 491; Marvel v. Merritt, 116 U. S. 11, 12, 29 L. ed. 550, 6 Sup. Ct. Rep. 207.

Solicitor General Bullitt argued the cause and filed a brief for appellee:

The decision of the Postmaster General is conclusive and should not be reviewed.

Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595.

A mere compliance with the statutory requirements does not make the publication a periodical.

Houghton v. Payne, 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. Rep. 590; Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595; Smith v. Payne, 194 U. S. 104, 48 L. ed. 893, 24 Sup. Ct. Rep. 595.

The contents of the publication determine whether or not it is a periodical.

Ibid.

The reprinting feature was not the determining factor in Houghton v. Payne and Smith v. Payne, supra.

Former Solicitor General Lehmann also filed a brief for appellee:

The notice given and the hearing accorded the complainants fulfilled the requirements of the law.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Japanese Immigrant Case, 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611.

The issues of "Tip Top Weekly" are books, and not periodicals.

Houghton v. Payne, 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. Rep. 590; Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595.

Mr. Justice Holmes delivered the opinion of the court:

*These are bills to restrain* the Postmaster General from revoking orders according second-class mail privileges to the several plaintiffs,—in the first-named case in respect of a series of publications issued under the name of the Tip Top Weekly; in the second, in respect of a similar one entitled Work and Win. The ground of the bills is that the privileges were annulled without granting the hearing required by the act of March 3, 1901, chap. 851, 31 Stat. at L. 1099, 1107, U. S. Comp. Stat. 1901, p. 2655, and that the publications are periodical publications within the meaning of the act of March 3, 1879, chap. 180, §§ 7, 10, 14, 20 Stat. at L. 358, 359, U. S. Comp. Stat. 1901, p. 2646, and therefore must be carried as second-class matter, by the very terms of the law.

We will take up the second question first. The facts are not in dispute and are alike in the two cases. The publications are weekly, each containing a single story complete in itself, but the same character is carried through the series, and the reader is led by announcements to expect further tales after the one before him. Most of the stories are by the same author. The element of sequence may be indicated by a few of the titles in the Tip Top Weekly: Frank Merriwell in Arizona; or, the Mysteries of the Mine. Frank Merriwell's Friend; or, Muriel the Moonshiner. Frank Merriwell's Double; or, Fighting for Life. Frank Merriwell Meshed; or, the Last of the Danites. Frank Merriwell's Magic; or, the Pearl of Tangier. Frank Merriwell in London; or, The Grip of Doom, etc., etc. There is nothing else in a number except a roll of honor or list of some of those who have *endeavored to increase the circu-[58 lation of the series, laudatory letters with insignificant comments, and a page or two of inquiries as to physical culture, purporting to come from readers, with short replies, all more or less incident to the muscular tenor of the tales. The publications measure about 11 by 8 inches on the outside, are said to contain about thirty thousand words, have thirty-two pages, including a page of advertisement, and exclusive of the cover, of which twenty-six are filled by the story. The front cover bears a colored illustration of some incident narrated within.

Thus a question of law is raised, although, as suggested in Bates & G. Co. v. Payne, 194 U. S. 106, 108, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595, we should not interfere with the decision of the Postmaster General unless clearly of opinion that it was wrong. Id. 110. American School v. McAnnulty, 187 U. S. 94, 106, 47 L. ed. 90, 95, 23 Sup. Ct. Rep. 33; Public Clearing House v. Coyne, 194 U. S. 497, 509, 48 L. ed. 1092,

1098, 24 Sup. Ct. Rep. 789. We have no such clear opinion, as the decision is pretty nearly if not wholly sustained by Houghton v. Payne, 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. Rep. 590, and Smith v. Payne, 194 U. S. 104, 48 L. ed. 893, 24 Sup. Ct. Rep. 595. Indeed, the latter case dealt with The Medal Library, which was a periodical publication of several issues of the Tip Top Weekly, bound together; as the principal plaintiff now puts it, in book form, and it is true, reprinted in a different size and shape. Some attempt was made to reargue the law of the decisions just cited, but we do not feel called upon to reopen the discussion in that part of the appellants' brief.

It must be taken as established that not every series of printed papers published at definite intervals is a periodical publication within the meaning of the law, even if it satisfies the conditions for admission to the second class, set forth in § 14. Houghton v. Payne, 194 U. S. 88, 96, 48 L. ed. 888, 889, 24 Sup. Ct. Rep. 590. It is established by the same authorities that books that are expressly embraced in mail matter of the third class by § 17, and so made liable to a higher rate of postage, 59] *cannot be removed from that class and brought into the second by the simple device of publishing them in a series at regular intervals of time. It was suggested, to be sure, that the distinction was between reprints of well-known works and new matter, but we can see nothing in that; neither do we find much weight in the identity of authorship, the retention of the name of the hero through successive tales, or the ever-renewed promise of further wonders in the next. All these might co-exist and yet each number might be a book, and if so, it goes into the third class. "Mail matter of the third class shall embrace books." § 17.

The noun "periodical," according to the nice shade of meaning given to it by popular speech, conveys at least a suggestion, if not a promise, of matter on a variety of topics, and certainly implies that no single number is contemplated as forming a book by itself. But we can approach the question more profitably from the other end, and shall have gone as far as we need when we decide whether the numbers exhibited constitute so many books. The word "book," also, of course, has its ambiguities, and may have different meanings according to the connection in which it is used. For purposes of copyright the common monthly magazines may be books, yet they are not so under the present § 17. As books are not turned into periodicals by number and sequence, the magazines are not brought into the third class by having a considerable number of pages stitched together. Without attempting a definition, we may say that generally a printed publication is a book when its contents are complete in themselves, deal with a single subject, betray no need of continuation, and, perhaps, have an appreciable size. There may be exceptions, as there are other instances of books. It hardly would be an exception if, where the object is information and the subject-matter is a changing one, a publication periodically issued, giving information for *the time, should be held to fall into[60 the second class. From this point of view the Tip Top Weekly and Work and Win are books. They are large enough to raise no doubt on that score; each volume is complete in itself and betrays no inward need of more, notwithstanding that, as in the highwayman stories of an earlier generation, further adventures to follow are promised at the end.

The decision that these weeklies are books shortens what needs to be said as to the sufficiency of the hearing. The parties were notified that they would be granted a hearing at the office of the Third Assistant Postmaster General, Washington, District of Columbia, at a fixed day and hour, to show cause why the admission to the second-class should not be revoked and the third-class rate of postage charged, on the ground that the issues were not periodical publications, but were books. They sent a representative to Washington who left a printed response in advance, asking for further opportunity for argument if the authorities were not satisfied, and who called at the appointed time. He was referred to the Chief of the Classification Division,—the proper person. Rev. Stat. § 161, U. S. Comp. Stat. 1901, p. 80; Postal Laws and Regulations, 1902 ed. §§ 6, 19, subsec. 1, 8. He saw him and asked if the brief had been received, was answered yes, and then asked if the other had any questions to ask, and was answered no. He presented a pamphlet, "The Influence of the Dime Novel," and departed, offering no further argument, seemingly somewhat aggrieved at not having seen the Third Assistant Postmaster General in person. Subsequently, the Assistant Attorney General for the Postoffice Department was consulted by the officials, and in accordance with his opinion the order was issued which the plaintiffs seek to restrain.

The matter was argued to us with some feeling, and it is not impossible that the interview gave an impression of official indifference. But the plaintiffs allege in their bills that the question was a pure question of law; it was a question *that[61 they had a right to have reviewed and have had reviewed in this court; it was

clearly defined; the official was not called on to state reasons or to discuss,—his only duty was to hear; and beyond offering the printed brief, the plaintiffs' representatives showed no desire to be heard. This is not a case in which even by manner or indirection, the plaintiffs were prevented from offering material evidence. The facts and the question were as plain then as now. The conclusion reached was right; and in the circumstances disclosed, we are of opinion that the plaintiffs had no cause to complain.

Decrees affirmed.

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UNITED STATES OF AMERICA, Appt.,
v.
UNION PACIFIC RAILROAD COMPANY et al.

(See S. C. Reporter's ed. 61–98.)

**Monopoly — combination by carriers — stock control.**

1. A combination which places railroads engaged in interstate commerce in such a relation as to create a single dominating control in one corporation whereby natural and existing competition in interstate commerce is unduly restricted or suppressed constitutes a restraint of interstate commerce forbidden by the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), whether accomplished through a holding company or through a direct transfer of a dominating stock interest from one company to the other.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

**Monopoly — combination by carriers — stock control.**

2. A purchase by one railway company of a dominating stock interest in another, though legal in the state where made, and within corporate powers conferred by state authority, cannot escape condemnation under the Sherman anti-trust act of July 2, 1890, if it contravenes the prohibitions of that statute against combinations and conspiracies in restraint of trade, enacted by Congress in the exercise of its supreme authority over interstate commerce.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

**Monopoly — combination by carriers — stock control.**

3. The acquisition by the Union Pacific Railroad Company, then operating a line from Missouri river points to Portland, and thence to San Francisco by steamship connection, of 46 per cent of the outstanding capital stock of the Southern Pacific Company, with the intent and result, not only of securing the California connection at Ogden over the Central Pacific line, and thus effecting such a continuity of the Union Pacific and Central Pacific lines from the Missouri river to San Francisco, as was contemplated by the acts of July 1, 1862 (12 Stat. at L. 489, chap. 120), July 2, 1864 (13 Stat. at L. 356, chap. 216), and June 20, 1874 (18 Stat. at L. 111, chap. 331, U. S. Comp Stat. 1901, p. 3577), but of obtaining the dominating control of the entire Southern Pacific system, consisting of lines by water and rail, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific coast points, with various branches and connections, besides a steamship line from San Francisco to Panama, and from San Francisco to the Orient, and a half interest in another line between the two latter points, which system was actively competing with the purchasing road for interstate business, large in volume, though small in comparison with the total traffic carried, creates, contrary to the act of July 2, 1890, a combination in restraint of interstate trade.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

**Injunction — against monopolies — scope of relief.**

4. The Federal district court, in relieving against a combination in restraint of interstate trade, created contrary to the act of July 2, 1890, by the acquisition by the Union Pacific and Central Pacific lines from inant stock interest in the Southern Pacific Company, a competing railway system, should, by its decree, provide against the right to vote such stock while in the ownership or control of the Union Pacific Railroad Company, or any corporation owned by it, or while held for it by any corporation or person, and forbid any transfer or disposition thereof in such wise as to continue its control, and should enjoin the payment of dividends on the stock while so held, except to a receiver appointed by the court to collect and hold such dividends until disposed of by its decree.

[For other cases, see Injunction, I. g, in Digest Sup. Ct. 1908.]

**Appeal — remanding for further hearing — dissolution of monopoly.**

5. Any plan for the disposition of the shares of stock of the Southern Pacific Company, found by the Federal Supreme Court to have been acquired by the Union Pacific Railroad Company, contrary to the act of July 2, 1890, prohibiting combinations in the restraint of interstate trade, must be such as effectively to dissolve the unlawful combination, and must be subject to the approval and decree of the district court, which shall proceed, upon the presentation of any plan, to hear the government and the defendants, and may bring in any

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NOTE.—As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act—see note to Loewe v. Lawlor, 52 L. ed. U. S. 488.

As to illegal trusts under modern anti-trust laws generally—see note to Whitwell v. *Continental* Tobacco Co. 64 L.R.A. 689.

additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views of the Supreme Court.

[For other cases, see Appeal and Error, 5403-5406, in Digest Sup. Ct. 1908.]

**Appeal — remanding for further hearing — dissolution of monopoly.**

6. Nothing in the decision of the Federal Supreme Court that the acquisition by the Union Pacific Railroad Company of a dominant stock interest in the Southern Pacific Company constitutes a restraint of interstate commerce forbidden by the act of July 2, 1890, should be construed as preventing the government or any party in interest, if so desiring, from presenting to the district court a plan for permitting the Union Pacific Company to retain the California connection at Ogden over the Central Pacific line, and thus effect such a continuity of the Union Pacific and Central Pacific lines from the Missouri river to San Francisco as was contemplated by the acts of July 1, 1862, July 2, 1864, and June 20, 1874, or as preventing the court from adopting and giving effect to any such plan so presented.

[For other cases, see Appeal and Error, 5403-5406, in Digest Sup. Ct. 1908.]

**Appeal — remanding for further hearing — dissolution of monopoly.**

7. Plans for dissolving a combination created by the purchase by the Union Pacific Railroad Company of a dominant stock interest in the Southern Pacific Company, which the Federal Supreme Court finds to constitute a restraint of interstate commerce forbidden by the act of July 2, 1890, should be presented to the Federal district court within three months from the receipt of the mandate of the Supreme Court, failing which, or upon the rejection by the court of plans submitted within that period, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve the unlawful combination.

[For other cases, see Appeal and Error, 5403-5406, in Digest Sup. Ct. 1908.]

[No. 446.]

Argued April 19, 22, and 23, 1912. Decided December 2, 1912.

APPEAL from the Circuit Court of the United States for the District of Utah to review a decree dismissing the bill in a suit to enforce the provisions of the Sherman anti-trust act against certain alleged conspiracies and combinations in restraint of interstate commerce. Reversed in part, the District Court to retain jurisdiction to see that the decree outlined is made effectual.

See same case below, 188 Fed. 102.

The facts are stated in the opinion.

Attorney General Wickersham and Messrs. Cordenio A. Severance and Frank B. Kellogg, *Special Assistants to* *57 L. ed.*

the Attorney General, argued the cause and filed a brief for appellant:

The Sherman law, as construed by the courts, is directed against all attempts to suppress competition among interstate carriers or to monopolize interstate commerce.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; United States v. Standard Oil Co. 173 Fed. 177; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

The courts have recognized and enforced the policy, both under statutory and constitutional provisions, and also in the absence of such provisions.

Central R. Co. v. Collins, 40 Ga. 582; Clarke v. Central R. & Bkg. Co. 15 L.R.A. 683, 50 Fed. 338; Com. v. South Pennsylvania R. Co. 1 Pa. Co. Ct. 214; Continental Securities Co. v. Interborough Rapid Transit Co. 165 Fed. 945; Currier v. Concord R. Corp. 48 N. H. 322; East St. Louis Connecting R. Co. v. Jarvis, 34 C. C. A. 639, 92 Fed. 735; East Line & R. River R. Co. v. State, 75 Tex. 434, 12 S. W. 690; Edwards v. Southern R. Co. 66 S. C. 277, 44 N. E. 748; Gulf, C. & S. F. R. Co. v. State, 72 Tex. 404, 1 L.R.A. 849, 2 Inters. Com. Rep. 335, 13 Am. St. Rep. 815, 10 S. W. 81; Hamilton v. Savannah, F. & W. R. Co. 49 Fed. 412; Langdon v. Branch, 37 Fed. 449; Louisville & N. R. Co. v. Com. 97 Ky. 675, 31 S. W. 476; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Morrill v. Boston & M. R. Co. 55 N. H. 531; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Pennsylvania R. Co. v. Com. 3 Sadler (Pa.) 100, 7 Atl. 368; State v. Vanderbilt, 37 Ohio St. 590; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; Texas & P. R. Co. v. Southern P. R. Co. 41 La. Ann. 970, 17 Am. St. Rep. 445, 6 So. 888; Yazoo & M. Valley R. Co. v. Southern R. Co. 83 Miss. 746, 36 So. 74.

It is immaterial that one of two competing roads may be organized under the laws of another state, or situated beyond the borders of the state having the prohibition.

Currier v. Concord R. Corp. 48 N. H. 322; Re Consolidation & Combinations of Carriers, 12 Inters. Com. Rep. 305; Morrill v. Boston & M. R. Co. 55 N. H. 531; Union P. R. Co. v. Mason City & Ft. D. R. Co. 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. Rep. 19; United States v. Union P. R. Co. 188 Fed. 121.

Prior to the acquisition of the stock of the Southern Pacific Company by the Union Pacific, the lines of those two systems were competitive; and such acquisition, having eliminated such competition, was therefore in restraint of trade and in violation of the anti-trust act.

East St. Louis Connecting R. Co. v. Jarvis, 34 C. C. A. 639, 92 Fed. 735; East Line & R. River R. Co. v. State, 75 Tex. 434, 12 S. W. 690; East Line & R. River R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834; Gulf, C. & S. F. R. Co. v. State, 72 Tex. 404, 1 L.R.A. 849, 2 Inters. Com. Rep. 335, 13 Am. St. Rep. 815, 10 S. W. 81; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Kimball v. Atchison, T. & S. F. R. Co. 46 Fed. 888; Louisville & N. R. Co. v. Com. 97 Ky. 675, 31 S. W. 476; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Pennsylvania R. Co. v. Com. 3 Sadler (Pa.) 100, 7 Atl. 368; Standard Oil Co. v. United States, 221 U. S. 1, 67, 55 L. ed. 619, 648, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; State ex rel. Nolan v. Montana R. Co. 21 Mont. 221, 45 L.R.A. 271, 53 Pac. 636; State v. Vanderbilt, 37 Ohio St. 590; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; Texas & P. R. Co. v. Southern P. R. Co. 41 La. Ann. 970, 17 Am. St. Rep. 445, 6 So. 888; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 302, 41 L. ed. 1007, 1014, 17 Sup. Ct. Rep. 548, 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 64; United States v. Union P. R. Co. 188 Fed. 110.

The clause in the Pacific Railroad act authorizing the Central Pacific and the Union Pacific to consolidate their lines gave the Union Pacific no right to buy the Southern Pacific.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Union P. R. Co. v. Mason City & Ft. D. R. Co. 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. Rep. 19.

The acquisition of the controlling interest in the Southern Pacific system by the Union Pacific tended to suppress competition, and therefore was in restraint of trade; also tended to monopoly, and is in violation of the Sherman act.

Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Pennsylvania R. Co. v. Com. 3 Sadler (Pa.) 100, 7 Atl. 368; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

The ownership by the Union Pacific of less than a majority of the stock in the Southern Pacific, Santa Fe, Northern Pacific, Great Northern, and San Pedro lines tended to suppress competition and create a monopoly, and is inhibited by the Sherman act.

Central R. Co. v. Collins, 40 Ga. 582; Gibbs v. Consolidated Gas Co. 130 U. S. 408, 32 L. ed. 984, 9 Sup. Ct. Rep. 553; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Pennsylvania R. Co. v. Com. 3 Sadler (Pa.) 100, 7 Atl. 368; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; United States v. Standard Oil Co. 173 Fed. 179, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548.

The fact that the Union Pacific has, since the commencement of this suit, sold the balance of its stock in the Great Northern and Northern Pacific, and in the Santa Fe, is no reason why an injunction should not be granted.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. St. Rep. 548.

The control of the San Pedro road under the circumstances of this case tended to suppress competition and is void, although that line was not completed at the time of the acquisition of the stock therein.

Com. v. Beech Creek, C. & S. W. R. Co. 1 Pa. Co. Ct. 223; Farrington v. Stucky, 91 C. C. A. 311, 165 Fed. 325; Hamilton v. Savannah, F. & W. R. Co. 49 Fed. 412; Hartford & N. H. R. Co. v. New York & N. H. R. Co. 3 Robt. 411; Interstate Commerce Commission v. Philadelphi & R. R. Co. 123 Fed. 969; Langdon v. Branch, 37

Fed. 449; Pennsylvania R. Co. v. Com. 3 Sadler (Pa.) 100, 7 Atl. 368; State v. Hartford & N. H. R. Co. 29 Conn. 538; Thomsen v. Union Castle Mail S. S. Co. 92 C. C. A. 315, 166 Fed. 251; United States v. Patterson, 59 Fed. 280; United States v. Standard Oil Co. 173 Fed. 177, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734.

The combination of steamship lines between American and foreign ports, for the purpose of suppressing competition, is within the inhibitions of the Sherman act.

Thomsen v. Union Castle Mail S. S. Co. 92 C. C. A. 315, 166 Fed. 251.

Mr. P. F. Dunne argued the cause and filed a brief for the appellees:

The restriction of competition at which the anti-trust act is leveled must be direct in its nature, not remote; substantial, not incidental or relatively unimportant; undue and unreasonable, if any restriction there be. The union of two connecting lines, making for better service and better administration,—for the expansion of commerce and the welfare of communities,—could rarely, if ever, be accomplished in this country under legislation like the anti-trust act, if that legislation were not given a reasonable construction. Some incidental restriction of competition in a spot or in spots, existing, it may be, only in possibility, not in fact, is seldom absent from the inter-relations of railroad carriers in a country traversed and intersected by railroad lines as this country is; some competition in some sense, more or less limited, becomes visible if sufficiently looked for,—however characteristic and substantial the relations of two carriers may be as natural connecting lines.

Standard Oil Co. v. United States, 221 U. S. 1, 67, 55 L. ed. 619, 648, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 458; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 594; United States v. Joint Traffic Asso. 171 U. S. 568, 43 L. ed. 287, 19 Sup. Ct. Rep. 25; Anderson v. United States, 171 U. S. 615, 616, 43 L. ed. 305, 306, 19 Sup. Ct. Rep. 50; Addyston Pipe & Steel Co. v. United States, 175 U. S. 228, 44 L. ed. 142, 20 Sup. Ct. Rep. 96; State v. Central of Georgia R. Co. 109 Ga. 716, 48 L.R.A. 351, 35 S. E. 37; Kimball v. Atchison, T. & S. F. R. Co. 46 Fed. 890; Rogers v. Nashville, C. & St. L. R. Co. 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 318.

The Southern Pacific was not a competitor on California business of its own connecting lines, whether at the Ogden or New Orleans terminus or the El Paso junction.

Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330.

Does the expression, as used in the Pacific Railroad acts, "one continuous line," import a traffic agreement, for a joint rate, or does it mean that the roads—physical things—shall be operated and used in travel and transportation as an unbroken mechanical line, without interruption or breach of continuity, as they have been operated and as they are being operated through Ogden to this day? Certainly the expression is a familiar one in state legislation authorizing the consolidation of continuous and connecting lines, and its implication has always been physical.

Mackintosh v. Flint & P. M. R. Co. 34 Fed. 615.

Uniformity of rate per ton per mile, or per passenger per mile, as well as uniformity of gauge in the physical track, between points on the one continuous line, was the thing that Congress had in mind. Through rates on transcontinental traffic between points off the continuous line on the Atlantic seaboard or in the interior, upon the one hand, and in California, upon the other, were not in mind and were not intended.

Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 51 Fed. 475; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 914; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 778.

There is no machinery in these Pacific Railroad acts for the ascertainment of through joint freight tariffs, and beyond that, for the apportionment of the through joint rate between the two connecting lines at Ogden. If the Southern Pacific, for example, refuses to make joint through rates with the Union Pacific, it is not competent for a court to make the contract and prescribe the terms, nor, having decreed what the through joint rate shall be, to go on and rule how it shall be apportioned between the parties. This is not a judicial function.

Prentis v. Atlantic Coast Line R. Co. 211 U. S. 226, 53 L. ed. 158, 29 Sup. Ct. Rep. 67; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 682, 28 L. ed. 297, 4 Sup. Ct. Rep. 185; Express Cases, 117 U. S. 28, 29, 29 L. ed. 802, 803, 6 Sup. Ct. Rep. 542, 628.

The contracts forbidden by the anti-trust act, as stated and reiterated in Addyston Pipe & Steel Co. v. United States, 175 U. S. 229, 44 L. ed. 143, 20 Sup. Ct. Rep. 96, are those which directly and substan-

tially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states.

And in the Standard Oil and Tobacco Cases, the more comprehensive generalization and criterion has been evolved, historically and analytically, of the rule of reason, guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve.

Two independent lines cannot be said to be competing in the direct sense, as distinguished from some indirect and "limited" sense, unless they are related by common termini.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 682, 40 L. ed. 850, 16 Sup. Ct. Rep. 714; Burke v. Cleveland, C. C. & I. R. Co. 10 Ohio Dec. Reprint, 529.

An incidental and remote effect upon interstate commerce, to use the terms of the Addyston Case,—of all the cases, from the Trans-Missouri Case down,—is not the thing that the statute is concerned with.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432, 26 Sup. Ct. Rep. 208; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 458.

The anti-trust act deals with agreements in undue restraint of existing competitive conditions, and prohibits the continuing or entering into such an agreement for the future.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

It does not prohibit an undertaking between two men or two corporations, having no actual competitive relation, having in contemplation a business existing only in idea,—not to speak of competition which could come only as a sequel,—from joining prudentially and making the enterprise a common one.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734.

The formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

*The Union Pacific did* not purchase the properties of the Southern Pacific. Those properties are still in the same corporate proprietorship,—in the Southern Pacific Company as the owner and depositary of the title and control, with an equity over of participation in its stockholders.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Porter v. Pittsburg Bessemer Steel Co. 120 U. S. 649, 670, 30 L. ed. 830, 838, 7 Sup. Ct. Rep. 1206.

Its holding of Southern Pacific stock, as having always been that of a minority stockholder, is one of the actual circumstances in this case of legal import and consequence.

Pearsall v. Great Northern R. Co. 161 U. S. 671, 40 L. ed. 846, 16 Sup. Ct. Rep. 705; United States v. Northern Securities Co. 120 Fed. 726; Noyes, Intercorporate Relations, § 294.

The acquisition and ownership by the Union Pacific of the Huntington stock by out-and-out sale to it by a stockholder in the market is not, as such, within the power of Congress to regulate, under the commerce clause of the Constitution.

United States v. E. C. Knight Co. 156 U. S. 11, 13, 39 L. ed. 328, 329, 15 Sup. Ct. Rep. 249; Gibbons v. Ogden, 9 Wheat, 1, 6 L. ed. 23; Union Nat. Bank v. Matthews, 98 U. S. 628, 25 L. ed. 190; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 407, 408, 36 L. ed. 754, 12 Sup. Ct. Rep. 953; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. St. Rep. 714; Northern Securities Co. v. United States, 193 U. S. 391, 48 L. ed. 722, 24 Sup. Ct. Rep. 436; Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 202, 52 L. ed. 1016, 1023, 28 Sup. Ct. Rep. 650.

The disposition here will be to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits.

Harriman v. Interstate Commerce Commission, 211 U. S. 407, 421, 53 L. ed. 253, 264, 29 Sup. Ct. Rep. 115.

An out-and-out sale or conveyance is quite distinguishable from the collateral stipulation or covenant which may or may not run with the sale, and which goes by the name, "contract in restraint of trade,"—a term "of well-known meaning at common law or in the law of this country."

Standard Oil Co. v. United States, 221 U.

S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Maine, Ancient Law, p. 305; United States v. Joint Traffic Asso. 171 U. S. 505, 567, 568, 43 L. ed. 259, 286, 287, 19 Sup. Ct. Rep. 25; Diamond Match Co. v. Roeber, 106 N. Y. 483, 60 Am. Rep. 464, 13 N. E. 419; Bancroft v. Union Embossing Co. 72 N. H. 407, 64 L.R.A. 298, 57 Atl. 97; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

The law, certainly since Mitchel v. Reynolds, 1 P. Wms. 181, has recognized these collateral covenants in restraint of trade. It has, however, annexed the qualification that they must be reasonable. But the term "reasonable" in law and good sense, like many other expressions,—like the term "substantial," so often found in qualification of that other term, "restraint of competition," in the decisions of the Supreme Court, since the Trans-Missouri Case,—is measured and applied relatively to the subject-matter.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413.

The sale of the Huntington stock certainly has none of the features of combination or conspiracy. The parties to a combination or conspiracy do not answer to that conception unless they combined together,—unless they conspired together,—unless they are acting in co-operation after the manner of a partnership.

United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 37.

Something more than the acquisition of a competing property is necessary to bring the purchaser and seller within the Federal statutes.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 185, 50 L. ed. 433, 26 Sup. Ct. Rep. 208; Shawnee Compress Co. v. Anderson, 209 U. S. 434, 52 L. ed. 875, 28 Sup. Ct. Rep. 572; United States Chemical Co. v. Provident Chemical Co. 64 Fed. 950; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

Nor is a sale made criminal or innocent by the statute, according as it is larger or not so large. The test is not size.

Re Greene, 52 Fed. 115.

And combinations themselves are not necessarily and universally unlawful.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Central Shade Roller Co. v. Cushman, 143 Mass. 364, 9 N. E. 629; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; Herriman v. Menzies, 115 Cal. 19, 35 L.R.A.(N.S.) 318, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730; Collins v. Locke, L. R. 4 App. Cas. 674, 48 L. J. P. C. N. S. 68, 41 L. T. N. S. 292, 28 Week. Rep. 189; Skrainke v. Scharringhausen, 8 Mo. App. 522; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Cohen v. Berlin & J. Envelope Co. 38 App. Div. 499, 56 N. Y. Supp. 588; Kellogg v. Larkin, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; Dolph v. Troy Laundry Machinery Co. 28 Fed. 554; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 233, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Cote v. Murphy, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 317; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077.

Contracts and acts are unreasonably restrictive of competitive conditions when they proceed by unlawful means and methods. What is the definition of "fair competition?" Lord Bramwell asked pertinently in Mogul S. S. Co. v. McGregor [1892] A. C. 25, in the House of Lords, p. 47; and he answered his own question with another—"What is unfair that is neither forcible nor fraudulent?" Lord Morris said, in the same case, p. 49: "It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons." In Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 459, it was said that an attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. "Competition," remarked the court in Bonsack Mach. Co. v. Smith, 70 Fed. 388, "it is often said, is the life of trade. But the effort of all competition is to drive out other competitors."

Individual stockholders may lawfully own a controlling interest in each of two competing companies.

Bigelow v. Calumet & H. Min. Co. 167 Fed. 704.

Mr. N. H. Loomis also argued the cause and filed a brief for appellees:

The Southern Pacific was not bound to agree to joint tariffs.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. 3 I. C. C. Rep. 1, 6, 2 Inters. Com. Rep. 456; Express Cases, 117 U. S. 1–28, 29 L. ed. 791–803, 6 Sup. Ct. Rep. 542, 628; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 474; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568–571, 48 L. ed. 565–570, 24 Sup. Ct. Rep. 339; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 553, 50 L. ed. 585, 593, 26 Sup. Ct. Rep. 330; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 915.

The want of legal power on the part of the Union Pacific to compel the Southern Pacific to recognize the usual incidents of a through route, and the discretion possessed by the Southern Pacific to do as its own welfare might dictate with respect to through rates, gave to that company additional advantages, and made it possible for the Southern Pacific more effectively to control the situation.

A railroad is not a competitor of its connections.

Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330; Standard Oil Co. v. United States, 221 U. S. 1, 80, 55 L. ed. 619, 653, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734.

The Union Pacific was not a competitor of the Southern Pacific's Sunset Route.

Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 539, 50 L. ed. 587, 26 Sup. Ct. Rep. 330.

In order to bring the competition within the inhibition of the Sherman act, it must be direct and substantial.

United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Anderson v. United States, 171 U. S. 604–615, 43 L. ed. 300–306, 19 Sup. Ct. Rep. 50; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211–229, 44 L. ed. 138–143, 20 Sup. Ct. Rep. 96; Standard Oil Co. v. United States, 221 U. S. 1, 34 L.R.A. (N.S.) 834, 55 L. ed. 619, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 206; Kimball v. Atchison, T. & S. F. R. Co. 46 Fed. 888; State v. Central of Georgia R. Co. 109 Ga. 716, 48 L.R.A. 351, 35 S. E. 37; Rogers v. Nashville, C. & St. L. R. Co. 33 C. C. A. 517, 62 U. S. App. 49, 91 Fed. 299.

Messrs. H. F. Stambaugh and D. T. Watson filed a brief for appellee Henry C. Frick.

Mr. Paul D. Cravath filed a brief for appellees Jacob H. Schiff and Otto H. Kahn.

Mr. James M. Beck filed a brief for appellee James Stillman.

Mr. Justice Day delivered the opinion of the court:

The case was begun in the United States circuit court for the district of Utah to enforce the provisions of the so-called Sherman anti-trust act of 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp Stat. 1901, p. 3200) against certain alleged conspiracies and combinations in restraint of interstate commerce. The case in its principal aspect grew out of the purchase by the Union Pacific Railroad Company in the month of February, 1901, of certain shares of the capital stock of the Southern Pacific Company from the devisees under the will of the later Collis P. Huntington, who had formerly owned the stock. Other shares of Southern Pacific stock were acquired at the same time, the holding of the Union Pacific amounting to 750,000 shares, or about 37½ per cent (subsequently increased to 46 per cent) of the outstanding stock of the Southern Pacific Company. The stock is held for the Union Pacific Company by one of its proprietary companies, the Oregon Short Line Railroad Company. The government contends that the domination over and control of the Southern Pacific Company given to the Union Pacific Company by this purchase of stock brings the transaction within the terms of the anti-trust act. A large amount of testimony was taken and the case heard before four circuit judges of the eighth circuit, resulting in a decree dismissing the bill. 188 Fed. 102.

Prior to the stock purchase in 1901 the Union Pacific *system may briefly be de-[80
scribed as a line of railroad from the Missouri river to the Pacific coast; namely, from Omaha, Nebraska, or perhaps more strictly from Council Bluffs, Iowa; and from Kansas City, Missouri, to Ogden,

Utah, and Portland, Oregon, with various branches and connections and a line of steamships from Portland to San Francisco, California, and from Portland to the Orient; and a line of steamships from San Francisco to the Orient (the Occidental & Oriental Steamship Company), in which the Union Pacific and the Southern Pacific each owned a half interest. The main line from Council Bluffs to Ogden, a little over 1,000 miles in length, with the branch from Kansas City, through Denver, Colorado, to Cheyenne, Wyoming, on the main line, was owned and operated by the Union Pacific; the line from Granger, Wyoming, on the main line of the Union Pacific, to Huntington, Oregon, was owned and operated by the Oregon Short Line Railroad Company, the capital stock of which was owned by the Union Pacific; and the line from Huntington to Portland was owned and operated by the Oregon Railroad & Navigation Company, the stock ownership of which was in the Oregon Short Line The boat line from Portland to San Francisco and to the Orient, the Portland & Asiatic Steamship Company, was organized early in 1901, its stock being owned by the Oregon Railroad & Navigation Company.

The Southern Pacific Company, a holding company of the state of Kentucky, also engaged in operating certain lines of railroad under lease, controlled a line of railroad extending from New Orleans through Louisiana, Texas, New Mexico, Arizona, California, and Oregon to Portland, reaching Los Angeles and San Francisco, with several branch lines and connections extending into tributary territory. A line of boats running between New York and New Orleans was also owned and operated by the Southern Pacific, and later the same ships *81]entered the port of Galveston, *where also the Southern Pacific reached tidewater, and it had branches extending to various points in northern Texas, connecting with other lines of road. The Southern Pacific also operated, under lease, the railroad of the Central Pacific Railway Company, all the stock of which is owned by the Southern Pacific. The lines of the Central Pacific consisted of the road from San Francisco to Ogden, about 800 miles, in length, and connecting at the latter place with the Union Pacific and the Denver & Rio Grande Railroad Company's line. It also had various branches in and about California, aggregating in mileage about 500 miles. The Southern Pacific also owned a majority of the stock of the Pacific Mail Steamship Company, which operated a line of steamships plying to ports in the Orient and running between San Francisco and Panama, which, with the Panama Railroad and its boats, constituted the so-called Panama Route.

The contention of the government is that, prior to the stock purchase, the Union Pacific and Southern Pacific were competing systems of railroad engaged in interstate commerce, and acted independently as to a large amount of such carrying trade, and that since the acquisition of the stock in question the dominating power of the Union Pacific has eliminated competition between these two systems, and that such domination makes the combination one in restraint of trade, within the meaning of the 1st section of the act of Congress of July 2, 1890, and the transaction an attempt to monopolize interstate trade within the provisions of the 2d section of the act.

In view of the recent consideration of the history and meaning of the act (Standard Oil and Tobacco Cases, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S) 834, 31 Sup. Ct. Rep. 502, and 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632, respectively), it would be superfluous to enter upon any general consideration of its origin and scope. In certain aspects the law has been thoroughly considered and its construction authoritatively settled, and in determining the present controversy we need but *briefly[82 restate some of the conclusions reached. The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof. United States v Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep 25. The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce, and unduly suppress or restrict the play of competition in the conduct thereof. United States v. Joint Traffic Asso. supra. In that case an agreement between competing interstate railroads for the purpose of fixing and maintaining rates was condemned.

"It is," said the court (p. 571), "the combination of these large and powerful corporations, covering vast sections of territory, and influencing trade throughout the whole extent thereof, and acting as one body in all matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

In the Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep 436, this court dealt with a combination differing in character from that considered in the Trans-Missouri and Joint

Traffic Cases, and it was there held that the transfer to a holding company of the stock of two competing interstate railroads, thereby effectually destroying the power which had theretofore existed to compete in interstate commerce, was a restraint upon such commerce, and Mr. Justice Harlan, announcing the affirmance of the decree of the circuit court, said (p. 337):

"In all the prior cases in this court the anti-trust act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in inter-83]state commerce; in *other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Nor, can this court say that such a rule is prohibited by the Constitution, or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

Mr. Justice Brewer, who delivered a concurring opinion, while expressing the view that the former cases were rightly decided, said that they went too far in giving the reasons for the judgments, and declared his view that Congress only intended to reach and destroy those contracts which were in direct restraint of trade, unreasonable, and against public policy. He was nevertheless emphatic in condemning the combination effected by the Northern Securities Company and the transfer of stocks to it, which policy, he declared, might be extended until a single corporation with stocks owned by three or four parties would be in practical control of both roads; or, viewing the possibilities of combination, the control of the whole transportation system of the country; and, in concluding his concurring opinion, said (p. 363):

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce,—one in conflict with state law, and within the letter and spirit of the statute and the power of Congress."

Of the Sherman act and kindred statutes, this court, speaking by Mr. Justice McKenna, said in National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L ed. 689, 694, 25 Sup. Ct. Rep. 379:

*"According to them, competition, not[84 combination, should be the law of trade. If there is evil in this, it is accepted as less than that which may result from the unification of interest, and the power such unification gives And that legislatures may so ordain this court has decided. United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed 325, 15 Sup. Ct. Rep. 249; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276."

In the recent discussion of the history and meaning of the act in the Standard Oil and Tobacco Cases this court declared that the statute should be given a reasonable construction, with a view to reaching those undue restraints of interstate trade which are intended to be prohibited and punished; and in those cases it is clearly stated that the decisions in the former cases had been made upon an application of that rule, and there was no suggestion that they had not been correctly decided. In the Tobacco Case, after referring to the previous decision in the Standard Oil Case and the Decisions in the Trans-Missouri and Joint Traffic Cases, the doctrine was tersely summarized by the Chief Justice, speaking for the court, as follows (p. 179):

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreeements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain *the power to[85 make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term 'restraint of trade'

required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect."

We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable. Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the Northern Securities Case, the controlling interest in the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or com-86]merce. This court has repeatedly *held this general phraseology embraces all forms of combination, old and new. "In view of the many new forms of contracts and combinations," said the Chief Justice in the Standard Oil Case (p. 59), "which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other could hardly be conceived. If it is true, as contended by the government, that a stock interest sufficient for the purpose was obtained in the Southern Pacific Company, with a view to securing the control of that company and thus destroying or restricting competition with the Union Pacific in interstate trade, the transaction was, in our opinion, within the terms of the statute.

That the purchase was legal in the state where made, and within corporate powers conferred by state authority, constitutes no defense, if it contravenes the provisions of the anti-trust act, enacted by Congress in the exercise of supreme authority over interstate commerce. Northern Securities Co v. United States, 193 U. S. 334, 48 L. ed. 699, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 68, 55 L. ed. 648, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502; United States v. American Tobacco Co. 221 U. S. 183, 55 L. ed. 695, 31 Sup. Ct. Rep. 632.

It is said, however, and this was the view of the majority of the circuit judges, that these railroads were not competing, but were engaged in a partnership in interstate carriage as connecting railroads; and it was further said that the Southern Pacific, because of its control of the line from Ogden to San Francisco and other California points, was the dominating partner. A large amount of the testimony in this voluminous record was given by railroad men of wide experience, business men and shippers, who, with *practical unanimity, expressed the[87 view that, prior to the stock purchase in question, Union Pacific and Southern Pacific systems were in competition, sharp, well-defined, and vigorous, for interstate trade. To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific, through its agents, advertisements, and literature, had undertaken to obtain transportation for its "Sunset" or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement fixed at the same figure whichever route was used, and then apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight, and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their r

enues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation— did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment. 88] *The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates (United States v. Joint Traffic Asso. 171 U. S. 577, 43 L. ed. 290, 19 Sup. Ct. Rep. 25). It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. Pearsall v. Great Northern R. Co. 161 U. S. 646, 676, 40 L. ed. 838, 848, 16 Sup. Ct. Rep. 705; United States v. Joint Traffic Asso. supra.

It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete, and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock, this traffic was the subject of active competition between these systems; but by reason of the power arising from such transfer it has since been placed under a common control. It was by no 89]means a *negligible part, but a large and valuable part, of interstate commerce which was thus directly affected

The fact that the Southern Pacific had a road of its own from the Gulf to the Pacific coast did not prevent competition for this traffic. *The Union* Pacific and its connections were engaged in the same carrying trade, and as a matter of fact were competing for that trade by all the usual means of competition resorted to by rival railroad systems. As this court said, speaking by Mr. Justice Holmes, in Swift & Co. v. United States, 196 U. S. 398, 49 L. ed. 525, 25 Sup. Ct. Rep. 276: "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." That commerce, as conducted from the East to the Pacific coast, was, in a substantial part, the subject-matter of rivalry and competition between these two systems. Since the stock transfer the companies have common officers, and the rival soliciting agencies have been, for the most part, abandoned.

It is contended that the Union Pacific was but a connecting road and really had no line to San Francisco, but was dependent upon the Southern Pacific for such terms as it could make over the old Central Pacific line from Ogden to San Francisco. The facts disclose, as we have already said, that the Union Pacific had a line to Portland by way of the Oregon Short Line and the Oregon Railroad & Navigation Company, and thence to San Francisco by steamboat connection It may be admitted that this was a much longer route than by way of the Ogden connection, and that, as a practical matter, nearly all of the freight intended for San Francisco and nearby points went over the Ogden route; nevertheless, the Portland route was a factor in rate making to the coast, and the testimony shows that the Union Pacific and the Southern Pacific, up to the time of the sale of the stock, had been working for many years under a satisfactory arrangement as to rates. It is going too far to say that the Union Pacific was entirely at the *mercy[90 of the Southern Pacific in making rates for freight by way of the Ogden connection, because the latter company controlled the old Central Pacific line to San Francisco. It certainly would have been very detrimental to the Southern Pacific to have declined an arrangement for the carriage of freight received from the Union Pacific and its connections for transportation to California by way of the Ogden route. The traffic manager of the Southern Pacific testified that the division of the through rate from Omaha to San Francisco has been the same since 1870; that he thought it unfair to the Southern Pacific, but that it was the best that could be obtained at the time. One of the reasons for the Central Pacific leasing its lines to the Southern Pacific, as set forth in the lease, was that the Union Pacific had secured control of the Oregon Short Line, and thereby obtained an outlet to the

Pacific, other than over the Central Pacific, "and thus in that respect placed itself in opposition to the interests of the Central Pacific," and that it was "not only to the best interests of, but absolutely necessary that, the Central Pacific Railroad Company, in order to maintain itself against these diversions (of the Union Pacific and others), should be operated in connection with a friendly through line to the waters of the Atlantic."

Nor do we think it can be justly said that, because of the connection with the Rio Grande road at Ogden, the Southern Pacific was in position to discriminate at will against the Union Pacific in such wise as to greatly impair the latter road's carrying trade upon eastbound freight. In this connection it is said that since the consolidation, notwithstanding the former published rates are maintained, the favoring attitude of the Southern Pacific to the Union Pacific practically destroyed the carrying trade from Ogden to the East for the Rio Grande system, and necessitated the construction by the latter road of a new connection for California points, and that 91] *such would have been the fate of the Union Pacific upon disagreement as to rates with the Southern Pacific. In reference to this point we think it is pertinent to consider the acts of Congress known as the Pacific Railroad acts. These acts required the two roads, the Central Pacific and Union Pacific, to be "operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line" (12 Stat. at L. 489, 495, act of July 1, 1862, § 12, chap. 120), and in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies or adverse to the road or business of any or either of the others. . . ." (31 Stat. at L. 356, 362, act of July 2, 1864, § 15, chap. 216). They also authorized the consolidation of the roads. These acts, it is said, are only intended to secure the permanent physical connection of the roads, and to provide for equal accommodations upon the basis of independent carriage, and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the interstate commerce acts. Therefore, it is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable treatment which *might have been accorded* to it in the matter of through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast, so far as physical continuity is concerned, is apparent; but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time, and transportation shall be without any discrimination of any kind in favor of either of said companies, or adverse to the road or business of any or either of the others; and the purpose of Congress *to[92 secure a continuous line of road, operating from the Missouri river to the Pacific coast as one road, is further emphasized in the act of Congress of June 20, 1874 (18 Stat. at L. 111, chap. 331, U. S. Comp. Stat. 1901, p 3577), making it an offense for any officer or agent of the companies authorized to construct the roads, or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of or adverse to any or either of said companies. Such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific, and be equally violative of the letter and spirit of the acts of Congress Certainly such discriminations could be restrained by the courts (Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 603, 604, 41 L. ed. 265, 279, 16 Sup. Ct. Rep. 1173), and might possibly have resulted in a forfeiture of all rights under the acts of Congress The obligation to keep faith with the government continued, as did the legislative power of Congress concerning these roads, notwithstanding changed forms of ownership and organization. Union P. R. Co. v. Mason City, & Ft. D. R. Co. 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. Rep. 19

It is further contended that the real purpose in acquiring the stock was not to obtain the control of the Southern Pacific as a system, but to secure the California connection *via* Ogden, and to avoid the situation which has been termed the "bottling up" of the Union Pacific at that point. That process, we have undertaken to show, might have been detrimental to the Southern Pacific business *in California, as it[93 is apparent that much of it would not have gone over the "Sunset" route of the Southern

Pacific. It may be conceded, as is undoubtedly the fact, that the connection at Ogden was a valuable one, the one practically and largely, if not exclusively, used in the transportation of freight to and from the state of California; but this case is not to be decided upon the theory that only so much of the Southern Pacific system as operates between Ogden and San Francisco has been acquired. Conceding for this purpose that it might have been legitimate, had it been practicable, to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done; and that was the purchase of the controlling interest in the entire Southern Pacific system, consisting of ocean and river lines with a mileage of about 3,500 miles, and railroad lines aggregating over 8,000 miles, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific Coast points, with various branches and connections, besides a steamship line from San Francisco to Panama and from San Francisco to the Orient, and a half interest in another line between the two latter points. The purchase may be judged by what it in fact accomplished, and the natural and probable consequences of that which was done. Because it would have been lawful to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road.

In determining the validity of this combination, we have a right to look also to the intent and purpose of those who conducted the transactions from which it arose, and to the objects had in view. (Swift & Co. v. United States, 196 U. S. 396, 49 L ed. 524, 25 Sup. Ct. Rep. 276; United States v. Terminal R. Asso. 224 U. S. 383, 395, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507.) It appears that at the time the Union Pacific 94]was *about to raise the means to effect the Southern Pacific stock purchase it authorized the issuance of $100,000,000 of bonds "for the purpose of meeting present and future financial requirements of the company," provision being made for the use of the proceeds from $40,000,000 of this amount in the purchase of the Southern Pacific stock, with no designation whatever as to the purpose to which the balance, $60,000,000, should be applied. It is said that the remaiding $60,000,000 were intended to be used in the acquisition of a part interest in the railroad system of the Chicago, Burlington, & Quincy Railway Company, in view of the imminent probability of the purchase of that system by the Northern Pacific Railway Company and the Great Northern Railway Company. As a matter of fact, the Northern Pacific and Great Northern having each secured a half interest in the Burlington, the Union Pacific did acquire a large amount of the Northern Pacific stock with this $60,000,000. The failure to secure control of the Northern Pacific by acquiring a majority of its common stock resulted in the formation of the Northern Securities Company, terminating in the litigation of the Northern Securities Case and the judgment of this court, reported in 193 U. S. 197, 48 L. ed 679, 24 Sup. Ct. Rep. 436. When that combination was declared illegal, the Union Pacific interests undertook to compel a return of the Northern Pacific stock which they had turned over to the Northern Securities Company, and opposed a distribution among the stockholders of the latter company of the stock of the Northern Pacific Company and the Great Northern Company, which had been put into the combination. That attempt was dealt with in Harriman v. Northern Securities Co. 197 U. S. 244, 49 L ed. 739, 25 Sup. Ct. Rep. 493, and of the effect of the return of the Northern Pacific stock to the Union Pacific interests instead of the distribution of the stock and assets of the Northern Securities Company among its stockholders, this court said (p. 297):

*"It is clear enough that the delivery[95 to complainants of a majority of the total Northern Pacific stock, and a ratable distribution of the remaining assets to the other Securities stockholders, would not only be in itself inequitable, but would directly contravene the object of the Sherman law and the purposes of the government suit.

"The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition."

In view of the testimony, we think the evident purpose of issuing the $100,000,000 of bonds was to acquire a fund to be used for the acquisition of the stock of the Southern Pacific, a great competitive system, and also of the stocks of other competing roads.

After acquiring the Southern Pacific stock, Mr. Harriman, who dominated in the affairs of the Union Pacific, became president and chairman of the executive committee of the Southern Pacific Company, with the same ample power which he had in like positions in the Union Pacific Company and the companies owned and controlled by it. These facts cannot be

lost sight of in determining the object and scope of the transaction in question, which resulted, as we have said, in that unified control which has in its power the suppression of competition.

But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent, which was afterwards somewhat increased and diminished until about 46 per cent of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is 96] *ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46 per cent is ample to control the operations of the corporation. This is frankly admitted in the testimony of Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific Company, and, he added, the Union Pacific did thus acquire such interest.

Reaching the conclusion that the Union Pacific thus obtained the control of a competing railroad system and thereby effected a combination in restraint of trade, within the meaning of the Sherman act, the question remains, What should be the relief in such circumstances? The remedies provided in the statute, generally speaking, were said by this court in the Standard Oil Case, supra, to be twofold in character (p. 78):

"1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In applying this general rule of relief we must deal with each case as we find it; and in the present one the object to be attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the district court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation *owned by it*, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as *to continue its control, and shall[97 provide an injunction against the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the district court to collect and hold such dividends until disposed of by the decree of the court.

As the court below dismissed the government's bill, it was unnecessary there to consider the disposition of the shares of stock acquired by the Union Pacific Company, which acquisition, we hold, constituted an unlawful combination in violation of the anti-trust act. In order to effectually conclude the operating force of the combination, such disposition shall be made subject to the approval and decree of the district court, and any plan for the disposition of this stock must be such as to effectually dissolve the unlawful combination thus created. The court shall proceed, upon the presentation of any plan, to hear the government and defendants, and may bring in any additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views herein expressed.

As to the suggestion made at the oral argument by the Attorney General, in response to a query from the court as to the nature of the decree, that one might be entered which, while destroying the unlawful combination in so far as the Union Pacific secured control of the competing line of road extending from New Orleans and Galveston to San Francisco and Portland, would permit the Union Pacific to retain the Central Pacific connection from Ogden to San Francisco, and thereby to control that line to the coast, thus effecting such a continuity of the Union Pacific and Central Pacific from the Missouri river to San Francisco as was contemplated by the acts of Congress under which they were constructed, it should be said that nothing herein shall be considered as preventing the government or any party in interest, if so desiring, from presenting to the district court a plan for accomplishing *this re-[98 sult, or as preventing it from adopting and giving effect to any such plan so presented.

Any plan or plans shall be presented to the district court within three months from the receipt of the mandate of this court; failing which, or, upon the rejection by the court of plans submitted within such time, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve such unlawful combination.

The government has appealed from th

decree, which is a general one, dismissing the bill. So far as concerns the attempt to acquire the Northern Pacific stock and the stock of the Atchison, Topeka, & Santa Fe Railway Company, afterwards abandoned, and a certain interest in the San Pedro, Los Angeles, & Salt Lake Railroad Company, and other features of the case which were dealt with and disposed of by the decree and opinion of the court below, it is sufficient, without going into these matters in detail, to say that as to them we find no reason to disturb the action of the court below, but for the reasons stated the decree should be reversed, and one entered in conformity to the views herein expressed, so far as concerns the acquisition of the Southern Pacific stock.

Reversed in part, the District Court to retain its jurisdiction to see that the decree above outlined is made effectual.

Mr. Justice Van Devanter took no part in the hearing or determination of this case.

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99] *LOUISIANA NAVIGATION COMPANY, Limited, Plff. in Err.,
v.
OYSTER COMMISSION OF LOUISIANA et al.

(See S. C. Reporter's ed. 99–102.)

**Error to state court — final judgment.**

1. A judgment of the highest court of a state, which reversed a judgment below, dismissing a petition because it stated no cause of action, and remanded the cause for further proceedings, is not final for the purpose of a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 296–313, in Digest Sup. Ct. 1908.]

**Error to state court — final judgment.**

2. The finality of the judgment of the highest court of a state is to be tested by the form of the judgment, and the Federal Supreme Court cannot, for the purpose of determining whether its reviewing power exists, resort to the state law for the purpose of converting a judgment not on its face final into one final in character.

[For other cases, see Appeal and Error, 246–313, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review.**

3. The rule which excludes the right to review questions arising in a cause depending in a state court until a final judgment is rendered by such court involves as a necessary correlative the power and the duty in the Federal Supreme Court, when a final judgment in form is rendered and the cause is brought there for review, to consider and pass upon all the Federal controversies in the cause, irrespective of how far it may be that by the state law such questions were concluded during the litigation, and before a final judgment susceptible of review was rendered.

[For other cases, see Appeal and Error, 2070–2256, in Digest Sup. Ct. 1908.]

[No. 40.]

Argued November 6, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which reversed a judgment of the Civil District Court for the Parish of Orleans, in that state, dismissing a petition because it stated no cause of action, and remanded the cause for further proceedings. Dismissed for want of final judgment.

See same case below, 125 La. 740, 51 So. 706.

The facts are stated in the opinion.

Messrs. Thomas Gilmore and Edward N. Pugh argued the cause, and, with Mr. J. C. Gilmore, filed a brief for plaintiff in error:

The judgment below was a final one.

Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; Cary v. Richardson, 35 La. Ann. 508; Hunstock v. Hunstock, 43 La. Ann. 375, 8 So. 922; State ex rel. Ikerd v. Eighth Dist. Judge, 35 La. Ann. 213; Wheeling & B. Bridge Co. v. Wheeling Bridge Co. 138 U. S. 290, 34 L. ed. 968, 11 Sup. Ct. Rep. 301; 1 Rose, Code Fed. Proc. p. 210, § 38; Tippecanoe County v. Lucas, 93 U. S. 113, 23 L. ed. 824; Forgay v. Conrad, 6 How. 204, 12 L. ed. 405; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 378, 40 L. ed. 463, 16 Sup. Ct. Rep. 318; Lodge v. Twell, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; McGourkey v. Toledo & O. R. Co. 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; Houston v. Moore, 3 Wheat. 433, 4 L. ed. 428; Davis v. Crouch, 94 U. S. 517, 24 L. ed. 282.

The finality *vel non* of the judgment appealed from is to be settled and determined by the effect given to it under the law of Louisiana and the established procedure thereunder, as laid down and expounded by the supreme court of Louisiana.

Wheeling & B. Bridge Co. v. Wheeling Bridge Co. 138 U. S. 290, 34 L. ed. 968, 11 Sup. Ct. Rep. 301; Southern R. Co. v. Postal Teleg. Co. 179 U. S. 643, 45 L. ed. 356, 21 Sup. Ct. Rep. 249.

The test of the finality of a judgment is whether or not the matters decided can be again raised or questioned. Applying this test to the judgment rendered by the supreme court of Louisiana, it is self-evident that, as to the issues dismissed by the lower court

and affirmed by the supreme court, plaintiff can never, in any shape, manner, or form, dispute the correctness of that judgment. Those issues have passed into the domain of *res judicata*, and are forever foreclosed and ended. This question has, however, been passed on and decided by the supreme court of Louisiana, and the principle laid down that the fact that only part of the demand is dismissed does not prevent the plaintiff appealing from the judgment so dismissed in part.

State ex rel. Ikerd v. Eighth Dist. Judge, 35 La. Ann. 213.

The court declined to hear Mr. **Ruffin G. Pleasant**, Attorney General of Louisiana, who filed a brief for the Conservation Commission:

The judgment of the supreme court of Louisiana, sought to be reviewed herein, is not a final judgment. The defendants in the civil district court filed exceptions of no cause of action, which were sustained, and an appeal was taken to the supreme court of Louisiana, and that court, on appeal, reversed the judgment, and decreed "that the judgment appealed from be set aside, and that this cause be remanded to the district court, to be there proceeded with in accordance with the views expressed in this opinion, the costs of appeal to be paid by defendant, and those of the district court to await the final judgment." Hence, this court will not review the judgment of the supreme court of Louisiana under these conditions.

Haseltine v. Central Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46.

The court declined to hear Mr. **John Dymond, Jr.**, who filed a brief for E. C. Joullian Canning Company and Dunbars, Lopez, & Dukate Company.

Mr. Walter Guion, former Attorney General of Louisiana, and Mr. John C. Wickliffe filed a brief for the Oyster Commission of Louisiana:

A judgment which orders a new trial, or any further proceedings, cannot be thus reviewed.

Houston v. Moore, 3 Wheat. 433, 4 L. ed. 428; Parcels v. Johnson, 20 Wall. 653, 22 L. ed. 410; Rankin v. Tennessee, 11 Wall. 380, 20 L. ed. 175; McComb v. Knox County, 91 U. S. 1, 23 L. ed. 185; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Gibbons v. Ogden, 6 Wheat, 448, 5 L. ed. 302; Meagher v. Minnesota Thresher Mfg. Co. 145 U. S. 608, 36 L. ed. 834, 12 Sup. Ct. Rep. 876; Cincinnati Street R. Co. v. Snell, 179 U. S. 395, 45 L. ed. 248, 21 Sup. Ct. Rep. 205.

A writ of error will not issue to a judgment of the highest court of a state, remanding a suit to an inferior court for a new trial, or for other proceedings in equity.

Johnson v. Keith, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669; Winn v. Jackson, 12 Wheat. 135, 6 L. ed. 577; Mayberry v. Thompson, 5 How. 121, 12 L. ed. 78; Holcombe v. McKusick, 20 How. 552, 15 L. ed. 1020; Zeller v. Switzer, 91 U. S. 487, 23 L. ed. 366; Baker v. White, 92 U. S. 176, 23 L. ed. 480; Davis v. Crouch, 94 U. S. 514, 24 L. ed. 281; Smith v. Adams, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566; Brown v. Baxter (Brown v. Marion) 146 U. S. 619, 36 L. ed. 1106, 13 Sup. Ct. Rep. 260; Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318.

A decree which in part sustained and in part overruled a demurrer, but which did not dismiss the petition, was held not final, and not reviewable on appeal.

Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; De Armas v. United States, 6 How. 103, 12 L. ed. 361.

Where a state statute permitted the amendment of a pleading after a demurrer had been sustained, it was held that a judgment of a state court sustaining a demurrer to a petition was not a final judgment until it appeared that the plaintiff's right to amend had been abandoned or taken away.

Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Clark v. Kansas City, 172 U. S. 334, 43 L. ed. 467, 19 Sup. Ct. Rep. 207.

Mr. Chief Justice **White** delivered the opinion of the court:

The supreme court of Louisiana in this case reviewed the judgment of a trial court which dismissed the petition of the plaintiff because it stated no cause of action. The plaintiff in error here was plaintiff in the trial court and appellant in the court below. The suit was based on an alleged right to recover damages for slander of the title of plaintiff to described lands. Under the law of Louisiana, for the purpose of passing upon the exception of no cause of action, the case in substance became one petitory in its character,—that is, one to try title to land. Treating the action as of that nature, the court below elaborately reviewed the averments of the petition, and expressed the opinion that in some respects a cause of action was stated,—that is, that there was allegation of title as to some of the land, and that there was no title al-

leged to other of the land involved. The court concluded as follows:

"We think, therefore, that plaintiff should be again afforded an opportunity to amend its petition . . . by setting forth specifically the particular places or portions of its property upon which the alleged trespass has been committed, together with the time and manner of the trespass."

The judgment was as follows:

"It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that this case be remanded to the district court, to be there proceeded with in accordance with the views expressed in this opinion . . . " [125 La. 755, 756, 51 So. 706.]

Upon the theory that Federal questions 101 were involved *within the cognizance of this court, this writ of error to the judgment thus rendered was sued out. But as the judgment of the court below on its face is not a final one, it follows that a motion to dismiss must prevail. Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1001, 25 Sup. Ct. Rep. 654; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46.

The contention, however, is that the judgment below is final for the purpose of review by this court, because, when the opinion of the supreme court of Louisiana is carefully weighed, it will be found that that court practically finally disposed adversely to the title of the plaintiff of the substantial part of the lands involved in the suit, and hence that the court, in remanding the cause for further proceedings, did so only as to other lands. But conceding this to be true, it does not justify the claim based on it. In the first place, it is settled that this court may not be called upon to review by piecemeal the action of a state court which otherwise would be within its jurisdiction, and in the second place, the rule established by the authorities to which we have referred is that, on the question of finality, the form of the judgment is controlling, and hence that this court cannot, for the purpose of determining whether its reviewing power exists, be called upon to disregard the form of the judgment in order to ascertain whether a judgment which is in form not final might, by applying the state law, be treated as final in character. Indeed, it has been pointed out that the confusion and contradiction which inevitably arose from resorting to the state law for the purpose of converting a judgment not on its face final into one final in character was the dominating reason leading to the establishment of the principle that the form of the judgment was controlling for the purpose of ascertaining its finality. Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 268, 56 L. ed. 1082, 1085, 32 Sup. Ct. Rep. 828.

The suggestion that the right to review by this court will be lost if it does not disregard the form of the judgment, *and [102 review the action of the court below concerning the title to land as to which the court below expressed opinions which, as the law of the case, will hereafter be binding upon it and upon other courts of the state of Louisiana, is without merit. We say this because the contention is but illustrative of the misconception which the argument involves, which we have already pointed out. The rule which excludes the right to review questions arising in a cause depending in a state court until a final judgment is rendered by such court involves as a necessary correlative the power and the duty of this court when a final judgment in form is rendered and the cause is brought here for review, to consider and pass upon all the Federal controversies in the cause, irrespective of how far it may be that by the state law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered. Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 214, 53 L. ed. 765, 768, 29 Sup. Ct. Rep. 430.

Of course, for the purpose of disposing of the motion to dismiss upon the ground of the want of finality of the judgment, we have taken it for granted, for the sake of the argument, that the case otherwise involved Federal questions within our power to review.

Dismissed for want of jurisdiction.

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E. B. DEMING, Deming-Gould Company, and Pacific American Fisheries, Plffs. in Err.,

v.

CARLISLE PACKING COMPANY.

(See S. C. Reporter's ed. 102–110.)

**Error to state court — frivolous Federal question — removal of causes.**

1. The asserted right to remove to a Federal court for an alleged fraudulent joinder of parties defendant an action for a breach of contract, in which a resident citizen was made a joint defendant with two nonresident corporations, and in which there was a joint answer by the defendants, such

NOTE.—As to error to state court where removal to Federal court was sought—see note to Williams v. First Nat. Bank, 54 L. ed. U. S. 625.

assertion proceeding upon the assumption that if the evidence in the case was properly weighed and the legal principles applicable were correctly applied, the individual defendant could not be held personally liable on the contract, is too unsubstantial and frivolous to serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1110–1127, in Digest Sup. Ct. 1908.]

**Error to state court — prosecution for delay.**

2. The conclusion that a writ of error from the Federal Supreme Court to a state court has been prosecuted for delay is the necessary inference from an order of dismissal because of the unsubstantial and frivolous character of the only asserted Federal question.

[For other cases, see Appeal and Error, VII. i, 6, in Digest Sup. Ct. 1908.]

**Error to state court — dismissal — damages for delay.**

3. The power to award damages for delay which U. S. Rev. Stat. § 1010, U. S. Comp. Stat 1901, p. 715, confers in cases "where, upon a writ of error, judgment is affirmed in the Supreme Court," gives the authority to exert that power where in form there is no judgment of affirmance, but only an order for the dismissal of a writ of error to a state court because of the unsubstantial and frivolous character of the asserted Federal right.

[For other cases, see Appeal and Error, IX. h, in Digest Sup. Ct. 1908.]

[No. 511.]

Submitted November 4, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court for the County of Whatcom, in that state, in favor of plaintiff in an action for a breach of contract. Dismissed for want of jurisdiction, with damages for delay.

See same case below, 62 Wash. 455, 114 Pac. 172.

The facts are stated in the opinion.

Mr. James A. Kerr submitted the cause for plaintiff in error. Mr. E. S. McCord was on the brief:

Deming was fraudulently and wrongfully made a party to the case without cause and without right, and for the fraudulent purpose of depriving the Federal court of jurisdiction.

Weeker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757.

Regardless of whether the opinion in express language evaded the decision of the Federal question, the judgment in effect did pass upon the question, and denied the right of the petitioners to have the case removed, and denied them the right granted to them by the act of Congress.

The mere fact that a joint answer is filed is not an admission of joint liability.

Hayden v. Nott, 9 Conn. 367; 31 Cyc. 138; Livesay v. First Nat. Bank, 36 Colo. 526, 6 L.R.A.(N.S.) 598, 118 Am. St. Rep. 120, 86 Pac. 102.

Messrs. Aldis B. Browne and Charles W. Dorr submitted the cause for defendant in error. Messrs. S. M. Bruce and Hiram E. Hadley were on the brief:

The decision of a state court that a Federal right has been waived does not, under the settled practice of this court, raise a Federal question, for the simple reason that such a decision does not involve the denial of a Federal right, but admits the existence of the Federal right, which, however, because of the action or inaction of a party, is held to have been lost, and for the further reason that such a holding is based upon a finding of fact, and not of law. Whether the decision of the state court to the effect that there has been a waiver of the Federal right claimed is well founded or not makes no difference, and creates no Federal question reviewable in this court.

Beaupre v. Noyes, 138 U. S. 397, 401, 34 L. ed. 991, 992, 11 Sup. Ct. Rep. 296; Eustis v. Bolles, 150 U. S. 361, 369, 370, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 640, 40 L. ed. 284, 289, 16 Sup. Ct. Rep. 113; Gillis v. Stinchfield, 159 U. S. 658, 660, 40 L. ed. 295, 296, 16 Sup. Ct. Rep. 131; Seneca Nation v. Christy, 162 U. S. 283, 289, 40 L. ed. 970, 972, 16 Sup. Ct. Rep. 828; Pierce v. Somerset R. Co. 171 U. S. 641, 648, 650, 43 L. ed. 316, 319, 320, 19 Sup. Ct. Rep. 64; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 422, 423, 49 L. ed. 1108, 1111, 25 Sup. Ct. Rep. 750.

Even admitting that the supreme court of Washington denied to plaintiffs in error a right claimed under a Federal statute, nevertheless, inasmuch as the record clearly shows that plaintiffs in error did in fact waive whatever right to remove they may have had, and inasmuch as this alone is sufficient to sustain the decision of that court, there is no Federal question involved in the case; for it is well settled that in order to sustain the jurisdiction of this court, it must appear that the decision of the Federal question claimed to be involved in the case was necessary to the determination of the cause.

Mississippi & M. R. Co. v. Rock, 4 Wall, 177 180, 181, 18 L. ed. 381–383; Murdock v. Memphis, 20 Wall. 590, 634, 635, 22 L. ed. 429, 443, 444; Johnson v. Risk, 137

U. S. 300, 307, 309, 34 L. ed. 683, 686, 687, 11 Sup. Ct. Rep. 111; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 651, 34 L. ed. 1110, 1115, 11 Sup. Ct. Rep. 435; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131.

The decision of the court that Deming was a real party to the contract sued on, and in negotiating the same did not act merely as the agent of the other plaintiffs in error, was a finding of law, but of the law of Washington, the *locus celebrationis* of the contract, and involved no Federal question. Under these circumstances there is no reviewable question in the case.

Merced Min. Co. v. Boggs, 3 Wall. 304, 310, 18 L. ed. 245, 247; Eilers v. Boatman, 111 U. S. 356, 28 L. ed. 454, 4 Sup. Ct. Rep. 432, 15 Mor. Min. Rep. 471; Crary v. Devlin, 154 U. S. 619, 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 645-647, 44 L. ed. 305, 308, 309, 20 Sup. Ct. Rep. 245; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 579, 47 L. ed. 307, 311, 23 Sup. Ct. Rep. 178; McMillen v. Ferrum Min. Co. 197 U. S. 343, 347, 49 L. ed. 784, 787, 25 Sup. Ct. Rep. 533.

Admitting, for purposes of argument, that a Federal question is involved in the case, that question is so wholly devoid of merit, and has been so explicitly foreclosed by the decisions of this court, as to leave no room for real controversy in the matter. To warrant this court in assuming jurisdiction of a case, the Federal question asserted to be involved therein must be "a real, substantive question."

Millingar v. Hartupee, 6 Wall. 258, 261, 18 L. ed. 829, 830; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 87, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 662, 42 L. ed. 315, 316, 17 Sup. Ct. Rep. 925; Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 871, 18 Sup. Ct. Rep. 435; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344-346, 46 L. ed. 936, 941, 942, 22 Sup. Ct. Rep. 691; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311-315, 47 L. ed. 190, 192, 193, 23 Sup. Ct. Rep. 123; Hamblin v. Western Land Co. 147 U. S. 531, 532, 37 L. ed. 267, 268, 13 Sup. Ct. Rep. 353.

Mr. Chief Justice White delivered the opinion of the court:

The Carlisle Packing Company, a corporation of the state of Washington, sued in a court of that state Deming and the two corporations who, with him, are the plaintiffs in error on this record. Deming was a citizen and resident of the state of Washington, and the corporations were *alleged [104 to be citizens of states other than Washington. The defendants were sued jointly for a violation by them of a contract alleged to have been jointly made for the purchase of salmon. There was a joint answer by the defendants, putting at issue the material allegations of the complaint. There was a jury trial. When the Carlisle Company rested, motions for nonsuit were separately made on behalf of each of the defendants and were overruled.

After the defendants had offered their proof and the case was ripe for submission, the counsel for the two corporate defendants presented a petition and bond for the removal of the cause to the proper Federal court, and asked that the bond be approved and further proceedings be stayed. The asserted right to remove proceeded upon the assumption that Deming had been fraudulently joined as a defendant for the purpose of preventing the two nonresident defendants from removing the case. This was supported by the contention that the proof as offered left no doubt that Deming had made the contract declared on merely as the agent of the two corporations, and was therefore not personally bound. In denying the petition to remove, the trial judge directed attention to the fact that the motion made at the close of the plaintiff's proof for a nonsuit in favor of Deming had been denied because the court was of opinion that there was evidence to go to the jury on the question of the liability of that defendant, and further observed that the situation in this respect had not been altered by the testimony introduced for the defendants. The cause was submitted to the jury upon instructions which, among other things, left it open to find against less than all of the defendants if the jury believed that the contract had not been made with all. There was a verdict for the plaintiff against all the defendants, and a judgment entered thereon was affirmed by the supreme court of the state. 62 Wash. 455, 114 Pac. 172. The appellate court, among other things decided that no *error had been committed [105 in overruling the motions for nonsuit and in denying the petition to remove, and in substance held that the plaintiff had the right to join Deming as a party defendant.

The prosecution of this writ of error is based upon the assumption that a Federal question was involved in the refusal to grant the petition for removal. In view, however, of the well-settled and, indeed, now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal

question is of such an unsubstantial character as to cause it to be devoid of all merit, and therefore frivolous, we think it is our duty to grant a motion to dismiss which has been here made. We reach this conclusion because the case was not a removable one when it was called for trial. Not being removable before trial, the plaintiff had the right to have the issues of fact and law raised determined in the state court which had jurisdiction over the cause. This power could not be destroyed by the mere act of the defendants, or one of them, in asking a removal based upon the assumption that if the evidence in the case was properly weighed and the legal principles applicable were correctly applied there would result a condition from which a right to remove would arise. On its face the assertion of such a right involved two propositions, whose unsubstantial character is made manifest by their mere statement: (a) That the state court had jurisdiction over the cause, but had no right to exercise that jurisdiction; (b) that a Federal court could endow itself with jurisdiction over a cause to which its authority did not extend by disregarding the pleadings and wrongfully assuming the right to revise the decision of the state court on matters of an absolutely non-Federal character which that court had the right to decide. Nor is there force in the suggestion that the right to remove under the circumstances stated finds [106]support in the ruling *in Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, since in that case a separable controversy on the face of the record arose at the opening of the trial, consequent on the discontinuance by the plaintiff of his action as against the resident defendant whose joinder had, up to that time, made the action nonremovable. The difference between that case, and the one here presented is apparent, and, at the time the petition for removal was presented and this writ of error was sued out, had been pointed out in decisions of this court. Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 217, 50 L. ed. 441, 447, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101.

Dismissing the writ of error, as we shall therefore do for the reasons stated, it remains to consider whether we should grant a prayer for damages for delay which has been made. That the unsubstantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is, in *our opinion, indubitable.* Does the power to award damages for delay exist where a writ of error is dismissed because of the unsubstantial and frivolous character of the asserted Federal right and the conclusive inference that the writ was prosecuted for mere delay, which arises from sustaining such ground for dismissal? is then the question. That the comprehensive text of rule 23, embracing, as it does, "all cases" where a writ of error shall appear to have been sued out for mere delay, brings this case within its purview, is obvious. But as the power which the rule expresses depends upon Rev. Stat. § 1010 (U. S. Comp. Stat. 1901, p. 715), we must consider the subject in the light of the statute. The power conferred is to impose damages for delay in cases "where, upon a writ of error, judgment is affirmed in the supreme court. . . ."

It has been decided that where there was no power on a motion to dismiss, to consider whether a case was prosecuted for delay only, that a prayer for dismissal on such *ground could not be allowed and dam-[107 ages could not be awarded. Amory v. Amory, 91 U. S. 356, 23 L. ed. 436. But the mere statement of the doctrine demonstrates that it rested upon the obvious proposition that a decree would not be made to embrace subjects which the court was not empowered to consider in determining whether the relief asked for should be awarded. This doctrine has no application here, since, by a line of cases announced subsequent to the decision in Amory v. Amory, it has come to be settled that on a motion to dismiss, it is the duty of the court to consider whether an asserted Federal question is devoid of merit and unsubstantial, either because concluded by previous authority, or because of its absolutely frivolous nature, and if it is found to be of such character, to allow a motion to dismiss. This being true, as the conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous, the duty to affirm results.

We have, then, this situation: the finding that a particular ground—that is, the frivolity of the Federal question—exists indifferently justifies either a judgment of affirmance or an order of dismissal. Chanute v. Trader, 132 U. S. 210, 33 L. ed. 345

10 Sup. Ct. Rep. 67; Richardson v. Louisville & N. R. Co. 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; Blythe v. Hinckley, 180 U. S. 338, 45 L. ed. 561, 21 Sup. Ct. Rep. 390; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123. The want of substantial difference between the two, as well as the rule which should determine the practice to be followed in awarding, in such a case, one or 108] *the other, either affirmance or dismissal, was pointed out in the Equitable Case. Thus, the court said (187 U. S. 314):

"From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. . . . It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal questions for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in Chanute v. Trader, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; Richardson v. Louisville & N. R. Co. 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268 and Blythe v. Hinckley, 180 U. S. 338, 45 L. ed. 561, 21 Sup. Ct. Rep. 390. This being the case, it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect, to finally dispose of this controversy. . . . As this is a case governed by the principles controlling writs of error to state courts, it follows that the Federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing, —*that is, the two questions* are therefore absolutely coterminous. Hence, *in[109 reason, the denial of one of the motions, necessarily involves the denial of the other, and hence, also, one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other."

Stating that in such a case the determination whether a judgment of affirmance would be awarded or an order of dismissal be allowed involved nothing whatever of substance, but mere form of statement, as the two were the equivalent one of the other, it was observed that the better practice, where the question was not inherently Federal, was to adopt the form of allowing a motion to dismiss; the court, on the subject of the inherently Federal question, referring to Swafford v. Templeton, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783.

The inquiry, then, narrows itself to this: Does the power to award the damages for delay which the statute confers in cases of affirmance give the authority to exert the power where, in form, there is no judgment of affirmance, but only an order of dismissal? To say that the duty to impose the statutory damage in such a case did not exist would require us to hold that things which were one and the same must be held to be different, and that the statute did not extend to and include that which in substance it embraced, because, by adhering blindly to mere form of words, the statute might be treated as not extending to an authority embraced within its spirit and purpose. No more cogent demonstration of the truth of this view could be given than by pointing out that if the proposition were not true, it would follow that in no case could this court, without operating injustice, grant a motion to dismiss because of the frivolous and unsubstantial nature of the alleged Federal ground. This would be the case, since, if greater right would be conferred by affirming on such ground, the duty would arise to follow that practice instead of the practice of dismissing. Indeed, the subject is further aptly illustrated by directing attention to the fact that it is not questioned that the power here obtains *to direct[110 the imposition of the penalty if the result of our conclusion that the Federal ground was frivolous be followed by an affirmance instead of an order of dismissal. Because of the absolute coincidence between a dismissal on account of the frivolous and unsubstantial character of the Federal question relied upon and an affirmance upon the same ground, we are of opinion that the statutory authority to impose the penalty obtains in either case. In stating the reasoning which has led us to this conclusion we have not been unmindful of, although

we have not reviewed, a line of cases concerning the nature and extent of the power to impose costs in the case of a dismissal for want of jurisdiction. See Citizens' Bank v. Cannon, 164 U. S. 319, 323, 41 L. ed. 451, 453, 17 Sup. Ct. Rep. 89, and cases cited. We have not deemed it necessary to do so because nothing in the reasoning of those cases tends to affect the substantial identity which exists between a decree of dismissal and one of affirmance where the ground upon which one is placed equally justifies either form of decree.

In consequence of the conclusion which we have reached as above stated, we direct the imposition of a penalty, in addition to interest, of 5 per cent on the amount of the judgment recovered below and the taxation of costs as upon an affirmance. Writ of error dismissed with damages, etc.

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FIRST NATIONAL BANK OF PRINCETON, ILLINOIS, et al., Appts.,

v.

CHARLES E. LITTLEFIELD, Trustee, etc.

(See S. C. Reporter's ed. 110-112.)

**Appeal — review of facts — concurrent findings.**

The concurrent findings of the two lower courts that the claimants against the bankrupt estate of a firm of stockbrokers had failed to trace into the hands of the receiver in bankruptcy any of the proceeds of stock purchased by the bankrupts with the claimants' money, and wrongfully converted by the bankrupts, will not be disturbed by the Federal Supreme Court on appeal, where not manifestly erroneous.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

[No. 572.]

Submitted November 4, 1912. Decided December 2, 1912.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which, on a second appeal, affirmed a decree of the District Court for the Southern District of New York, disallowing claims to property in the hands of a receiver in bankruptcy. Affirmed.

See same case below on first appeal, 99 C. C. A. 345, 175 Fed. 769; on second appeal, 113 C. C. A. 348, 193 Fed. 24.

Mr. Thorndike Saunders submitted the cause for appellants.

Mr. Daniel P. Hays submitted the cause for appellee.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

Albert O. Brown and others, members of a firm known as A. O. Brown & Company, stockbrokers in New York city, were adjudicated bankrupts. The National Bank of Princeton and four other claimants petitioned to have the receiver in bankruptcy return certain sums of money to which they asserted ownership, because the amounts claimed had been sent to the firm to buy shares of stock for account of the claimants, and the stock had never been delivered to them. The special master, to whom the matter was referred, reported in favor of the claimants. The district court, however, disapproved the conclusion of the master and rejected the claims. The circuit court of appeals reversed. 99 C. C. A. 345, 175 Fed. 769. It was held that as the stock bought with the moneys of the claimants and for their account belonged to them, they were entitled as owners, the stock having been wrongfully converted by the bankrupts, to take out of the bankrupt estate so much of the avails of their wrongfully converted stock as they might be able to trace into the hands of the receiver. Upon amended pleadings a further hearing was had before the special master, who reported against the claimants because it was found as a matter of fact that there was a failure to trace any of the proceeds of the converted *stock into the hands of [112 the receiver. The report of the master was confirmed by the district court (189 Fed. 432, 442), and the action of that court was in all respects affirmed by the circuit court of appeals (113 C. C. A. 348, 193 Fed. 24). This appeal was then taken, and the claim of the Princeton Bank has been specially presented, under an agreement that the decision as to that claim will govern as to the others.

All the contentions relied upon in various forms simply assert that the master and the two courts erred in their appreciation of the facts. But the burden of proof was upon the claimant to establish its ownership of the fund,—a burden which it cannot in reason be said was sustained in view of the concurrent adverse action of the master and the courts below. Indeed, as the settled rule is that the concurrent action of two courts upon questions of fact will not be disturbed except in a case of manifest error,—a condition which we are of the opinion after an examination of the record does not here obtain,—it follows that the judgment below must be and it is affirmed.

SELOVER, BATES, & COMPANY, Plff. in Err.,
v.
ELLA T. WALSH.

(See S. C. Reporter's ed. 112–126.)

**Constitutional law — due process of law — regulating cancelation of land contracts.**

1. The vendor in an executory contract made and to be performed within the state for the sale of land in another state is not deprived of his property without due process of law by applying, in an action against him for his refusal to perform, the provision of Minn. Laws 1897, chap. 223, that a vendor in a contract for the sale of land shall have no right to cancel, terminate, or declare a forfeiture of the contract except upon thirty days' written notice to the vendee, who shall have that time in which to perform.

[For other cases, see Constitutional Law, 591–604, 870–876, in Digest Sup. Ct. 1908.]

**Conflict of laws — extraterritorial operation of statute — regulating cancelation of land contract.**

2. An extraterritorial effect is not given to the provisions of Minn. Laws 1897, chap. 223, that a vendor in a contract for the sale of land shall have no right to cancel, terminate, or declare a forfeiture of the contract except upon thirty days' written notice to the vendee, who shall have that time in which to perform, by applying them to an action by the vendee in an executory contract made and to be performed within the state for the sale of land in another state, to recover damages from the vendor for his refusal to perform.

[For other cases, see Conflict of Laws, I., in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — regulating cancelation of land contract.**

3. The equal protection of the laws is not denied to the vendor in an executory contract made and to be performed within the state for the sale of land in another state by applying, in an action against him for damages for his refusal to perform, the provisions of Minn. Laws 1897, chap. 223, that a vendor in a contract for the sale of land shall have no right to cancel, terminate, or declare a forfeiture of the contract except upon thirty days' written notice to the vendee, who shall have that time in which to perform, since the vendor is not treated differently from any other seller of land in his situation.

[For other cases, see Constitutional Law, 203–208, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review — questions not raised below.**

4. Federal questions not raised in the court below cannot be reviewed in the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2164–2174, in Digest Sup. Ct. 1908.]

**Constitutional law — privileges and immunities — corporations.**

5. A corporation cannot claim the protection of the clause of U. S. Const., 14th Amend., which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the laws of a state.

[For other cases, see Constitutional Law, 243–247, in Digest Sup. Ct. 1908.]

[No. 22.]

Submitted October 29, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of the Fourth Judicial District, awarding damages to a vendee for a breach by the vendor of an executory contract for the sale of land in another state. Affirmed.

See same case below, 109 Minn. 136, 123 N. W. 291.

The facts are stated in the opinion.

Mr. Arthur W. Selover submitted the cause for plaintiff in error:

The *lex loci rei sitæ* applies to all matters with reference to the transfer of lands, including contracts for the purchase and sale thereof.

Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Dicey, Confl. L. 573; Story, Confl. L. p. 591, § 424; Re Kellogg, 113 Fed. 120; Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482; Orvis v. Powell, 98 U. S. 176, 25 L. ed. 238; Swift v. Smith, 102 U. S. 442, 26 L. ed. 193; Mason v. Northwestern Mut. L. Ins. Co. 106 U. S. 163, 27 L. ed. 129, 1 Sup. Ct. Rep. 165; Parker v. Dacres, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433; Rorer, Inter-State Law, pp. 167, 190–207, 208, § 11; p. 209, § 1; Watkins v. Holman, 16 Pet. 26–57, 10 L. ed. 874–886; United States v. Fox, 94 U. S. 315–320, 24 L. ed. 192, 193; Lyon v. McIlvaine, 24 Iowa, 9; Bronson v. Kinzie, 1 How. 311–314, 11 L. ed. 143, 144; Green v. Biddle, 8 Wheat. 75–84, 5 L. ed. 565–568; Tillotson v. Prichard, 60 Vt. 107, 6 Am. St. Rep. 95, 14 Atl. 302.

Under the common law, parties have the right to contract as they will respecting time being of the essence of such a contract, and as to the conditions and circumstances under which said contract shall terminate; and the courts will respect and carry out such stipulations to the letter.

Cheney v. Libby, 134 U. S. 68–77, 33 L. ed.

NOTE.—Corporations as persons entitled to benefit of constitutional guaranty of equal privileges and immunities—see note to Bacon v. State Tax Comrs. 60 L.R.A.

818–823, 10 Sup. Ct. Rep. 498; Mackey v. Ames, 31 Minn. 103, 16 N. W. 541; Schumann v. Mark, 35 Minn. 379, 28 N. W. 927; Dana v. St. Paul Invest. Co. 42 Minn. 194, 44 N. W. 55; Paget v. Park, 50 Minn. 186, 52 N. W. 532; Joslyn v. Schwend, 85 Minn. 130, 88 N. W. 410; Schwab v. Baremore, 95 Minn. 295, 104 N. W. 10; Tingue v. Patch, 93 Minn. 437, 101 N. W. 792; Chrisman v. Miller, 21 Ill. 235; Heckard v. Sayre, 34 Ill. 142; Apking v. Hoefer, 74 Neb. 325, 104 N. W. 177; Iowa R. Land Co. v. Mickel, 41 Iowa, 402; St. Louis Trust Co. v. York, 81 Mo. App. 342; Coughran v. Bigelow, 9 Utah, 260, 34 Pac. 51; Woodruff v. Semi-Tropic Land & Water Co. 87 Cal. 275, 25 Pac. 354; Axford v. Thomas, 160 Pa. 8, 28 Atl. 443; Murphy v. McIntyre, 152 Mich. 591, 116 N. W. 197; Gilbert v. Union P. R. Co. 79 Neb. 160, 112 N. W. 359.

Any attempt on the part of the state of Minnesota to authorize the foreclosure of such a contract would be, if effective to any degree as against the nonresident vendee, a taking of his property without due process of law, and would deny him the equal protection of the laws.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

The means of enforcement of a contract is the breath of its vital existence, and is inseparable from the right.

Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Sturges v. Crowinshield, 4 Wheat. 122, 4 L. ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Curran v. Arkansas, 15 How. 304, 14 L. ed. 705; Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776; White v. Hart, 13 Wall. 646, 20 L. ed. 685; Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357.

The state of Minnesota was without power to authorize, either by a direct action in equity or by substituted service, the foreclosure of such a contract when neither the person to be affected nor the thing itself was at any time within the territorial jurisdiction of the state.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Watts v. Waddell, 6 Pet. 389, 8 L. ed. 437; Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181; Boswell v. Otis, 9 How. 336, 13 L. ed. 164; Harris v. Hardeman, 14 How. 334, 14 L. ed. 444; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Allis v. Northwestern Mut. L. Ins. Co. 97 U. S. 145, 24 L. ed. 1008; Orvis v. Powell, 98 U. S. 176, 25 L. ed. 238; Schley v. Pullman's Palace Car Co. 120 U. S. 575, 30 L. ed. 789, 7 Sup. Ct. Rep. 730; Langdon v. Sherwood, 124 U. S. 74–76, 31 L. ed. 344, 8 Sup. Ct. Rep. 424; Bacon v. Northwestern Mut. L. Ins. Co. 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787; McGahey v. Virginia, 135 U. S. 662–694, 34 L. ed. 304–314, 10 Sup. Ct. Rep. 972; Goldey v. Morning News, 156 U. S. 521, 39 L. ed. 518, 15 Sup. Ct. Rep. 559; Barnitz v. Beverly, 163 U. S. 127, 41 L. ed. 99, 16 Sup. Ct. Rep. 1042; De Vaughn v. Hutchinson, 165 U. S. 570, 41 L. ed. 829, 17 Sup. Ct. Rep. 461; Dull v. Blackman, 169 U. S. 243–247, 42 L. ed. 733, 734, 18 Sup. Ct. Rep. 333; Caledonian Coal Co. v. Baker, 196 U. S. 444, 49 L. ed. 545, 25 Sup. Ct. Rep. 375; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Fall v. Eastin, 215 U. S. 1–8, 54 L. ed. 65–69, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 367, 369, 372, 54 L. ed. 228, 237, 238, 239, 30 Sup. Ct. Rep. 140; Benedict v. St. Joseph & W. R. Co. 19 Fed. 176; Singer Mfg. Co. v. McCollock, 24 Fed. 669; Union Mut. L. Ins. Co. v. Union Mills Plaster Co. 3 L.R.A. 90, 37 Fed. 292; Central Trust Co. v. Charlotte, C. & A. R. Co. 65 Fed. 259; Southern R. Co. v. Bouknight, 30 L.R.A. 823, 17 C. C. A. 181, 25 U. S. App. 415, 70 Fed. 446; Deck v. Whitman, 96 Fed. 874; Nelson v. Potter, 50 N. J. L. 326, 15 Atl. 375; Lindley v. O'Reilly, 50 N. J. L. 643, 1 L.R.A. 79, 7 Am. St. Rep. 802, 15 Atl. 379; Second Ward Sav. Bank v. Schranck, 97 Wis. 262, 39 L.R.A. 569, 73 N. W. 31; Griffin v. Griffin, 18 N. J. Eq. 107; Jackson ex dem. M'Crea v. Dunlap, 1 Johns. Cas. 114, 1 Am. Dec. 100; Jackson ex dem. Lowell v. Parkhurst, 4 Wend. 369; Rockwell v. Hobby, 2 Sandf. Ch. 9; Story, Confl. L. 754, § 539; Wharton, Confl. L. p. 64, §§ 288, 289; Boswell v. Otis, 9 How. 336–348, 13 L. ed. 164–169; United States v. Fox, 94 U. S. 315–320, 24 L. ed. 192, 193; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Freeman v. Alderson, 119 U. S. 185–187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165; Arndt v. Griggs, 134 U. S. 316–320, 33 L. ed. 918, 919, 10 Sup. Ct. Rep. 557; Dewey v. Des Moines, 173 U. S. 193–204, 43 L. ed. 665–668, 19 Sup. Ct. Rep. 379; Overby v. Gordon, 177 U. S. 214–222, 44 L. ed. 741–744, 20 Sup. Ct. Rep. 603; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 21–22, 51 L. ed. 345, 350, 351, 27 Sup. Ct. Rep. 236; Eliot v. McCormick, 144 Mass. 10, 10 N. E. 705; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Eastman v. Wadleigh, 65 Me. 251, 20 Am. Rep. 695; Easterly v. Goodwin, 35 Conn. 277.

Strictly speaking, the contract was not made in Minnesota, and the holding of the court below that it was is against the great

weight of authority. The contract became effective upon its acceptance and signature by the vendee in North Dakota.

Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126; Stockham v. Stockham, 32 Md. 196; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Brauer v. Shaw, 168 Mass. 198, 60 Am. St. Rep. 387, 46 N. E. 617; Abbott v. Shepard, 48 N. H. 14; Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634; Crandall v. Willig, 166 Ill. 233, 46 N. E. 755; Patrick v. Bowman, 149 U. S. 411–424, 37 L. ed. 790–795, 13 Sup. Ct. Rep. 811, 866; McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; Cooper v. Lansing Wheel Co. 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 39; John A. Tolman Co. v. Reed, 115 Mich. 71, 72 N. W. 1104; 2 Kent, Com. 47; 1 Parson, Contr. 475; 1 Story, Contr. 490; Hilliard, Sales, § 20; Benjamin, Sales, § 73; Bascom v. Zediker, 48 Neb. 380, 67 N. W. 148; Gay v. Rainey, 89 Ill. 221; 31 Am. Rep. 76; Eliason v. Henshaw, 4 Wheat. 225, 4 L. ed. 556; M'Intyre v. Parks, 3 Met. 207; Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 223; Western Transp. & Coal Co. v. Kilderhouse, 87 N. Y. 430; Wharton, Confl. L. p. 886, §§ 421, 422; Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849; Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 476; Hill v. Chase, 143 Mass. 129, 9 N. E. 30; Morehouse v. Terrill, 111 Ill. App. 460; Born v. Home Ins. Co. 120 Iowa, 299, 94 N. W. 849; Lawson v. Tripp, 34 Utah, 28, 95 Pac. 520; Rickard v. Taylor, 122 Fed. 931; Galloway v. Standard F. Ins. Co. 45 W. Va. 237, 31 S. E. 969; Newlin v. Prevo, 90 Ill. App. 515; Central of Georgia R. Co. v. Gortatowsky, 123 Ga. 366, 51 S. E. 469; Waldron v. Ritchings, 9 Abb. Pr. N. S. 359; Aultman, M. & Co. v. Holder, 68 Fed. 467; Perry v. Mt. Hope Iron Co. 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; Cobb v. Dunlevi, 63 W. Va. 398, 60 S. E. 384; First Nat. Bank v. Doeden, 21 S. D. 400, 113 N. W. 81; Bank of Yolo v. Sperry Flour Co. 141 Cal. 314, 65 L.R.A. 90, 74 Pac. 855.

Liberty of contract is subject to reasonable police regulation by the state, but only with respect to a subject-matter over which it has jurisdiction. To prohibit the making of a certain kind of contract respecting the transfer of land in another state is to deprive the citizen of his liberty of contract.

Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Frorer v. People, 141 Ill. 172, 16 L.R.A. 492, 31 N. E. 395; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; State ex rel. McKell v. Robins, 71 Ohio St. 290, 69 L.R.A. 427, 73 N. E. 470, 2 Ann. Cas. 485; Kuhn v. Detroit, 70 Mich. 534, 38 N. W. 470; Andrews v. Beane, 15 R. I. 451, 8 Atl. 540; Powers v. Shepard, 1 Abb. Pr. N. S. 129, 45 Barb. 524; Shaver v. Pennsylvania Co. 71 Fed. 931; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The abolishment of all remedy is objectionable to the Constitution, in that it deprives the citizen of his property without due process of law.

Black, Constitutional Prohibitions, §§ 146–171; Sutherland, Stat. Constr. pp. 1206, 1208, §§ 5, 8; Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490.

It is unthinkable that a transfer or a right to transfer immovable property should be subject to regulations at the same time by two different and distinct sovereignties. In so far as the state of Minnesota penalizes its resident owner because he has obeyed the law of the state or country wherein the land is situated,—the law which he must be subject to,—just so far does it exceed its powers and deny to its citizen the equal protection of the laws.

Price v. Pennsylvania R. Co. 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427; Allen v. St. Louis Nat. Bank, 120 U. S. 27, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Connolly v. Union Sewer Pipe Co. 184 U. S. 544, 46 L. ed. 683, 22 Sup. Ct. Rep. 431; Massie v. Cessna, 239 Ill. 352, 28 L.R.A. (N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152; Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 48 L. ed. 604, 24 Sup. Ct. Rep. 319; Ex parte Hollman, 79 S. C. 9, 21 L.R.A. (N.S.) 242, 60 S. E. 19, 14 Ann. Cas. 1105; Ex parte Hawley, 22 S. D. 23, 15 L.R.A. (N.S.) 138, 115 N. W. 93; American De Forest Wireless Teleg. Co. v. Superior Court, 153 Cal. 533, 17 L.R.A. (N.S.) 1117, 126 Am. St. Rep. 125, 96 Pac. 15; Re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986; Greene v. State, 83 Neb. 84, 131 Am. St. Rep. 626, 119 N. W. 6; Lively v. Missouri, K. & T. R. Co. 102 Tex. 545, 120 S. W. 852; Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463–501, 52 L. ed. 297–310, 28 Sup. Ct. Rep. 141; Seaboard Air Line R. Co. v. Railway Commission, 155 Fed.

792; Board of Education v. Alliance Assur. Co. 159 Fed. 994; Phipps v. Wisconsin C. R. Co. 133 Wis. 153, 113 N. W. 456.

By this decision the court below refused to give full faith and credit to the acts and records of Colorado.

Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 622, 30 L. ed. 522, 7 Sup. Ct. Rep. 398; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 647, 48 L. ed. 828, 24 Sup. Ct. Rep. 532; Minnesota v. Northern Securities Co. 194 U. S. 72, 48 L. ed. 881, 24 Sup. Ct. Rep. 598.

Such legislation and the holding therein of the court below make and enforce a law which abridges the privileges and immunities of plaintiff in error as a citizen of the United States.

Ex parte Virginia, 100 U. S. 347, 25 L. ed. 679, 3 Am. Crim. Rep. 547; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Missouri v. Dockery, 191 U. S. 170, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Huntington v. New York, 118 Fed. 686.

Messrs. A. B. Choate and George W. Buffington submitted the cause for defendant in error:

Even if it could be technically held that the contract was made in Dakota, which is not conceded, the general principle in relation to contracts made in one place, to be performed in another, is well settled. They are to be governed by the law of the place of performance.

Andrews v. Pond, 13 Pet. 65, 78, 10 L. ed. 61, 67.

Assuming that the default clauses of this contract were valid by the law of some other state, the Minnesota courts would not enforce them if they contravened the laws of Minnesota.

Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 277, 26 L. ed. 539, 546; Teal v. Walker, 111 U. S. 242, 252, 28 L. ed. 415, 419, 4 Sup. Ct. Rep. 420.

If this obnoxious condition for forfeiture was void under Minnesota statutes, then, being a Minnesota contract, it was void everywhere; and it is immaterial what the law of any other state is, whether for the foreclosure of such contracts or for other remedy.

Andrews v. Pond, 13 Pet. 65, 78, 10 L. ed. 61, 67.

Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501.

Until the supreme court of Minnesota shall construe the statute in question as *requiring the plaintiff in error to do some impossible thing*, application to this court is premature. This court will not so construe it if it is capable of a construction to the contrary.

New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 562, 50 L. ed. 305, 310, 26 Sup. Ct. Rep. 144; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 412, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66.

When a statute makes a certain fact prima facie evidence of another fact, the prima facie evidence is neither necessary nor exclusive of other evidence.

State ex rel. Cunningham v. District Ct. 29 Minn. 67, 11 N. W. 133; Easton v. Childs, 67 Minn. 242, 69 N. W. 903; Perkins v. Gibbs, 108 Minn. 151, 121 N. W. 605.

Until other proof of nonresidence is refused by the state court, this court should not be asked to hold that the statute requires a sheriff's return.

Hinde v. Vattier, 5 Pet. 398, 8 L. ed. 168; Clement v. Packer, 125 U. S. 309, 322, 31 L. ed. 721, 726, 8 Sup. Ct. Rep. 907.

The rules of property and of evidence established by the state tribunals furnish the guides and rules of decision in those of the Union in all cases where they apply.

Hinde v. Vattier, 5 Pet. 398, 400, 8 L. ed. 168, 169.

The 14th Amendment was not designed to interfere with the police power of the state.

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357.

The state government is supreme and exclusive in its own domain. There is no divided sovereignty in the exercise of the police power. Jurisdiction is entirely vested either in the state or the nation, and not divided between them.

Re Heff, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506; York v. Miln, 11 Pet. 102, 138, 9 L. ed. 648, 662.

In the exercise of the police power a wide discretion is necessary.

License Cases, 5 How. 504, 592, 12 L. ed. 256, 296.

No constitutional right has been invaded in the case at bar, and the fears of plaintiff in error of some future injury due to what it deems ill-advised or unjust legislation in the exercise of the police power of the state are immaterial.

Mobile County v. Kimball, 102 U. S. 691, 704, 26 L. ed. 238, 242.

This court will not override the judgment and discretion of the state of Minnesota because corporations who are creatures of that state cannot afford to do a certain class of business unless permitted to violate the state laws. Plaintiff in error has no vested right to sell land in another state, which can limit the state in the exercise of its police power.

Buttfield v. Stranahan, 192 U. S. 470, 493, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349.

The legislature may classify subjects of legislation, and legislate for the classes separately.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357.

The judgment complained of is not an attempt to exercise extraterritorial jurisdiction.

De Wolf v. Johnson, 10 Wheat. 368, 382, 383, 6 L. ed. 343, 347.

The contract clause of the Constitution of the United States has reference only to a statute of a state enacted after the making of the contract whose obligation is alleged to have been impaired; it does not apply to laws enacted prior to the contract, the obligation of which is asserted to be impaired.

Ogden v. Saunders, 12 Wheat. 213, 303, 6 L. ed. 606, 637; Edwards v. Kearzey, 96 U. S. 595, 603, 24 L. ed. 793, 797.

The record in this case fails to show that the supreme court of Minnesota ever had the existence of any act of Colorado brought to its attention in any manner.

Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398.

Mr. Justice McKenna delivered the opinion of the court:

Error to the supreme court of Minnesota to review a judgment of that court awarding damages to defendant in error for a breach by plaintiff in error of an executory contract for the sale of land situated in the state of Colorado.

The contract was made by one Bates for plaintiff in error at the office of the latter, in the city of Minneapolis, he being one of its officers, with P. D. Walsh, the husband of defendant in error. Walsh, however, actually signed the contract at his residence in North Dakota. He subsequently assigned his interest to her, as Bates did to plaintiff in error.

Plaintiff in error, asserting that Walsh had made default of the terms of the contract, canceled it and subsequently sold the land to other parties. This action was then brought by defendant in error, resulting in a judgment for her which was affirmed by the supreme court. 109 Minn. 136, 123 N. W. 291.

By the contract, Bates, the assignor of plaintiff in error, covenanted to convey the land to Walsh, the assignor of defendant in error, reserving certain mining rights therein. Payments were to be made in installments at the office of plaintiff in error in *Minneapolis, punctually*, and it was stipulated "that time and punctuality" were "material and essential ingredients" of the contract. It was covenanted that in case of failure to make the payments *"punc-[121 tually and upon the strict terms and times" limited, and upon default thereof or in the strict and literal performance of any other covenant, the contract, at the option of the party of the first part (Bates), should become utterly null and void, and the rights of the party of the second part (Walsh) should, "at the option of the party of the first part, utterly cease and determine" as if "the contract had never been made." There was forfeiture of the sums paid and a reversion of all rights conveyed, including the right to take immediate possession of the land "without process of law," and it was covenanted that no court should "relieve the party of the second part upon failure to comply strictly and literally" with the contract.

The default of Walsh consisted in the failure to pay taxes, and plaintiff in error elected to terminate the contract, and gave notice of such election to him in writing in the state of North Dakota. Against the effect of such default and notice, defendant in error opposed chapter 223, Laws of Minnesota, 1897, which provides that a vendor in a contract for the sale of land shall have no right to cancel, terminate, or declare a forfeiture of the contract except upon thirty days' written notice to the vendee, and that the latter shall have thirty days after service of such notice in which to perform the conditions or comply with the provisions upon which default shall have occurred.

The trial court and the supreme court held the statute applicable, and judgment went, as we have said, for defendant in error. This ruling is attacked on the ground that, as so applied, the statute offends against the 14th Amendment of the Constitution of the United States in that it deprives plaintiff in error of its property without due process of law and of the equal protection of the laws.

With the ruling of the court as to the applicability of the statute to the contract we have nothing to do. We are *only[122 concerned with the contention that, as so applied, it violates the 14th Amendment. Of this the supreme court said:

"There can be no serious question as to the constitutionality of the statute. It in effect prescribes a period of redemption in contracts of this character, and was within the power and authority of the legislature. Defendants' principal contention on this branch of the case is not so much that the statute is unconstitutional, as that it should not be construed to apply to

contracts made in Minnesota for the sale of land in another state. There is force in this contention, but within the rule of the Finnes Case (102 Minn. 334, 113 N. W. 883), which a majority of the court do not feel disposed to reconsider, the action does not involve the title to the land, is purely personal, and the rights of the parties are controlled by the laws of this state. Under the decision in that case, defendants had no right arbitrarily to declare the contract at an end and refuse to perform it, and are liable for such damages as their refusal caused plaintiff. Following the Finnes Case, we have no alternative but to affirm the action of the court below."

This excerpt clearly presents the ground of the court's decision, and we may put in contrast to it the contention of plaintiff in error. Its contention is that the contract itself provided for the manner of its termination, and made exact punctuality the essence of its obligation, and that the statute of the state, as it exempts from such obligation, deprives plaintiff in error of its property without due process of law. The argument to support the contention is somewhat confused, as it mingles with the right of contract simply a consideration of the state's jurisdiction over the land which was the subject of the contract. As to the contract simply, we have no doubt of the state's power over it, and the law of the state, therefore, constituted part of it. It is elementary that the obligation of a contract is the law under which it was made, and 123]we are *not disposed to expend much time to show that the Minnesota statute was a valid exercise of the police power of the state. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238. Whether it had extraterritorial effect is another question. The contention is that the statute, as applied, affected the transfer of land situated in another state, and outside of, therefore, the jurisdiction of the state of Minnesota. In other words, it is contended that the law of Colorado, the situs of the property, is the law of the contract. The principle is asserted in many ways and with an affluent citation of cases. The principle cannot be contested, but plaintiff in error pushes it too far. Courts in many ways, through action upon or constraint of the person, affect property in other states (Fall v. Eastin. 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853) and in the case at bar the action is strictly personal. It in no way affects the land or seeks any remedy against it. The land had been conveyed to another by *plaintiff* in error, and it was secure in the possession of the purchaser. Redress was sought in a Minnesota court for the violation of a Minnesota contract, and, being such, the law of Minnesota gave the right and measure of recovery.

In Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737, a contract made in North Carolina between a husband and wife, who were domiciled there, by which he covenanted to surrender, convey, and transfer all of his rights to lands owned by her in Massachusetts, was declared to be a North Carolina contract and enforceable in Massachusetts, notwithstanding that under the law of the latter state husband and wife were incapable of contracting with each other. To the objection that the laws of the parties' domicil could not authorize a contract between them as to land in Massachusetts, it was answered: "Obviously this is not true. It it true that the laws of other states canot render valid conveyances of property within our borders which our laws say are void, for the *plain[124 reason that we have exclusive power over the *res*. . . . But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the law of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract." Precedents against the view were noted and contrasted with those supporting it.

The case at bar is certainly within the principle expressed in Polson v. Stewart. The Minnesota supreme court followed the prior decision in Finnes v. Selover, B. & Co. 102 Minn. 334, 113 N. W. 883, in which it said that, upon repudiation of a contract by the seller of land, two courses were open to the purchaser: "He might stand by the contract and seek to recover the land, or he could declare upon a breach of the contract, and recover the amount of his damages." If he elected the former, it was further said, the courts of Colorado alone could give him relief; if he sought redress in damages, the courts of Minnesota were open to him. And this, it was observed, was in accordance with the principle that the law of the situs governs as to the land, and the law of the contract as to the rights of the parties in the contract.

Plaintiff in error bases a contention upon the difficulty of complying with the provisions of the statute with regard to giving

notice. Written notice is, as we have seen, necessary to be given of any default, and the time when the cancelation of the contract shall take effect, which must not be less than thirty days after the service; and it is provided that the notice must be served in the manner provided for service of summons in the district court if the vendee resides in the county where the real estate covered by the contract is situated. 125] If the vendee is not *within the county where the real estate is situated, then notice must be served by publication in a weekly newspaper within the county, or, if there is none in the county, then in a newspaper published at the capital of the state. And it is provided that the vendee shall have thirty days after service to perform the conditions or comply with the provisions. The contention is that these provisions cannot be complied with, either in Minnesota or Colorado; and that plaintiff in error is brought to the dilemma of not being able to cancel the contract, whatever be the default.

The dilemma was not presented to the supreme court of the state for resolution, as plaintiff in error had made no attempt to comply with the statute in any way. As that court held the statute applicable to contracts such as that under review, it will, no doubt, in a proper case, so construe the statute as to make it effective. We are not called upon to anticipate its ruling.

It is manifest from these views that plaintiff in error was not, by the enforcement of the Minnesota statute, deprived of its property without due process of law.

It is further contended that the Minnesota statute denies plaintiff in error the equal protection of the laws and is therefore void. In specification of the way in which this is done, plaintiff in error says: "In so far as the state of Minnesota penalizes its resident owner because he has obeyed the laws of the state or country wherein the land is situated,—the law which he must be subject to,—just so far does it exceed its powers and deny to its citizens the equal protection of the laws." This manifestly is but another way of presenting the argument, which we have answered, that the law of Colorado controls the contract, and not the law of Minnesota. Discrimination is not made out by saying that resident owners of Minnesota land are given a right to foreclose their contracts, and that residents of Minnesota owning land in other states are not given the same right, even if this were true. The plaintiff 126] *in error is not treated differently from any other seller of land in his situation. *This is the test of the* application of the equal protection clause of the Constitution of the United States.

Plaintiff in error further charges that the supreme court of the state refused to give full faith and credit to the acts and records of Colorado. The contention was not made in the court below and cannot be made here. The same comment is applicable to the contention that privileges and immunities of plaintiff in error as a citizen of the United States are abridged. We may say of the contentions that they are but a repetition of the view that the law of Colorado, and not that of Minnesota, governs the contract. And we may say further, it is well settled that a corporation cannot claim the protection of the clause of the 14th Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a state. Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384.

Judgment affirmed.

The Chief Justice and Mr. Justice Van Devanter dissent.

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BROOKE P. TAYLOR, Nannie M. McCormick, Rosalie McCormick, et al., Appts.,
v.
COLUMBIAN UNIVERSITY (Now Known in Law as George Washington University) and Johns Hopkins University.

(See S. C. Reporter's ed. 126-137.)

**Charities — uncertainty — incapacity of execution.**

1. A valid charitable trust, not open to the objection of uncertainty or incapacity of execution, apparent upon its face, was created under the will of a retired Navy officer by which, after stating his desire to make some contribution to the Navy, he devised real property to an educational institution in trust to provide for the free education of young men to fit them for admission to the United States Naval Academy, or for positions as mates or masters in the "merchant marine service of the United States," or for appointment from civil life to the steam engineer department of the Navy.

[For other cases, see Charities, I. b; I. d, in Digest Sup. Ct. 1908.]

**Charities — failure to accomplish object.**

2. A charitable trust for the free education of young men to fit them for admission to the United States Naval Academy cannot be said to fail in its execution to ac-

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Note.—As to certainty of purpose or beneficiaries of charitable bequest—see note to Hadley v. Forsee, 14 L.R.A.(N.S.) 84, 116.

complish in some degree the charitable object, where at least two out of twenty-four of those who availed themselves of its benefits entered such Academy.

[No. 41.]

Argued November 6, 1912. Decided December 2, 1912.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which, on a second appeal, affirmed a decree of the Supreme Court of the District, dismissing the bill in a suit to declare void a testamentary trust. Affirmed.

See same case below, 35 App. D. C. 68.

The facts are stated in the opinion.

Mr. Henry E. Davis argued the cause, and, with Mr. J. K. M. Norton, filed a brief for appellants:

The bequest does not come under the broadest definition of charitable bequests.

2 Words & Phrases, p. 1075.

If it does not appear from the instrument that the donor intended a general public charity, it will not be carried out at all, if, by reason of its uncertainty or otherwise, it cannot be so carried out as to accomplish the object specified by the donor.

Kain v. Gibboney, 101 U. S. 362, 25 L. ed. 813; Stratton v. Physio-Medical College, 5 L.R.A. 35, note; People v. Powers, 147 N. Y. 104, 35 L.R.A. 502, 41 N. E. 432; Norris v. Thomson, 19 N. J. Eq. 307; Perry, Trusts, § 709; Re Randell, L. R. 38 Ch. Div. 213, 57 L. J. Ch. N. S. 899, 58 L. T. N. S. 626, 36 Week. Rep. 543; Re Prison Charities, L. R. 16 Eq. 129, 42 L. J. Ch. N. S. 748; Story, Eq. Jur. § 1182.

If the devise be held to be a charitable trust, it is yet too uncertain and indefinite to be carried out. Under the devise it is uncertain what young men are to partake of the benefit; no method nor plan for the selection of the beneficiaries is prescribed or provided.

Norcross v. Murphy, 44 N. J. Eq. 522, 14 Atl. 903; Tilden v. Green, 130 N. Y. 29, 14 L.R.A. 33, 27 Am. St. Rep. 487, 28 N. E. 880; Stratton v. Physio-Medical College, 5 L.R.A. 33, note; Fairfield v. Lawson, 50 Conn. 513, 47 Am. Rep. 669; Beardsley v. Bridgeport, 53 Conn. 489, 55 Am. Rep. 152, 3 Atl. 557; Hughes v. Daly, 49 Conn. 34; White v. Fisk, 22 Conn. 53; Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; Dutch Church v. Mott, 7 Paige, 77; Goodell v. Union Asso. 29 N. J. Eq. 32; Atty. Gen. v. Jolly, 1 Rich. Eq. 90, 42 Am. Dec. 349; Gibson v. M'Call, 1 Rich. L. 174; Johnson v. Johnson, 92 Tenn. 571, 22 L.R.A. 179, 36 Am. St. Rep. 104, 23 S. W. 114; Maught v. Getzendanner, 66 Md. 529, 57 Am. Rep. 352, 57 L. ed.

5 Atl. 471; Dulany v. Middleton, 72 Md. 67, 19 Atl. 146; Methodist Episcopal Church v. Smith, 56 Md. 362; Dashiell v. Atty. Gen. 5 Harr. & J. 392, 9 Am. Dec. 572, 6 Harr. & J. 1; Yingling v. Miller, 77 Md. 104, 26 Atl. 491; Rizer v. Perry, 58 Md. 112; Needles v. Martin, 33 Md. 609; Wheeler v. Smith, 9 How. 55, 13 L. ed. 44; Trinity M. E. Church v. Baker, 91 Md. 539, 46 Atl. 1020; Pratt v. Sheppard & E. P. Hospital, 88 Md. 610, 42 Atl. 51; Gambell v. Trippe, 75 Md. 252, 15 L.R.A. 235, 32 Am. St. Rep. 388, 23 Atl. 461; Barnum v. Baltimore, 62 Md. 292, 50 Am. Rep. 219; Long v. Gloyd, 25 Wash. L. Rep. 50; Coltman v. Moore, 1 MacArth. 197; Speer v. Mosher, 31 Wash. L. Rep. 630.

The court declined to hear Mr. Walter C. Clephane, who filed a brief for appellees:

This is undoubtedly a charitable trust.

Jackson v. Phillips, 14 Allen, 539; Vidal v. Girard, 11 L. ed. 205, note; 3 Pom. Eq. Jur. § 1025; Speer v. Colbert, 24 App. D. C. 187, affirmed in 200 U. S. 130, 50 L. ed. 403, 26 Sup. Ct. Rep. 201; Smith v. Gardiner, 36 App. D. C. 485; Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 331; University of London v. Yarrow, 23 Beav. 159; Marsh v. Means, 3 Jur. N. S. 790; Tatham v. Drummond, 11 L. T. N. S. 325; Barnum v. Baltimore, 62 Md. 275, 50 Am. Rep. 219.

When property is devoted to a charitable use, the heirs at law of the donor can never recover, but the *cy près* doctrine will be applied.

2 Story, Eq. Jur. § 1177; Russell v. Allen, 107 U. S. 163, 27 L. ed. 397, 2 Sup. Ct. Rep. 327; Fontain v. Ravenel, 17 How. 369, 15 L. ed. 80; Church of Jesus Christ, L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792; Moggridge v. Thackwell, 7 Ves. Jr. 39, 6 Revised Rep. 76; Atty. Gen. v. Ironmongers' Co. 2 Myl. & K. 576, 3 L. J. Ch. 11, 2 Beav. 313, Craig & Ph. 208, 10 L. J. Ch. N. S. 201, 10 Clark & F. 908; Bloomfield v. Stowe-market (1619) Duke, Charitable Uses, 624; Atty. Gen. v. Guise, 2 Vern. 266; Atty. Gen. v. Baliol College 9 Mod. 407; Atty. Gen. v. Glasgow College, 2 Colly. Ch. Cas. 665, 1 H. L. Cas. 800; Atty. Gen. v. Hicks, 3 Bro. Ch. 166, note; Highmore, Mortmain, 336, 354; Jackson v. Phillips, 14 Allen, 539; Adams Female Academy v. Adams, 65 N. H. 225, 6 L.R.A. 785, 18 Atl. 777, 23 Atl. 430; Cincinnati v. McMicken, 6 Ohio C. C. 188, 3 Ohio C. D. 409; Weeks v. Hobson, 150 Mass. 377, 6 L.R.A. 147, 23 N. E. 215; Potter v. Thornton, 7 R. I. 252; McIntire v. Zanesville, 17 Ohio St. 352; Crerar v. Williams, 145 Ill. 625, 21 L.R.A. 454, 34 N. E.

467; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

Mr. Justice McKenna delivered the opinion of the court:

Suit by appellants as heirs of Levin M. Powell, to declare void a trust created by his will, and to recover certain real estate held by the George Washington University, the legal successor of the Columbian University.

Levin M. Powell was, when he made his will, an admiral in the United States Navy, on the retired list. The clause which creates the trust is as follows:

"Item: Fifth, it being my wish and desire to make some contribution to the Navy of the United States, of which I have been for so many years, I hope, a worthy member, and so in a measure to pay off the debt I feel I owe the honorable profession I have pursued through a long lifetime, and to that end to establish in the Columbian University in the District Columbia, in a manner most conducive for that purpose, a means for the education of such young men as may be willing to profit therefrom in the branches of education best fitted to prepare them for officers of the line in the Navy of the United States, or for the places of mates or captains in the merchant 131]marine *service of the United States. I do hereby give, devise, and bequeath to the said Columbian University and its successors all those certain pieces or parcels of ground situate and lying in said city of Washington, . . . in trust for the purposes following, and for no other purpose whatever,—that is, in trust to create an endowment to be known as the Admiral Powell endowment, and with that view to take the said property, and the same to rent from year to year, or to lease for a term of years, as to the trustees and overseers of said University shall seem best; and the rents, issues, and profits arising therefrom, after first paying out of the same the taxes, insurance, repairs, and other expenses, to devote as far as the same will go, under such regulations as to the said trustees and overseers may seem best, to the free education of such young men as may desire to take advantage of the said endowment by way of their preparation for entrance into the Naval Academy at Annapolis, Maryland, or such as may fit them to become mates or masters in the merchant marine service of the United States, such preparation to be confined in the case of each young man so embracing the advantages of the said endowment to one year, and to include principally the studies following, that is to say: arithmetic, geometry, trigonometry, and astronomy, with the use of astronomical instruments, the construction of charts, and the application of this knowledge to hydrographical survey by latitude and longitude, and if possible such study as will give to such young men a knowledge of scientific voyages of discovery, and other matters relating to war and commerce on the high seas; and it is further my desire that this endowment shall, if possible, embrace in its benefits such apprentices as, having filled their time in the great steam manufactory establishments of the country, may apply for appointment from civil life in the steam engineer department of the United States Navy, to such I would like to have a year's *education afforded under such regula-[132 tions as the president and faculty of the University may think proper. And should it at any time for any reason be impossible to carry into effect the trusts, provisions, and conditions having relation to and herein imposed upon this bequest by me made for the creation of the endowment described on the part of the said Columbian University, or should it be made manifest at any time that the said trust is not being administered in accordance with my wishes and desires, and in conformity with the conditions specified, then and in such case it is my will and desire that the said endowment shall be placed in other hands, and to that end and upon happening of the contingency mentioned, I do hereby give, devise, and bequeath the said property to the Johns Hopkins University of Baltimore, in the state of Maryland, and its successors, to be taken and held by the said University or the officers thereof proper for that purpose, upon the trusts and for the purposes hereinbefore particularly set forth in the bequest of said property to the Columbian University, in such manner that the purposes of the said endowment as by me indicated may be fully carried into effect."

The bill alleges that the Columbian University, supposing it had the right to execute the trust, took possession of the property, and has let it to various tenants, and for more than sixteen years has issued a catalogue publishing its classes, the names of all of its students, instructors, and officers, and the many and various schools of education it maintains, and that the catalogue is widely circulated throughout the United States. The University has, it is alleged, for a like period advertised "The Powell Scholarship," and notwithstanding the wide circulation of the advertisement, the University has been unable to execute the trust.

It is alleged that the devise is so indefinite and the trust intended to be created so uncertain of its objects and subjects

133] *that it is impossible of execution by the Columbian University, or by the Johns Hopkins University, and has in no wise been executed by either of them; and that therefore the trust is wholly void and of no effect. The collection of the rents and profits by the Columbian University is alleged. It was prayed that the trust be declared void and that the Columbian University be required to account for the rents and profits collected by it.

A demurrer to the bill was overruled, which ruling was sustained by the court of appeals. 25 App. D. C. 124.

The court of appeals held that the devise created a special charitable trust, and that it was not void for uncertainty or incapacity of execution apparent upon its face. The court, however, held that the nineteenth paragraph of the bill, which alleged that the impossibility of the execution of the trust had been demonstrated, stated a cause of action, and remanded the case for further proceedings. Upon the return of the case to the supreme court, the University answered, by which it traversed the allegations of the bill, and alleged in effect that it undertook the trust and has ever since efficiently executed it. It further alleged that its codefendant, the Johns Hopkins University, is able, ready, and willing to accept and administer the trust at any time, if for any reason it should be impossible for it, the Columbian University, to administer the same, or "should fail to carry out the trust in that regard reposed in it."

Testimony was taken, and the trial court found from the facts proved the following:

"First. From the testimony adduced by plaintiffs upon this point, it appears that beginning with the scholastic year 1885-86 (the will of Powell was probated in 1885), the defendant Columbian University published in its annual catalogues that, under the terms of the Admiral Powell Endowment, free scholarships would be given to a 134]limited *number of pupils who were preparing for admission to the United States Naval Academy at Annapolis. This notice was in some issues of the catalogue more explicit, giving in greater detail the terms of the trust, and in other issues courses of study were given from which the special course contemplated by the terms of the trust might be selected. It further appears from the records of the University that beginning with the scholastic year 1891-92 twenty-four young men actually took a course of study under the Powell Scholarships, in some cases the same man being permitted to pursue the course for more than one year. Of this number at least two entered the Naval Academy. *I find nothing* in the evidence showing the net income derived by the University from the trust property, but there is nothing to show that the full net income thereof was not applied to the administration of the trust. I am of the opinion that the evidence adduced is not sufficient to demonstrate the 'incapacity' of the execution of the trust."

Second. Granting that the testimony was sufficient to demonstrate the inability of the Columbian University to execute the trust, it did not appear that the Johns Hopkins University might not be able to do so, and that until it "has tried and failed, the court would certainly not be justified in frustrating the intention of the testator by bestowing the property upon" the plaintiffs, "related so remotely to him."

The court of appeals practically affirmed these conclusions. The court said that while the testimony did not show that the expectations of the testator have been fully answered, and that it had failed "to show that the entire net proceeds of the trust property have been devoted exclusively to the purposes of the trust, and none other, it was sufficient to show that the trust can be executed, as well as that, in some measure, it is being executed." The court said further that it was unimportant to consider *defects of execution of the trust by [135 the Columbian University, as that possibility was contemplated by the testator, and the Johns Hopkins University appointed as an alternate trustee, and as its ability to execute the trust was asserted and not denied, "it must be taken as true." These conclusions, so far as they depend upon the testimony, not being manifestly erroneous, we must accept, being the decisions of two courts.

The legal proposition, however, which determined the ruling upon the demurrer and the first decision of the court of appeals, is open for consideration. That court, as we have seen, decided that the will created a special charitable trust, and that the trust was not void for uncertainty or incapacity of execution apparent upon its facts. These propositions are contested. It is contended, first, that the "object of the testator must be clearly charitable; and, second, the thing he directs to be done must, in its execution, accomplish the charitable object, in some degree, at least." It is argued that these conditions are not fulfilled by the devise because, it is said, "the testator had no idea of assisting either of the universities named, or of assisting anyone merely to get an education," and, further, that "his sole purpose, as he himself stated, was 'to make some contribution to the Navy of the United States.'"

The devise, we think, satisfies the testa-

The object of the testator was not "to make some contribution to the Navy of the United States." Such contribution was but an incidental effect, or rather, the mere inducement to the testator's benefaction. The testator's special object was, so far as his property would accomplish it, to give to young men not having the pecuniary ability to prepare themselves, the opportunity to do so. Preparatory training was necessary; he made it available, to the extent of his means, to young men who otherwise could not bear the expense. And he 136]knew the conditions of appointment, *in whom it rested, and the contingencies upon which it depended. If the field of candidacy was limited, he knew that he was helping some to aspire and qualify to succeed. The knowledge and help were definite. He certainly could not designate the individuals. That could be done, and necessarily was left to be done, by his trustees, one or the other of them. The purpose of the testator has not been disappointed. In other words, the charitable object has been accomplished, "in some degree, at least,"—the test which appellants apply. The finding is that at least two out of twenty-four of those who availed themselves of the scholarships instituted by the Columbian University entered the Naval Academy. We can suppose a better result from a better administration of the trust.

The testator had in view another career for young men besides the Navy, which could be attained by the same means; that is, "the places of mates or captains in the merchant marine service of the United States." But it is said that "there is no such thing" as the merchant marine service "known to the law," and that "wherefore the meaning of the testator in this behalf is left open to ascertainment outside of the testator's language and the provision of the will." The criticism is too exact. The merchant marine was and is a very definite and substantial thing, and had unmistakable definition in general, if not in legal, nomenclature. The meaning of a testator is not required to be found in law lexicons; the usages of popular speech may furnish a guide to it. Besides, the words "merchant marine" receive certain meaning from their context, and it is easy to put one's self in the place of the sailor testator and appreciate his impulse and purpose. His relatives were remote, his property not large, and he had been an officer in the United States Navy. He desired to assist others to become also officers in that service or in a cognate service. He knew the equipment necessary and he prescribed it. 137]He chose proper educational *instruments to confer the equipment and to select and qualify the candidates for the designated services. The purpose of the testator was worthy, and there is nothing in reason or authority which requires us to pronounce it legally insufficient.

Decree affirmed.

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J. E. EUBANK, Plff. in Err.,
v.
CITY OF RICHMOND.

(See S. C. Reporter's ed. 137-145.)

**Constitutional law — police power — establishing building line.**

An unconstitutional infringement of the guaranties of U. S. Const., 14th Amend., which cannot be upheld as an exercise of the police power, results from a municipal ordinance passed under the authority of Va. Laws 1908, p. 623, which requires the committee on streets, upon request of the owners of two thirds of the abutting property, to establish a building line on the side of the square on which such property abuts, not less than 5 nor more than 30 feet from the street line.

[For other cases, see Constitutional Law, 500-522, 861-869, in Digest Sup. Ct. 1908.]

[No. 48.]

Argued November 12 and 13, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Hustings Court of the City of Richmond, affirming a judgment of the police justice of that city, imposing a fine for an alleged violation of a municipal ordinance establishing a building line. Reversed and remanded for further proceedings.

See same case below, 110 Va. 749, 67 S. E. 376, 19 Ann. Cas. 186.

The facts are stated in the opinion.

Mr. S. S. P. Patteson argued the cause and filed a brief for plaintiff in error:

The establishment of a building line on residential private property, without compensation to the owner, is unlawful.

Lewis, Em. Dom. 2d ed. p. 433, § 227; Chicago v. Pittsburg, C. C. & St. L. R. Co. 244 Ill. 220, 135 Am. St. Rep. 316, 91 N. E. 422; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.)

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NOTE.—As to power to establish building line—see note to report of this case in 42 L.R.A.(N.S.) 1123.

Exercise of police power for esthetic purposes—see note to Haller Sign Works v. Physical Culture Training School, 34 L.R.A. (N.S.) 99?

466, 117 Pac. 1101; May v. Craig, 13 Cal. App. 368, 109 Pac. 842; St. Louis v. Hill, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861; People ex rel. Dilzer v. Calder, 89 App. Div. 503, 85 N. Y. Supp. 1017; Byrnes v. Riverton, 64 N. J. L. 210, 44 Atl. 857; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 34 L.R.A.(N.S.) 1004, 94 N. E. 920.

Mr. H. R. Pollard argued the cause and filed a brief for defendant in error:

The police power resident in every state embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.

Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

Statutory restrictions upon the height of buildings are a proper and valid exercise of the police power.

People ex rel Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862; Welch v. Swasey, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567. See also Rochester v. West, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673.

Under proper grant of power, ordinances may establish, on certain streets, building lines, and provide that a certain class or character of buildings shall be erected in such district.

McQuillin, Mun. Ord. § 32.

Building lines fixed by lawful authority must be observed by an abutting owner. The right to build up to the (street) line is subject to the police power of the municipality, under which a building line back from the street may, for sufficient cause, be established by reasonable ordinance, on due notice.

29 Cyc. 859.

Probably the most pronounced declaration of this court of its reluctance to reverse the finding of state courts in the matter of police regulation, or considered by the state authorities, legislative and judicial, as a matter of police regulation, was made in case of Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301. See also Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

Prima facie, every act of a legally constituted legislative body is constitutional, and the person who assails an act on that account must clearly *establish his contention.*

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257.

What the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy.

Dill. Mun. Corp. 5th ed. § 600; State v. Clarke, 54 Mo. 36, 14 Am. Rep. 471; District of Columbia v. Waggaman, 4 Mackey, 328; Danville v. Hatcher, 101 Va. 532, 44 S. E. 723; Soon Hing v. Crowley, 113 U. S. 710, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; Wabash R. Co. v. Defiance, 167 U. S. 102, 42 L. ed. 93, 17 Sup. Ct. Rep. 748; United States ex rel. Strasburger v. District of Columbia, 5 Mackey, 389.

There is nothing in the record as hereinbefore set out to sustain the contention that the general assembly of Virginia enacted the statute for esthetic considerations only.

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192.

The failure of the statute to make provision for compensation to the lot owner on account of depriving him of the right to occupy his entire lot with buildings does not invalidate the act.

Watertown v. Mayo, 109 Mass. 318, 12 Am. Rep. 694.

In order to justify the rejection of the statute as unconstitutional, it must be wholly, not partially, for esthetic purposes.

Varney & Green v. Williams, 155 Cal. 318, 21 L.R.A.(N.S.) 743, 132 Am. St. Rep. 88, 100 Pac. 867; Cockran v. Preston, 108 Md. 220, 23 L.R.A.(N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 Ann. Cas. 1048; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 34 L.R.A. (N.S.) 1003, 94 N. E. 920.

Mr. Justice McKenna delivered the opinion of the court:

In error to review a judgment of the hustings court of the city of Richmond, affirming a judgment of the police court of the city, imposing a fine of $25 on plaintiff in error for alleged violation of an ordinance of the city fixing a building line. The judgment was affirmed by the supreme court of the state. 110 Va. 749, 67 S. E. 376, 19 Ann. Cas. 186.

Plaintiff in error attacks the validity of the ordinance and the statute under which it was enacted on the ground that they infringe the Constitution of the United States, in that they deprive plaintiff in error of his property without due process of law, and deny him the equal protection of the laws.

The statute authorized the councils of cities and towns, among other things, "to 141]make regulations concerning the *building of houses in the city or town, and in their discretion, . . . in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings and to regulate the height of buildings." Acts of 1908, p. 623, 4.

By virtue of this act the city council passed the following ordinance: "That whenever the owners of two thirds of property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than 5 feet nor more than 30 feet from the street line. . . . And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line." A fine of not less than $25 nor more than $500 is prescribed for a violation of the ordinance.

The facts are as follows: Plaintiff in error is the owner of a lot 33 feet wide on the south side of Grace street, between Twenty-eight and Twenty-ninth streets. He applied for and received a permit on the 19th of December, 1908, to build a detached brick building to be used for a dwelling, according to certain plans and specifications which had been approved by the building inspector, dimensions of the building to be 26x59x28 feet high.

On the 9th of January, 1909, the street committee being in session, two thirds of the property owners on the side of the square where plaintiff in error's lot is situated, petitioned for the establishment of a building line, and in accordance with the petition a resolution was passed establishing a building line on the line of a majority 142] *of the houses then erected, and the building inspector ordered to be notified. This was done, and plaintiff in error given notice that the line established was "about fourteen (14) feet from the true line of the street, and on a line with the majority of the houses." He was notified further that all portions of his house, "including Octagon bay, must be set back to conform to" that line. Plaintiff in error appealed to the board of public safety, which sustained the building inspector.

At the time the ordinance was passed, the material for the construction of the house had been assembled, but no actual construction work had been done. The building conformed to the line, with the exception of the octagon bay window referred to above, which projected about 3 feet over the line.

The supreme court of the state sustained the statute, saying that it was neither "unreasonable nor unusual," and that the court was "justified in concluding that it was passed by the legislature in good faith and in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or, at least, some, of these objects." The court further said that the validity of such legislation is generally recognized and upheld as an exercise of the police power.

Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. And further, "It is the most essential of powers, at times the most insistent, and *always one of the least[143 limitable of the powers of government." District of Columbia v. Brooke, 214 U. S. 138, 149, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560. But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitution. Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. The point where particular interests or principles balance "cannot be determined by any general formula in advance." Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

But in all the cases there is the constant admonition, both in their rule and examples, that when a statute is assailed as offending against the higher guaranties of the Constitution, it must clearly do so to justify the courts in declaring it invalid. This condition is urged by defendant in error, and attentive to it we approach the consideration of the ordinance.

It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the 144]property rights of others, creates *no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line, between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence,—even, it may be, the kind of business or character of residence. *One* person having a two-thirds ownership of a block may have that power against a *number* having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

The case requires no further comment We need not consider the power of a city to establish a building line or regulate the structure or height of buildings. The cases *which are cited are not apposite to[145 the present case. The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain. Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

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AUGUSTO BURNET, Appt.,
v.
JOSEFA AND ISABEL DESMORNES Y ALVAREZ.

(See S. C. Reporter's ed. 145-148.)

**Pleading — statutes of limitation.**

1. Prescription of an action to claim filiation under the limitations imposed by Porto Rico Civ. Code 1889, art. 137, and Porto Rico act of March 1, 1902, § 199, must be pleaded to be available as a defense, even though the statutes extinguish the right if suit be not brought in time, and therefore establish a condition precedent.

[For other cases, see Pleading, III. g, 2, in Digest Sup. Ct. 1908.]

**Appeal — discretion below.**

2. The failure of the Porto Rican Supreme Court, when reversing a decree in favor of defendant in an action to claim filiation, because the bar of prescription had not been pleaded, to send the case back to the lower court to permit the defendant to cross-examine the claimants, should not be revised by the Federal Supreme Court, the question being only one of discretion, and not of power.

[For other cases, see Appeal and Error, VIII. i, in Digest Sup. Ct. 1908.]

[No. 11.]

Submitted October 30, 1912. Decided December 2, 1912.

APPEAL from the Supreme Court of Porto Rico to review a decree which reversed a decree of the District Court for the Judicial District of Humacao in favor of defendant in an action to claim filiation, because the bar of prescription had not been pleaded. Affirmed.

See same case below, 13 P. R. R. 18.

The facts are stated in the opinion.

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NOTE.—Review by Federal Supreme Court of discretionary action of court below—see *note to* Barrow v. Hill, 14 L. ed. U. S. 48.

Mr. Willis Sweet submitted the cause for appellant:

The decision in the case at bar has, in principle, been several times reversed by the supreme court of Porto Rico, and the contention of the appellant sustained.

Gual v. Bonafoux, 15 P. R. R. 545; Puente v. Puente, 16 P. R. R. 556; Calaf v. Calaf, 17 P. R. R.; Armsterdam v. Puente, 16 P. R. R. 527.

A remedial statute controls and directs the manner and method of the remedy, but does not affect the right. But a remedial statute may be changed or modified at any time, and the procedure goes with it.

Pritchard v. Norton, 106 U. S. 124-130, 27 L. ed. 104-106, 1 Sup. Ct. Rep. 102; Bank of United States v. Donnally, 8 Pet. 361, 8 L. ed. 974.

The witnesses should have been subjected to cross-examination, or at least the privilege should have been extended. This is especially true under the extraordinary statements contained in the testimony of witness Isabel Desmornes.

Mollan v. Torrance, 9 Wheat. 538, 6 L. ed. 154; Garland v. Davis, 4 How. 132, 11 L. ed. 907.

No appearance for appellees.

146] *Mr. Justice Holmes delivered the opinion of the court:

This was a proceeding by the appellees, as illegitimate children of Adolfo Desmornes, deceased, to be adjudged his recognized children. The appellant answered that he was the nephew and heir of Desmornes, and denied that the appellees were his children or ever were recognized as such. The district court held that the action had prescribed under the limitations imposed upon actions of this class by the Civil Codes of 1889 and 1902. This decision was reversed by the supreme court on the ground that the bar to the action had not been pleaded, and a decree was entered for the appellees upon a consideration of the evidence taken below.

The case was argued in this court on behalf of the appellant only, and we shall content ourselves with discussing the argument made by him. By the Civil Code of 1889, art. 137, actions of this kind "can be instituted only during the life of the presumed parents," with certain exceptions. It appears by the complaint that Desmornes died on November 2, 1905, before this suit was brought. By the statute of Porto Rico approved March 1, 1902, § 199, under which the appellant says that the appellees proceed, "An action to claim filiation may be filed at any time within two years after the child shall become of age," etc. It appeared in evidence that the appellees became of age more than two years before this action was filed. It is urged that the words of both statutes are jurisdictional and constitute a condition precedent. It is said further that the supreme court of Porto Rico in later decisions has shown an inclination to recede from the doctrine of the present one; but as this case has not been overruled in terms, we shall do no more than indicate why we think the decision right.

*Whether prescription goes only to[147 the remedy or extinguishes the right, it affects the jurisdiction no more than any other defense. When a court has general jurisdiction to try the question whether an alleged right exists, the rules that determine the existence of the right ordinarily govern the duty only of the court, not its power. Its judgment that the right is established cannot be impeached collaterally by proof that the judgment was wrong. For instance, a common-law court ought not to give judgment for the plaintiff upon a parol promise without consideration, but if it does so the judgment is not open to collateral attack. Even words in a statute that might seem to affect the power of the court, such as "no action shall be brought," in the statute of frauds, are assumed without question merely to fix the law by which the court should decide, as is explained in Fauntleroy v. Lum, 210 U. S. 230, 235, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641. We see no reason why the ordinary rule should not apply to this case.

But it is said that, whether the statutes go to the jurisdiction or not, they establish a condition precedent. Of course, all defenses disclose conditions precedent to the successful maintaining of the action; but more than that must be meant, and we take the argument to be that the statute extinguishes the right if the suit is not brought in time, and therefore creates a condition precedent to the right of the appellees. But that abstract proposition does not decide the case. The question before us is a question of pleading, and not every matter that may affect the existence of the right at the time of bringing suit must be dealt with by the plaintiff in stating his cause of action. A release under seal destroys a right as fully as prescription could, yet a plaintiff does not have to deny a release in his declaration. Usually, if facts have arisen since the cause of action accrued, that take it away, it is more convenient and it is required that the defendant should allege them, rather than that the plaintiff should be called *on to[148 deny in the first place all possible matters of that sort. Sawyer v. Boston, 144 Mass.

470, 472, 11 N. E. 711. "For if he should do so, the declaration would be more prolix than was convenient." Hawkings v. Billhead, Cro. Car. 404. "The mere fact that the time of bringing suit goes in some sense to the jurisdiction of the court does not necessarily take the case out of the general rules of pleading." Sawyer v. Boston, supra. It would seem, as observed by the court below, that the defendant was free to renounce the objection if he saw fit. We know of no public policy that would prevent his permitting the appellees to acquire rights that earlier they were entitled to. So that on this ground as well as on that of convenience, we are of opinion that the general rule of pleading applies.

The only matter remaining to be mentioned is a suggestion that the supreme court should have sent the case back to the lower court to give the appellant an opportunity to cross-examine the appellees; but there being no question of the power of the supreme court, we should be slow to control its discretion on this point.

Judgment affirmed.

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FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, Appt.,
v.
CHARLES SPRINGER.

(See S. C. Reporter's ed. 148–157.)

**Bankruptcy — ouster of state jurisdiction — sale under attachment.**

1. The pendency of proceedings in bankruptcy, unknown to any of the parties concerned, or to the court, does not prevent a territorial court having custody of perishable property through its receiver appointed under an attachment levied before the petition in bankruptcy was filed, from ordering a sale on a finding that, in the words of N. M. Comp. Laws 1897, § 2716, "the interests of both plaintiff and defendant will be promoted by the sale," but such sale is valid, and the claim of the trustee in bankruptcy is transferred to the proceeds.

[For other cases, see Bankruptcy, 53–59, in Digest Sup. Ct. 1908.]

**Appeal — from territorial court — construction of local statute.**

2. The ruling of the territorial supreme court that a judicial sale was within the terms of N. M. Comp. Laws 1897, § 2716, governing the sale of attached property of a perishable nature when the interests of the parties will be promoted by the sale, will ordinarily be followed by the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

[No. 23.]

Argued October 30 and November 4, 1912.
Decided December 2, 1912.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for the County of Colfax, in that territory, denying the title of the trustee in bankruptcy to a mining dredge formerly the property of the bankrupt, but sold under an attachment levied before the petition in bankruptcy was filed. Affirmed.

See same case below, 15 N. M. 98, 103 Pac. 265.

The facts are stated in the opinion.

Messrs. Elmer E. Studley and J. E. MacLeish argued the cause, and, with Messrs. Frank H. Scott and Edgar A. Bancroft, filed a brief for appellant:

After the petition in bankruptcy was filed, the assets of the bankrupt were *in custodia legis*, and the jurisdiction of the bankruptcy court to sell the same was exclusive. The sale to Charles Springer was had subsequent to the order of adjudication in bankruptcy, and he was charged with notice of the pendency of the bankruptcy proceedings, and could obtain no title superior to that of the trustee.

(a) No title passed to the purchaser of the dredge because the proceedings to sell and the sale were had subsequent to the entry of the order of adjudication in the bankruptcy proceedings.

Conner v. Long, 104 U. S. 228, 231, 232, 26 L. ed. 723, 724, 725; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 307, 56 L. ed. 208, 213, 32 Sup. Ct. Rep. 96; International Bank v. Sherman, 101 U. S. 403, 406, 25 L. ed. 866, 867; Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269; New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 661, 23 L. ed. 336, 338; Re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818; State Bank v. Cox, 74 C. C. A. 285, 143 Fed. 91.

(b) The proviso to § 67f of the bankruptcy act of 1898, protecting the title of an innocent purchaser for value, is no protection to appellee, as the same does not apply to the sale made in this case, nor does it, under any circumstances, contemplate a purchase subsequent to an adjudication in bankruptcy.

International Bank v. Sherman, 101 U. S. 403, 406, 25 L. ed. 866, 867; Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 306, 307, 56 L. ed. 208, 213, 32 Sup. Ct. Rep. 96; Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363.

(c) The sale in this case was not had in a proceeding to enforce a pre-existing lien, and the jurisdiction of the territorial court ended, although not appearing upon its own record, when the adjudication was entered in the bankruptcy proceedings.

Conner v. Long, 104 U. S. 228, 239, 240, 26 L. ed. 723, 727, 728; Re Watts, 190 U. S. 1, 27, 30, 47 L. ed. 933, 941, 942, 23 Sup. Ct. Rep. 718, 14 Am. Crim. Rep. 48; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Doe v. Childress, 21 Wall. 642, 22 L. ed. 549.

(d) Subsequent to adjudication, perishable property, like all other property of the bankrupt, must be sold in the bankruptcy court.

Conner v. Long, 104 U. S. 228, 26 L. ed. 723; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 306, 56 L. ed. 208, 213, 32 Sup. Ct. Rep. 96; Re Watts, 190 U. S. 1, 27, 30, 47 L. ed. 933, 941, 942, 23 Sup. Ct. Rep. 718, 14 Am. Crim. Rep. 48.

Assuming that the jurisdiction of the territorial court to sell perishable property was concurrent with that of the bankruptcy court,

(a) The dredge was not perishable property within the meaning of those words as contemplated by the sale of perishable property in bankruptcy proceedings, in that the dredge was in the custody of the bankruptcy court and could have been conserved, and the same was not destroyed, or expensive to keep, in the sense that it ought to have been sold.

Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557.

(b) The dredge was not perishable property within the meaning of the statute of the territory of New Mexico relating to sales of property of a perishable nature, and liable to be lost before final adjudication.

Mosher v. Bay Circuit Judge, 108 Mich. 579, 66 N. W. 478; Oneida Nat. Bank v. Paldi, 2 Mich. N. P. 221; Newman v. Kane, 9 Nev. 234; Goodman v. Moss, 64 Miss. 303, 1 So. 241; Weis v. Basket, 71 Miss. 771, 15 So. 659.

Mr. Ernest Knaebel argued the cause, and, with Messrs. Charles A. Spiess, Aldis B. Browne, Alexander Britton, and Evans Browne, filed a brief for appellee:

Appellee, Charles Springer, purchased the dredge at a sale ordered by the judge of the district court of Colfax county, the district court of Colfax county directing the sale thereof in the rightful exercise of conceded jurisdiction, without knowledge on the part of the court or on the part of Springer of the pendency of the bankruptcy proceedings in Illinois, and he therefore obtained a perfect title to the dredge.

*Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; Doe v. Childress, 21 Wall. 642, 22 L. ed. 549; Kent v. Downing, 44 Ga. 116; Re Davis, 1 Sawy. 260, Fed. Cas. No. 3,620; Re Fuller, 1 Sawy. 243, Fed. Cas. No. 5,148; Brackett v. Dayton, 34 Minn. 219, 25 N. W. 348; Revere Copper Co. v. Dimmock, 90 N. Y. 33; Muser v. Kern, 55 Fed. 916; Morning Teleg. Pub. Co. v. S. B. Hutchinson Co. 146 Mich. 38, 8 L.R.A.(N.S.) 1232, 109 N. W. 42; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481; Re Rathman, 106 C. C. A. 253, 183 Fed. 913; Jaquith v. Rowley, 188 U. S. 620–625, 47 L. ed. 620–623, 23 Sup. Ct. Rep. 369; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681; Conner v. Long, 104 U. S. 228, 26 L. ed. 723.

Springer's title to the dredge is in nowise dependent upon the validity of the attachment proceedings, nor does it in anywise depend upon the question of whether or not the title became vested in the trustee in bankruptcy as of the date of the filing of the petition. He purchased the dredge at a sale ordered by the New Mexico court in a proceeding *in rem*, having for its purpose the transmutation of perishable property, or property liable to be lost or diminished in value, into imperishable money.

Young v. Kellar, 94 Mo. 581, 4 Am. St. Rep. 406, 7 S. W. 293; Betterton v. Eppstein, 78 Tex. 443, 14 S. W. 861.

The proceeds of the sale simply take the place of the attached property, and do not interfere with prior liens.

State ex rel. Block v. Civil Dist. Judge, 44 La. Ann. 87, 10 So. 405; Pollard v. Baker, 101 Mass. 259; Taylor v. Thurman, — Tex. —, 12 S. W. 614; Welsh v. Lewis, 71 Ga. 387.

The object of the statute permitting sale of property expensive to keep or perishable, before judgment, is for the benefit of both parties or any third party who claims it.

Pollard v. Baker, 101 Mass. 259; Oeters v. Aehle, 31 Mo. 380; York v. Sanborn, 47 N. H. 403.

The correctness of an order for the sale of the attached property before judgment, or the determining the propriety of such sale, will not be reviewed, nothing appearing affirmatively impeaching it, but the propriety thereof will be presumed.

McCreery v. Berney Nat. Bank, 116 Ala. 224, 67 Am. St. Rep. 105, 22 So. 577; Runner v. Scott, 150 Ind. 441, 50 N. E. 479; Dunn v. Salter, 1 Duv. 342; Re Le Vay, 125 Fed. 990.

The term "perishable" should receive a liberal rather than a narrow construction, and will embrace property the keeping of which may render it of no value in the end to satisfy the claims, and in this sense

almost any property subject to attachment may be sold as perishable.

McCreery v. Berney Nat. Bank, 116 Ala. 224, 67 Am. St. Rep. 105, 22 So. 577; Young v. Davis, 30 Ala. 213; Schumann v. Davis, 26 Abb. N. C. 125, 13 N. Y. Supp. 575; Southern R. Co. v. Sheppard, 42 S. C. 543, 20 S. E. 481; Anonymous, 18 N. J. L. 26; Mosher v. Bay Circuit Judge, 108 Mich. 579, 66 N. W. 478.

Springer is a bona fide purchaser for value of the dredge, and his title is recognized and protected by the very provisions of the bankruptcy act which opposing counsel contend have destroyed or prevented the acquisition by him of his title.

Clark v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363; Re Franks, 95 Fed. 635.

A bona fide purchaser is one who buys property without notice that some third party has a right to, or interest in, such property, and pays a full and fair price for the same at the time of such purchase, or before he has notice of the claim or interest of such other in the property.

Spicer v. Waters, 65 Barb. 227; Perry, Trusts, p. 218; Alden v. Trubee, 44 Conn. 455.

Mr. Justice Holmes delivered the opinion of the court:

This case comes here upon appeal from a judgment denying the title of the appellant, as trustee in bankruptcy, to property formerly belonging to the bankrupt and sold in this suit by order of the local court. The facts are these. The property in question is a mining dredge. It was attached on February 27, 1906, and a receiver was appointed on March 19. On May 1, a petition was filed for an order directing the dredge to be sold on the ground that it was "of a perishable nature, and liable to be lost or diminished in value before [154] the final adjudication of the "case" within the Compiled Laws of New Mexico, 1897, § 2716, and an order to that effect was made on the same day. The ground of the finding on which the sale was ordered was that the dredge was anchored in an embanked pond fed by a mountain stream subject to heavy floods, and was liable to damage from that source. The sale took place on June 26, and the dredge was bought in good faith and without notice of the defendant's insolvency, at a price of $5,000, paid into court by the appellee, Springer. The sale was confirmed on July 17. But on March 12, 1906, a petition in bankruptcy had been filed in the northern district of Illinois against the Oro Dredging Company, the defendant in this suit. On April 23, the company was adjudged a bankrupt. On July 9, the appellant was appointed trustee, and on July 19 qualified. On August 2, he first appeared in this cause, that being the first notice of the adjudication received by the parties concerned or the court. He filed an intervening petition praying that the order of sale be set aside, the attachment dissolved, and the property turned over to him. The petition, so far as it affects the dredge, was denied, the judgment was affirmed by the supreme court of the territory, and the trustee appealed.

The main ground of the appeal is that by § 70 of the bankruptcy act the title of the trustee related back to the date of the adjudication of bankruptcy, and that, as matter of law, Springer could not be a bona fide purchaser within the proviso of § 67f, saving the title of a bona fide purchaser for value who shall have acquired the property by the attachment without notice or reasonable cause for inquiry. It is argued that filing the petition in bankruptcy was a caveat to all the world (Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269, and that the above proviso can have effect only when the judgment and sale took place before the petition was filed.

We have no occasion to consider the last proposition in order to decide this case, or what effect, if any, the proviso "has [155] upon some language in Conner v. Long, 104 U. S. 228, 26 L. ed. 723, relied upon by the appellant (see Clarke v. Larremore, 188 U. S. 486, 488, 47 L. ed. 555, 557, 23 Sup. Ct. Rep. 363), the proceeding not having been one to enforce the lien of the attachment, but simply an order made on a finding that, in the language of the New Mexico statute, "the interests of both plaintiff and defendant will be promoted by the sale of the property." But the proposition quoted from Mueller v. Nugent must be taken with reference to the facts then before the court, and not as applicable to all intents and purposes. York Mfg. Co. v. Cassell, 201 U. S. 344, 353, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481; Hiscock v. Varick Bank, 206 U. S. 28, 41, 51 L. ed. 945, 953, 27 Sup. Ct. Rep. 681; Re Rathman, 106 C. C. A. 253, 183 Fed. 913, 924, 925. It is true that the estate is regarded as *in custodia legis* from the date of the petition, as against a subsequent attachment. Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 306, 307, 56 L. ed. 208, 213, 32 Sup. Ct. Rep. 96. But in a case like the present, where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and

jurisdiction of the local court were ended before notice of the bankruptcy proceedings. Eyster v. Gaff, 91 U. S. 521, 524, 525, 23 L. ed. 403-405; Scott v. Ellery, 142 U. S. 381, 384, 35 L. ed. 1050, 1051, 12 Sup. Ct. Rep. 233; Jaquith v. Rowley, 188 U. S. 620, 626, 47 L. ed. 620, 623, 23 Sup. Ct. Rep. 369; Frank v. Vollkommer, 205 U. S. 521, 529, 51 L. ed. 911, 915, 27 Sup. Ct. Rep. 596; Revere Copper Co. v. Dimock, 90 N. Y. 33.

The jurisdiction of the territorial court not having been avoided, and that court having the actual custody of the *res*, it had the power to preserve the subject-matter of the controversy that necessarily is incident to such conditions. An illustration, although not a perfect analogy, is to found in United States v. Shipp, 203 U. S. 563, 573, 51 L. ed. 319, 323, 27 Sup. Ct. Rep. 165, 8 Ann. Cas. 265. An appeal had been taken to this court on a petition for habeas corpus, where a prisoner was held under sentence of a state court, and pending the appeal this court had ordered the custody of the appellant to be retained. Shipp was charged with contempt for having 156]been party *to a conspiracy that ended in lynching the prisoner. It was strongly argued that neither the circuit court that refused the writ, nor this court, had any jurisdiction of the case, but it was held that, whether it had jurisdiction or not, until the question was decided, this court had authority from the necessity of the case to preserve the subject of the petition. A similar authority existed in the territorial court until the trustee saw fit to intervene, which, so far as would have appeared at the time of the sale, had anyone known of the bankruptcy proceedings, he might never do. According to Marshall, Ch. J., "a right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use." Jennings v. Carson, 4 Cranch, 2, 26, 2 L. ed. 531, 539. The recognition of a power springing from necessity is of old standing in English law. Eyston v. Studd, 2 Plowd. 459, 466; 2 Co. Inst. 168; Baker v. Baker, 1 Vent. 313. See further Young v. Kellar, 94 Mo. 581, 4 Am. St. Rep. 406, 7 S. W. 293; Betterton v. Eppstein, 78 Tex. 443, 14 S. W. 861; Re Le Vay, 125 Fed. 990, 992.

It is argued that if a sale was necessary, the court of bankruptcy could have directed it under general order 18, 3, and that its power was exclusive. But such a rule would much impair the usefulness of the principle. The trustee, if appointed, may not know the condition of the property, or be prepared to decide. The court having the actual custody of the *res* does not know of the bankruptcy proceedings. There is a necessity for immediate action and no one is ready to act. If the local court, in its ignorance, directs a sale and the purchaser is chargeable with notice that there may be somewhere a petition filed that will destroy his title, the doubt affects the price that he will give, and if the sale turns out effective, the goods have been sacrificed. The very reason of the rule that permits a good title to be given by an authority that has *none contradicts the limitation sup-[157 posed. We are of opinion that the power of the territorial court remained. "For necessity (which is excepted out of the law) the sale in that case is good." 2 Co. Inst. 168. The proceeding is *in rem*, against all the world, the sale stands, and the claim of the trustee is transferred to the proceeds, which ordinarily must be presumed to represent the fair value of the goods and take their place.

Finally it is argued that the court of bankruptcy must decide whether the property is perishable or not, and that this property was not within the power conferred by the statute of New Mexico. The first proposition is little more than the one last discussed in another form. But assuming that for any reason we could go behind the findings on which the case comes here, we see no reason for doing so, if the sale was within the terms of the local act. On that question, as usual, we follow the ruling of the supreme court of the territory unless there are stronger reasons to the contrary than are shown here. Fox v. Haarstick, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457; Albright v. Sandoval, 216 U. S. 331, 339, 54 L. ed. 502, 508, 30 Sup. Ct. Rep. 318. The act as construed, though possibly broader than general order 18, 3, does not go beyond the principle of necessity, at least, as applied to this case.

Judgment affirmed.

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CENTRAL LUMBER COMPANY, Plff. in Err.,

v.

STATE OF SOUTH DAKOTA.

(See S. C. Reporter's ed. 157-162.)

**Constitutional law — equal protection of the laws — prohibiting unfair competition — police power.**

1. Punishing the selling of goods at a

NOTE.—As to forbidding the sale of a commodity in a particular locality at a lower rate than elsewhere, for the purpose of stifling competition—see note to State v. Central Lumber Co. 42 L.R.A.(N.S.) 804.

lower rate in one place than in another, for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer, as is done by S. D. Laws 1907, chap. 131, does not deny the equal protection of the laws because it affects only those selling goods in two or more places in the state, nor because the protection of the statute is not extended to those making only a transitory incursion into the business.

[For other cases, see Constitutional Law, IV. a, 5; IV. c, 3, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — freedom to contract — prohibiting unfair competition — police power.**

2. Liberty to contract is not abridged, contrary to U. S. Const. 14th Amend., by the provision of S. D. Laws 1907, chap. 131, punishing the selling of goods at a lower rate in one place than in another, for the purpose of destroying the competition of any regular established dealer therein, or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer.

[For other cases, see Constitutional Law, IV. b, 7 b; IV. c, 3 a, in Digest Sup. Ct. 1908.]

[No. 51.]

Argued November 13 and 14, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the State of South Dakota to review a judgment which affirmed a conviction in the Circuit Court of McPherson County, in that state, of unfair competition in trade. Affirmed.

See same case below, 24 S. D. 136, 42 L.R.A.(N.S.) 804, 123 N. W. 504.

The facts are stated in the opinion.

Mr. David F. Simpson argued the cause, and, with Messrs. L. L. Brown, William A. Lancaster, and Milton D. Purdy, filed a brief for plaintiff in error:

A law may be partial and discriminatory, in that it only operates in favor of or to protect a particular class of the public, and not other classes similarly situated.

Chicago, M. & St. P. R. Co. v. Westby, — L.R.A.(N.S.)—, 102 C. C. A. 65, 178 Fed. 619.

It is just as incompetent for a state to grant or give unequal rights or privileges or exemptions to one class as it is to impose unequal burdens or liabilities upon another class.

Ibid.

The fact that the language from Yick Wo v. Hopkins, 118 U. S. 370, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, with reference to those absolute and inalienable rights of the individual citizen, should be quoted with approval by the supreme court of Nebraska in State v. Drayton, 82 Neb. 254, 23 L.R.A. (N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768, and by the supreme court of South Dakota in the present case, as supporting the power of the respective states in the particular legislation complained of, shows a startling misconception of the real issue in these two cases.

This act is partial and discriminatory legislation, and violates the equal protection clause of the 14th Amendment, for two reasons:

(1) Because it attempts to make certain acts an offense when committed by one class of persons, and no offense when committed by other classes.

(2) Because it is not the exercise of the so-called police power for the benefit of the public generally, but only for the benefit of a particular and limited class; to wit, the "regular established dealer."

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Yick Wo v. Hopkins, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; State v. Loomis, 115 Mo. 314, 21 L.R.A. 789, 22 S. W. 350; VanZant v. Waddel, 2 Yerg. 260; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Re Jacobs, 98 N. Y. 114, 50 Am. Rep. 636; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; People ex rel. Phillips v. Raynes, 136 App. Div. 417, 120 N. Y. Supp. 1053; Webb v. Downes, 93 Minn. 457, 101 N. W. 966; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Frorer v. People, 141 Ill. 177, 16 L.R.A. 492, 31 N. E. 395; Imboden v. People, 40 Colo. 142, 90 Pac. 623; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313; Ozan Lumber Co. v. Union County Nat. Bank, 76 C. C. A. 218, 145 Fed. 344, 7 Ann. Cas. 390; Peonage Cases, 123 Fed. 671; Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; State ex rel. Star

Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; Lappin v. District of Columbia, 22 App. D. C. 68; State v. Whitcom, 122 Wis. 110, 99 N. W. 468; Ex parte Jentzsch, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 Ann. Cas. 927; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Grainger v. Douglas Park Jockey Club, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997; Ferd Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; Luman v. Hitchens Bros. 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354; Black v. State, 113 Wis. 205 90 Am. St. Rep. 853, 89 N. W. 522.

Where there are two dealers in a particular community, in the same kind of commodities, each may be reasonably supposed to be competing for the same trade. This is called competition, and competition necessarily implies strife for a common object. To say that one dealer is seeking to destroy the competition of his competitor is, in effect, saying no more than that he is seeking to secure the other's trade; and, as long as he seeks to secure that trade by competition, either in the quality of the goods sold, or the service furnished, or the prices named, any damage to the competitor which may result from that competition is necessarily *damnum absque injuria.*

Passaic Print Works v. Ely & W. Dry Goods Co. 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163.

Both the supreme court of Nebraska and the supreme court of South Dakota seem to treat the acts denounced by the statute as malicious injuries at common law. This, however, is clearly unsound, according to all the decisions.

Tuttle v. Buck, 107 Minn. 145, 22 L.R.A. (N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807; State ex rel. Durner v. Aikens, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3.

The distinction which the supreme court of South Dakota has attempted to draw between classifications of persons committing the offense, and of the acts constituting the offense, finds no support in any of the decided cases.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; State ex rel. Mudeking v. Parr, 109 Minn. 147, 134 Am. St. Rep. 759, 123 N. W. 408; State ex rel. Greenwood v. Ramage, 109 Minn. 302, 123 N. W. 823; State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; State v. Walsh, 136 Mo. 400, 35 L.R.A. 231, 37 S. W. 1112; State v. Miksicek, 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Toledo, St. L. & W. R. Co. v. Long, 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912 D, 805; Re Grice, 79 Fed. 627; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Louisville v. Weikel, 137 Ky. 784, 127 S. W. 147, 128 S. W. 587; Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624.

The act in question unreasonably interferes with the right to contract and to hold, use, and dispose of property, and thus deprives the plaintiff in error of its property without due process of law.

Hale v. Henkel, 201 U. S. 43, 74, 50 L. ed. 652, 665, 26 Sup. Ct. Rep. 370; Live Stock Dealers & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Ex parte Virginia, 100 U. S. 366, 25 L. ed. 686, 3 Am. Crim. Rep. 547; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Niagara F. Ins. Co. v. Cornell, 110 Fed. 816; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Gibbs v. Tally, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970; Wynehamer v. People, 13 N. Y. 378; Humes v. Little Rock, 138 Fed. 929; Thomas v. Hot Springs, 34 Ark. 558, 36 Am. Rep. 24; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; Ex parte Hutchinson, 137 Fed. 949; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; People ex rel. Madden v. Dycker,

72 App. Div. 308, 76 N. Y. Supp. 111; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Young v. Com. 101 Va. 853, 45 S. E. 327; Com. v. Moorhead, 7 Pa. Co. Ct. 513; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Hewin v. Atlanta, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 95 N. W. 1098; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; Re Jacobs, 98 N. Y. 107, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377; 52 Am. Rep. 34, 2 N. E. 29; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; Lawton v. Steele, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Cooley, Torts, p. 278; Passaic Print Works v. Ely & W. Dry Goods Co. 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Slaughter-House Cases, 16 Wall. 106, 21 L. ed. 418; San Francisco Lumber Co. v. Bibb, 139 Cal. 325, 73 Pac. 864; Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150; Ex parte Quarg, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; Cody v. Dempsey, 86 App. Div. 335, 83 N. Y. Supp. 899; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Republic Iron & Steel Co. v. State, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; State v. Missouri Tie & Lumber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Block v. Schwartz, 27 Utah, 387, 76 Pac. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; Shaver v. Pennsylvania Co. 71 Fed. 931; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798.

The court declined to hear Mr. **Royal C. Johnson**, Attorney General of South Dakota and Mr. **Samuel W. Clark**, who, with Mr. James M. Brown, filed a brief for defendant in error:

Legislation prohibiting unfair competition and discrimination is not confined to the states of South Dakota and Nebraska alone.

State ex rel. Young v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527; State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496; State v. Fairmont Creamery Co. 153 Iowa, 702, 42 L.R.A.(N.S.) 821, 133 N. W. 895.

The act in question is a police regulation and clearly within the powers of the state.

House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234; McLean v. Arkansas, 211 U. S. 546, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Bacon v. Walker, 204 U. S. 317, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Com. v. Alger, 7 Cush. 53; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

There is no such classification as to render the act repugnant to the 14th Amendment.

McLean v. Arkansas, 211 U. S. 539, 5

L. ed. 315, 29 Sup. Ct. Rep. 206; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Tinsley v. Anderson, 171 U. S. 106, 43 L. ed. 96, 18 Sup. Ct. Rep. 805; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 325, 46 L. ed. 932, 22 Sup. Ct. Rep. 662; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 103 Am. St. Rep. 910, 70 L.R.A. 704, 72 N. E. 231, 1 Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; Batchel v. Wilson, 204 U. S. 41, 51 L. ed. 360, 27 Sup. Ct. Rep. 246; Heath & M. Co. v. Worst, 207 U. S. 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 114; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 106, 43 L. ed. 913, 19 Sup. Ct. Rep. 609; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; Orient Ins. Co. v. Daggs, 172 U. S. 561, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Bacon v. Walker, 204 U. S. 318, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; St. George v. Hardie, 147 N. C. 88, 60 S. E. 921; Holden v. Hardy, 169 U. S. 397, 42 L. ed. 792, 18 Sup. Ct. Rep. 383; National Cotton Oil Co. v. Texas, 197 U. S. 130, 49 L. ed. 694, 25 Sup. Ct. Rep. 379; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

The act is not discriminating legislation.

State v. Fairmont Creamery Co. 153 Iowa, 702, 42 L.R.A.(N.S.) 821, 133 N. W. 895; State ex rel. Young v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527.

The act in question does not unreasonably interfere with the right of contract.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Hopper v. Stack, 69 N. J. L. 562, 56 Atl. 1; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220, 19 Tex. Civ. App. 1, 44 S. W. 996; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Spurr v. Travis, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 Ann. Cas. 250; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; Walp v. Mooar, 76 Conn. 515, 57 Atl. 277; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312.

The sale and distribution of lumber and builders' material in the state of South Dakota is internal commerce of the state, and as such is subject to the police power of the state, and may be regluated by law.

Moore v. American Transp. Co. 24 How. 39, 16 L. ed. 681; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 210, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Com. v. Strauss, 191 Mass. 550, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

The internal commerce of a state—that is, the commerce which is confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government.

Sands v. Manistee River Improv. Co. 123 U. S. 295, 31 L. ed. 149, 8 Sup. Ct. Rep. 113.

The plaintiff in error here is a corporation—a foreign corporation—doing business in this state under a permit granted to it by the state, and a much different rule obtains as to it.

McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 378, 15 Ann. Cas. 645; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. ed. 657, 663, 20 Sup. Ct. Rep. 518; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

There can be no reasonable doubt but that the legislature enacted this law for the purpose of supplementing the anti-trust and anti-monopoly laws already upon our statute books, so as to reach a method of creating a monopoly not within the purview of the former laws.

State v. Fairmont Creamery Co. 153 Iowa, 702, 42 L.R.A.(N.S.) 821, 133 N. W. 895; State ex rel. Young v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527; State v. Central Lumber Co. 24 S. D. 136, 42 L.R.A.(N.S.) 804, 123 N. W. 504.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was found guilty of unfair discrimination under Session Laws of South Dakota for 1907, chap. 131,

and was sentenced to a fine of $200 and costs. It objected in due form that the statute was contrary to the 14th Amendment, but on appeal the judgment of the trial court was sustained. 24 S. D. 136, 42 L.R.A.(N.S.) 804, 123 N W. 504. By the statute anyone "engaged in the production, manufacture, or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section . . than such person . . . charges for such commodity in another section, . . . after equalizing the distance from the point of production," etc., shall be guilty of the crime and liable to the fine.

The subject-matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts, as alleged, with the Constitution of the United States. The grounds on which it is said to do so are that it denies the equal protection of the laws, because it affects the conduct of only a particular 160]class,—those selling goods in *two places in the state,—and is intended for the protection of only a particular class,—regular established dealers; and also because it unreasonably limits the liberty of people to make such bargains as they like.

On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the acts constituting the offense, and it is urged that to punish selling goods in one place lower than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists *without covering* the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

That is not the arbitrary selection that is condemned in such cases as Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247. The 14th Amendment does not prohibit legislation special in character. Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594. It does not prohibit a state from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. Orient Ins. Co. v. Daggs, 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; Quong Wing v. Kirkendall, 223 U. S. 59, 62, 56 L. ed. 350, 351, 32 Sup. Ct. Rep. 192. If a class is deemed to present *a conspicuous example of what[161 the legislature seeks to prevent, the 14th Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other states. State v. Drayton, 82 Neb. 254, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768; State ex rel. Young v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527; State v. Fairmont Creamery Co. 153 Iowa, 702, 42 L.R.A.(N.S.) 821, 133 N. W. 895; State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496.

What we have said makes it unnecessary to add much on the second point, if open, that the law is made in favor of regular

established dealers, but the short answer is simply to read the law. It extends on its face also to those who intend to become such dealers. If it saw fit not to grant the same degree of protection to parties making a transitory incursion into the business, we see no objection. But the supreme court says that the statute is aimed at preventing the creation of a monopoly by means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods. 162] *Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids certain class of dealings, we think it enough to say that as the law does not otherwise encounter the 14th Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this court that we simply refer to Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 567, 568, 55 L. ed. 328, 338, 339, 31 Sup. Ct. Rep. 259, and the cases there cited to illustrate how much power is left in the states. See also Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 442, 54 L. ed. 826, 831, 30 Sup. Ct. Rep. 535; Lemieux v. Young, 211 U. S. 489, 496, 53 L. ed. 295, 300, 29 Sup. Ct. Rep. 174; Otis v. Parker, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168.

Judgment affirmed.

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SOUTHWESTERN BREWERY & ICE COMPANY, Don J. Rankin, Henry Loebs, and Otto Dieckmann, Plffs. in Err.,

v.

JOSEPH SCHMIDT.

(See S. C. Reporter's ed. 162–169.)

**Trial — special findings — judgment.**

1. A master is not entitled to judgment on the special findings in an action by a servant for personal injuries alleged to be due to a defective appliance because one finding was that such appliance was not at the time in such a bad condition that a man of ordinary prudence would not have used it, where another finding was that the master did not use ordinary care in furnishing the appliance and in having it repaired, and another, that the master promised the servant that the appliance should be repaired, as an inducement for him to continue using it, since it is evident that the first above finding meant only that the servant was not negligent in remaining at work.

[For other cases, see Trial, X., in Digest Sup. Ct. 1908.]

**Master and servant — safe place for work — continuing in employment after complaint — promise to repair.**

2. A master may remain liable for a certain time for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed.

[For other cases, see Master and Servant, 82, 83, in Digest Sup. Ct. 1908.]

**Appeal — discretion below — leading questions.**

3. The discretion of the trial court in allowing somewhat leading questions will not ordinarily be reversed by the Federal Supreme Court,—especially where the witness was of foreign birth and did not well understand the questions put to him.

[For other cases, see Appeal and Error, 4438–4453, in Digest Sup. Ct. 1908.]

**Trial — question for jury — sufficiency of evidence.**

4. Whether there is credible evidence to sustain the verdict is a question for the jury, and not for an appellate court.

[For other cases, see Trial, 95–107, in Digest Sup. Ct. 1908.]

**Appeal — assumption contrary to fact — instruction omitted from bill of exceptions.**

5. The Federal Supreme Court will not assume, on writ of error to a territorial supreme court, that the trial court refused to give a pertinent instruction because it is not contained in the bill of exceptions, where the territorial supreme court took notice that such instruction was in fact given.

**Trial — instructions — damages.**

6. The jury were properly instructed as to the measure of damages in an action by a servant against a master for personal injuries, where they were told that they might consider the servant's loss of time with reference to his ability to earn money, the impairment, whether temporary or permanent, of such ability, his disfigurement and pain, past, or reasonably certain to be suffered in the future, and that they should deduct from the amount, if any, the disbursements made under a release which the finding of the jury set aside, although a part of the disbursements were wages during the servant's disability.

[For other cases, see Trial, 602–623, in Digest Sup. Ct. 1908.]

[No. 55.]

Argued and submitted November 14 and 15, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court for the County of Bernalillo, in that territory, in favor of plaintiff in an action by a servant against his master for personal injuries. Affirmed.

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NOTE.—As to continuing work on master's promise to remove a specific cause of danger —*see note* to Illinois Steel Co. v. Mann, 40 *L.R.A. 781.*

See same case below, 15 N. M. 232, 107 Pac. 677.

The facts are stated in the opinion.

Mr. Francis E. Wood argued the cause, and, with Mr. O. N. Marron, filed a brief for plaintiffs in error:

The law imposed on the defendant in this case only the obligation to use reasonable and ordinary care and diligence in keeping the cooker in a reasonably safe condition for use. It did not make him an insurer of the condition of the cooker or of the safety of the plaintiff. To make the defendant liable, it must appear that it knew, or should have known, by a reasonable inspection and examination of the cooker, that it was unsafe for use, and was likely to break and cause damage, and that a reasonably prudent and careful man would not have used it, or supplied it for use. The care necessary to be exercised by the defendant in determining whether or not the cooker was safe to use was such as a reasonably prudent man would exercise if his own person were exposed to the danger.

20 Am. & Eng. Enc. Law 74; Shearm. & Redf. Neg. 4th ed. § 189; Probst v. Delamater, 100 N. Y. 266, 3 N. E. 184; Brymer v. Southern P. Co. 90 Cal. 496, 27 Pac. 371.

This rule applies as well to inspection and repair as to furnishing the original instrument.

26 Cyc. 113–168; Labatt, Mast. & S. § 110; Moore v. Wabash, St. L. & P. R. Co. 85 Mo. 588; Bailey v. Rome, W. & O. R. Co. 139 N. Y. 302, 34 N E. 918.

A promise to change conditions the existence of which is not negligence gives no right of action if injury results from such condition while the promise remains unfulfilled.

Sweeney v. Berlin & J. Envelope Co. 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; Shearm. & Redf. Neg. § 186.

It is the original negligence of the defendant that is the base of the cause of action, and not the promise to repair.

Coin v. John H. Talge Lounge Co. 25 L.R.A.(N.S.) 1179, note; Andrecsik v. New Jersey Tube Co. 73 N. J. L. 664, 4 L.R.A. (N.S.) 913, 63 Atl. 719, 9 Ann. Cas. 1006; International & G. N. R. Co. v. Williams, 82 Tex. 342, 18 S. W. 700; Dunkerley v. Webendorfer Mach. Co. 71 N. J. L. 60, 58 Atl. 94; Obanhein v. Arbuckle, 80 App. Div. 465, 81 N. Y. Supp. 133; Bodie v. Charleston & W. C. R. Co. 61 S. C. 468, 39 S. E. 715; Reiser v. Southern Planing Mill & Lumber Co. 114 Ky. 1, 69 S. W. 1085.

Unless the promise to repair was the procuring or inducing cause of his continuing to use the *cooker, the servant could not be*



excused from assuming the risk incident to its use.

Lewis v. New York & N. E. R. Co. 153 Mass. 73, 10 L.R.A. 513, 26 N. E. 431; Southern P. Co. v. Leash, 2 Tex. Civ. App. 68, 21 S. W. 563; Brewer v. Tennessee Coal, Iron & R. Co. 97 Tenn. 615, 37 S. W. 549; Harris v. Bottum, 81 Vt. 346, 70 Atl. 560; Hollis v. Widener, 221 Pa. 72, 70 Atl. 287; Holloran v. Union Iron & Foundry Co. 133 Mo. 470, 35 S. W. 260.

The rule that leading questions are within the discretion of the trial court to permit is subject to the exception that the allowance of such a question, if apparent abuse of discretion, may amount to reversible error.

Rangel v. State, 22 Tex. App. 642, 3 S. W. 788; Mathis v. Buford, 17 Tex. 152; Tinsley v. Carey, 26 Tex. 350; Wigmore, Ev. § 357.

It was error for the trial court to refuse to charge that the burden was on the plaintiff to establish by a preponderance of evidence that he was incompetent to make a binding contract at the time the release was executed.

Jackson ex dem. Cadwell v. King, 4 Cow. 207, 15 Am. Dec. 354; Jones v. Jones, 137 N. Y. 613, 33 N. E. 479; Taylor v. Buttrick, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507; Myatt v. Walker, 44 Ill. 485; Artrip v. Rasnake, 96 Va. 277, 31 S. E. 4; note to State v. Scott, 36 L.R.A. 731.

The judge's charge has no place in the record proper, and is not properly a part of the record. The document appearing in the record and purporting to be the charge cannot be considered by this court, because in no manner authenticated.

Clune v. United States, 159 U. S. 593, 40 L. ed. 270, 16 Sup. Ct. Rep. 125.

Instructions to the jury do not become a part of the record unless included within the bill of exceptions; and, where merely filed in the cause, cannot be considered by the appellate court for any purpose.

Territory v. McGrath, 16 N. M. 202, 114 Pac. 364.

The measure of damages for loss of earning capacity is the difference between what was earned before the injury, and what he would be able to earn thereafter (Braithwaite v. Hall, 168 Mass. 38, 46 N. E. 398); and the injured party is required to use all reasonable efforts to reduce the damages.

4 Sutherland, Damages, § 1255.

If the party has received compensation or wages between the time of the injury and the trial, he can recover nothing for loss of such wages.

4 Sutherland, Damages, § 1249; Drinkwater v. Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 So. 363.

Wherever the plaintiff has been able to earn as much since as before the injury, the jury should not consider the item of impairment of earning capacity.

8 Am. & Eng. Enc. Law, 654; Kane v. Savannah, F. & W. R. Co. 85 Ga. 858, 11 S. E. 493; Mexican C. R. Co. v. Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282; Drinkwater v. Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624.

The evidence to justify a recovery of damages for future pain and suffering must be so certain and definite that its existence is not left to the mere imagination or guesswork of the jury.

Shultz v. Griffith, 103 Iowa, 150, 40 L.R.A. 117, 72 N. W. 445; Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 63 N. E. 1008; Carter v. Nunda, 55 App. Div. 501, 66 N. Y. Supp. 1059; 6 Thomp. Neg. 2794.

Messrs. Francis E. Wood, O. N. Marron, Aldis B. Browne, Alexander Britton, and Evans Browne filed a separate brief for plaintiffs in error.

Mr. Neill B. Field submitted the cause for defendant in error:

The special findings are harmonious with each other and with the general verdict.

Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612, New Jersey & N. Y. R. Co. v. Young, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723; Gowen v. Harley, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973; Detroit Crude-Oil Co. v. Grable, 36 C. C. A. 94, 94 Fed. 73; Chicago Drop Forge & Foundry Co. v. Van Dam, 149 Ill. 337, 36 N. E. 1024; Breckenridge Co. v. Hicks, 94 Ky. 362, 42 Am. St. Rep. 361, 22 S. W. 554; Lutz v. Atlantic & P. R. Co. 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912; Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; 2 Bailey, Mast. & S. § 3073; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Crookston Lumber Co. v. Boutin, 79 C. C. A. 368, 149 Fed. 680.

The jury saw the witnesses and heard their testimony; and although the defendant in error was contradicted by the testimony of the doctor, the lawyer, and the general manager of the plaintiff in error, the jury accepted the testimony of the defendant in error as to all matters of conflict.

Northern P. R. Co. v. Urlin, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. 64 C. C. A. 180, 129 Fed. 668; Eli Min. & Land Co. v. Carleton, 47 C. C. A. 166, 108 Fed. 24.

It is not necessary in a civil case in the territory of New Mexico to have the instructions and the decision of the court granting or refusing them, and the motion for a new trial, incorporated in the bill of exceptions, but when they are in the transcript, the court can consider them.

Schofield v. Territory, 9 N. M. 526, 56 Pac. 306.

On a question of practice based upon local statutes and procedure, this court habitually follows the local court.

Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Fox v. Haarstick, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457; Armijo v. Armijo, 181 U. S. 558, 45 L. ed. 1000, 21 Sup. Ct. Rep. 707; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695; Lewis v. Herrera, 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412; English v. Arizona, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658; Santa Fé County v. New Mexico, 215 U. S. 296, 54 L. ed. 202, 30 Sup. Ct. Rep. 111.

The trial court, in its discretion, might have refused to charge the jury as to the burden of proof, and such refusal would not have constituted error.

Chicopee Bank v. Seventh Nat. Bank, 8 Wall. 641, 19 L. ed. 422; J. M. Robinson, N. & Co. v. Tuscaloosa Mills, 106 C. C. A. 306, 183 Fed. 966; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843.

The charge upon the measure of damages is amply supported by authority.

4 Sutherland, Damages, 3d ed. §§ 1241, 1242, 1246, 1251; Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 34, 124 Fed. 142; Union P. R. Co. v. Jones, 1 C. C. A. 282, 4 U. S. App. 115, 49 Fed. 343; Swensen v. Bender, 51 C. C. A. 627, 114 Fed. 1; Kliegel v. Aitken, 94 Wis. 432, 35 L.R.A. 249, 59 Am. St. Rep. 900, 69 N. W. 67; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; Chicago, M. & St. P. R. Co. v. Lindeman, 75 C. C. A. 18, 143 Fed. 946.

The jury found specially every fact necessary to fix the liability of the plaintiff in error.

Emerson v. Metropolitan L. Ins. Co. 185 Mass. 318, 70 N. E. 200; Germaine v. Muskegon, 105 Mich. 213, 63 N. W. 78; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823.

Messrs. Neill B. Field, Joseph W. Cox, and John A. Kratz, Jr., filed a separate brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action by a servant for personal injuries. The declaration alleged that it was the plaintiff's duty to cook brewer's

mash in a cooker; that the cooker was so out of repair that the plaintiff was unwilling to use it, but that the defendant requested him to go on until it could be repaired, and promised that it should be 168]within a very *short time; that the plaintiff did go on, relying upon the promise, that the cooker gave way, and the plaintiff was badly scalded. The defendant denied the allegations and pleaded plaintiff's contributory negligence and a release. In a replication the plaintiff denied his mental capacity at the time the release was made. There was a verdict for the plaintiff, subject to special findings which by the law of New Mexico control (Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421), the defendant alleged exceptions. These were overruled by the supreme court of the territory and the judgment affirmed.

The first point argued is that the defendant was entitled to judgment on the special findings, because the fourth was that the cooker at the time was not in such a bad condition that a man of ordinary prudence would not have used the same. But the eleventh was that the defendant did not use ordinary care in furnishing the cooker and in having it repaired, and the sixth, that the defendant promised the plaintiff that the cooker should be repaired as an inducement for him to continue using it. So it is evident that the fourth finding meant only that the plaintiff was not negligent in remaining at work. Whatever the difficulties may be with the theory of the exception (1 Labatt, Mast. & S. chap. 22, § 423), it is the well-settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed. Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612.

Next it is argued that the judgment should be set aside because the court allowed somewhat leading questions to be asked to bring out the plaintiff's reliance upon the defendant's promise. If this matter is open, it is enough to say that the plaintiff is a German, and seemingly did 169]not *understand the questions put to him very well, and that it would require a very much stronger case than this to induce an appellate court to revise the discretion of the trial court, and grant a new trial upon such a ground. Northern P. R. Co. v. Urlin, 158 U. S. 271, 273, 39 L. ed. 977, 980, 15 Sup. Ct. Rep. 840. The next point, that there was no credible evidence to sustain the verdict, so far as it does not rest on the preceding one, was for the jury, not for this court.

Fourthly, it is argued that the court erred in refusing to instruct the jury that the burden was on the plaintiff to prove his incompetence at the time of making the release. It seems from the record that an instruction to that effect was given, but that it was omitted from the bill of exceptions. The supreme court of the territory took notice of the fact, and we certainly should not go behind their decision upon a matter of local practice in order to reverse a judgment upon a technicality and an assumption contrary to the fact. Santa Fé County v. New Mexico, 215 U. S. 296, 54 L. ed. 202, 30 Sup. Ct. Rep. 111.

Finally it is said that the instructions as to the measure of damages were wrong. The court instructed the jury that they might consider the plaintiff's loss of time with reference to his ability to earn money, the impairment of his capacity to earn money, whether temporary or permanent, disfigurement, and pain, past or reasonably certain to be suffered in the future, and that they should deduct from the amount, if any, the disbursements made under the release which the finding of the jury set aside. It is objected that a part of the disbursements were wages during the plaintiff's disability; but it did not matter whether they were or not if the transaction was rescinded. With regard to future pain, etc., the judge did not go beyond the conservative rule laid down in such cases as Chicago, M. & St. P. R. Co. v. Lindeman, 75 C. C. A. 18, 143 Fed. 946, 950. The rest of the argument is a discussion of evidence, with which we have nothing to do.

Judgment affirmed.

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*TOBIAS MILLER, Plff. in Err.,[170

v.

SECONDO GUASTI and Juan A. Bernard.

(See S. C. Reporter's ed. 170, 171.)

**Error to state court — scope of review — finding of fact.**

1. A finding of the highest court of the state that the evidence sustained the finding below that a bankrupt had actual knowledge of the residence and postoffice address of certain judgment creditors who had no knowledge of the bankruptcy proceedings until long after the discharge is binding on the

NOTE.—As to review of questions of fact on writ of error to a state court—see notes to Smiley v. Kansas, 49 L. ed. U. S. 546, and Missouri ex rel. Hill v. Dockery, 63 L.R.A. 577.

Federal Supreme Court, on writ of error to the state court.

[For other cases, see Appeal and Error, 2175-2208, in Digest Sup. Ct. 1908.]

**Bankruptcy — discharge — schedule and notice to creditors.**

2. Debts owing to judgment creditors were not properly scheduled as required by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), §§ 7, 17, in order to be released by the discharge, where the residence of such judgment creditors, though known, was not stated, as required by the statute, and they did not have actual knowledge of the bankruptcy proceedings until long after their termination.

[For other cases, see Bankruptcy, 388-390, in Digest Sup. Ct. 1908.]

[No. 478.]

Submitted October 15, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, First Department, which had in turn affirmed an order of the Supreme Court for the County of New York at Special Term, refusing to cancel a judgment because of a discharge in bankruptcy Affirmed.

See same case below in court of appeals, 203 N. Y. 259, 96 N. E. 416.

Mr. **William C. Rosenberg** submitted the cause for plaintiff in error. Mr. Jesse S. Epstein was on the brief.

Mr. **Albert M. Yuzzolino** submitted the cause for defendants in error.

Memorandum opinion, by direction of the court, by Mr. Justice **Day**:

Tobias Miller, plaintiff in error herein, obtained a discharge in bankruptcy in the district court of the United States for the southern district of New York. Among his liabilities was a judgment rendered in the city court of New York April 16, 1895, in favor of the defendants in error, Guasti and Bernard. Miller applied at a special term of the supreme court of the county of New York for an order canceling the judgment under § 1268 of the Code of Civil Procedure, because of the discharge in bankruptcy. The supreme court held that he was not entitled to have the judgment canceled. The order was affirmed by the appellate division, and its order was affirmed by the court of appeals. 203 N. Y. 259, 96 N. E. 416. That order being entered in the supreme court, this writ of error was sued out. A motion is made here to affirm the judgment of the state court.

*From the facts found in the court of [171 appeals, it appears that Miller, in his bankruptcy schedules, set forth that the residence and occupation of Guasti and Bernard, holders of the judgment, were "Unknown.—California." The court further found that Guasti and Bernard knew nothing of the proceedings in bankruptcy until long after the discharge, and first learned of them August 23, 1910. The court of appeals further found that the affidavits filed sustained the finding of the special term that Miller had actual knowledge of the residence and postoffice address of Guasti and Bernard. Such finding of fact is binding upon this court, and is, moreover, amply sustained by the record.

The bankruptcy act provides, § 17:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." [30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1496.]

Section 7 of the bankruptcy act requires a bankrupt to file in court a schedule, made under oath, containing, among other things, "a list of his creditors, showing their residences, if known; if unknown, that fact to be stated," etc It therefore appears that the bankruptcy act does not extend the protection of the discharge to debts not duly scheduled in time for proof and allowance.

In view of the facts found, it is manifest that the debt of Guasti and Bernard was not scheduled as it should have been in order to make the discharge operative as to it. Their residence, though found to be known, was not stated, as required by the act, and the creditor did not have actual knowledge of the bankruptcy proceedings until long after their termination. We think the correctness of the judgment is so plain as not to require further argument.

Affirmed.

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*FOUR HUNDRED AND FORTY-[172 THREE CANS OF FROZEN EGG PRODUCT, H. J. Keith Company, Claimant, Appt. and Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 172-184.)

**Appeal — mode of review — seizures under pure food act.**

1. A decree of a Federal district court

dismissing, after a trial without a jury, a libel having for its object the condemnation of food products seized upon land under the pure food act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), is reviewable in the circuit court of appeals by writ of error, and not by appeal, notwithstanding the provision of § 10 of that act that the "proceedings of such libel cases shall conform as near as may be to the proceedings in admiralty, except that each party may demand trial by jury of any issue of fact joined," since such provision cannot be deemed to intend to liken such proceedings to those in admiralty beyond the seizure of the property by process *in rem*, then giving the case the character of an action at law with trial by jury if demanded, and with the review already obtaining in actions at law

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

**Appeal — mode of review — consent.**

2. Writ of error being the proper mode of reviewing in the circuit court of appeals a decree of a district court dismissing, after trial without a jury, a libel seeking the condemnation of food products seized upon land under the pure food act of June 30, 1906, neither the action of the court nor the consent of the parties could confer jurisdiction of an appeal.

[For other cases, see Appeal and Error, I. c, in Digest Sup. Ct. 1908.]

**Appeal — judgment — remanding for dismissal.**

3. The Federal Supreme Court, having acquired appellate jurisdiction of a decree of a circuit court of appeals which had proceeded without jurisdiction to revise on appeal a decree of a district court which was in fact reviewable only by writ of error, will reverse the judgment of the circuit court of appeals, and remand the case to that court, with instructions to dismiss the appeal for want of jurisdiction.

[For other cases, see Appeal and Error, 5481–5494, in Digest Sup. Ct. 1908.]

[No. 590.]

Argued October 24 and 25, 1912. Decided December 2, 1912.

APPEAL from and IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed on appeal a judgment of the District Court for the District of New Jersey, dismissing a libel seeking the condemnation of food products seized under the pure food act. Reversed and remanded, with instructions to dismiss the appeal to the Circuit Court of Appeals for the want of jurisdiction.

See same case below, 113 C. C. A. 457, 193 Fed. 589.

The facts are stated in the opinion.

Mr. Ralph S. Rounds argued the cause and filed a brief for appellant and plaintiff in error:

An information under the provisions of the pure food act for the condemnation of property is, like an information for forfeiture under the confiscation act and under the revenue laws, a common-law proceeding.

The Sarah, 8 Wheat. 391, 5 L. ed. 644; Morris's Cotton (Morris v. United States) 8 Wall. 507, 19 L. ed. 481; Armstrong's Foundry, 6 Wall. 766, 769, 18 L. ed. 882, 884; St. Louis Street Foundry, 6 Wall. 770, 18 L. ed. 884; United States v. Emholt, 105 U. S. 414, 26 L. ed. 1077; United States v. Bales of Cotton, 154 U. S. 556, and 18 L. ed. 889, 14 Sup. Ct. Rep. 1212; Union Ins. Co. v. United States, 6 Wall. 759, 18 L. ed. 879.

The objection that the case was not properly before the circuit court of appeals on appeal is jurisdictional and could not be waived.

Brooks v. Norris, 11 How. 204, 13 L. ed. 665; Barry v. Mercein, 5 How. 103, 12 L. ed. 70; United States v. Curry, 6 How. 106, 12 L. ed. 363; Jones v. La Vallette, 5 Wall. 579, 18 L. ed. 550; Sarchet v. United States, 12 Pet. 143, 9 L. ed. 1033; Ballance v. Forsyth, 21 How. 389, 16 L. ed. 143; Kelsey v. Forsyth, 21 How. 85, 16 L. ed. 32; The Lucy, 8 Wall. 307, 19 L. ed. 394; United States v. Emholt, 105 U. S. 414–416, 26 L. ed. 1077, 1078; Stevens v. Clark, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 321; De Lemos v. United States, 46 C. C. A. 196, 107 Fed. 121; Nelson v. Huidekoper, 13 C. C. A. 658, 30 U. S. App. 88, 66 Fed. 616; Taylor, Jurisdiction, § 119.

The practice followed by this court in cases where the trial court or intermediate appellate court is without jurisdiction is to reverse the decree and to direct the inferior court to dismiss the proceeding.

Mordecai v. Lindsay, 19 How. 199, 15 L. ed. 624; Stickney v. Wilt, 23 Wall. 150, 162, 23 L. ed. 50, 54; United States v. Huckabee, 16 Wall. 414, 435, 436, 21 L. ed. 457, 465.

Unless a jury is waived, a proceeding of condemnation under the pure food act, being a common-law proceeding, must be tried before a jury, unless the provisions of U. S. Rev. Stat. § 566, U. S. Comp. Stat. 1901, p. 461, have been modified or repealed by the provisions of that act.

Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 269, 21 L. ed. 493, 498.

There is no express provision that in seizure cases under the pure food act trial of issues of fact may be had without a jury; and considering the constitutional provision and the history of similar legislation in connection with the wording and structure of the statute, there is no reasonable in

plication that the pure food act was meant to modify or repeal § 566 of the Revised Statutes.

Voorhees v. Jackson, 10 Pet. 449, 471, 9 L. ed. 490, 499; Minis v. United States, 15 Pet. 423, 445, 10 L. ed. 791, 799; White v. United States, 191 U. S. 545, 551, 48 L. ed. 295, 297, 24 Sup. Ct. Rep. 171; Wood County v. Lackawana Iron & Coal Co. 93 U. S. 619, 624, 23 L. ed. 989, 991; Cope v. Cope, 137 U. S. 682, 686, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222; Morris's Cotton (Morris v. United States) 8 Wall. 507, 19 L. ed. 481; Union Ins. Co. v. United States, 6 Wall. 759, 18 L. ed. 879; Rosencrans v. United States, 165 U. S. 257, 262, 41 L. ed. 708, 710, 17 Sup. Ct. Rep. 302.

There was no statute in existence which provided for a trial in the district court without a jury, although, the parties having waived a jury, the judgment after trial by the district court was not erroneous.

Kearney v. Case, 12 Wall. 275, 20 L. ed. 395; Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96; Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91.

The reason is twofold: First, because a trial by the court in a common-law case without a jury is a proceeding unknown to the common law, and the judge in such case acts as a judicial arbitrator, and not as a court.

Kearney v. Case, 12 Wall. 275, 283, 20 L. ed. 395, 397; Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96; Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91.

Second, because, being a common-law proceeding, appeal will not lie, and error will only lie to review the verdict of a jury as to matters of law; and there is no method provided by the statutes of the United States to review a judgment of the district court where trial is had without a jury.

Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96; Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; Boogher v. New York L. Ins. Co. 103 U. S. 90, 98, 26 L. ed. 310, 312; United States v. St. Louis, I. M. & S. R. Co. 94 C. C. A. 441, 169 Fed. 74; United States v. Cleage, 88 C. C. A. 249, 161 Fed. 86; Dirst v. Morris, 14 Wall. 484, 20 L. ed. 722; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Cooper v. Omohundro, 19 Wall. 65, 22 L. ed. 47; Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 321; Wilson v. Merchants' Loan & T. Co. 183 U. S. 121, 46 L. ed. 113, 22 Sup. Ct. Rep. 55; Distilling & Cattle Feeding Co. v. Gottschalk Co. 13 C. C. A. 618, 24 U. S. App. 638, 66 Fed. 609; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 241; Bond v. Dustin, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; Dundee Mortg. & Trust Invest. Co. v. Hughes, 124 U. S. 157, 31 L. ed. 357, 8 Sup. Ct. Rep. 377; Spalding v. Manasse, 131 U. S. 65, 33 L. ed. 86, 9 Sup. Ct. Rep. 649.

The phrase "shall conform as near as may be" requires only such conformity as is reasonable and convenient under the circumstances.

Indianapolis & St. Louis R. Co. v. Horst, 93 U. S. 291, 300, 301, 23 L. ed. 898, 901; Phelps v. Oaks, 117 U. S. 236, 239, 29 L. ed. 888, 889, 6 Sup. Ct. Rep. 714; Shepard v. Adams, 168 U. S. 618, 625, 626, 42 L. ed. 602, 604, 605, 18 Sup. Ct. Rep. 214.

The word "proceedings" obviously refers only to the mode of proceeding, and not to the extent of the jurisdiction or power of the supreme court to review circuit courts of appeals' judgments.

Bronson v. Schulten, 104 U. S. 410, 417, 26 L. ed. 797, 799; St. Joseph Mfg. Co. v. Harrington, 53 Iowa, 382, 5 N. W. 568.

In the somewhat analogous case of the conformity statutes, by which Congress has provided that procedure at law in the Federal courts shall conform to the state practice, it is uniformly held by this court that the statutes do not apply to proceedings for review.

Parsons v. Bedford, 3 Pet. 433, 444, 7 L. ed. 732, 736; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 553, 32 L. ed. 508, 511, 9 Sup. Ct. Rep. 150.

It is undisputed that a pure food case is not "an admiralty case."

Ex parte Graham, 10 Wall. 541, 19 L. ed. 981; Ex parte Waples, 154 U. S. 579, and 38 L. ed. 1088, 14 Sup. Ct. Rep. 1214.

Lack of jurisdiction cannot be waived even by participating in a trial.

Perez v. Fernandez, 202 U. S. 80, 100, 50 L. ed. 942, 949, 26 Sup. Ct. Rep. 561.

Assistant Attorney General Adkins argued the cause, and, with Mr. Louis G. Bissell, filed a brief for appellee and defendant in error:

The parties have the right to waive a jury trial.

Parsons v. Armor, 3 Pet. 413, 7 L. ed. 724.

And where the parties avail themselves of this right, there is nothing to prevent Congress authorizing the review of the case by appeal.

Hecht v. Boughton, 105 U. S. 235, 26 L. ed. 1018; Story v. Black, 119 U. S. 235, 30 L. ed. 341, 7 Sup. Ct. Rep. 176; United States v. Union P. R. Co. 105 U. S. 263, 26 L. ed. 1021; Grayson v. Lynch, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; Apache County v. Barth, 177 U. S. 538, 44 L. ed. 878, 20 Sup. Ct. Rep. 718; William W. Bierce v. Hutchins, 205 U. S. 340, 51 L. ed.

828, 27 Sup. Ct. Rep. 524; Elliott v. Toeppner, 187 U. S. 327, 334, 335, 47 L. ed. 200, 203, 23 Sup. Ct. Rep. 133.

The word "proceedings" covers all steps taken in a case, from its inception; including those necessary to remove the case to a higher court for review.

O'Dea v. Washington County, 3 Neb. 118.

It is well settled, and the doctrine was reaffirmed at the last term in Campbell v. United States, 224 U. S. 99, 56 L. ed. 684, 32 Sup. Ct. Rep. 398, that in suits at common law, in the district courts, the waiver of the jury trial deprives the parties of the right to review the judgment, either upon the facts or the law, except for such questions of law as are presented by the pleadings. Since proceedings under the food and drugs act are to be instituted in the district courts, this doctrine would apply to them. It is incredible that Congress, after plainly inviting the claimant to waive his right to trial by jury, meant to deprive him of the right of appeal. This imputation of bad faith is completely met by giving to the words used their plain meaning. It follows that while Congress deemed trial by the court desirable, it was intended to provide for the review of such trials as in admiralty by appeal.

United States v. 779 Cases of Molasses, 98 C. C. A. 197, 174 Fed. 327.

Mr. Justice Day delivered the opinion of the court:

This case is here on both writ of error to and appeal from a decree of the circuit court of appeals for the third circuit, reversing the judgment of the United States district court for the district of New Jersey, dismissing a libel brought by the United States which had for its object the 178]condemnation of 443 *cans of frozen egg product seized under the pure food act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354).

The United States filed its libel alleging that 443 cans of frozen egg product, in the possession of the Merchants' Refrigerating Company at Jersey City, New Jersey, consisted in whole or in part of a "filthy, decomposed, and putrid animal, to wit, egg substance," and praying for their condemnation. At the trial the issues were narrowed so as to exclude filthy and putrid substances, leaving the charge to stand as to decomposed substance. Three hundred and forty-two cans were seized. The H. J. Keith Company appeared and claimed the goods, denying the charges concerning them. The case was tried without a jury, to the district judge, who entered a decree dismissing the libel. *The United States took* an appeal to the circuit court of appeals, and, after consideration in that court, the decree dismissing the libel was reversed, and. upon the facts, a decree of condemnation in favor of the government was entered. (113 C. C. A. 457, 193 Fed. 589.) The claimant, the H. J. Keith Company, thereupon appealed to this court, and also sued out this writ of error to the same decree.

We are met at the outset with a question of jurisdiction. Section 10 of the pure food act provides:

"That any article of food . . . that is adulterated or misbranded within the meaning of this act, and is being transported from one state . . . to another for sale, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. . . . The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."

*It will be observed that the last[179 sentence of the section provides that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." The contention of the government upon this question of jurisdiction is, that the words, "conform, as near as may be, to the proceedings in admiralty," mean, except in cases where jury trial is demanded, to include appellate proceedings, as well as original proceedings in the district court, and therefore the review of the judgments of the district court would be by appeal to the circuit court of appeals, as in admiralty cases under the circuit court of appeals act (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), and under the Judicial Code (36 Stat. at L. 1087, 1133, sec. 128, chap. 231, U. S. Comp. Stat. Supp. 1911, pp. 128, 193). If that is a proper construction of the statute, then the circuit court of appeals had the right to review the case upon the facts and enter a final decree, which, under the circuit court of appeals act and Judicial Code, would be reviewable here only upon writ of certiorari.

The appellant, also plaintiff in error, contends that the seizure being upon land, the proceeding was at law, and reviewable only upon writ of error in the circuit court of

appeals; that the attempted appeal did not give the circuit court of appeals jurisdiction, and that upon the writ of error here this court should reverse the judgment and remand the case to that court, with directions to dismiss the appeal.

The determination of this controversy requires some examination of previous legislation, and of the decisions of this court, interpreting such legislation, as to the nature and extent of the jurisdiction of the district courts of the United States in seizure cases.

The judiciary act of 1789 (1 Stat. at L. 76, § 9, chap. 20) gave to the district courts:

180] *"Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; and . . . also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States."

In the case of The Sarah, 8 Wheat. 391, 5 L. ed. 644, a libel was filled against 422 casks of wine, alleging a forfeiture by false entry. It appearing in the course of the trial that the seizure was made on land, it was held that his court could not review the case save upon writ of error. Chief Justice Marshall, delivering the opinion of the court, said (p. 394):

"By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of 10 tons burthen and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of United States v. La Vengeance (reported in 3 Dall. 297, 1 L. ed. 610), United States v. The Sally (in 2 Cranch, 406, 2 L. ed. 320), and United States v. The Betsy (in 4 Cranch, 443, 2 L. ed. 673), that the trial is to be by the court.

"Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals; and can no more be blended than a court of chancery with a court of common law."

A statute, practically the same, with some slight changes, was embodied in § 563 of the Revised Statutes, *subdivision 8[181 (U. S. Comp. Stat. 1901, p. 457), giving the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction . . . and of all seizures on land and on waters not within admiralty and maritime jurisdiction," the subdivision mentioned omitting the provision found in the section of the judiciary act of 1789, to which we have referred, as to seizures "within their respective districts," and including cases of "seizures on land and on waters not within the admiralty and maritime jurisdiction." Under this statute it has been uniformly held that the district court, as to seizures on land, proceeds as a court of common law, with trial by jury, and not as a court of admiralty. United States v. Winchester, 99 U. S. 372, 25 L. ed. 479.

Questions analogous to the one here came before this court in construing the confiscation acts enacted in 1861 [12 Stat. at L. 255, 319, chaps. 3, 60, U. S. Comp. Stat. 1901, pp. 3615, 3614] and 1862 [12 Stat. at L. 589, chap. 195, U. S. Comp. Stat. 1901, p. 3623]. This court, in Union Ins Co. v. United States, 6 Wall. 759, 18 L. ed. 879, construed the act of Congress of August 6, 1861, entitled, "An Act to Confiscate Property Used for Insurrectionary Purposes." That act provided for the seizure of such property and its condemnation in the district or circuit court having jurisdiction of the amount, or in admiralty in any district in which the property might be seized, and authorized the Attorney General to institute proceedings of condemnation. In that case it was held that in the condemnation of real estate or property on land the proceedings were to be shaped in general conformity to the practice in admiralty, but in respect to trial by jury and exceptions to evidence the proceedings should conform to the course of proceeding by information on the common-law side of the court. It was held that where proceedings for the forfeiture of real estate were had in conformity with the practice in courts of admiralty, they could not be reviewed in this court by appeal, and that the case could come here only for the purpose of reversing the decree and directing a new trial.

In the case of Morris's Cotton (Morris v. United States) 8 Wall. 507, 19 L. ed. 481, this court *had under considera-[182 tion the acts of 1861 and of July 17, 1862, which act provided (12 Stat. at L. 589, 591, § 7, chap. 195, U. S. Comp Stat. 1901, p. 3623) for the institution of proceedings in

the name of the United State in any district court, etc., where the property might be found, etc., "which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." In the Morris Case it was said:

"Where the seizure is made on navigable waters, within the 9th section of the judiciary act, the case belongs to the instance side of the district court; but where the seizure was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.

"Seizures, when made on waters which are navigable from the sea by vessels of 10 or more tons burden, are exclusively cognizable in the district courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common-law suits, and can only be removed into this court by writ of error."

This jurisdiction of the district court was known to Congress at the time it passed the pure food act, as were the decisions of this court construing the former acts of Congress; and it declared that such proceedings shall conform to those in admiralty, as near as may be, giving to either party, however, the right to demand a trial by jury in case of issues of fact joined. We think this act must be held to have been passed not to confer a new jurisdiction upon the district court, but in recognition of the jurisdiction already created in seizures upon land and water. The act makes no reference, in conforming the proceedings as near as may be to those in admiralty, to appellate procedure. It leaves that to be determined by the nature of the case and the statutes already in force. It is true that the right of trial by jury is 183]preserved, where demanded *by either party. We think Congress inserted this provision with a view to removing any question as to the constitutionality of the act. It was held under the confiscation acts, although no such specific provision is contained, that the action provided was one at common law, with a right to trial by jury. The 7th Amendment to the Constitution preserves the right of trial by jury in suits at common law involving more than $20, and provides that no fact tried by a jury shall be reviewed otherwise than according to the rules of the common law. Having in mind these provisions, and, as well, the construction of the previous acts, we think it was the purpose of Congress to leave no doubt as to the right of trial by jury in the law proceeding for condemnation which the act intended to provide.

These proceedings for the seizure and condemnation of property which is impure or adulterated are intended to be, in a sense, summary, and yet the statute, as we have construed it, gives the owner a right to a hearing in a court of record, with a right of review upon questions of law by writ of error in the circuit court of appeals; and, where more than $1,000 is involved, finally in this court (§ 6 of the circuit court of appeals act). It is to be noted in this connection that where the examination of specimens of food or drugs, made by the Department of Agriculture, shows that the articles are adulterated or misbranded, the parties from whom the specimens were obtained are (§ 4 of the act) given a hearing before the matter is certified to the district attorney by the Secretary of Agriculture.

We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process *in rem*, then giving the case the character of a law action, with trial by jury if demanded, and with the review already obtaining in actions at law. It is true that, if the action is tried in the district court without a *jury, the circuit court of[184 appeals is limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding. Campbell v. United States, 224 U. S. 99, 56 L. ed. 684, 32 Sup. Ct. Rep. 398. But the party on jury trial may reserve his exceptions, take a bill of exceptions, and have a review upon writ of error in the manner we have pointed out.

It is insisted for the government that inasmuch as the hearing in the circuit court of appeals upon appeal was without objection by the claimant, the jurisdictional objection was waived. We cannot take that view As we construe the statute, the circuit court of appeals had no jurisdiction upon the appeal, and neither the action of the court nor the consent of the parties could give it. Leo Lung On v. United States, 86 C. C. A 513, 159 Fed. 125; Jones v. La Vallette, 5 Wall. 579, 18 L. ed. 550; United States v. Emholt, 105 U. S. 414, 26 L. ed. 1077; Perez v. Fernandez, 202 U. S. 80, 100, 50 L. ed. 942, 949, 26 Sup Ct. Rep. 561.

As the Circuit Court of Appeals, in our opinion, proceeded without jurisdiction by reason of the appeal, this court, having acquired jurisdiction, should reverse the judgment of the Circuit Court of Appeals, and remand the case to that court, with instructions to dismiss the appeal for want of jurisdiction. Union & Planters' Bank v.

Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

Judgment accordingly.

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TOYOTA, Plff. in Err.,
v.
TERRITORY OF HAWAII.

(See S. C. Reporter's ed. 184–192.)

**Error to Hawaiian supreme court — scope of review — Federal question.**

1. The ruling of the Hawaiian supreme court that daily sales of fish in basket lots to the highest bidder were sales at public auction, within the meaning of Haw. Rev. Laws, § 1343, prescribing a license fee, although bids were accepted only from retail dealers or persons conducting fish tables at the market, presents no Federal question which, under the act of April 30, 1900 (31 Stat. at L. 141, chap. 339), § 86, can be reviewed on a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, III. d, 5, in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — classification — license fee.**

2. The discrimination between the district of Honolulu and other districts in the amount of the fee imposed by Haw. Rev. Laws, § 1343, for a license to make sales at auction, which is $600 for the district of Honolulu, and $15 for each other taxation district, is not so arbitrary or unreasonable as to render the statute unconsti-

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Note.—As to questions reviewable by United States Supreme Court on writ of error—see note to Parks v. Turner, 13 L. ed. U. S. 883.

As to limit of amount of license fees—see note to State ex rel. Toi v. French, 30 L.R.A. 415.

Gradation of license fees according to volume of business or capital employed—see note to Salt Lake City v. Christensen Co. 17 L.R.A.(N.S.) 898.

As to discrimination with respect to occupation tax based on classification of municipalties—see note to Hager v. Walker, 15 L.R.A.(N.S.) 195.

**Appellate jurisdiction of Federal Supreme Court over Hawaiian courts.**

The jurisdiction of the Supreme Court of the United States to review judgments of the courts of the territory of Hawaii was, under the act of April 30, 1900 (31 Stat. at L. 141, chap. 339), § 86, to be measured by the power conferred upon the former court to review judgments of state courts. Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

The failure of the record to show that any Federal question was raised or suggested before the assignment of error in the Federal Supreme Court precludes the maintenance of a writ of error from that court under this statute, to review a judgment of the Hawaiian supreme court. Honolulu Rapid Transit & Land Co. v. Wilder, 211 U. S. 144, 53 L. ed. 124, 29 Sup. Ct. Rep. 46.

The dismissal on motion of a writ of error to the supreme court of the territory of Hawaii, which is governed by the principles controlling writs of error to state courts, will be ordered, instead of granting a motion to affirm, where the subject-matter of the controversy is not inherently Federal, and the only Federal question raised has been so explicitly decided by the Supreme Court of the United States in accordance with the ruling of the lower court as to foreclose further argument on the subject. Equitable *Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.*

The reader will find it helpful to consider in this connection the note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts, also the note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33, on how and when questions must be reased and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States.

No order of the Supreme Court of the United States, assigning the territory of Hawaii to a judicial circuit under the act of March 3, 1891, could give a right of appeal inconsistent with the provision of the act of April 30, 1900, § 86, restricting appeals from the courts of the territory of Hawaii to cases in which appeals are allowable to the courts of the United States from the courts of the several states. Ex parte Wilder's S. S. Co. 183 U. S. 545, 46 L. ed. 321, 22 Sup. Ct. Rep. 225.

But the jurisdiction under consideration was enlarged by the amendatory act of March 3, 1905 (33 Stat. at L. 1035, chap. 1465), § 3, to embrace in addition "all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars." Harrison v. Magoon, 205 U. S. 501, 51 L. ed. 900, 27 Sup. Ct. Rep. 577.

A writ of error directed on its face to the supposed judgment of the supreme court of the territory of Hawaii, disposing of exceptions on non-Federal grounds, prior to the act of March 3, 1905, enlarging the appellate jurisdiction of the Federal Supreme Court over the territorial courts, cannot be sustained on the theory that a final judgment in the case was not rendered until after the passage of that act, when judgment on the verdict was entered in the trial court in connection with a *nunc pro tunc* entry, since such judgment must necessarily have been entered after the judgment which the writ seeks to review. Notley v. Brown, 206 U. S. 429, 52 L. ed. 559, 28 Sup. Ct. Rep. 385.

Jurisdiction of a writ of error directed, on its face, to a supposed judgment of the supreme court of the territory of Hawaii, dis-

tutional, as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, e, in Digest Sup. Ct. 1908.]

[No. 49.]

Submitted November 13, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a conviction in the District Court of Honolulu, in that territory, of the offense of selling goods at auction without a license. Affirmed.

See same case below, 19 Haw. 651.

The facts are stated in the opinion.

Messrs. D. W. Burchard and A. L. C. Atkinson submitted the cause for plaintiff in error. Mr. Ralph P. Quarles was on the brief:

Section 1343 of the Revised Laws of Hawaii, which imposes upon a person engaged in the occupation of auctioneer in the district of Honolulu a license forty times as great as in Hilo and other districts within the territory of Hawaii, violates the 5th Amendment to the Constitution, in that it takes from such person his property without due process of law, and violates the 14th Amendment in that it makes an arbitrary classification, and discriminates between persons engaged in the same occupation in the territory of Hawaii,

posing of exceptions on non-Federal grounds prior to the act of March 3, 1905, enlarging the appellate jurisdiction of the Federal Supreme Court over the territorial court, cannot be taken by treating the writ as addressed to a later judgment of that court, quashing a writ of error to the trial court, which judgment was not formally entered until long after the writ of error from the Federal Supreme Court was sued out, where to regard the entry as relating back to the time when the opinion of the court was announced would, if the same rule be applied to the *nunc pro tunc* entry of the judgment of the trial court, require an affirmance of the judgment of the territorial supreme court on the ground that the writ of error to the trial court was not sued out in time. Ibid.

A writ of error from the Federal Supreme Court to the supreme court of the territory of Hawaii, which would not lie when final judgment was entered, cannot be sustained as an exercise of the appellate jurisdiction conferred by the act of March 3, 1905, § 3, amending the act of April 30, 1900, § 86, because a petition for rehearing which the territorial supreme court entertained and acted upon was not denied by that court until after the later statute went into effect. Harrison v. Magoon, supra.

But a judgment of the Hawaiian supreme court did not become final before the enactment of the act of March 3, 1905, and hence not reviewable in the Federal Supreme Court under that act, where, although the opinion was filed prior to that enactment, a petition for rehearing was duly filed and entertained by the court, and was not denied until after the passage of such statute. William W. Bierce v. Waterhouse 219 U. S. 320, 55 L. ed. 237, 31 Sup. Ct. Rep. 241.

A writ of error to review a judgment of the supreme court of Hawaii in an action of ejectment will not be dismissed on the ground that the value of the land in dispute is less than $5,000, where the contrary sufficiently appears by affidavits in the record and in the Federal Supreme Court. Spreckels v. Brown, 212 U. S. 208, 53 L. ed. 476, 29 Sup. Ct. Rep. 256.

The owners of real property are not estopped by their tax returns under oath, valuing such property at less than $5,000, from asserting that such property has that value, in order to sustain the jurisdiction of the Federal Supreme Court of a writ of error to review a judgment of the Hawaiian supreme court in an action of ejectment. Ibid.

A writ of error from the Supreme Court of the United States to the Hawaiian supreme court to review a judgment sustaining an assessment for taxation will not lie under the act of March 3, 1905, § 3, where the amount of the tax assessed is less than the jurisdictional amount prescribed by that section. Honolulu Rapid Transit & Land Co. v. Wilder, 211 U. S. 144, 53 L. ed. 124, 29 Sup. Ct. Rep. 46.

A property owner and taxpayer has no such personal interest in a suit brought by him to restrain territorial officers from exchanging certain public lands of the territory of Hawaii for other lands as will sustain a writ of error from the Federal Supreme Court to review a judgment of the territorial supreme court, denying the relief sought, where the suit is grounded on the theory that the proposed exchange is illegal under the territorial laws because the lands sought to be exchanged are under lease and are in parcels of mere than 1,000 acres. McCandless v. Pratt, 211 U. S. 437, 53 L. ed. 271, 29 Sup. Ct. Rep. 144.

There is no final judgment below to sustain an appeal to the Federal Supreme Court from the supreme court of the territory of Hawaii in a case in which the latter court has pursued the usual course upon exceptions, and has not entered or directed a judgment. Hutchins v. William W. Bierce, 211 U. S. 429, 53 L. ed. 267, 29 Sup. Ct. Rep. 122.

And the mere entry upon the minutes by the clerk of the supreme court of the territory of a decision overruling exceptions taken under Haw. Rev. Laws 1905, § 1862 et seq., which did not bring up the whole case, and called upon the reviewing court merely to pass upon specific questions raised by the bill, does not make such decision a final judgment, so as to be subject to review in the Federal Supreme Court. Cotton

and denies the plaintiff in error the equal protection of the law.

Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; State v. Shedroi, 75 Vt. 277, 63 L.R.A. 179, 98 Am. St. Rep. 825, 54 Atl. 1081, 15 Am. Crim. Rep. 129; Ex parte Deeds, 75 Ark. 542, 87 S. W. 1030; Re Yot Sang, 75 Fed. 983; Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 704, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Ex parte Jentzsch, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803; Luman v. Hitchens Bros. Co. 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; Evansville v. State, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; State v. Cadigan, 73 Vt. 245, 57 L.R.A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079; State v. Wiggin, 64 N. H. 508, 1 L.R.A. 56, 15 Atl. 128; Sayre v. Phillips, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; State ex rel. Hoadley v. Insurance Comrs. 37 Fla. 564, 33 L.R.A. 288, 20 So. 772; Rossmiller v. State, 114 Wis. 169, 58 L.R.A. 93, 91 Am. St. Rep. 910, 89 N. W. 839; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Territory v. McDonald, 17 Haw. 389; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641; St. Louis, I. M. & S. R. Co. v. Williams, 49 Ark. 492, 5 S. W. 883; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006; San Antonio & A. P. R. Co. v. Wilson, 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; San Mateo County v. Southern P. R. Co. 13 Fed. 722; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Territory v. Pottie, 19 Haw. 99; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 20 L.R.A.(N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234; Charles J. Off & Co. v. Morehead, 235 Ill. 40, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434; Cooley, Const. Lim. 4th ed. pp. 744, 745; Cooley, Taxn. 2d ed. 169, 170.

Mr. Charles R. Hemenway submitted the cause for defendant in error. Messrs. Alexander Lindsay, Jr., Attorney General of Hawaii, and E. W. Sutton, Deputy Attorney General of Hawaii, were on the brief:

The Hawaiian statute requiring a higher license fee for auctioneers in Honolulu than elsewhere is clearly constitutional, for the difference in license fee is based upon a difference not only in population, but in the amount of business transacted in different places.

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v. Hawaii, 211 U. S. 162, 53 L. ed. 131, 29 Sup. Ct. Rep. 85.

But a judgment of the supreme court of Hawaii on a writ of error, overruling exceptions to a verdict and judgment in ejectment, and affirming the judgment, is final for the purpose of a review in the Supreme Court of the United States. Spreckels v. Brown, supra.

The order of the Hawaiian supreme court, reversing the order of the court below, granting a new trial, cannot be reviewed by the Federal Supreme Court on a writ of error directed alone to a later decision in the same case, overruling exceptions, the record of which cannot be regarded as embracing the proceedings had below in respect to the matter of a new trial. Cotton v. Hawaii, supra.

But the entire case is open for the consideration of the Federal Supreme Court on a writ of error to the Hawaiian supreme court, to review a judgment of that court, which, on a second writ of error, affirmed a judgment below, entered pursuant to its mandate, issued on the first writ of error. William W. Bierce v. Waterhouse, supra.

Errors assigned in the supreme court of Hawaii, but passed by it without decision, are open for review in the Federal Supreme Court on writ of error, if that court finds that the former court erred in reversing the judgment of the trial court upon the single error considered. Ibid.

Concurrent findings of the two lower courts on the question as to what is the correct English translation of a will written in the Hawaiian language will be followed by the Supreme Court of the United States on appeal from the Hawaiian supreme court. Gray v. Noholoa, 214 U. S. 108, 53 L. ed. 931, 29 Sup. Ct. Rep. 571.

The question whether the original judgment creditors alone can sue on a judgment rendered in favor of a trustee and the beneficiary, where a new trustee has since been appointed successor in the trust, and the former trustee has assigned the judgment to him, is a pure matter of form, on which the Federal Supreme Court, when reviewing a judgment of the Hawaiian supreme court, will not go behind the local practice. Kalanianaole v. Smithies, 226 U. S. 462, post, 303, 33 Sup. Ct. Rep. 169.

Cooley, Const. Lim. 6th ed. 479–481; Giozza v. Tiernan, 148 U. S. 657, 661, 37 L. ed. 559, 601, 13 Sup. Ct. Rep. 721; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Hayes v. Missouri, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; State v. O'Hara, 36 La. Ann. 93; State v. Schlier, 3 Heisk. 281; O'Hara v. State, 121 Ala. 28, 25 So. 622; Texas Banking & Ins. Co. v. State, 42 Tex. 636; East St. Louis v. Wehrung, 46 Ill. 392; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 354, 52 L. ed. 236, 243, 28 Sup. Ct. Rep. 114; Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Strange v. Grant County, 173 Ind. 640, 91 N. E. 242; State v. Mitchell, 97 Me. 70, 94 Am. St. Rep. 481, 53 Atl. 887; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; First American Sav. & T. Co. v. Campbell, 19 Haw. 263.

Whether the judgment of the legislature as to the amount of difference in the rate of charge was unwise or even possibly oppressive in the opinion of this court, that of itself would not be sufficient cause for declaring the statute passed pursuant to such judgment violative of the equal protection clause of the Constitution. It is not sufficient ground for holding such a statute unconstitutional that it may possibly be arbitrary and unreasonable, but it must be as a matter of fact actually arbitrary and unreasonable.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; First American Sav. & T. Co. v. Campbell, 19 Haw. 262; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Clark v. Kansas City, 176 U. S. 114, 119, 44 L. ed. 392, 397, 20 Sup. Ct. Rep. 284.

The construction placed upon the Hawaiian statute by the supreme court of Hawaii, upon the facts involved and the meaning of the statute, although not decisive, is entitled to great consideration, and should be followed by this court unless manifest error appear.

Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 152, 41 L. ed. 107, 110, 16 Sup. Ct. Rep. 1096; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 97, 43 L. ed. 910, 19 Sup. Ct. Rep. 609; Dower v. Richards, 151 U. S. 658, 672, 38 L. ed. 305, 310, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Egan v. Hart, 165 U. S. 193, 41 L. ed. 682, 17 Sup. Ct. Rep. 300; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 479, 51 L. ed. 1143, 1146, 27 Sup. Ct. Rep. 695; Kealoha v. Castle, 210 U. S. 149, 154, 52 L. ed. 998, 1001, 28 Sup. Ct. Rep. 684.

Mr. Justice Hughes delivered the opinion of the court:

The plaintiff in error was convicted in the district court of Honolulu, Hawaii, of the offense of selling goods at auction, in Honolulu, without an auctioneer's license, and was sentenced to pay a fine of $600 and costs. The supreme court affirmed the conviction and the case comes here on error.

In order to obtain a license for auction sales it was necessary to pay the fee prescribed by § 1343 of the Revised Laws of the territory of Hawaii, which provides:

"The annual fee for a license to sell goods, wares, and merchandise or other property at auction shall be $600 for the district of Honolulu, and $15 for each other taxation district."

An agreed statement of facts showed that the plaintiff in error was the agent of the corporation known as the "Hawaiian Fisheries, Limited," which handled fish daily for a large number of fishermen. The catch was brought to the market in Honolulu, where the plaintiff in error offered it in basket lots, each basket containing from 70 to 100 pounds, to the retail dealers of fish only, the one bidding the highest price becoming the purchaser.

The plaintiff in error contended in the territorial court that he did not sell at auction within the meaning of the statute, and further, that the statute, if it was applicable, denied to him the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States, because of the discrimination between the *district of Honolulu and [191 other districts in the amount of the license fees imposed.

The supreme court of Hawaii assumed, as the plaintiff in error argues, that the word "auction" in § 1343 means public auction. This conclusion was reached in the light of

the requirement of § 1345, that the bond to be given by the person receiving the license should contain a provision that he will not sell "except at public auction;" and the court ruled that the sales conducted by the plaintiff in error were sales at public auction within the contemplation of the statute, although bids were accepted only from the retail dealers or the persons conducting fish tables at the market. This ruling presents no Federal question, and hence is not reviewable here, as only such questions are before us upon this writ of error as could be raised upon a writ of error to a state court. Act of April 30, 1900, chap. 339, § 86, 31 Stat. at L. 141, 158; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 309, 47 L. ed. 190, 191, 23 Sup. Ct. Rep 123; Notley v. Brown, 208 U. S. 429, 440, 52 L. ed. 559, 563, 28 Sup. Ct. Rep. 385. In view of the amount involved, the case cannot in any view come within the amendment made by the act of March 3, 1905, chap. 1465, § 3, 33 Stat. at L. 1035; Honolulu Rapid Transit & Land Co. v. Wilder, 211 U. S 144, 53 L. ed. 124, 29 Sup. Ct. Rep. 46.

The remaining contention, urged in various forms by the assignments of error, comes to the single point that the statute created an arbitrary classification. It cannot be said, however, that there was no reasonable basis for a distinction between Honolulu and other districts. And it was the province of the legislature to decide upon the amount of the fees which should be charged. It must be assumed that in so deciding it took into account varying conditions in the respective localities; as, for example, in the amount of business transacted and in the corresponding value of such licenses. Necessarily, as was said in Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 42 L. ed 1037, 1043, 18 Sup. Ct. Rep. 594, the power of classification "must have a wide range of discretion." It is not reviewable "unless palpa-192]bly *arbitrary." Orient Ins. Co. v. Daggs, 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 52–55, 54 L. ed. 921, 927–929, 30 Sup. Ct. Rep. 676; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep 190; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160; Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 56 L. ed. 175, 179, 32 Sup. Ct. Rep. 74. With its intimate knowledge of local conditions, the supreme court of the territory said upon this point: "The great bulk of the business of the territory is done in Honolulu. It is not for us to say whether we would make the difference in the amount of license fees in this case as large as the legislature has made it. It is sufficient that we cannot say that the difference is unreasonable, or that the statute is unequal or arbitrary in its operation." [19 Haw. 651.] We find no ground for a different conclusion.

Judgment affirmed.

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PURITY EXTRACT & TONIC COMPANY and the United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

C. C. LYNCH.

(See S. C. Reporter's ed. 192–205.)

**Commerce — state regulation — sales — malt liquors.**

1. The decision of a state court sustaining the defense of illegality, under Miss. Laws 1908, chap. 115, prohibiting the sale of malt liquors, to a suit brought by a nonresident manufacturer of a beverage to recover the amount which a local dealer agreed to pay for the exclusive right to make local sales, does not involve the denial of any right incident to interstate commerce, where such agreement contained no suggestion that the contemplated resales were to be made in the original imported packages, but was broad enough to include other sales, and hence encountered the local statute as applied to transactions outside the protection accorded by the Federal Constitution to interstate commerce.

[For other cases, see Commerce, IV. b, 2, in Digest Sup. Ct. 1908.]

**Commerce — original packages — malt liquors — bottle.**

2. Each separate bottle shipped into the state by a manufacturer to a local dealer under a contract by the terms of which the agreed prices were per cask containing 10 dozen bottles, and per case containing 6 dozen bottles, cannot be considered an original package, so as to save the local sales from the interdiction of Miss. Laws 1908, chap. 115, prohibiting sales of malt liquors.

[For other cases, see Commerce, IV. b, 2, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — police power — prohibiting sales of malt liquors.**

3. Local sales of malt liquors, whether intoxicants or not, may be forbidden by the state in the exercise of its police power, as is done by Miss. Laws 1908, chap. 115,

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NOTE.—As to the original package doctrine generally—see note to Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

As to what constitutes an original or unbroken package—see note to State v. Maire, 39 L.R.A.(N.S.) 1051.

Power to prohibit or regulate the sale of "soft" drinks—see note to Tolliver v. Blizzard, 34 L.R.A.(N.S.) 890.

without infringing the prohibition of U. S. Const., 14th Amend., against taking liberty or property without due process of law.
[For other cases, see Constitutional Law, 479–481, 895–903, in Digest Sup. Ct. 1908.]

[No. 464.]

Submitted October 28, 1912. Decided December 2, 1912.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Hinds County, in that state, sustaining the defense of illegality under a state law to a suit brought by a nonresident manufacturer of malt liquor to recover the amount which a local dealer agreed to pay for the exclusive right to make local sales. Affirmed.

See same case below, 100 Miss. 650, 56 So. 316.

The facts are stated in the opinion.

Mr. Marcellus Green submitted the cause for plaintiffs in error. Messrs. G. W. Green and Marcellus Green, Jr., were on the brief:

Chapter 113, § 1, as interpreted by the supreme court of the state of Mississippi, in so far as it regulates the movement of "Poinsetta" in interstate commerce, violates the Federal Constitution.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 869, 1062; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Scott v. Donald, 165 U. S. 95, 41 L. ed. 643, 17 Sup. Ct. Rep. 265; Vance v. W. A. Vandercook Co. 170 U. S. 441, 42 L. ed. 1102, 18 Sup. Ct. Rep. 674; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 999, 23 Sup. Ct. Rep. 817; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Pabst Brewing Co. v. Crenshaw, 198 U. S. 21, 49 L. ed. 927, 25 Sup. Ct. Rep. 552; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Foppiano v. Speed, 199 U. S. 504, 50 L. ed. 289, 26 Sup. Ct. Rep. 128; South Carolina v. United States, 199 U. S. 461, 50 L. ed. 269, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Rearick v. Pennsylvania, 203 U. S. 508, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 81, 56 L. ed. 357, 32 Sup. Ct. Rep. 189.

The statute as interpreted by the supreme court of the state of Mississippi, in so far as it deprives plaintiff in error of the right to sell "Poinsetta," is in conflict with the 14th Amendment, in that thereby it attempts to deprive plaintiff in error of its property and liberty without due process of law.

Lochner v. New York, 198 U. S. 56, 49 L. ed. 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Hooper v. California, 155 U. S. 662, 39 L. ed. 303, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Hudson County Water Co. v. McCarter, 209 U. S. 355, 52 L. ed. 831, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Welch v. Swasey, 214 U. S. 103, 53 L. ed. 929, 29 Sup. Ct. Rep. 567.

Mr. George D. Lancaster also submitted the cause for plaintiffs in error.

Mr. Edward Mayes submitted the cause for defendant in error. Messrs. Robert B. Mayes and James R. M'Dowell were on the brief:

The state did not exceed its police powers in attempting to prohibit the sale of malt liquors which are nonintoxicating.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Ah Sin v. Wittman, 198 U. S. 500, 49 L. ed. 1142, 25 Sup. Ct. Rep. 756; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Fuller v. Jackson, 97 Miss. 237, 30 L.R.A. (N.S.) 1078, 52 So. 877; Feibelman v. State, 130 Ala. 122, 30 So. 384; Cooley, Const. Lim. 7th ed. pp. 150, 201, 849; Black, Intoxicating Liquors, § 34; Monroe v. Lawrence, 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113; Pennell v. State, 141 Wis. 35, 123 N. W. 115; State ex rel. George v. Aiken, 42 S. C. 222, 26 L.R.A. 345, 20 S. E. 221; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Mugler v. Kansas, 123 U. S. 660, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Barbier v. Connolly 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The object of the Wilson act was to aid, and not to hamper, the states in enforcing their prohibition laws.

17 Am. & Eng. Enc. Law, 2d ed. 293, 294; Black, Intoxicating Liquors, §§ 34, 76–78; Tinker v. State, 90 Ala. 638, 8 So. 814; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

When the court is called upon to construe the Wilson act, and to determine what it meant, it will say that the Wilson act meant to make all classes of liquors, whether intoxicating or not, the sale of which was prohibited by a state statute, to come within the provisions of the Wilson act.

See Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552.

The container or box in which these bottles are packed is the original package.

17 Am. & Eng. Enc. Law, 2d ed. 294, 295, and notes; Black, Intoxicating Liquors, § 75; Harrison v. State, 91 Ala. 62, 10 So. 30; Keith v. State, 91 Ala. 2, 10 L.R.A. 430, 8 So. 353; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233.

Mr. Justice Hughes delivered the opinion of the court:

This is an action for breach of contract. The Purity Extract & Tonic Company (plaintiff below), a Tennessee corporation, is the manufacturer of a beverage called "Poinsetta;" and in November, 1910, it made an agreement with the defendant. Lynch, for the purchase of the article by him on stated terms during the period of five years. The agreement contemplated resales by the defendant in Hinds county, Mississippi, to the making of which he was to devote his best efforts. It was provided that he was to sell only in that county, where he was to have the exclusive right of sale, for which he was to pay to the plaintiff the sum of $500 within five days after the making of the contract. It was to recover this amount that the action was brought, the defendant having repudiated the agree 198]ment at the outset, *upon the ground that, on coming to Mississippi, he found it to be unlawful to sell "Poinsetta" in that state. The trial court sustained the defense of illegality, and its judgment was affirmed by the supreme court of Mississippi. 100 Miss. 650, 56 So. 316.

The statute which the agreement has been held to violate is chapter 115 of the Laws of Mississippi of 1908, § 1, which includes in its prohibition the sale of malt liquors.

The case was tried upon an agreed statement of facts in which the characteristics of "Poinsetta" are set forth at length. In substance, the statement is that it is composed of pure distilled water to the extent of 90.45 per cent, the remaining 9.55 per cent being solids derived from cereals, "which are in an unfermented state, and are wholesome and nutritious;" that "it contains 5.73 per cent of malt, and is sold as a beverage;" that it does not contain either alcohol or saccharine matter, being manufactured in such a manner under a secret formula obtained from German scientists as to bring neither into its composition; that it is not intoxicating; that its taste and odor are distinctive; that its appearance is such that "it would not probably be mistaken for any intoxicating liquor;" and that it "cannot be employed as a subterfuge for the sale of beer, because it is bottled in a distinctive way, and its name blown in each bottle which contains the beverage." It is further agreed that "the United States government does not treat Poinsetta as within the class of intoxicating liquors, and does not require anything to be done with reference to its sale."

The state court, following its decision in Fuller v. Jackson, 97 Miss. 237, 30 L.R.A (N.S.) 1078, 52 So. 873, construed the statute as prohibiting the sale of all malt liquors, whether in fact intoxicating or not, and this construction of the state law is binding here. The court said: "Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such *is prohibited[199 from being sold in this state. The prohibition law cannot be made effective unless it excludes all subterfuges." (100 Miss. 650, 657, 56 So. 316.)

The agreed statement of facts also contained the following: "Poinsetta is put up in bottles at Chattanooga, Tennessee, and is shipped in bottles, each separate and apart from the other, placed in a case to which they are in no way attached, and which is done merely to prevent breakage of the bottles in transit. The case is not fastened with nails or other device, but merely closed. The bottles so contained are shipped in interstate commerce from Chattanooga, Tennessee, and are to be received under the contract by the consignee in Mississippi in the same condition as when bottled, and are to be sold as each several package. There is to be no retail sale under such right by said Lynch in the state of Mississippi, but all shipments are to be made direct either to said Lynch, or to other persons who shall desire to purchase said drink, and are to be delivered to said purchasers of said bottles in precisely the same shape as prepared in Tennessee, and said Poinsetta is still contained in the original package at the time it will be offered for sale in Mississippi by the purchaser thereof in the original package, which was sent from Tennessee through Alabama into Mississippi."

The plaintiff brings this writ of error, assailing the validity of the statute, as construed by the state court, (1) as an unconstitutional interference with interstate commerce and (2) as depriving the plaintiff of its liberty and property without due process of law.

First. We do not find that the decision of the state court involves a denial of any right incident to interstate commerce. The contract, it is true, provided for purchases by the defendant from the plaintiff, the deliveries to be made at Chattanooga, Tennessee, for transportation to the defendant at Jackson, Mississippi. So far as appears, however, there were no purchases and no de-[200]liveries. The *reason obviously is that the agreement looked to resales by the defendant in Hinds county. Finding that such sales would be against the local law, he refused performance *in limine*. The state court did not deny to the plaintiff the right to sell to the defendant, or to have its article transported and delivered to the defendant in interstate commerce. (Rhodes v. Iowa, 170 U S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 82, 56 L. ed. 355, 358, 32 Sup. Ct Rep. 189.) It had no such question before it. This suit was brought to recover the amount which the defendant promised to pay for the exclusive right of making sales in Hinds county. In this aspect, the validity of the contract under the state law was to be judged by its provisions for sales within the state. The contract contained no suggestion that these sales were to be limited to those made in the original packages imported. Its provisions were broad enough to include other sales, and hence encountered the local statute as applied to transactions outside the protection accorded by the Federal Constitution to interstate commerce.

Nor is the contention of the plaintiff aided by the agreed statement of facts. This statement, in one of its clauses, says that there was to be "no retail sale" by the defendant. Whatever this may mean in the light of the words of the contract, which contained no such limitation, it is clear that the defendant was not debarred from selling the bottles separately. On the contrary, the argument for the plaintiff is that "each bottle," brought into the state in cases as described, constitutes "an original package." As to this, it is to be noted that by the terms of the contract the agreed prices on the purchases by the defendant from the plaintiff were per cask containing 10 dozen bottles and per case containing 6 dozen bottles, respectively. In short, the plain purpose was that the defendant was to buy in casks and cases, and in the light of the transactions thus contemplated, and. [201]as they would *be normally conducted, between the plaintiff as manufacturer and the defendant as local dealer, it cannot be said that each separate bottle which he might sell in Hinds county must be considered as an original package, so as to save the sale from the interdiction of the state law. May v. New Orleans, 178 U. S 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Cook v Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233. We are therefore not called upon to consider whether or not the Wilson act (August 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp Stat. 1901, p. 3177) governs in the case of such an article as "Poinsetta," and, confining ourselves to the issue presented, we express no opinion upon that point.

Second. Treating the matter, then, as one of local sales, the question is whether the prohibitory law of the state, as applied to a beverage of this sort, is in conflict with the 14th Amendment.

That the state, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L ed. 989; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13. It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct Rep. 425; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Ah Sin v. Wittman, 198 U. S. 500, 504, 49 L. ed. 1142, 1144, 25 Sup. Ct Rep. 756; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L ed. 75, 29 Sup. Ct. Rep. 10; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 Sup. Ct. Rep. 697. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that *the enactment has no substantial re-[202]lation to a proper purpose, it cannot be said that the limit of legislative power has been transcended To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system.

Thus, in Booth v. Illinois, 184 U. S. 425,

46 L. ed. 623, 22 Sup. Ct. Rep. 425, the defendant was convicted under a statute of that state which made it a criminal offense to give an option to buy grain at a future time. It was contended that the statute, as interpreted by the state court, was "not directed against gambling contracts relating to the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling." The argument was that it directly forbade the citizen "from pursuing a calling which, in itself, involves no element of immorality." This court, in sustaining the judgment of conviction, said: "If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of rights secured by the fundamental law." It must be assumed, it was added, that "the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time;" and the court could not say that the means employed were not appropriate to the end which it was competent for the state to accomplish. (Id. pp. 429, 430 )

The same principle was applied in Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 203]Sup. Ct. Rep. 168, *which dealt with the provision of the Constitution of California that all contracts for the sale of shares of the capital stock of any corporation, on margin, or to be delivered at a future day, should be void, and that any money paid on such contracts might be recovered. The objection urged against the provision in its literal sense was that the prohibition of all sales on margin bore no reasonable relation to the evil sought to be cured; but the court upheld the law, being unwilling to declare that the deep-seated conviction on the part of the people concerned as to what was required to effect the purpose could be regarded as wholly without foundation. (Id. pp. 609, 610.),

A strong illustration of the extent of the power of the state is found in New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10. The state of New York, by its forest, fish, and game law, prohibited the possession of certain game during the close season. The statute covered game coming from without the state. It appeared that Silz was charged with the possession of plover and grouse which had been lawfully taken abroad during the open season and had been lawfully brought into the state; that these game birds were varieties different from those known as plover and grouse in the state of New York; that, although of the same families, in form, size, color, and markings, they could readily be distinguished from the latter; and that they were wholesome and valuable articles of food. This court affirmed the conviction, saying: "It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the state is authorized to pass measures for the protection of the *people of the[204 state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted." It was pointed out that the prohibition in question had been found to be expedient in several states, "owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were take in another state or country."

It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of "malt liquors." In thus dealing with a class of beverages which, in general, are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion, logically pressed, would save the nominal power while preventing its effective exercise The statute establishes its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and

assumes the character of a merely arbitrary fiat.

That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other states and the decision of the courts in its construction. State v. O'Connell, 99 Me. 61, 58 Atl. 59; State v. Jenkins, 64 N. H. 375, 10 Atl. 699; State v. York, 74 N. H. 125, 127, 65 Atl. 685, 13 Ann Cas. 116; State ex rel. Guil-205]bert v. Kauffman, 68 Ohio *St. 635, 67 N. E. 1002; Luther v. State, 83 Neb. 455, 20 L.R.A.(N.S.) 1146, 120 N. W. 125; Pennell v. State, 141 Wis. 35, 123 N. W 115. We cannot say that there is no basis for this widespread conviction.

The state, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power.

Judgment affirmed.

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BUCK STOVE & RANGE COMPANY et al., Plffs in Err.,
v.
C. C. VICKERS et al.

(See S. C. Reporter's ed. 205-216.)

**Statutes — revision — separation of parts of existing section.**

1. The separation in the Revised Statutes of the United States of the several parts of a section of an existing statute according to an arrangement adopted for purposes of convenience only did not work any change in their purpose or meaning, in the absence of some substantial change in phraseology.

[For other cases, see Statutes, II. k, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review — ruling on plea in abatement.**

2. The power of the Federal Supreme Court upon a writ of error to a state court, to review a ruling of such state court upon a plea in abatement, is not affected by the provision of U. S. Rev. Stat. § 1011, U. S. Comp. Stat 1901, p. 715, that there shall be no reversal in the Supreme Court of the United States for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, but this enactment was intended to embrace only writs of error to the Federal circuit and district courts.

[For other cases, see Appeal and Error, 2209-2226, in Digest Sup. Ct. 1908.]

**Commerce — state regulation — foreign corporations.**

3. The right of foreign corporations to do a purely interstate business within the state cannot, consistently with the commerce clause of the Federal Constitution, be restricted, as is attempted by Kan. Gen. Stat. 1905, § 1358, which requires such corporations, as a condition of their right to prosecute such business, to make and file with the secretary of state a complete and detailed statement exhibiting their financial condition, and provides that the obtaining of the certificate of the secretary of state that such statement has been properly made shall be a condition precedent to the right of the corporation to maintain an action in the Kansas courts.

[For other cases, see Commerce, IV., in Digest Sup. Ct. 1908.]

[No. 10.]

Argued December 19, 1911. Decided December 2, 1912.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Morris County in that state, sustaining pleas in abatement and dismissing suits brought by foreign corporations doing an interstate business for failure to comply with the Kansas laws. Reversed and remanded for further proceedings.

See same case below, 80 Kan 29, 101 Pac. 668.

The facts are stated in the opinion.

Messrs. Seneca N. Taylor and Malcolm B. Nicholson argued the cause, and, with Mr. William J. Pirtle, filed a brief for plaintiffs in error:

There is no misjoinder of plaintiffs in error.

Kansas City v. King, 65 Kan. 65, 68 Pac. 1093; Werner v. Hatton, 54 Kan. 250, 38 Pac. 279.

These plaintiffs in error having been engaged exclusively in interstate commerce, the application of the corporation laws of Kansas to them is repugnant to the interstate commerce clause of the Constitution of the United States, and such application cannot lawfully be made.

Stockard v. Morgan, 185 U. S. 27, 46 L.

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NOTE.—For exclusion or conditional admission of foreign corporation as interference with interstate commerce—see note to Western U. Teleg. Co. v. Tuggart, 60 L.R.A. 677.

As to recognition or exclusion of foreign corporations generally—see note to Cone Export & Commission Co. v. Poole, 24 L.R.A. 289.

ed. 785, 22 Sup. Ct. Rep. 576; Brown v. Maryland, 12 Wheat, 419, 6 L. ed. 678; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.

State statutes requiring foreign corporations to comply with certain conditions before doing business in the state have frequently been held inapplicable to a foreign corporation whose only business in the state is selling through traveling agents and delivering goods manufactured outside of the state, since any other construction of the statute would render it void as an interference with interstate commerce.

Havens & G. Co. v. Diamond, 93 Ill. App. 557; Coit & Co. v. Sutton, 102 Mich. 324, 25 L.R.A. 819, 4 Inters. Com. Rep. 768, 60 N. W. 690; W. B. Mearshon & Co. v. Pottsville Lumber Co. 187 Pa. 12, 67 Am. St. Rep. 560, 40 Atl. 1019; Toledo Commercial Co. v. Glen Mfg. Co. 55 Ohio St. 217, 45 N. E. 197; Bateman v. Western Star Mill Co. 1 Tex. Civ. App. 90, 4 Inters. Com. Rep. 260, 20 S. W. 931; Davis & R. Bldg. & Mfg. Co. v. Dix, 64 Fed. 406; Woessner v. H. J. Cottam & Co. 19 Tex. Civ. App. 611, 47 S. W. 678; Ft. Scott v. Pelton, 39 Kan. 764, 18 Pac. 954; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

These plaintiffs in error had a vested right to maintain and prosecute the suits to judgment.

Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; Fitzgerald v. Weidenbeck, 76 Fed. 695; Martindale v. Moore, 3 Blackf. 275; Root v. Sweeney, 12 S. D. 43, 80 N. W. 149; Elston v. Piggott, 94 Ind. 14; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; Yeatman v. Day, 79 Ky. 186; 8 Cyc. 932, Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Westerly Waterworks v. Westerly, 75 Fed. 181.

Mr. Stephen H. Allen argued the cause, and, with Mr. Robert Stone, filed a brief for defendants in error:

A joint assignment of error which cannot be sustained as to all who join therein is bad as to all.

2 Enc. Pl. & Pr. 933; 2 Cyc. 1003; Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909.

The statute, as construed by the supreme court of Kansas, and also by the circuit court of appeals, merely defeats the particular suit which is being prosecuted without compliance with it, and does not debar the plaintiff from commencing at some other time or in some other way.

State v. American Book Co. 69 Kan. 1, 1 L.R.A.(N.S.) 1041, 76 Pac. 411, 2 Ann. Cas. 56; Hamilton v. Reeves & Co. 69 Kan. 844, 76 Pac. 418; John Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304; Ryan Live-stock & Feeding Co. v. Kelly, 71 Kan. 874, 81 Pac. 470; Vickers v. Buck Stove & Range Co. 70 Kan. 586, 79 Pac. 160; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; Benjamin v. Dubois, 118 U. S. 46, 30 L. ed. 52, 6 Sup. Ct. Rep. 925; Harrington v. Holler (Crawford v. Haller) 111 U. S. 796, 28 L. ed. 602, 4 Sup. Ct. Rep. 697; Chicago & A. R. Co. v. Wiswall, 23 Wall. 507, 23 L. ed. 103; Glencove Granite Co. v. City Trust, S. D. & Surety Co. 55 C. C. A. 212, 118 Fed. 386; Blodgett v. Lanyon Zinc Co. 58 C. C. A. 79, 120 Fed. 893.

The order of the court dismissing the action for failure to comply with the statute is therefore in substance and effect an order ruling a plea in abatement, and not subject to review in this court.

Robertson v. Coulter, 16 How. 106, 14 L. ed. 864; Stephens v. Monongahela Nat. Bank, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336.

A judgment for the costs which had accrued in the fruitless action does not amount to a final judgment which will support the jurisdiction of this court.

Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; 13 Am. & Eng. Enc. Law, 34.

The right of a foreign corporation to exercise its corporate powers within a state other than that of its creation depends solely upon the will of such other state.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

As this is the only question in fact presented by the record, we respectfully submit that it fails to present any question which this court has jurisdiction to determine, and that the writ of error herein should therefore be dismissed.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227.

A state has a right to its own public policy, and may impose on foreign corporations the same restrictions it imposes on domestic ones.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206.

The act deals exclusively with the exercise of corporate powers,—a subject over which the power of the legislature is absolute.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

In Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 257, 50 L. ed. 1013, 1018, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317, the power of the state to revoke all authority to do business in the state for a clearly unconstitutional reason was upheld by this court. In the case now before the court the exercise of one corporate power only is suspended until the law is complied with. All corporations, domestic as well as foreign, are subject to the same disability under the same circumstances. The requirement of the law for which the exclusion is made is not unreasonable or unusual in the legislation of the states, and but for the decision in the case of International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, could hardly be said to be clearly invalid or unconstitutional. 19 Cyc. 1298.

Mr. Justice Van Devanter delivered the opinion of the court:

By suits begun in the district court of Morris county, Kansas, and consolidated for purposes of trial and judgment, seven judgment creditors of one Vickers sought to set aside, as fraudulent, a conveyance by him, [212] and to subject the land included therein to the satisfaction of their several judgments. The plaintiffs were corporations organized under the laws of states other than Kansas, and four of them were doing a purely interstate business in that state, but without complying with its laws presently to be mentioned. The defendants set up this noncompliance by an answer in the nature of a plea in abatement, and the court sustained the plea and dismissed the suits as to the four plaintiffs. As to the other three plaintiffs, relief was denied for other reasons, which need not be stated. The judgment was affirmed by the supreme court of the state, against the contention that the laws of Kansas under which the plea in abatement was sustained are violative of the commerce clause of the Constitution of the United States (80 Kan. 29, 101 Pac. 668), and then the case was brought here.

Some minor questions of appellate practice were urged upon our attention, but their statement and consideration have become unnecessary through the concession of counsel for plaintiffs in error, made during the oral argument and acted upon at the time, that the writ of error might be dismissed as to the Aultman and Miller Buckeye Company, the Consolidated Steel & Wire Company, and the Galveston Rope Company. Therefore, attention need be given only to the ruling upon the plea in abatement.

Our power to review this ruling is challenged, because of the statutory provision that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." Rev. Stat. § 1011, U. S. Comp. Stat. 1901, p. 715. This provision has been part of the judiciary acts from the beginning, and often has been applied upon writs of error to the circuit and district courts, but never to a case coming here from a state court. Piquignot v. Pennsylvania R. Co. 16 How. 104, 14 L. ed. 863, and Stephens v. Monongahela Nat. Bank, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336, illustrate its application in cases brought here from circuit [213] courts, and International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, and International Textbook Co. v. Lynch, 218 U. S. 664, 54 L. ed. 1201, 31 Sup. Ct. Rep. 225, are cases in which it was not applied upon writs of error to state courts This difference in the treatment of the two classes of cases has not been inadvertent, but deliberate, and the reason for it is at once apparent when § 22 of the original judiciary act (1 Stat. at L. 84, chap. 20) is examined. The provision originated in that section and was there associated with other provisions which unmistakably show that it was intended to embrace only writs of error to the circuit and district courts. At the time of the revision in 1873, § 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; but that, in the absence of some substantial change in phraseology, did not work any change in their purpose or meaning. Rev. Stat. § 5600, U. S. Comp. Stat. 1901, p. 3751; Hyde v. United States, 225 U S. 361, 56 L. ed. 1123, 32 Sup. Ct. Rep. 793; McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142. This is a writ of error to a state court, and so

our power to review the ruling upon the plea in abatement is not affected by § 1011.

The statute of Kansas under which the plea was sustained is embodied in the General Statutes of 1905, and provides, in §§ 1332-1336, that to entitle a corporation organized under the laws of another state to do business in Kansas it must (a) make application to, and obtain the permission of, the charter board of the state, (b) accompany its application with a fee of $25, (c) file with the secretary of state its irrevocable consent that process against it may be served upon that officer, (d) be organized for a purpose for which a domestic corporation may be organized, (e) pay to the state treasurer, for the benefit of the permanent school fund, a specified per cent of its authorized capital, and (f) file with the secretary of state a certified copy of its 214]charter. And by § 1358 the *statute provides that each corporation for profit, doing business in the state, except banking, insurance, and railroad corporations, shall annually prepare and deliver to the secretary of state a complete and detailed statement, exhibiting: "1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the postoffice address of each, and the number of shares held and paid by each. 6th. The names and postoffice addresses of the officers, trustees, or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held." This section further provides that a failure to file such statement by any corporation doing business in the state, and not organized under its laws, shall work a forfeiture of the right or authority to do business in the state, and that "no action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section have been properly made."

The four corporations against which the plea was sustained were corporations for profit, organized under the laws of states other than Kansas, were not banking, insurance, or railroad corporations, were doing business in Kansas,—a purely interstate business,—and had not complied with the statute just described. There can be no doubt, therefore, that if the statute, especially § 1358, is valid as against such corporations, the plea was rightly sustained; otherwise, it should have been overruled. So, the question for decision is whether, consistently with the commerce clause of the Constitution of the United States, a state may thus restrict and burden the right to do interstate business within its limits. This precise *question was presented to this court[215 and decided in the negative in the case of International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103,—a case in which the supreme court of Kansas had applied the provisions of § 1358 (§ 1283, Gen. Stat. 1901) to a corporation of another state, doing an interstate business in Kansas. And the decision of this court in that case was shortly thereafter followed in the similar case of International Textbook Co. v. Lynch, 218 U. S. 664, 54 L. ed 1201, 31 Sup. Ct. Rep. 225, brought here on error to the supreme court of Vermont. It is due to the supreme court of Kansas to observe that this court's decision in the Pigg Case had not been made when that court's decision in the present case was given; but in saying this we would not be understood as implying that this case announced any new doctrine in the Pigg Case, for it but reiterated and applied principles which were already well recognized, as was shown in the earlier cases of Paul v. Virginia, 8 Wall. 168, 182, 19 L. ed. 357, 360; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 734, 28 L. ed. 1137, 1139, 5 Sup. Ct. Rep. 739, and Crutcher v. Kentucky, 141 U. S. 47, 56, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851.

As accurately reflecting what was held in the Pigg Case, we excerpt the following from the opinion of the court, delivered by Mr. Justice Harlan (pp. 109, 112):

" 'To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and that the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject'

. . . . . .

"How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect of the right *to sue and defend in the courts,[216 is a question which the exigencies of this case do not require to be indefinitely decided. It is sufficient to say that the requirement of the statement mentioned in § 1283 [§ 1358, Gen. Stat. 1905] of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is in violation of its constitution-

al rights. It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation It results that the provision as to the statement mentioned in § 1283 [§ 1358, Gen. Stat. 1905] must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of *the same section* which provides that the obtaining of the certificate of the secretary of state that such statement has been properly made shall be a condition precedent to the right of the plantiff to maintain an action in the courts of Kansas."

Following the decision in that case, we held that the statute upon which the plea in abatement was rested is unconstitutional and void, and that the plea should not have been sustained, but overruled.

The judgment is reversed as to the remaining plaintiffs in error, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Pitney did not hear the argument or participate in the decision of this case.

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217] *YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plff. in Err.,

v.

JACKSON VINEGAR COMPANY.

(See S. C. Reporter's ed. 217–220.)

**Constitutional law — due process of law — equal protection of the laws — statutory penalty.**

1. Neither due process of law nor the equal protection of the laws is denied to a carrier by the imposition under Miss. Laws 1908, chap. 196, of a penalty of $25 for the failure to settle a claim for damages to an intrastate shipment between two points on the carrier's line within sixty days from the giving of notice of the claim, where, upon the trial, the actual damages were assessed at the sum stated in the notice.

[For other cases, see Constitutional Law, 279–284, in Digest Sup. Ct. 1908.]

**Statutes — who may assail validity.**

2. A carrier, penalized under Miss. Laws 1908, chap. 196, for its failure to make reasonably prompt settlement of a claim which the judgment in the suit finds to be just in every respect, cannot urge that such statute is unconstitutional, in that it equally penalizes the failure to accede to an excessive or extravagant claim

[For other cases, see Statutes, I. d, 8, in Digest Sup. Ct. 1908.]

[No. 57.]

Submitted November 13, 1912. Decided December 2, 1912.

IN ERROR to the Circuit Court of Hinds County, in the State of Mississippi, to review a judgment imposing a penalty upon a carrier for its failure to make prompt settlement of a claim for damages. Affirmed.

The facts are stated in the opinion.

Messrs. Edward Mayes and Charles N. Burch submitted the cause for plaintiff in error:

The constitutionality of a law is to be tested not by what has been done under it, in the specific instance, but by what may be done under it as a general rule.

Southern R. Co. v. Com. 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289; St. Louis & S. F. R. Co. v. State, 26 Okla. 62, 30 L.R.A.(N.S.) 137, 107 Pac. 929; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493; Sully v. American Nat. Bank, 178 U. S. 289, 299, 300, 44 L. ed. 1072, 1076, 1077, 20 Sup. Ct. Rep. 935; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 501, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 573, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533.

Mr. William H. Watkins submitted the cause for defendant in error:

It is a mistake to assume that the duty of a carrier ends merely with the delivery of the property intrusted to it for transportation. It owes to the parties in interest the duty not only to transport within a reasonable time, but to transport safely and without damage; and in the event loss or damage is had to the property during the transportation, then it becomes the duty of the carrier to compensate the injured party, and the duty to make compensation is just as high and just as binding on the carrier

NOTE.—As to constitutionality of statute imposing penalty or added liability for failure of carrier to pay claim—see note to Mobile & O. R. Co. v. Brandon, 42 L.R.A. (N.S.) 106.

Who may raise objection that a statute contains an unconstitutional discrimination —see note to Pugh v. Pugh, 32 L.R.A. (N.S.) 954.

after the loss or damage as any other duty incident thereto.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378.

It is the duty of this court to so construe a state statute, if possible, that the same will not be in violation of the Constitution of the United States.

Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; Marshall v. Grimes, 41 Miss. 31.

It may be that a legislative enactment on its face might be in violation of the fundamental law, but if it should appear that the supreme court of the state, in construing the act, had put such a construction upon it as would restrain its operation within constitutional boundaries, then such a construction would be binding upon the Supreme Court of the United States, although a literal construction of the statute would lead to a different result.

Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

Railroad companies need not be, and will not be, liable for the penalty if they will simply comply with the spirit and purpose of the statute; that is to say, make a sincere and honest effort to ascertain the extent of the damage and make compensation for the same.

Mobile & O. R. Co. v. Brandon, 98 Miss. 461, 42 L.R.A.(N.S.) 106, 53 So. 957.

The question as to the justice of the claim cannot. of course, be raised by this court. The state court found that the claim was a correct claim for the full amount, and such finding is conclusive upon this court.

Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 585; Quimby v. Boyd, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147.

218] *Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action to recover damages from a railway company for the partial loss of a shipment of vinegar carried over the company's line from one point to another in the state of Mississippi. This case originated in a justice's court and was taken on appeal to the circuit court of Hinds county, where the plaintiff recovered a *judgment for actual* damages and $25 as a statutory penalty. That being the highest court in the state to which the case could be carried, it was then brought here. The position of the railway company, unsuccessfully taken in the state court and now renewed, is that the Mississippi statute providing for the penalty is repugnant to the due process of law and equal protection clauses of the 14th Amendment to the Constitution of the United States. The statute reads:

"Railroads, corporations, and individuals engaged as common carriers in this state are required to settle all claims for lost or damaged freight which has been lost or damaged between two given points on the same line or system, within sixty days from the filing of written notice of the loss or damage with the agent at the point of destination; and where freight is handled by two or more roads or systems of roads, and is lost or damaged, claims therefor shall be settled within ninety days from the filing of written notice thereof, with the agent by consignee at the point of destination. A common carrier failing to settle such claims as herein required shall be liable to the consignee for $25 damages in each case, in addition to actual damages, all of which may be recovered in the same suit: Provided that this section shall only apply when the amount claimed is $200 or less." Laws 1908, 205, chap. 196

The facts showing the application made of the statute are these: The plain-[219 tiff gave notice of its claim in the manner prescribed, placing its damages at $4.76, and, upon the railway company's failure to settle within sixty days, sued to recover that sum and the statutory penalty. Upon the trial the damages were assessed at the sum stated in the notice, and judgment was given therefor, with the penalty. Thus, the claim presented in advance of the suit, and which the railway company failed to settle within the time allotted, was fully sustained.

As applied to such a case, we think the statute is not repugnant to either the due process of law or the equal protection clause of the Constitution, but, on the contrary, merely provides a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment. See Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; St Louis, I. M. & S. R. Co. v. Wynne. 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493.

Although seemingly conceding thus much, counsel for the railway company urge that the statute is not confined to cases like the present, but equally penalizes the failure to accede to an excessive or extravagant claim; in other words, that it contemplates

the assessment of the penalty in every case where the claim presented is not settled within the time allotted, regardless of whether, or how much, the recovery falls short of the amount claimed. But it is not open to the railway company to complain on that score. It has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which, upon due inquiry, has been pronounced just in every respect. Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand, and not with imaginary ones. It suffices, therefore, 220]to *hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now. New York ex rel. Hatch v. Reardon, 204 U S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Lee v. New Jersey, 207 U. S. 67, 70, 52 L. ed. 106, 107, 28 Sup. Ct. Rep. 22; Southern R. Co. v. King, 217 U. S 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Collins v. Texas, 223 U. S. 288, 295, 56 L. ed. 439, 443, 32 Sup. Ct. Rep. 286; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed 1197, 1201, 32 Sup. Ct. Rep. 784.

The judgment is accordingly affirmed.

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## GERMAN ALLIANCE INSURANCE COMPANY, Petitioner,
v.
## HOME WATER SUPPLY COMPANY.

(See S. C. Reporter's ed. 220-234.)

**Waters — contract for fire protection — breach — action by taxpayer.**

1. A contract by a city with a water company for a water supply will not sustain an action against the company for a breach of its contractual obligations to furnish water for fire protection, brought by a taxpayer whose property was destroyed by fire as the result of such breach.

[For other cases, see Waters, III. a; Parties, I. a, in Digest Sup. Ct. 1908.]

NOTE.—As to liability of water company in tort for loss to one sustaining no contract relation with it, because of its failure to comply with its contract with the municipality—see notes to Mugge v. Tampa Waterworks Co. 6 L.R.A.(N.S.) 1171, and Hone v. Presque Isle Water Co. 21 L.R.A. (N.S.) 1021.

**Waters — duty of water company to furnish fire protection — breach — action by taxpayer.**

2. An action *ex delicto* cannot be maintained against a water company by a taxpayer whose property has been destroyed by fire in consequence of the company's failure to comply with its contract with the municipality to furnish water for fire protection.

[For other cases, see Waters, III. a; Parties, I. a, in Digest Sup. Ct. 1908.]

[No. 19.]

Argued April 26, 1912. Decided December 2, 1912.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of South Carolina, sustaining a demurrer to and dismissing the complaint in an action by an insurance company to recover from a water company because of its failure to furnish water for fire protection. Affirmed.

See same case below, 42 L.R.A.(N.S.) 1005, 99 C. C. A. 258, 174 Fed. 764.

Statement by Mr. Justice **Lamar**:

"The Spartan Mills" owned a number of houses in Spartanburg, South Carolina. They were damaged by fire on March 25, 1907. The German Alliance Company, which had insured the buildings, paid $68,000, the amount of the loss, took from the mills an assignment "of all claims and demands against any person arising from or connected with the loss or damage," and brought suit, in the United States court for the district of South Carolina, against the Home Water Supply Company, on the ground that the fire could easily have been extinguished and the damage prevented if the water company had complied with its contract and duty to furnish the inhabitants of the city with water for fire protection.

The complaint alleged that on February 14, 1900, the city council adopted an ordinance, ratifying a contract, previously prepared, between the city and the water company, by which the latter was empowered, for a term of thirty-three years, to lay and maintain pipes in the streets and operate waterworks with which "to supply the city and its inhabitants with water suitable for fire, sanitary, and domestic purposes." The city agreed to use the hydrants *for the extinguishment of[222 fires and sprinkling purposes only; to make good any injury which might happen to them when used by its fire department; to pay rent for said fire protection, for the term of ten years, at the rate of $40 per year for each hydrant, and annually to

levy a tax sufficient to pay what should become due under the contract.

The company agreed to lay at least 6 miles of pipe, but on sixty days' notice from the city would lay additional pipes and install hydrants, not less than ten to the mile, for each of which the city was to pay $40 per year.

The company agreed to keep all hydrants supplied with water for fire protection, and to maintain a height of at least 70 feet of water in the standpipe. If any hydrant remained out of order for more than twenty-four hours, after notice, the company was to pay the city $7 per week while each hydrant was unfit for use.

It was further alleged that in 1905 and 1906 the city ordered the company to "put in certain hydrants with connecting pipes," "which order, if obeyed, would have carried water protection to within about 200 feet of the building which first caught fire on March 25, 1907, instead of 650 feet, which was the distance of the nearest hydrant to the said fire on said day; that in violation of its duty and obligation to adequately protect the property from fire, and in defiance of the order of council, the defendant failed to make such extensions, and as a direct result there was no plug near enough to furnish water to extinguish said fire,—all due to the defendant's culpable and wilful negligence and disregard of duty and obligations to said city and its inhabitants."

Other breaches were charged, in laying 4-inch instead of 6-inch pipe; in neglecting to install the electric cut-off; and "in failing absolutely to furnish water with which to extinguish such fire and prevent its spreading to other houses."

The defendant made no question as to 223]the right of the *insurance company to maintain the action if the Spartan Mills could have done so, but filed a general demurrer which was sustained July 14, 1908. That judgment was affirmed November 4, 1909, by the circuit court of appeals (42 L.R.A. (N.S.) 1005, 99 C. C. A. 258, 174 Fed. 764), and the case was brought here by writ of certiorari.

**Mr. Hartwell Cabell** argued the cause, and, with Mr. Stanyarne Wilson, filed a brief for petitioner:

As to the bondholders, the decision in the supreme court of North Carolina in Fisher v. Greensboro Water Supply Co. 128 N. C. 375, 38 S. E. 912, created no estoppel, and therefore the question whether the facts relied upon by Fisher as a cause of action were such as satisfied the definition of the legal term "tort," as it is used in the statute, so as to entitle him to a preference, was open for decision by the Federal courts.

Brooks v. Burlington & S. W. R. Co. 101 U. S. 443, 25 L. ed. 1057; Hassall v. Wilcox, 130 U. S. 493, 32 L. ed. 1001, 9 Sup. Ct. Rep. 590.

If this contention be correct, it would follow that the conclusion reached both by the United States circuit court and by this court, that the facts found by the jury in Fisher v. Greensboro Water Supply Co. were sufficient to sustain a judgment for a tort, was germane to the issues, and that the case involved the decision of a question which had to be decided by the Federal courts in the affirmative in order to allow the judgment lien of Fisher a preference over the mortgage liens.

Mugge v. Tampa Waterworks Co. 52 Fla. 371, 6 L.R.A.(N.S.) 1171, 120 Am. St. Rep. 207, 42 So. 81; Ancrum v. Camden Water, Light & Ice Co. 82 S. C. 284, 21 L.R.A. (N.S.) 1029, 64 S. E. 151; Knuth v. Butte Electric R. Co. 148 Fed. 73.

The previous cases in North Carolina allowing recoveries against private water companies under similar circumstances (Gorrell v. Greensboro Water Supply Co. 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720; Jones v. Durham Water Co. 135 N. C. 553, 47 S. E. 615) proceeded upon the theory of the right of the party aggrieved to recover in an action upon the contract with the municipality, holding that the contract had been entered into for the benefit of the inhabitants, and that therefore they were entitled to maintain an action thereon. There was therefore no "rule of property" in North Carolina arising out of numerous adjudications upon the construction of N. C. Code, § 1255, which Federal courts would feel inclined to follow.

Moreover, in Fisher v. Greensboro Water Supply Co. 128 N. C. 375, 38 S. E. 912, the supreme court of North Carolina did not undertake to construe or apply § 1255. As to Fisher's rights under that law, they refused to commit themselves, the bondholders not being before them, and that question not being raised by the record. They contented themselves by declaring that the facts found constituted a tortious injury, as that term is to be understood at common law.

But, even had they undertaken to construe the statute, this court could not have been bound by such construction in a case involving the rights of parties against whom there was no estoppel of record.

Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Venice v. Murdock, 92 U. S. 494, 501, 23 L. ed. 583, 585; Pleasant Twp. v. Ætna L. Ins. Co. 138 U. S. 67, 34 L. ed. 864, 11 Sup.

Ct. Rep. 315; Burgess v. Seligman, 107 U. S. 20, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10.

The English courts from early times have held that when an individual or a private corporation, for valuable consideration, has contracted to render services of a public nature, such individual or corporation by operation of law becomes charged with a duty to the public, and may be held liable for the negligent discharge of that duty to any member of the public who may be injured thereby.

Lyme Regis v. Henley, 3 Barn. & Ad. 77; 5 Bing. 91; Payne v. Partridge, 1 Shower, K. B. 255; Lynn v. Turner, Cowp. pt. 1, p. 86; Mersey Docks v. Gibbs, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, L. R. 1 H. L. 93, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872.

The same doctrine has received general recognition in the courts of this country. The liability of railroad companies, electric light and gas companies, and other and similar quasi public corporations, for their negligence, irrespective of contract, is too well settled to require citation of authorities. Many other callings of a public nature have been held to be within the same rule of responsibility.

Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Fulton F. Ins. Co. v. Baldwin, 37 N. Y. 648; Little v. Banks, 85 N. Y. 258; Lampert v. Laclede Gaslight Co. 14 Mo. App. 376; Appleby v. State, 45 N. J. L. 161.

The right of a private citizen to recover as for a tort against a water company whose failure to furnish adequate water for fire protection has caused damage has been sustained in a number of cases.

Paducah Lumber Co. v. Paducah Water Supply Co. 89 Ky. 340, 7 L.R.A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249; Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; Fisher v. Greensboro Water Supply Co. 128 N. C. 375, 38 S. E. 912; Mugge v. Tampa Waterworks Co. 52 Fla. 371, 6 L.R.A.(N.S.) 1171, 120 Am. St. Rep. 207, 42 So. 81.

It is well known that when a company undertakes to supply a town with water, the ordinary methods to obtain water to extinguish fires are abandoned by the people; and under such circumstances it would be gross negligence in the company to permit the supply of water to be intermitted or diminished to any considerable extent, and thus endanger the property within the town.

State, Olmsted, Prosecutor, v. Morris Aqueduct, 46 N. J. L. 495.

The assumption that water for fire purposes is furnished to the city, and not to its inhabitants, and *that therefore the company* is not engaged in a public service, is untenable.

Planters' Oil Mill v. Monroe Waterworks & Light Co. 52 La. Ann. 1250, 27 So. 684; Ferris v. Carson Water Co. 16 Nev. 44, 40 Am. Rep. 485; Bonaparte v. Camden & A. R. Co. Baldw. 223, Fed. Cas. No. 1,617; Kiernan v. Metropolitan Constr. Co. 170 Mass. 378, 49 N. E. 648; Washington v. Washington Water Co. 70 N. J. Eq. 254, 62 Atl. 390; Public Service Corp. v. American Lighting Co. 67 N. J. Eq. 122, 57 Atl. 482.

Some courts have held that in furnishing a supply of water for fire purposes, the water company is acting as a governmental agency,—a delegate of the municipality; and since the city cannot be held liable for failure to supply water for such purposes, even when it has undertaken to do so, neither can a water company be held liable.

Britton v. Green Bay & Ft. H. Waterworks Co. 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; Nichol v. Huntington Water Co. 53 W. Va. 348, 44 S. E. 290; Akron Waterworks Co. v. Brownless, 10 Ohio C. C. 620, 5 Ohio C. D. 1.

The conclusion reached in these cases is due to a confusion of ideas which should have been kept quite distinct. When governmental functions are delegated to a municipality, the immunity of the sovereign from suits by its subjects accompanies their exercise by the municipality. The individual property owner is without a remedy against the city, simply because the city, in providing fire protection, exercises the sovereign power of the state, and hence cannot be sued. As the court of appeals of New York said in Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405, if the defendant (the municipality) assumes a governmental function, then it comes under the sanction of the rule which exempts governments from suits by citizens.

But it is a *non sequitur* to say that because a municipality is not liable to individuals, a private water company which undertakes to perform the same acts is also not liable. When a municipal corporation does these acts it is a discretionary agent of the state, performing a function of sovereignty, and simply cannot be sued; while the water company does not represent the state, and enjoys no such exemption.

People ex rel. Mills Waterworks Co. v. Forrest, 97 N. Y. 97.

To hold, as the cases cited above do hold, that the exemption of the municipality from suit by individuals is due to the public and general character of the beneficiary, and that therefore the water company, which serves the same purpose, is also exempt, is to overlook the very basis of municipal nor

liability. The question is not one of beneficiaries at all, but of a technical exemption from suit, granted on grounds of public policy to cities and other municipal corporations, but denied to private corporations.

Mr. I. A. Phifer argued the cause, and, with Messrs. Ralph K. Carson and Thomas Ruffin, filed a brief for respondent:

A water company is not liable in tort for loss to one sustaining no contract relation with it, by its failure to comply with its contract with the municipality.

Note to Mugge v. Tampa Waterworks Co. 6 L.R.A.(N.S.) 1171; 3 Michigan L. Rev. 501–507.

The complaint does not allege the existence of an ordinance in effect in the city of Spartanburg under which the water company was acting, which provided that the water company should be responsible for any or all damage sustained by the city or any individual from the negligence of the company in either the construction or operation of the plant; whereas, the existence of such an ordinance did appear in the opinion in the Fisher Case, and while the existence of this ordinance was not stressed in the Supreme Court of the United States, such fact could well have formed the basis of the judgment when it was first rendered in the North Carolina court.

And while it was a rule of law in North Carolina when judgment was rendered, that the taxpaying property owner was the real party in interest to a contract by a municipality which acted as its agent with a water company for a supply for fire purposes (Gorrell v. Greensboro Water Supply Co. 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720), no such rule of law prevails in South Carolina (Black v. Columbia, 19 S. C. 412, 45 Am. Rep. 785; Ancrum v. Camden Water, Light & Ice Co. 82 S. C. 284, 21 L.R.A.(N.S.) 1029, 64 S. E. 151).

The courts of the United States have always looked askance at anyone who has attempted to treat the municipality as his agent, or as being directly answerable to him in the conduct of its affairs, and have stated in substance that "no citizen can be heard to contend that the laws and ordinances under which a municipal water supply has been created and regulated are invalid because his individual and personal views have not been formally obtained and considered."

Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

This court has expressly stated, in the case of St. Tammany Waterworks Co. v. New Orleans Waterworks Co. 120 U. S. 68, 30 L. ed. 565, 7 Sup. Ct. Rep. 405, in speaking of whose province it was to determine whether or not the public health would be better protected or the public comfort subserved in the matter of furnishing water, that "these are matters which neither the appellant nor individual citizens may determine for the constituted authorities."

This court has no disposition or tendency to engraft new, strange, and radical principles on the body of our well-established law, under the false guise of progress to meet the spirit of the age. Principles which reason has established and long experience has sanctioned are very apt to be the best that legislative and judicial wisdom can devise, and the safest criterion of judicial action.

Britton v. Green Bay & Ft. H. Waterworks Co. 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

In Ancrum v. Camden Water, Light, & Ice Co. 82 S. C. 284, 21 L.R.A.(N.S.) 1029, 64 S. E. 151, the supreme court of South Carolina, construing a contract much like the one here involved, held that a taxpayer could not maintain an action against a water company for damage due to its failure to furnish water as required by such an agreement with the city. The plaintiff, however, contends that although the present suit is for damage to property located in South Carolina, that decision is not of controlling authority, because it was rendered two years after this action was begun. Relying on Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, it insists that when the contract was made, February, 1900, there was no settled state law on the subject, and therefore the Federal courts must decide for themselves, as matter of general law, the much controverted question as to a water company's liability to a taxpayer for failure to furnish fire protection, according to the terms of its contract with the city.

The courts have almost uniformly held that municipalities are not bound to furnish water for fire protection. Such was the unquestioned rule when they relied, as some still do, on wells and cisterns as a source of supply; nor was there any increase of liability with the gradual increase of facilities; though, with the introduction of reservoirs, standpipes, pumping stations, and steam engines, cities were frequently sued for damages resulting from an inadequate supply or insufficient pressure. But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or great-

or liability. It acted in a governmental 228]capacity, and was *no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

If the common law did not impose such duty upon a public corporation, neither did it require private companies to furnish fire protection to property reached by their pipes. And there could, of course, be no liability for the breach of a common-law, statutory, or charter duty which did not exist. It is argued, however, that even if, in the first instance, the law did not oblige the company to furnish property owners with water, such a duty arose out of the public service upon which the defendant entered. But if, where it did not otherwise exist, a public duty could arise out of a private bargain, liability would be based on the failure to do or to furnish what was reasonably necessary to discharge the duty imposed. The complaint proceeds on no such theory. It makes no allegation that the defendant failed to furnish a plant of reasonable capacity, or neglected to extend the pipes where they were reasonably required. Nor is it charged that what the company actually did was harmful in itself or likely to cause injury to others, so as to bring the case within the principle applicable to the sale of unwholesome provisions, or misbranded poisons, which, in their intended use, would be injurious to purchasers from the original vendee. So that, notwithstanding numerous charges of culpable, wanton, and malicious neglect of duty, this suit—whether regarded as *ex contractu* or *ex delicto*—is for breach of the provisions of the contract of February 14, 1900, which must, therefore, be the measure of plaintiff's right and of the defendant's liability.

Whether a right of action arises out of such a contract, in favor of a taxpayer, is a matter about which there has been much discussion and some conflict in decisions. Although for nearly a century it has been common for private corporations to supply 229]cities with water under this *sort of agreement, we find no record of a suit like this prior to 1878, when the supreme court of Connecticut, in a brief decision (Nickerson v. Bridgeport Hydraulic Co. 46 Conn. 24, 33 Am. Rep. 1), held that the property owner was a stranger to the agreement with the municipality, and therefore could not maintain an action against the company for a breach of its contract with the city. Since that time similar suits, some in tort and some for a breach of the contract, have been brought in many other states. In view of the importance of the question, the subject has been *examined and re-examined.* the contract subjected to the most critical analysis, and many elaborate opinions have been rendered. They are cited in 3 Dill. Mun. Corp. § 1340, and in the Ancrum Case, supra.

From them it appears that the majority of American courts hold that the taxpayer has no direct interest in such agreements, and therefore cannot sue *ex contractu.* Neither can he sue in tort, because, in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action *ex delicto.* A different conclusion is reached by the supreme courts of three states, in cases cited and discussed in Mugge v. Tampa Waterworks Co. 52 Fla. 371, 6 L.R.A. (N.S.) 1171, 120 Am. St. Rep. 207, 42 So. 81. They hold that such a contract is for the benefit of taxpayers, who may sue either for its breach, or for a violation of the public duty which was thereby assumed.

The plaintiff presses these decisions to their logical conclusion and sues not for negligence in operating the plant, but for breach of the contract of construction. The complaint charges that as a direct consequence of the refusal to lay the pipes, as provided by the contract, there was no plug near enough to extinguish the fire. The other allegations as to putting in 4-inch instead of 6-inch pipe, and failing to install the electric cut-off, are immaterial, except on the theory that if the property owner was indeed a beneficiary, it, after acceptance, would be entitled *to all the rights of[230 the original promisee, and if not otherwise injured, might at least recover nominal damages for any breach. By the same reasoning it, with the other members of the class, might release the company from liability already incurred, or even discharge it altogether from the duty of carrying out the agreement in the future. If this did not entirely substitute the taxpayer for the municipality, it would at least subject the promisor to liability to many, where it only had contracted with one. Dow v. Clark, 7 Gray, 201.

In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different states. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity necessary to enable him to hold the promisor liable Others make further conditions. But even where the right is most liberally granted, it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption that a contract is only intended for the benefit of those who made it. Before a

stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings . . . but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 124, 25 L. ed. 76. Cf. Hendrick v. Lindsay, 93 U. S. 149, 23 L. ed. 857; National Sav. Bank v. Ward, 100 U. S. 202, 205, 25 L. ed. 623, 625.

Here the city was under no obligation to furnish the manufacturing company with 231]fire protection, and this *agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect,—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

He is interested in the faithful performance of contracts of service by policemen, firemen, and mail contractors, as well as in holding to their warranties the vendors of fire engines. All of these employees, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue, though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven, Neg. 3d ed. 305; Pollock, Torts, 8th ed. 434, 547; Davis v. Clinton Waterworks Co. 54 Iowa, 61, 37 Am. Rep. 185, 6 N. W. 126.

Each of these promisors of the city, like the water company here, would be liable for any tort done by him to their persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not and, in the nature of things, could not have been, in contemplation of the parties.

The result is that plaintiff cannot maintain this action, and though based upon the general principle that the parties to a contract are those who are entitled to its rights, *is in accordance with the par-[232 ticular intent of those who made this agreement.

If the company had, indeed, made a valid contract for the benefit of a third person, the amount of the damages for which it might be liable would be immaterial. Yet, where there is no such express agreement, and liability to a taxpayer is sought to be raised by implication, it is proper to test the correctness of the proposed construction by noting the results to which it would lead. The contract was made in February, 1900. By its terms the city was, during a period of ten years, to pay $40 per annum for each hydrant. During that time the property subject to damage by fire might double or quadruple in value. The failure to provide that the water rent of $40 per hydrant should rise or fall with the increase or decrease in such values indicates that liability for damage to that property was not in the contemplation of the parties, and that no payment therefor was included in the price for each hydrant. Otherwise the amount of payment would naturally have varied with the risk assumed.

In some states it is held that, in the absence of a statute, a city can neither directly nor indirectly make a contract with a water company that the latter should pay private individuals for fire damage, since that would involve the use of public money to secure a private benefit to the owner of private property. Hone v. Presque Isle Water Co. 104 Me. 217, 21 L.R.A.(N.S.) 1021, 71 Atl. 769. In the Ancrum Case, supra, the South Carolina court held that the amount paid per hydrant was so insignificant by comparison with the enormous risk involved, as clearly to indicate that neither the city nor the water company intended that the latter should be liable to the taxpayer for a breach of the company's contract with the city.

This conclusion deprives the property owner of no right, for if the city had owned the works, and had been guilty of the same acts as are charged against the water company *here, no suit could have been[233 maintained against the municipality. There was no creation of a right to fire protection if, instead of doing so itself, the city contracted with a private company to furnish water. It bought the citizen no new right of action, and did not bargain to secure for him an indemnity against loss by fire, but left him to protect himself against that hazard

by insurance, paying the premium direct to an insurance company instead of indirectly, through taxation. When, in pursuance of such precaution, the Spartan Mills insured the houses, and the plaintiff later settled the fire loss, there was no right of action in favor of the manufacturing company against the water company to which the insurance company could be subrogated.

The plaintiff urges that, whatever the rule elsewhere, it is entitled to recover under the decision in Guardian Trust & D. Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186. But the facts there differ from those in this record. There the water company had an exclusive right to use the streets in the city of Greensboro, under an ordinance which, among other things, provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant." 58. Buildings were destroyed as a result of the negligent failure of the company to furnish sufficient water while operating its plant. The owner brought suit against the water company in the courts of North Carolina, where it had previously been settled that such actions could be maintained. He recovered a judgment "for the tortious injury and damage done to the plaintiff by the negligence of the defendant." 128 N. C. 375, 38 S. E. 912, 115 Fed. 187. Execution issued, but no levy could be made, because the property of the water company was in possession of a receiver, appointed in foreclosure proceedings 234]pending in the United States *court. The plaintiff intervened therein, claiming that he was entitled to be paid before the bondholders by virtue of the North Carolina statute, which provided that "judgments for corporate torts" should take priority over older mortgages.

It was urged, among other things, by the bondholders, that the suit in the state court was really for breach of contract, and that entering the judgment as for a tort did not change the nature of the action so as to entitle the plaintiff to the benefits of the North Carolina statute.

It was that question alone, as to the character of the suit and judgment, which was before this court. What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation. The Fisher Case could not have decided the primary question as to the right of the taxpayer to sue, for that issue had been finally settled by the state court. It raised no Federal question and was not in issue on the hearing in this court. Neither did the Fisher Case overrule the principle announced in Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 124, 25 L. ed. 76, that a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest. The judgment of the Circuit Court of Appeals is affirmed.

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CONCEPCION VEVE Y DIAZ, José Sastrano Belaval, Her Husband, et al., Plffs. in Err.,

v.

JOSÉ AVALO SANCHEZ.

(See S. C. Reporter's ed. 234–242.)

**Boundaries — calls for quantity — locative calls.**

1. A mortgagor who conveyed in unambiguous terms a single body of land with definitely described continuous exterior boundaries cannot prevail in an action of ejectment for a tract embraced within those boundaries, but alleged not to be covered by the mortgage, brought by him against the mortgagee, who was also the purchaser at the foreclosure sale, on the theory of the inapplicability to Porto Rico of the rule that calls for quantity must yield to the more certain and locative lines of the adjoining owners.

[For other cases, see Boundaries, IV. d, in Digest Sup. Ct. 1908.]

**Evidence — parol to vary writing — description.**

2. The mortgagor cannot prove by parol in an action of ejectment brought by him against the mortgagee who was also the purchaser at the foreclosure sale, that a lot in the center of a single body of land conveyed by the mortgagor in unambiguous terms with definitely described continuous exterior boundaries was not covered by the mortgage.

[For other cases, see Evidence, 1471–1475, in Digest Sup. Ct. 1908]

**Evidence — parol to vary writing — applicability to Porto Rico.**

3. The rule prohibiting the varying of written contracts by parol is applicable to a mortgage executed in Porto Rico in 1885.

[For other cases, see Evidence, VI. a, in Digest Sup. Ct. 1908.]

**Estoppel — by deed — after-acquired title.**

4. A statement in a mortgage, following the descriptive clause, that the mortgagor was the owner of the land, coupled with a provision in the judicial deed made in pursuance of the foreclosure sale, that the mortgagor "remains bound under the present sale to guarantee the title in accordance with law," estops the mortgagor, who after-

NOTE.—As to estoppel by recitals in deed —see note to Carver v. Jackson, 7 L. ed. U. S. 761.

wards acquires title to a parcel embraced in the description, from denying that he had the right to dispose of all the property which the mortgage purported to convey. [For other cases, see Estoppel, II. c, in Digest Sup. Ct. 1908.]

[No. 42.]

Argued November 7, 1912. Decided December 2, 1912.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment in favor of plaintiff in an action of ejectment. Reversed and remanded for further proceedings.

See same case below, on motion for new trial, 5 Porto Rico Fed. Rep. 366.

The facts are stated in the opinion.

Mr. Charles Hartzell argued the cause, and, with Mr. Manuel Rodriguez Serra, filed a brief for plaintiffs in error.

Mr. José R. F. Savage argued the cause, and, with Mr. Hector H. Scoville, filed a brief for defendant in error.

Mr. Justice Lamar delivered the opinion of the court:

In 1885, José Avalo Sanchez mortgaged to Doña Maria Diaz y Siaca a sugar plantation in Porto Rico, known as Bello Sitio, described as containing 400 cuerdas, and bounded on the north, south, east, and west by the colindantes, or adjoining landowners, whose names were given. Suit to foreclose was instituted in 1889, and at the end of three years the mortgagee obtained a decree 236 which, however, *instead of ending the controversy, was the beginning of litigation in the Spanish courts which is said to have been the most protracted and bitter in the history of the island of Porto Rico.

The record of the various proceedings is involved and complicated, but it appears that Mrs. Diaz purchased at the foreclosure sale, and apparently in accordance with Spanish custom (Graham v. United States, 4 Wall. 261, 18 L. ed 333), was put in possession on October 30, 1891. But before she received the judicial deed, attachments were levied on Bello Sitio, on a lot afterward called Sauri, "in the center of the same," and on certain personalty, as the property of Sanchez. About the same time a concurso of creditors, in the nature of bankruptcy proceeding, was begun against him. The trustee apparently went through the form of taking possession of all property of Sanchez, including Bello Sitio, though without actually evicting Mrs. Diaz. Sanchez himself later instituted proceedings to cancel the mortgage and judicial deed under which Mrs. Diaz claimed title. He failed in this suit, but the other branches of the litigation continued for sixteen years, and, after the death of Mrs. Diaz, finally terminated in 1907, when the supreme court of the island held that the attachment should be released, the bankruptcy proceedings dismissed, and all the property returned to Sanchez, except Bello Sitio, which was to remain at the disposal of the heirs of Mrs. Diaz.

Both parties seem to have considered this a decision in their favor,—the plaintiff claiming that it adjudged to him everything that was not Bello Sitio, and the defendants that it restored to them all that was included in the mortgage.

In the meantime Sanchez (in 1906) filed a bill in the United States court for Porto Rico, in which, as appears from statements in the opinion of the court, he attacked all of the proceedings in the Spanish tribunals as fraudulent, and asked that the mortgage foreclosure be set *aside and himself [237 declared to be the owner of Bello Sitio. Whether any issue was therein presented, or legally involved, as to the boundaries of the land, cannot, in the absence of a copy of the pleadings, be determined. On demurrer this bill was dismissed for laches and want of equity.

Sanchez then brought the present suit for the recovery of 134 cuerdas of land (lying within the exterior limits of Bello Sitio) and $60,000 as damages for improvements destroyed, crops removed, and mesne profits, from 1891 to 1907, during which time, he alleges, that the defendants and their ancestor, Mrs. Diaz, had usurped the premises, by means of false and fraudulent claims instituted in the Porto Rican courts. On demurrer the court held that the suit should be treated solely as an action in ejectment.

The defendants plead *res judicata*, title by prescription, and title under the mortgage foreclosure. We need only consider the question presented by the claim in the answer, "that the 400 cuerdas, known as the Hacienda Bello Sitio, includes the several parcels of land described in the plaintiff's complaint."

On the first hearing there was a mistrial. On the second, plaintiff offered evidence to show that between 1878 and 1880, he purchased three small lots forming a part of the tract mentioned in the complaint; that on January 5, 1880, he bought Bello Sitio from Monserrate Garcia, at the same time occupying, as lessee, the lot called Sauri. He admitted that "the land for which he is now suing was in the middle of what was formerly Bello Sitio," but claimed that Mrs. Diaz knew, or ought to have known, that the mortgage, dated May 28, 1885, did not convey Sauri, because he did not then own that place, and did not purchase it un-

til June 15, 1885, three weeks later. There was evidence that, in 1892, during the bankruptcy, a survey was made with a view to marking the lines between Bello Sitio and the land now sued for; that the agent of 238] *Mrs. Diaz was present and assented to the correctness of the survey. But if his admissions at that time could have bound the principal, or if he had authority to establish a new line by parol, the agreement was never executed by any change in possession, the complaint itself alleging that Mrs. Diaz and her heirs had been in possession since 1891. Plaintiff also relied on the records in the Spanish courts, which showed that from the time Mrs. Diaz took possession, in 1891, he, his creditors and the trustee in bankruptcy, had persistently claimed that Sauri and the other land now sued for formed no part of Bello Sitio, and was not included in the mortgage On the other hand, the defendants insisted that a single, not a divided, tract, was conveyed by the mortgage, which, as translated, described the land as being "a sugar cane plantation known as Bello Sitio . . . composed of 400 cuerdas of land, equivalent to 157 hectares, 21 areas, and 59 centiares, and its buildings . . . and other appurtenances used in its cultivation. Said land being bounded on the north by the property of Isabel Siaca and by lands of the plantation 'Convento,' belonging to Pilar Becerril y Torres; on the east by land of Nicolas Telemaco and by lands of Benigno and Sebastian de Santiago; on the south by the property called 'Ausubal' belonging to the Succession of Alejandrina Becerril y Torres, with lands belonging to Concepcion Lopez, and by the property belonging to the Successors of Alberto Western and the Luquillo-Fajardo road; and on the west by land belonging to Enrique Garcia and those of Nicolas Perez and of Gervasio Rivera."

A plat of Bello Sitio, made in 1907, showed that it contained exactly 415 cuerdas, and the defendants contended that if the 134 sued for were excluded, only 279 would be left, although the mortgage purported to convey 400 cuerdas. The plaintiff denied that the plat made in 1907 correctly represented the land which he had conveyed in 1885, insisting that, excluding Sauri, he 239]bought 400 cuerdas *from Monserrate Garcia, and had conveyed that quantity to Mrs. Diaz. He claimed that if there was any present deficiency, it was due to encroachments by the adjoining landowners He did not, however, establish what, if any, change had been made, while the surveyor testified that he followed the boundaries of Bello Sitio as indicated by *ditches, fences,* trees, stakes, and the documents of the adjoining landowners, all of whom were present when the survey was made and assented to its correctness. The landowners were also examined. Some of them had known the property from the date of the mortgage, and others, who were younger, for a shorter time. But all testified that they knew of no change in the lines.

The jury found a verdict for the plaintiff A motion for a new trial was overruled. The case is here on assignments which relate to rulings in admitting and excluding testimony, in charging and refusing to charge the jury, and in failing to direct a verdict for the defendants.

The plaintiff's testimony established that he was in possession of Bello Sitio as owner, and of Sauri as lessee, when he made the mortgage on May 28, 1885. Three weeks later, he purchased Sauri and established a title on which he was entitled to recover, unless it, and the other three lots sued for, were included in the mortgage which described the property by name (Bello Sitio), by quantity (400 cuerdas) and by colindancias or adjoiners, on the north, east, south, and west.

A tract may be so well known by name that it can be described and conveyed without other designation. And there are cases where, in the sale of a ranch, or of an island, or of a well-known plantation, the limits described by name have prevailed when there was a discrepancy between it and other descriptive terms set out in the same deed. Lodge v. Lee, 6 Cranch, 237, 3 L. ed. 210.

Ordinarily, however, designation by name will yield to the more definite description by metes and bounds. In *this case[240 there was nothing to show that "Bello Sitio" was understood to mean or describe a hacienda of clearly defined limits; and there was no basis for a charge as to the conditions on which such designation could prevail over the other calls in the mortgage. No instruction on that subject was given, but the court did charge the jury as to the effect of a description by quantity, telling them that they might consider the terms of the mortgage and all documents referred to in it, the condition of the property and circumstances surrounding the transaction, and if they found that, at the time the mortgage was signed, the plaintiff did not own 400 cuerdas, and afterwards acquired sufficient to make up what Mrs. Diaz believed and had reason to believe was included in the mortgage, then the law will hold that such land is included, and they must find for the defendants so as to make up the full quantity

of land. Conversely, they were instructed that "if, when Sanchez made the mortgage, he was in possession of a tract bought from Monserrate Garcia that contained 400 cuerdas, then they must find, under the language of the descriptive clause of the mortgage, that he did not convey to her any of the tracts he now sues for."

This makes the construction of the mortgage depend not upon its language, but upon the quantity of land the mortgagor owned at the date of its execution, and required the jury to make designation by cuerdas prevail over description by specific boundaries. This is contrary to the rule that calls for quantity must yield to the more certain and locative lines of the adjoining owners. Such lines are certain, or they can be made certain, and may be platted so as to show the exact course and distance. They are treated as a sort of natural monument, and must prevail over the more general and less distinct designation by quantity. Bartlett Land & Lumber Co. v. Saunders, 103 U. S. 316, 26 L. ed. 546; Whiting v. Dewey, 15 241]Pick. 434; Cox v. McGowan, 116 *N. C. 135, 21 S. E. 108; Reed v. Locks & Canals, 8 How. 289, 12 L ed. 1083; Leonard v. Forbing, 109 La. 220, 33 So. 203.

2. It was argued that this rule was not applicable to Porto Rican deeds, made at a time when loose and indefinite methods of describing land were used. Doolan v. Carr, 125 U. S. 632, 31 L. ed 849, 8 Sup. Ct. Rep. 1228. But we find nothing in this case to warrant a departure from a rule long established and necessary to the protection of titles. The mortgage adopted a common method of bounding land. If there had been any error in describing what had been conveyed, it became manifest when Mrs. Diaz took possession in 1891. If there was a mutual mistake, proceedings could have been brought to reform the mortgage, and on such trial most of the evidence upon which plaintiff now relies might have been relevant. But in this action of ejectment he must recover on the strength of his own title, and cannot prevail against those who hold under an instrument signed by him, and which, in unambiguous terms, conveyed not two separate tracts, but a single body of land with definitely described continuous exterior boundaries. To permit a grantor, on the claim that an ambiguity existed, to prove by parol that a lot in the center of such a tract had not been conveyed, would make every grantee liable to have what had been conveyed in writing taken away by word of mouth.

*3. The rule* prohibiting written contracts *from being varied by parol is not* confined to the common law, but was of force in Porto Rico when this mortgage was made, and its enforcement in construing the descriptive clause according to accepted rules governing boundaries preserves the rights of the parties here. Sanchez was in possession of Sauri, as lessee, when the mortgage was made. That possession was itself a prima facie indication of title. He conveyed 400 cuerdas bounded by the adjoining land lines. There is a claim, not established proof, that these lines had been changed. The slight excess of 15 *cuerdas,[242 shown by a later and accurate survey, is not inconsistent with defendants' right to 400 cuerdas, but confirmatory of their contention (P. R. Civ. Code, art. 1471), while if plaintiff recovers the defendants will be left in possession of only 279 cuerdas, when the mortgage conveyed their ancestor 400.

4. Following the descriptive clause in the mortgage was a statement that Sanchez was the owner of the land. In addition to this recital, which, according to Van Rensselaer v. Kearney, 11 How. 322-326, 13 L. ed 713-715, would be equivalent to a covenant of warranty and ownership, it was claimed that, under the laws of Porto Rico (P. R. Civ. Code 1474), a warranty was implied in all conveyances of real estate. Apparently, in accordance with this view, the judicial deed, made in pursuance of the foreclosure sale, contained a provision that "the debtor, José Avalo Sanchez, remains bound under the present sale to guarantee the title in accordance with law." These facts estopped Sanchez from denying that he had the right to dispose of all the property which the mortgage purported to convey. For, having received the money on the faith of the statement that he was the owner of the property, he was bound to repay that sum; or, failing that, to perfect the title on which the money had been advanced So that when he acquired what is now called Sauri, but which had been originally included in the land conveyed by the mortgage, the title inured to the benefit of his vendee. Amonett v. Amis, 16 La. Ann. 225; Lee v. Ferguson, 5 La. Ann. 533; Stokes v. Shackleford, 12 La. 172; New Orleans v. Riddell, 113 La. 1051, 37 So. 966; Partida, Book 5, tit. 5, law 51; Ib. tit. 13, law 50; Van Rensselaer v. Kearney, 11 How. 322-326, 13 L. ed. 713-715; Bush v. Person, 18 How. 85, 15 L. ed. 274; Moore v. Crawford, 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447.

The judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

243] *JAMES W. BEACH, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 243-260.)

**Appeal — from court of claims — findings.**

1. The findings of the court of claims upon a claim for the purchase price, arising out of the alleged use by the Postoffice Department of claimant's patented device for pneumatic transportation, are not open to the objection that they constitute a mere recital of the evidence instead of an ascertainment of the ultimate facts, where the court has set forth the documents upon which alone must rest claimant's contention of an express contract, and the history of the transaction from which, if at all, an agreement must be implied if there was no express contract, and has expressly found that the evidence does not establish that the letters patent were conveyed or delivered to the Postmaster-General, and has made similar negative findings respecting the claim of priority in invention, and the claim that the inventions or devices used by the government are those covered by claimant's patents

[For other cases, see Appeal and Error, V. c, in Digest Sup. Ct. 1908.]

**Claims — contract — express or implied — government use of patent.**

2. The lack of statutory authority on the part of the Postmaster-General to contract on behalf of the government for the purchase of pneumatic transportation devices, or of patented inventions relating thereto, is fatal to a claim asserting a purchase by the Postmaster-General of claimant's inventions and patents pertaining to pneumatic transportation, whether such claim be rested upon an express or implied contract.

[For other cases, see Claims, 122-127, in Digest Sup. Ct. 1908.]

**Claims — contract — express or implied — government use of patent.**

3. The Postmaster-General was not given the authority to contract in behalf of the United States for the purchase of devices for pneumatic transportation or patented inventions relating thereto, the lack of which would be fatal to a claim founded upon such asserted purchase, either by the provisions of the postoffice appropriation act of July 13, 1892 (27 Stat. at L. 145, chap. 165), § 6, looking toward an investigation and report by the Postmaster-General as to pneumatic transportation of the mails, nor by U. S. Rev. Stat. § 3965, U. S. Comp. Stat. 1901, p. 2708, empowering that official to provide for carrying the mail as often as he may think proper, nor by the various appropriations for pneumatic transportation of the mail made by statutes which were enacted long after the last transaction between the claimant and the Postmaster-General, out of which any contract, express or implied, could arise, and which make no reference to any such transactions.

[For other cases, see Claims, 122-127, in Digest Sup. Ct. 1908.]

**Claims — express contract — government use of patent.**

4. The retention by the Postmaster-General of a proposal by the patentee of an invention for pneumatic transportation without in terms rejecting it does not amount to a purchase under an express agreement to pay the sum mentioned as consideration, where such proposal was submitted in response to an advertisement which plainly stated that proposals were desired for purposes of investigation and estimate merely, and that the Postmaster-General had no authority to contract for the expenditure of money for the use or purchase of any such invention, and where such proposal was not, either in form or substance, an assignment *in præsenti* of the inventions and patents, but manifestly contemplated that something should be done on each side before they should in fact become the property of the United States, and contained four several propositions, acceptance of either of which involved rejection of the remaining three.

[For other cases, see Claims, 122-127, in Digest Sup. Ct. 1908.]

[No. 7.]

Argued and submitted October 30, 1912.
Decided December 2, 1912.

APPEAL from the Court of Claims to review a judgment dismissing a petition seeking a recovery of the purchase price arising out of the alleged use by the Postoffice Department of patented devices for pneumatic transportation. Affirmed.

See same case below, 41 Ct. Cl. 110.

Statement by Mr. Justice Pitney:

This is an appeal from a judgment of the court of claims, dismissing the petition of claimant (now appellant), whereby he sought to recover the sum of twenty millions of dollars for certain inventions and letters patent pertaining to pneumatic transportation, alleged to have been sold and transferred by him to the United States in the year 1893, by agreement, express or implied, made between the claimant and the Postmaster-General. 41 Ct. Cl. 110.

The following is a sufficient outline of the findings of facts in that court:

Prior to July 26, 1892, the claimant, James W. Beach, had been granted certain letters patent for inventions or improvements relating to pneumatic transportation; to wit, letters patent No. 267,318, dated November 14, 1882, and letters patent No. 444,038, dated January 6, 1891, the object being to provide a continuous current of air, moving at high velocity through a tube or other conduit, and thereby to transport the mails and all suitable commodities through such tube or conduit. Ten prior patents had been issued to other par-

lease to the United States for mail purposes only, as aforesaid, a right or rights, and upon reasonable and equitable terms, and for a reasonable consideration to be paid to me, the undersigned, my heirs, executors, administrators, or assigns therefor, by the United States, the amount thereof to be agreed upon by the United States and the undersigned James W. Beach (either by mutual agreement or by arbitration), a right or rights as aforesaid to construct and operate within said entire United States, or either of them (save and excepting therefrom said states of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, Michigan, and the District of Columbia), one or more of said pneumatic conveyors or devices, said consideration to be based upon the mileage of the pneumatic tubes to be used, or upon a small percentage of the total (present) annual cost of the transportation of the United States mails within said United States.

This proposal is made upon condition and the same shall not be binding upon the undersigned unless the United States shall by the Postmaster-General accept said propositions, or one of said propositions, and shall notify me, the undersigned, of said acceptance on or before the 1st day of August, A. D. 1893

In witness whereof I have hereunto set my hand and seal at Chicago, Illinois, this 30th day of August, A. D. 1892.

James W. Beach. [Seal.]

In presence of—
Edward J. Quenny (?)
Jacob H. Hopkins.

251] *This proposal was accompanied with a description of the several devices described in letters patent No. 267,318 and No. 444,-038, and with a written offer: "At our own expense to demonstrate in a positive and convincing manner that the said pneumatic devices will, when in operation, do and perform all that is claimed in the accompanying 'Description' of said devices . . . The undersigned is prepared to enter into a contract with the United States to construct or cause to be constructed (and operated, if so desired) one or more lines of said pneumatic devices in any city of the United States, or between any cities or towns in the United States (whether near or far apart), upon terms and for a consideration to be mutually agreed upon, and upon executing the said contract the undersigned will secure the performance of any undertaking which he may so enter into by a good and sufficient bond."

*Seven other* persons or companies answered the advertisement of the Postmaster-General for bids, and on September 15, 1892, he appointed a commission of three expert postal officials to examine into the merits of the pneumatic tubes and other systems so advertised for, and that commission reported to the Postmaster-General in writing on September 29, 1892, embodying in its report a brief schedule of the several propositions, and stating the general conditions or terms upon which the owners would place their respective devices at the disposal of the government, or submit the same to its experimental test. Among these were:

"No. 3. Pneumatic Transit Company of New Jersey. Pneumatic. Will put down line between main postoffice in Philadelphia and substation at Third and Chestnut streets, without cost to government and without obligation to purchase or lease. After one year's trial will lease or will sell at cost if desired by government."

"No. 8. James W. Beach and the Beach Pneumatic Conveyor Company, Chicago. Will make contract to *construct ex-[252 perimental line for a consideration to be mutually agreed upon. Will sell or lease. Experimental line to be in readiness in from four to twelve months from October 1, 1892"

The report contained the following specific recommendation:

"The offer known as 'No. 3,' submitted by the Pneumatic Transit Company of New Jersey, is to put down in the streets of Philadelphia, between the postoffice and the East Chestnut street branch postoffice, pneumatic tubes to connect these two offices, without expense to the Department, and without charge for one year's use of the same, and without liability thereafter. This offer is the best that has been received, and it is believed to be highly advantageous to the Department, because it will enable it to make an immediate and practical test of the pneumatic system. Your committee, therefore, desire to make the copy of the proposition No. 3, hereto attached, a part of this report, and they recommend prompt acceptance of the offer, that the test may be made without delay.

"It is worth while to add that in our judgment the placing of a line unconditionally at the disposal of the Department for practical, everyday use will go far towards demonstrating, in a general way, the extent to which it may be made possible to substitute a tube system for the existing manner of performing transfer service within large cities, where time enters so largely into the necessities of the people.

"The committee desire, as well, to emphasize that in making recommendation that an arrangement be made with the

Pneumatic Transit Company of New Jersey for the construction of an experimental line in Philadelphia, it does not wish to be understood as passing upon the merits of the system itself, that being a matter for consideration hereafter; in like manner it will be our purpose to give consideration to each one of the systems that have been submitted."

253] *Pursuant to this report, the Postmaster-General, on October 20, 1892, entered into a contract with the Pneumatic Transit Company of New Jersey, providing for the installation by that company at its own expense of a line of pneumatic tubes in the city of Philadelphia, connecting the main postoffice with the subpostoffice, and its operation for a period of one year after completion in such practical tests as the postmaster of Philadelphia and the Postmaster-General might see fit to conduct; the tests to be made without cost to the United States beyond the use of surplus steam from the boilers in the postoffice building. The agreement provided that at the expiration of the year the Transit Company would lease said pneumatic tubes to the United States year by year, or would sell the same to the United States at cost, and would authorize the use by the United States of all the patented inventions in the said pneumatic tubes and devices connected therewith, by license, sale, or assignment, as might then be agreed upon.

Similar contracts were entered into by the Postoffice Department for like transportation of United States mail at Philadelphia, New York, Brooklyn, and Boston.

The Pneumatic Transit Company, which was incorporated under the laws of the state of New Jersey in 1892, had in its employ as an engineer one Birney C. Batcheller. He designed some of the terminal apparatus that was first used in Philadelphia; and a system of tubes and devices which carried mails pneumatically was constructed under his direction and supervision. While in the employ of said Company, said Batcheller extensively investigated the subject of pneumatics, and subsequently applied for and was granted letters patent for various improvements in pneumatic tube delivery devices. Ten of such patents were granted before the filing of Beach's petition in the court of claims, and they were used, applied, and operated by the Pneumatic Transit Company.

254] Twenty of such *patents were granted to Batcheller subsequent to the filing of Beach's petition, and these likewise were used, applied, and operated by the Pneumatic Transit Company.

Among the specific findings of the court of claims are the following:

6. The evidence does not establish to the satisfaction of the court that plaintiff's letters patent were conveyed or delivered to the Postmaster-General.

9. The evidence does not establish to the satisfaction of the court that James W. Beach, the claimant herein, was the first inventor of the devices for pneumatic transportation used, operated, and conducted for the transportation of mail matter by persons contracting with the United States or by the agents of the United States.

10. The evidence does not establish to the satisfaction of the court that the letters patent issued to the claimant, James W. Beach, covered the same devices actually put into practical operation and used by the corporation which, under an act of Congress, contracted with the Postmaster-General for transmitting mail matter through pneumatic conveyors.

Upon the foregoing findings of fact the court of claims decided as a conclusion of law that the claimant was not entitled to recover, and that his petition should therefore be dismissed.

Mr. James W. Beach, *in propria persona*, argued the cause and filed a brief for appellant:

Action was taken by appellee, on the proposal, and this makes a binding contract.

Wharton, Contr. § 13, p. 33.

Even though the proposal is not signed by appellee, it is deemed to have assented and is bound (appellee signed the advertisement, —the request).

Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97; Old Jordan Min. & Mill. Co. v. Société Anonyme des Mines, 164 U. S. 261, 41 L. ed. 427, 17 Sup. Ct. Rep. 113; 1 Page, Contr. § 50, p. 88.

A contract implied in law arises where some pecuniary inequality exists upon which the law operates by creating a debt to the amount of the required compensation.

Leake, Contr. 38; Moses v. Macferlan, 2 Burr. 1005, 1 W. Bl. 219; Lewis v. Campbell, 8 C. B. 541, 19 L. J. C. P. N. S. 130, 14 Jur. 396.

The conduct of the parties distinctly indicates a meeting of the minds.

United States v. Société Anonyme des Anciens Etablissements Cail, 224 U. S. 309, 56 L. ed. 778, 32 Sup. Ct. Rep. 479.

Where a party receives and retains an instrument, the legal presumption is that he assented.

2 Enc. Ev. 9.

Where one accepts a paper which he knows contains the terms of an offer, he is bound.

American Ins. Co. v. Neiberger, 74 Mo

167; Fennell v. Zimmerman, 96 Va. 197, 31 S. E. 22; 9 Cyc. 391, 392.

The contract with Pneumatic Transit Company of New Jersey was not a rejection of appellant's proposal. On the contrary, it was a contract by which the transit company agreed to furnish work, labor, and materials, and to build the device in question for the appellee for its sole use and benefit.

Millar v. Fitzgibbons, 9 Daly, 505.

In the case at bar no tort was committed in making or using the device, and therefore the case is unlike Schillinger's Case. In Schillinger's Case a tort was committed.

Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85.

The findings are, in large measure, a mere recital of evidence, and they are not a statement of ultimate fact nor a special verdict, and the conclusion of law and judgment are premature.

Burr v. Des Moines R. & Nav. Co. 1 Wall. 102, 17 L. ed. 562.

Assistant Attorney General Thompson submitted the cause for appellee. Mr. Walter H. Pumphrey was on the brief:

There being "no authority in law" at the time, no contract could have been entered into by the Postmaster General which would bind the government.

Chase v. United States, 155 U. S. 489–502, 39 L. ed. 234–238, 15 Sup. Ct. Rep. 174; Hooe v. United States, 43 Ct. Cl. 245, 218 U. S. 322, 54 L. ed. 1055, 31 Sup. Ct. Rep. 85; Whiteside v. United States, 93 U. S. 247, 23 L. ed. 882.

An offer to sell imposes no obligations until accepted according to its terms.

Minneapolis & St. L. R. Co. v. Columbus Rolling Mill, 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. Rep. 168; Tilley v. Cook County, (Tilley v. Chicago) 103 U. S. 155, 26 L. ed. 374.

The advertisement by the postoffice department, and the appellant's bid or proposal in relation thereto, constitute no agreement on the part of the government to pay appellant anything, and the correspondence between the parties discloses no such agreement.

South Boston Iron Co. v. United States, 118 U. S. 37–42, 30 L. ed. 69–70, 6 Sup. Ct. Rep. 928.

No man can thrust a contract upon another. There must be agreement, or something from which agreement can be inferred, —request, acquiescence, knowledge, or the retention of a consideration which can be returned. A contract cannot be implied from the voluntary acts of only one party.

Monroe v. United States, 35 Ct. Cl. 199.

*If appellant's proposal without a seal was not a "deed of conveyance," the addition of the seal did not make it one. If intended to transfer patents, the seal did not give it any additional force or effect.*

Gottfried v. Miller, 104 U. S. 521, 26 L. ed. 851.

In Fletcher v. United States, 11 Ct. Cl. 748, affirmed by this court (131 U. S. Appx. cxcvii. and 26 L. ed. 156), substantially the same state of facts will be found to appear as in this case.

Mr. Justice Pitney, after stating the case as above, delivered the opinion of the court:

The appellant, by his amended petition, asked for a recovery against the government in the sum of twenty *million[255 dollars and interest, as the purchase price upon an alleged assignment and transfer in the year 1893 of certain inventions pertaining to pneumatic transportation for which letters patent had been theretofore issued to him as mentioned in the findings. His first insistence was and is that these inventions and patents had been purchased by the Postmaster-General under an express agreement to pay him the sum mentioned as consideration In the alternative he insisted and now insists that at least the government, with his consent, entered into the use and enjoyment of his devices and letters patent in the year 1893, and has ever since then used and enjoyed them, and ought to pay him their fair value, which he places at twenty million dollars. The facts from which the alleged contract of purchase (express or implied) is sought to be deduced are set forth in the findings of fact above referred to. These findings are criticized by the appellant on the ground that they constitute a mere recital of the evidence, instead of an ascertainment of the ultimate facts. This criticism, under the circumstances of the present case, is captious. The court has set forth the documents upon which alone must rest appellant's contention of an express contract, if that contention have any substantial basis; and has likewise set forth the history of the transactions from which, if at all, an agreement must be implied, if there was no express contract. At the same time the court has expressly found that "the evidence does not establish to the satisfaction of the court that plaintiff's letters patent were conveyed or delivered to the Postmaster-General;" and has made a similar negative finding respecting the appellant's claim to be the first inventor of the devices for pneumatic transportation used, operated, and conducted for the transportation of mail matter by persons contracting with the United States or by the agents of the United States; and a similar negative find-

ing respecting his claim that his letters 256]patent "covered the *same devices actually put into practical operation and use by the corporation which, under an act of Congress, contracted with the Postmaster-General for transmitting mail matter through pneumatic conveyors."

A fundamental obstacle stands in the way of appellant's claim, whether it be rested upon an express or an implied purchase of pneumatic devices, or of patented inventions relating thereto. We refer to the lack of power on the part of the Postmaster-General to contract in behalf of the government of the United States for such a purchase. Sec. 6 of the postoffice appropriation act of July 13, 1892 (27 Stat. at L. 145, chap. 165), provided merely "that the Postmaster-General is hereby authorized and directed to examine into the subject of a more rapid despatch of mail matter between large cities and postoffice stations and transportation terminals located in large cities, by means of pneumatic tubes or other systems, and make report upon the expense, cost, and advantages of said systems when applied to the mail service of the United States, and the sum of ten thousand dollars is hereby appropriated therefor."

Manifestly the appropriation was intended for the purpose of investigation and report, and did not extend to authorizing such a purchase as that which the appellant alleges.

Of this limitation upon the authority of the Postmaster-General the appellant had plain notice at the inception of his dealings with that official. Not only did the advertisement of July 26, 1892, begin by referring to the above-recited clause of the appropriation act, but it contained, near its close, this express declaration: "The Postmaster-General has no authority in law to contract for the expenditure of money for the use of or purchase of any such invention, nor is there any existing appropriation out of which the cost of the same could be paid"

Appellant insists that under other acts of 257]Congress the *Postmaster-General had authority to purchase the inventions and devices in question. Reference is made to § 3965, Rev. Stat. U. S. Comp. Stat. 1901, p. 2708, enacting that "the Postmaster-General shall provide for carrying the mail on all postroads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper." This is one of the sections that prescribe the general duties of the Postmaster-General, and cannot be fairly treated as authority for making the alleged contract of purchase. Successive appropriation acts are *referred to. Act of June 9.* 1896 (29 Stat. at L 315, chap. 386, U. S. Comp. Stat. 1901, p. 2724), authorizing the Postmaster-General, in his discretion, to use not exceeding $35,000 in the transportation of mail by pneumatic tube or other similar devices, contains no authorization of purchase. Act of March 3, 1897 (29 Stat. at L. 646, chap. 385), authorizes the use of not exceeding $150,000 in the transportation of mail by pneumatic tube or other similar devices, "by purchase or otherwise." But this was enacted more than four years after the last transactions (so far as the record shows) between the appellant and the Postmaster-General, out of which it could possibly be claimed that any contract, express or implied, had arisen. For like reasons, subsequent statutes that are referred to (act of June 13, 1898, 30 Stat. at L. 442, chap. 446, U. S. Comp Stat. 1901, p. 2720; act of March 1, 1899, 30 Stat. at L. 963, chap. 327; act of June 2, 1900, 31 Stat. at L. 258, chap. 613; act of July 1, 1898, 30 Stat. at L. 615, chap. 546; act of March 3, 1899, 30 Stat. at L. 1092, chap. 424) must be rejected. They indicate that pneumatic tube service was in operation in Philadelphia, New York City, Brooklyn, Boston, and perhaps elsewhere; but they have no reference to any transactions between the Postmaster-General and the appellant.

But if the obstacle arising out of the actual and avowed want of authority on the part of the Postmaster-General could be overcome, the appellant's case is still fatally *weak upon the question whether any[258 contract was in fact made, either expressly or by implication from the conduct of the parties.

The contention that there was an express contract rests upon the fact that the Postmaster-General retained the appellant's proposal without in terms rejecting it. The argument is untenable for several reasons, some of which may be stated.

First, it ignores the fact that the proposal was submitted in response to an advertisement which plainly stated that the proposals were desired for the purpose of investigation and estimate merely, and that the Postmaster-General had no authority to contract for the expenditure of money for the use or purchase of any such invention.

Secondly, it treats the appellant's proposal as an assignment *in præsenti* of his inventions and patents to the United States, and nothing else. It was not, either in form or substance, an assignment, but (so far as it had reference to a sale) merely purported to state the terms upon which Beach proposed and offered to sell, and manifestly contemplated that something should be done on each side before the inventions

should in fact become the property of the United States. It is significant that one of the terms of the proposal was: "This proposal is made upon condition, and the same shall not be binding upon the undersigned unless the United States shall, by the Postmaster-General, accept said propositions or one of said propositions, and shall inform me, the undersigned, of said acceptance on or before the 1st day of August, 1893."

Thirdly, the proposal was not a mere offer to sell the inventions and patents. It contained for several propositions, acceptance of either one of which involved rejection of the remaining three; that is to say, Beach offered (a) to invest in the United 259]States all of his rights under *the patents in all states and territories excepting Maine, New Hampshire, Connecticut, Rhode Island, Michigan and the District of Columbia, in consideration of $800,000 per annum, this offer being without limit as to the use to which the patented devices should be put; (b) to assign and transfer to the United States all rights in the patents in all the states and territorities saving those just mentioned for twenty million dollars (this, of course, contemplated an absolute sale); (c) to invest in the United States all his rights under the two patents ("the said pneumatic devices or conveyors to be used solely and only for the purpose of collecting and transmitting the United States mails, and for no other purpose") in the entire United States excepting the states already mentioned and the District of Columbia, in consideration of an annual payment of $354,580.20; and (d) to "license or lease to the United States for mail purposes only" the right to construct and operate his pneumatic conveyors anywhere in the United States, excepting the states already mentioned and the District of Columbia, "upon reasonable and equitable terms, and for a reasonable consideration to be paid to me . . . the amount thereof to be agreed upon by the United States and the undersigned James W. Beach (either by mutual agreement or by arbitration) . . . said consideration to be based upon the mileage of the pneumatic tubes to be used, or upon a small percentage of the total (present) annual cost of the transportation of the United States mails within said United States." It is evident that a retention of the proposal without dissent could not be deemed an acceptance of proposition (b) any more than of (a), or of (c), or of (d); and so the act of retention (if there were no obstacle arising out of the want of authority on the part of the Postmaster-General) cannot be treated as an acceptance of either one of the four several propositions.

For these and other reasons, the court of claims was *clearly right in holding[260 that the evidence did not establish that the letters patent were conveyed or delivered to the Postmaster-General.

The theory of implied contract is likewise untenable. In the first place, the want of statutory authority on the part of the Postmaster-General to represent the government in making an express contract is equally fatal to the theory of an implied contract. For it is fundamental that he who is without authority to bind his principal by an express contract cannot be held to have done so by implication.

Another and sufficient answer is that the appellant has failed to show any use by the Postmaster-General or his successors of the patented inventions or devices of the appellant, or to show that the contractors or agents of the government have made any use of them. His case here fails because he does not show that the inventions or devices used are those covered by his patents.

Therefore the Court of Claims correctly held that the appellant had not made out a case of contract.

Judgment affirmed.

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BENJAMIN ROSENTHAL, Plff. in Err.,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 260-272.)

**Constitutional law — privileges and immunities — regulating junk dealers.**

1. Privileges and immunities of citizens of the United States are not unconstitutionally abridged by the provisions of N. Y. Laws 1903, chap. 326, amending Pen. Code, § 550, which, as construed by the highest court of the state, make it a criminal offense for a dealer in or collector of junk, metals, or secondhand materials, to buy or receive any stolen wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so.

[For other cases, see Constitutional Law, IV. a, 1, 5, 8, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — liberty of contract — police regulation of junk dealers.**

2. No unconstitutional interference with

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NOTE.—As to power to regulate traffic in junk—see note to Com. v. Malatsky, 24 L.R.A.(N.S.) 1168.

Who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A. (N.S.) 954.

the liberty of contract is made by the provisions of N. Y. Laws 1903, chap. 326, amending Pen. Code, § 550, which, as construed by the highest court of the state, make it a criminal offense for a dealer in or collector of junk, metals, or secondhand materials, to buy or receive any stolen wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so, but such legislation is well within the legitimate bounds of the police power of the state.

[For other cases, see Constitutional Law, IV. b, 7, b; IV. c, 8, in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — classification — junk dealers.**

3. Junk dealers are not denied the equal protection of the laws by the provisions of N. Y. Laws 1903, chap. 326, amending Pen. Code, § 550, which, as construed by the highest court of the state, make it a criminal offense for a dealer in or collector of junk, metals, or secondhand materials, to buy or receive any stolen wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so.

[For other cases, see Constitutional Law, IV. a, 5, 8, in Digest Sup. Ct. 1908.]

**Statutes — who may assail validity.**

4. A junk dealer cannot invoke the equal protection of the laws clause of the Federal Constitution to invalidate the provisions of N. Y. Laws 1903, chap. 326, amending Pen. Code, § 550, which, as construed by the highest court of the state, make it a criminal offense for a dealer in or collector of junk, metals, or secondhand materials, to buy or receive any stolen wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so, because of the failure of the legislature to extend the protection of the act to the like kinds of property when owned by manufacturers of equipment for railroads, telephone, and telegraph lines, or to include the owners of blast furnaces and brass foundries, or other classes who are liable to losses by theft of articles of like kinds

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review — question not raised below.**

5. A point not raised in the court below nor covered by the assignments of errors in the Federal Supreme Court cannot be considered on a writ of error to a state court.

[For other cases, see Appeal and Error, 2164–2174, in Digest Sup. Ct. 1908.]

Argued and submitted November 5, 1912.
Decided December 2, 1912.

IN ERROR to the County Court of Monroe County, in the State of New York, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, Fourth Department, which had in turn affirmed a conviction in the County Court of receiving stolen property. Affirmed.

See same case below in court of appeals, 197 N. Y. 394, 46 L.R.A.(N.S.) —, 90 N. E. 991.

The facts are stated in the opinion.

Mr. Percival Dewitt Oviatt argued the cause and filed a brief for plaintiff in error:

The New York laws relating to criminally receiving stolen property, as they existed prior to 1903, were adequate to protect against the evils involved.

People v. Wilson, 151 N. Y. 403, 45 N. E. 862; People v. Dowling, 84 N. Y. 485.

The statute applies only to dealers in metals, etc., and is class legislation, based upon illogical and arbitrary distinctions.

Re Jacobs, 98 N. Y. 106, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Buffalo v. Linsman, 113 App. Div. 584, 98 N. Y. Supp. 737; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Lochner v. New York, 198 U. S. 45, 56, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; People v. Williams, 189 N. Y. 131, 12 L.R.A. (N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 107, 46 L. ed. 92, 108, 22 Sup. Ct. Rep. 30; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Josma v. Western Steel Car & Foundry Co. 249 Ill. 508, 94 N. E. 945; Chicago v. Lowenthal, 242 Ill. 404, 90 N. E. 287; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; People ex rel. Phillips v. Raynes, 136 App. Div. 417, 120 N. Y. Supp. 1053; People v. Beattie, 96 App. Div. 383, 89 N. Y. Supp. 193.

The statute is solicitous concerning the property of only railroad, telephone, gas,

and electric companies, and is class legislation based upon illogical and arbitrary distinctions.

Wright v. Hart, 182 N. Y. 330, 2 L.R.A. (N. S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Shaver v. Pennsylvania Co. 71 Fed. 931; Lochner v. New York, 198 U. S. 45, 56, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 109, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; People ex rel. Phillips v. Raynes, 136 App. Div. 417, 425, 120 N. Y. Supp. 1053; People v. Marcus, 110 App. Div. 255, 97 N. Y. Supp. 322; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; People v. Beattie, 96 App. Div. 383, 392, 89 N. Y. Supp. 193; Re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986.

The accident of who owned the property can have no bearing upon the guilt or innocence of the purchaser. If the property is of such a nature that it is peculiarly susceptible to theft, it is the nature of the property, and not the owner of it, which constitutes the fundamental and logical distinction.

People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257.

The statute required the plaintiff in error to determine a legal question, not as to whether the property had been stolen, but as to the legal right of the seller to sell it.

Lawton v. Steele, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Board of Excise v. Merchant, 103 N. Y. 148, 57 Am. Rep. 705, 8 N. E. 484; People v. Gillson, 109 N. Y. 389, 400, 4 Am. St. Rep. 465, 17 N. E. 343.

A criminal statute should be clear; and it is apparent from the literal reading of the statute involved, that the interpretation placed upon it by the court of appeals is an injection into the statute of circumstances not therein expressed. The court of appeals thought it necessary judicially to amend the statute in an effort to save it.

United States v. Capital Traction Co. 34 App. D. C. 592, 19 Ann. Cas. 68; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Czarra v. Medical Supers. 25 App. D. C. 443; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

When this defendant pleaded guilty, he had a right to rely upon the principle expressed in Lewis's Sutherland on Statutory Construction, 2d ed. vol. 1, p. 176, to the effect that "the law is to be tested not by what has been done under it, but what may be done under it."

The situation is such that this court is permitted to interpret the statute for itself.

Yick Wo. v. Hopkins, 118 U. S. 355 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; Baldwin v. Franks, 120 U. S. 680, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Burgess v. Seligman, 107 U. S. 21, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Douglass v. Pike County, 101 U. S. 679, 25 L. ed. 968; Piqua State Bank v. Knoop, 16 How. 369, 14 L. ed. 977; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Loeb v. Columbia Twp. 91 Fed. 37.

Mr. **Freeman F. Zimmerman** submitted the cause for defendant in error. Mr. John W. Barrett was on the brief:

The statute under consideration is not unconstitutional, as interpreted by the court of appeals of the state of New York.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The construction placed upon this statute by the court of appeals of the state of New York is conclusive.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Nobles v. Georgia, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727.

Mr. Justice **Pitney** delivered the opinion of the court:

The plaintiff in error pleaded guilty to an indictment charging him with "the crime of criminally receiving stolen property," in that he, being a dealer in and collector of junk, metals, and secondhand materials, did feloniously *buy and re-[265 ceive, from persons named, certain copper wire, "the same then and there consisting of copper wire used by and belonging to a telephone company, to wit, used by and being the goods, chattels, and personal property of the Bell Telephone Company,

of Buffalo, . . . then lately stolen, taken, and carried away from the possession of the said Bell Telephone Company, . . . without ascertaining by diligent inquiry that the said persons so selling and delivering the same had a legal right to do so."

The indictment was founded upon chap. 326 of the Laws of 1903 of the state of New York, amending § 550 of the Penal Code. The section, as amended, reads as follows:

"Sec. 550. Criminally receiving property.—A person who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise, or agreement for the same, conceals, withholds, or aids in concealing or withholding, any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation has been committed within the state, whether such property were so stolen or misappropriated within or without the state [*or who, being a dealer in or collector of junk, metals, or secondhand materials, or the agent, employee, or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company without ascertaining by diligent inquiry that the person selling or delivering the same has a legal right to do so*], is guilty of criminally receiving such property, and is punishable, by imprisonment in a state 266] prison for not more than *five years, or in a county jail for not more than six months, or by a fine of not more than $250, or by both such fine and imprisonment."

The words inclosed in brackets were added by the amendment of 1903, which made no other change in the section. The section as amended was re-enacted in the Penal Law as § 1308.

Having pleaded guilty, the plaintiff in error moved in arrest of judgment, upon the ground of the unconstitutionality of the amendment of 1903, and this motion having been denied, sentence of fine and imprisonment was imposed, whereupon he took an appeal to the appellate division, and from an adverse ruling in that court he appealed to the court of appeals, which court sustained the statute against the constitutional objections, and affirmed the judgment of conviction. 197 N. Y. 394, 46 L.R.A.(N.S.) —, 90 N. E. 991.

The record having been remitted to the county court, the present writ of error was taken. The errors relied upon are that the courts of the state of New York erred, because they ought to have decided that the amendment of 1903 to § 550 of the Penal Code was in conflict with the 14th Amendment, in that (a) it abridged the privileges and immunities of the plaintiff in error; (b) deprived him of his liberty and property without due process of law; and (c) denied to him the equal protection of the laws.

No serious argument was made to support the contention that the act in any way abridged the privileges or immunities of the plaintiff in error as a citizen of the United States. This part of the prohibition of the 14th Amendment refers only to such privileges and immunities as pertain to citizenship of the United States, as distinguished from state citizenship. Slaughter House Cases, 16 Wall. 36, 74, 80, 21 L. ed. 394, 408, 409. We are unable to see that the statute under consideration, or its enforcement in the case at hand, even if the act be fairly open to any or all of the criticisms that are made upon it, abridges in the *least any privilege or immunity[267 that arises out of the national citizenship of the plaintiff in error.

The argument is thus narrowed to a consideration of the statute in the light of the "due process of law" and "equal protection" clauses.

The New York court of appeals in the present case construed the amendment of 1903 as applying only to stolen property, and as putting upon the dealer in junk, metal, or secondhand materials, not the burden of ascertaining at his peril that the person selling or delivering the wire or other property specified has a legal right to do so, but only the duty of making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has such legal right.

Counsel for the plaintiff in error argues, first, that the act in question is unconstitutional even as thus interpreted; and this on the grounds that the previous laws relating to criminally receiving stolen property were adequate to protect against the evils involved, and that the act of 1903 is unreasonable and oppressive, and an undue interference with the liberty of contract; that since the act applies only to dealers in metals, etc., it is class legislation, based upon arbitrary distinctions; and that the statute protects the property only of railroad, telephone, gas, and electric companies, and for this reason likewise is based upon arbitrary distinctions.

In support of this argument, counsel

points out that, without the amendment of 1903, the Penal Code provides that anyone who buys or receives property, knowing it to be stolen, is guilty of a felony; that anyone who conceals or withholds or aids in the concealment or withholding of such property is guilty of a felony; that the decisions of the courts of New York hold that actual knowledge of the fact that the property is stolen is unnecessary, and that anything in the circumstances that would put an honest or prudent man upon inquiry is 268]sufficient to warrant *a conviction. People v. Dowling, 84 N. Y. 478, 485; People v. Wilson, 151 N. Y. 403, 45 N. E. 862. It is also pointed out that chapter 308 of the Laws of 1903 compels every junk dealer (except in cities of the first class) to obtain a license, provides that when such a dealer purchases any pig iron, pig metal, copper wire, or brass car journals, he shall cause a statement to be subscribed by the seller as to when, where, and from whom he obtained the property, which statement must be filed with the chief of police; and that when a junk dealer purchases the property described, he must keep such purchase absolutely separate and distinct, without change or mutilation, for a period of five days after the purchase, and must tag it with a tag bearing the particulars of the purchase. And that all cities of the first class have dealt with the subject-matter through the means of local ordinances at least as comprehensive as the statute just mentioned.

Counsel, indeed, concedes the abundant right of the legislature to regulate the junk business, and admits that such regulations as those just referred to are quite within the legislative power of the state.

This concession is, we think, very properly made; and, this being so, there is little ground left for an attack upon the amendment of 1903 because of its alleged unreasonable and arbitrary requirement that a dealer in or collector of junk, metals, or secondhand materials, who buys or receives any stolen wire, cable, copper, lead, solder, iron, or brass, used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, shall make diligent inquiry to ascertain that the person selling or delivering it has a legal right to do so.

When it is conceded that such a dealer may be properly subjected to punishment as a criminal if he receives stolen property without actual knowledge that it has been stolen, and merely because charged with notice of circumstances such as would have 269]put an honest or prudent *man upon inquiry, it needs little argument to vindicate legislation with respect to particular kinds of personal property that the legislature in its wisdom presumably deemed to be more susceptible of theft than other property, when that legislation but adds the further requirement of diligent inquiry by the dealer with respect to the right of the seller.

It is urged as a criticism that the statute directs the junk dealer's inquiry to the question of the legal right of the seller to sell, rather than to the question of an original larceny. It ought to be unnecessary to say that if goods have in fact been stolen, a diligent inquiry into the right of the present possessor to make sale or delivery of them will very surely tend to disclose the larcenous origin of his title. Indirect questions in such a case will very probably bring out the truth as readily and as surely as the plump inquiry—"Did you steal these goods?" Or, at least, the legislature might so presume. For, of course, all such matters rest in legislative discretion.

Counsel suggests that diligent inquiry by a junk dealer respecting the legal right of one offering certain wire or other goods for sale might lead to perplexing questions that only a court of last resort could properly determine. The obvious answer is that a method of inquiry that would bring to light, in rare instances, even the occult and doubtful point in a vendor's title, would, if systematically adhered to, be reasonably sure in a greater number of instances to develop the fact that the goods under investigation had been acquired by theft.

We have said enough to indicate the character of the arguments employed in the effort to show that the act of 1903 is wholly arbitrary and constitutes so groundless an interference with the citizen's liberty of contract as to bring it within the denunciation of the due process of law clause of the 14th Amendment. It seems to us that the object of the legislation is well within the *legitimate bounds of the police power[270 of the state, and sustainable upon the principles discussed in Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273, etc., of which more recent applications are to be found in Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425, and Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174. See also Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 568, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259.

Nor can the act in question be deemed to conflict with the "equal protection" clause because it places junk dealers, etc., in a class by themselves. The argument under this head is that if property of the kinds mentioned in the act is peculiarly susceptible of theft, there is no reason that

all persons should not be subjected to the same rules with reference to its purchase. This needs no answer beyond a reference to the well-known fact, alluded to by the New York court of appeals in its opinion herein, that junk dealers provide an important market for stolen merchandise of the kinds mentioned, and that because of their experience they are peculiarly fitted to detect whether property offered is stolen property. Plainly it cannot be said that the classification rests on no reasonable basis. It is unnecessary to rehearse the grounds upon which rests the authority of the states to resort to classification for purposes of legislation. The citation of a few recent illustrative cases will obviate extended discussion. Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Orient Ins. Co. v. Daggs, 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 52, 54 L. ed. 921, 927, 30 Sup. Ct. Rep. 676; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160.

The fact that the act of 1903 has reference to the property of only railroad, telephone, gas, and electric companies furnishes no ground for the plaintiff in error to invoke the "equal protection" clause of the 14th Amendment. The failure of the legislature to extend the protection of the act to the like kinds of property when owned by manufacturers of equipment for railroads, telephone, and telegraph lines, as well 271 ]as when owned by the *companies operating such lines; or the failure to include the owners of blast furnaces and brass foundries, or other classes who, as claimed by counsel, are liable to losses by theft of articles of the like kinds,—affords no footing for an attack by plaintiff in error upon the constitutionality of the act, for the reason that he does not bring himself within any of the classes that, according to the argument, are peculiarly susceptible to losses of the kind that the statute is designed to prevent, nor does he show that he has suffered any injury by reason of the failure of the legislature to extend the protection of the act to other classes of owners. Tyler v. Registration Ct. Judges, 179 U. S. 405, 409, 45 L. ed. 252, 254, 21 Sup. Ct. Rep. 206; Hooker v. Burr, 194 U. S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784.

So far, therefore, as plaintiff in error is concerned, the legislature has simply not extended the scope of the act so far as it might properly have done. The argument under this head concedes, and must concede, that the act is beneficial as far as it goes, the complaint being that it does not go far enough. But the Federal Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment.

The court of appeals, in the case before us, said with respect to this topic: "The legislature is presumed to have been familiar with current history and the decisions of the courts, which show that property of a certain kind, such as copper, brass, iron, etc., is frequently stolen from railroad, telegraph, and similar corporations, which cannot adequately protect it because it is scattered through the country along extensive lines of transportation or communication, and which is exposed to view and caption by the evil minded, who find their best market in the shops of certain junk dealers."

*If the act required any defense[272 against the criticism now under consideration, this expression would suffice.

It remains only to notice the second principal contention of plaintiff in error, which is that the construction placed upon the act of 1903 by the court of appeals is clearly erroneous, and that the situation is such that this court ought not to hold itself bound by that construction.

It is ingeniously argued that since the statute had never been judicially construed until the decision of the court of appeals in this case, and since that court (erroneously, it is asserted) injected into the act by construction two elements that are said not to be apparent from a literal reading,—to wit, that the statute applies only to stolen property, and that the dealer need not ascertain the legal right of the seller, but need only make diligent inquiry to ascertain the same, the plaintiff in error is aggrieved by what is called the "judicial amendment" of the statute.

Although not distinctly invoking the prohibition of *ex post facto* laws, as contained in art. 1, § 10, cl. 1 of the Federal Constitution, the argument, if it have any basis, must be rested upon that prohibition.

It is sufficient to say that no such point appears to have been raised in the court below, although it might have been raised by an application for rehearing. Nor is any such point covered by the assignments of error in this court.

Judgment affirmed.

URSZULIA ZAKONAITE, Appt.,
v.
CASPER J. WOLF, Jailor of the City of St. Louis.

(See S. C. Reporter's ed. 272–275.)

**Courts — deportation of alien — judicial review of findings.**

1. The findings of fact upon which were based an order of the Secretary of Commerce and Labor for the deportation, conformably to the act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p 499), § 3, of an alien found to be practising prostitution within three years after her entry into the United States, are not subject to review by the courts, if the evidence was adequate to support the Secretary's conclusions, and the alien was given a fair hearing.

[For other cases, see Courts, 243–245, in Digest Sup. Ct. 1908.]

**Aliens — deportation — power of Congress.**

2. Congress, in the exercise of its authority to prohibit the admission of aliens into the United States and to regulate their entrance, could constitutionally provide, as is done by the act of February 20, 1907, § 3, for the deportation of any alien found practising prostitution within three years after her entry into the United States.

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

**Jury — constitutional right — deportation of alien.**

3. Proceedings had conformably to provisions of the act of February 20, 1907, § 3, for the deportation of any alien found practising prostitution within three years after her entry into the United States, are not criminal, within the meaning of the guaranty of U. S. Const., 6th Amend., that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.

[For other cases, see Jury, I. b, 2, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — deportation of alien.**

4. Life, liberty, or property are not taken without due process of law, contrary to U. S. Const, 5th Amend., by proceedings under the act of February 20, 1907, § 3, resulting in the deportation of an alien found to be practising prostitution within three years after her entry into the United States, although the inquiry devolves upon the Department of Commerce and Labor, or subordinate officials thereof, and their findings of fact, after a fair though summary hearing, are made conclusive.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

**Criminal law — offenses against different sovereignties — deportation of alien.**

5. The police power of the state cannot be said to be unconstitutionally interfered with by the provisions of the act of February 20, 1907, § 3, for the deportation of an alien found to be practising prostitution within three years after her entry into the United States, because it vests in the Federal authorities the power to try an immigrant for a violation of the penal laws of the state of which she has become a resident.

[For other cases, see Criminal Law, IV., in Digest Sup. Ct. 1908.]

**Constitutional law — executive exercise of judicial power — deportation of alien.**

6. Judicial powers are not unconstitutionally vested in the executive branch of the government by the provisions of the act of February 20, 1907, for the deportation of an alien found to be practising prostitution within three years after her entry into the United States, although the inquiry under that statute devolves upon the Department of Commerce and Labor, or subordinate officials thereof, and their findings of fact, after a fair though summary hearing, are made conclusive.

[For other cases, see Constitutional Law, III. a, 2, in Digest Sup. Ct. 1908.]

**Habeas corpus — constitutional right — deportation of alien.**

7. The constitutional guaranty of the privilege of habeas corpus is not violated by the provisions of the act of February 20, 1907, for the deportation of an alien found to be practising prostitution within three years after her entry into the United States, although the inquiry under that statute devolves upon the Department of Commerce and Labor, or subordinate officials thereof, and their findings of fact, after a fair though summary hearing, are made conclusive.

[For other cases, see Habeas Corpus, I. b, in Digest Sup. Ct. 1908.]

[No. 53.]

Argued November 14, 1912. Decided December 2, 1912.

APPEAL from the District Court of the United States for the Eastern District of Missouri to review a judgment which affirmed an order dismissing a writ of habeas corpus to inquire into a detention of an alien immigrant under warrants of arrest and deportation. Affirmed.

Mr. Leander G. Pope argued the cause, and, with Messrs. Charles F. Joy and Henry B. Davis, filed a brief for appellant:

The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that the accused, in all criminal prosecutions, shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, extend to an alien, lawfully admitted into the United States.

Sprung v. Morton, 182 Fed. 330; United States ex rel. Huber v. Sibray, 178 Fed. 144;

Beavers v. Henkel, 194 U. S. 83, 48 L. ed. 886, 24 Sup. Ct. Rep. 605.

These guaranties are applicable to even a technically criminal prosecution, and cover an offense like that charged against appellant in the case at bar.

United States v. Zucker, 161 U. S. 481, 40 L. ed. 779, 16 Sup. Ct. Rep. 641; United States ex rel. Huber v. Sibray, 178 Fed. 144.

The 6th Amendment was intended to be restrictive of the powers of Congress, and was designed to prevent interference with the rights of the states.

Davis v. Texas, 139 U. S. 653, 35 L. ed. 302, 11 Sup. Ct. Rep. 675; Eilenbecker v. District Court, 134 U. S. 35, 33 L. ed. 803, 10 Sup. Ct. Rep. 424; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; United States ex rel. Huber v. Sibray, 178 Fed. 144.

The act approved February 20th, 1907, regulating the immigration of aliens into the United States, in so far as it attempts to confer jurisdiction upon a tribunal sitting outside of the state in which an offense is alleged to have been committed, to hear and determine such offense, is unconstitutional, and plainly in contravention of the provisions of the 5th and 6th Amendments to the Constitution.

Beavers v. Henkel, 194 U. S. 83, 48 L. ed. 886, 24 Sup. Ct. Rep. 605.

The provisions of the immigration act in question, vesting in the Federal authorities the power to try an immigrant, lawfully admitted into the United States, for a violation of the penal laws of the state of which he has become a resident, constitute an interference with the police powers, which are matters reserved for regulation by the states, and not within any powers delegated to Congress by the Constitution.

Davis v. Texas, 139 U. S. 653, 35 L. ed. 302, 11 Sup. Ct. Rep. 675; Eilenbecker v. District Court, 134 U. S. 35, 33 L. ed. 803. 10 Sup. Ct. Rep. 424; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Keller v. United States, 213 U. S. 138, 139, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Ullman v. United States, 213 U. S. 138, 139, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; United States ex rel. Huber v. Sibray, 178 Fed. 144, 150.

The immigration act in question, in making the findings of fact of the Department of Commerce and Labor conclusive, and not reviewable by the courts, in a proceeding like the one under discussion, is violative of the Constitution, which inhibits the suspension or abridgment of the writ of habeas corpus, excepting in the cases mentioned in the Constitution.

Sprung v. Morton, 182 Fed. 330; Chin Yow v. United States, 208 U. S. 11, 52 L. ed. 369, 28 Sup. Ct. Rep. 201.

The district court committed error in holding that said district court was precluded by the findings of fact of the Department from passing on the facts in the case, and in ruling out the evidence offered by the petitioner to show that she was illegally deprived of her liberty.

Davies v. Manolis, 103 C. C. A. 310, 179 Fed. 818; Sprung v. Morton and Chin Yow v. United States, supra.

Conceding, for the purpose of argument, that the Department of Commerce and Labor had been legally invested with judicial powers, and, by due process of law, acquired jurisdiction over the person of appellant, and the subject-matter of the action, the record unmistakably shows that the trial was conducted in contravention of the provisions of the Constitution, requiring the accused to be confronted with the witnesses against her; to have compulsory process for obtaining witnesses in her favor; and to have the assistance of counsel for her defense. Refusal of all these rights at the first hearing, at which the alleged damaging admissions were extracted from the accused, forming the basis for finding appellant guilty, as charged, constitutes the order made by the department oppressive, unjust, and illegal.

United States ex rel. Huber v. Sibray, 178 Fed. 144; Sprung v. Morton, 182 Fed. 330.

Where an accused alien, to whom the safeguards of the Constitution have accrued and properly appertain, is forcibly, and without her consent, and against her will, removed from the state of Illinois, of which she was an inhabitant at the time, and carried into the state of Missouri, and arraigned, tried, and convicted before a tribunal in the latter state, of an offense against the penal laws of the land, alleged to have been committed in the state from which she was removed, she is unquestionably deprived of her liberty, without due process of law, and most clearly denied her constitutional rights, and the courts should unhesitatingly order her release and discharge.

United States ex rel. Huber v. Sibray, 178 Fed. 144; Davies v. Manolis, 103 C. C. A. 310, 179 Fed. 818.

Assistant Attorney General Harr argued the cause and filed a brief for appellee:

Constitutional provisions relating to the trial of crimes have no application to deportation proceedings.

Fong Yue Ting v. United States, 149 U. S. 698, 730, 37 L. ed. 905, 919, 13 Sup. Ct. Rep. 1016; United States ex rel. Turner v. Williams, 194 U. S. 279, 289–290, 48 L. ed. 979, 983, 984, 24 Sup. Ct. Rep. 719; Keller v. United States, 213 U. S. 138, 143, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas.

1066; Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L. ed. 1165, 1168, 32 Sup. Ct. Rep. 734; United States v. Zucker, 161 U. S. 481, 40 L. ed. 780, 16 Sup. Ct. Rep. 641.

It is only when punishment by way of fine or imprisonment for a violation of law is sought to be imposed upon an alien in connection with his deportation that the matter becomes criminal, and a judicial trial is required.

Wong Wing v. United States, 163 U. S. 228, 237, 41 L. ed. 140, 143, 16 Sup. Ct. Rep. 977.

The findings of the Secretary of Commerce and Labor were conclusive.

Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L. ed. 1165, 1168, 32 Sup. Ct. Rep. 734; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201.

The plenary authority of Congress to expel aliens is no longer open to question.

Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Wong Wing v. United States, 163 U. S. 228, 237, 41 L. ed. 140, 143, 16 Sup. Ct. Rep. 977.

Memorandum opinion, by direction of the court, by Mr. Justice Pitney:

The appellant, having been arrested and held in custody under warrants of arrest and deportation issued by the Acting Secretary of Commerce and Labor under the immigration act of February 20, 1907 [34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1911, p. 499], sought to be discharged upon habeas corpus issued out 274]of the district *court, and that court having upon hearing ordered the dismissal of the writ, she prosecutes this appeal.

From the return and supplemental return of the respondent it appears that the appellant is an alien, and that as the result of a hearing and rehearing conducted in compliance with rule 35, paragraph E of the Rules and Regulations of the Department of Commerce and Labor, she was found to be in the United States in violation of § 3 of the act referred to, and subject to deportation, in that she was a prostitute, and had been found practising prostitution within three years after her entry into the United States.

In her behalf it was contended in the court below, and is here contended, first, that there was no evidence before the Secretary of Commerce and Labor sufficient to warrant the findings of fact upon which the order of deportation was based; and, secondly, that § 3 of the act of February 20, 1907 (34 Stat. at L. 898, 899, chap. 1134, U. S. Comp. Stat. Supp. 1911, pp. 499, 502), which provides that "any alien woman or girl who shall be found an inmate of a house of prostitution or practising prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act,"—is unconstitutional because violative of the guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, as contained in the 5th and 6th Amendments.

As to the first point, an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the Secretary's conclusion *of fact. That being so, and the[275 appellant having had a fair hearing, the findings are not subject to review by the courts.

With respect to the second point little more need be said. It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the 5th and 6th Amendments; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question. Fong Yue Ting v. United States, 149 U. S. 698, 730, 37 L. ed. 905, 919, 13 Sup. Ct. Rep. 1016; United States v. Zucker, 161 U. S. 481, 40 L. ed. 779, 16 Sup. Ct. Rep. 641; Wong Wing v. United States, 163 U. S. 228, 237, 41 L. ed. 140, 143, 16 Sup. Ct. Rep. 977; United States ex rel. Turner v. Williams, 194 U. S. 279, 289, 48 L. ed. 979, 983, 24 Sup. Ct. Rep. 719; Chin Yow v. United States, 208 U. S. 8, 11, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Tang Tun v. Edsell, 223 U. S. 673, 675, 56 L. ed. 606, 607, 32 Sup. Ct. Rep. 359; Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L. ed. 1165, 1167, 32 Sup. Ct. Rep. 734.

The appellant raises some other constitutional objections, *viz.*: that the immigration act vests in the Federal authorities the power to try an immigrant for a vio-

lation of the penal laws of the state of which he has become a resident, and so interferes with the police power of the state; that the act vests judicial powers in an executive branch of the government; that it violates the constitutional guaranty of the privilege of the writ of habeas corpus, and the like. These are without substance, and require no discussion.

Final order affirmed.

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276] *NATIONAL SURETY COMPANY, Plff. in Err.,

v.

ARCHITECTURAL DECORATING COMPANY.

(See S. C. Reporter's ed. 276–285.)

**Constitutional law — impairing contract obligations — change in remedy.**

1. The existing remedy for the breach of the obligation of a contract may be changed without violating the contract clause of the Federal Constitution, so long as a substantial and efficacious remedy remains, even though the contract, so far as pertains to its obligation, may be of statutory origin.

[For other cases, see Constitutional Law, 1475–1496, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — change in remedy — condition precedent.**

2. A change in the remedy without substantial modification of the obligation of the contract is all that is effected by applying to an action upon the bond of a public contractor, conditioned for the benefit of persons doing the work or furnishing the materials therefor, the provision of Minn. Gen. Laws 1909, chap. 413, changing the requirements of Rev. Laws 1905, § 4539, which were in force when the bond was executed and delivered, so as to require the notice of claim to be given within ninety days "after the completion of the contract and acceptance of the building by the proper public authorities," instead of within ninety days "after performing the last item of work, or furnishing the last item of skill, tools, machinery, or materials," and the action to be begun within one year "after the service of such notice," instead of within one year "after the cause of action accrues."

[For other cases, see Constitutional Law, 1475–1580, in Digest Sup. Ct. 1908.]

[No. 425]

Submitted October 28, 1912. Decided December 2, 1912.

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NOTE.—As to constitutionality of change in period of limitation—see *note to Wheeler v. Jackson, 34 L. ed. U. S. 659.*

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of St. Louis County in that state, in favor of plaintiff in an action upon the bond of a public contractor. Affirmed.

See same case below, 115 Minn. 382, 132 N. W. 289.

The facts are stated in the opinion.

Mr. Jed L. Washburn submitted the cause for plaintiff in error. Messrs. W. D. Bailey and Oscar Mitchell were on the brief:

By the common law, as interpreted by the Minnesota supreme court at the time the bond in question was given, no action could have been maintained by the Decorating Company against plaintiff in error on the bond sued on. The right of action given is statutory in its origin, and was conditioned on giving the proper notice.

Breen v. Kelly, 45 Minn. 352, 47 N. W. 1067; Park Bros. & Co. v. Sykes, 67 Minn. 153, 69 N. W. 712; Eidsvik v. Foley, 99 Minn. 468, 109 N. W. 993.

The statutes in force at the time the bond was executed and delivered, in so far, at least, as they conditioned the surety's liability, became a part of the plaintiff in error's contract, including the requirement for notice therein, as fully in all respects as if such requirement for notice had been set out at length therein.

Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314.

The requirement for notice in the statute at the time the bond was executed and delivered became a part of the contract thereafter existing between the plaintiff in error and the Decorating Company, and was a condition precedent to liability, and no part of the remedy.

Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133; The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106; Hamilton v. Hannibal & St. J. R. Co. 39 Kan. 56, 18 Pac. 57; Boyd v. Clark, 8 Fed. 849; Lambert v. Ensign Mfg. Co. 42 W. Va. 813, 26 S. E. 431; Theroux v. Northern P. R. Co. 12 C. C. A. 52, 27 U. S. App. 508, 64 Fed. 84; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep 978; Slater v. Mexican Nat. R. Co. 194 U. S

120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; Simerson v. St. Louis & S. F. R. Co. 97 C. C. A. 618, 173 Fed. 612; Pohlman v. Chicago, R. I. & P. R. Co. 105 C. C. A. 36, 182 Fed. 492; Lange v. Union P. R. Co. 62 C. C. A. 48, 126 Fed. 338; Veginan v. Morse, 160 Mass. 143, 35 N. E. 451; Healey v. George F. Blake Mfg. Co. 180 Mass. 270, 62 N. E. 270; McRae v. New York, N. H. & H. R. Co. 199 Mass. 418, 85 N. E. 425, 15 Ann. Cas. 489; Dolenty v. Broadwater County, 45 Mont. 261, 122 Pac. 919; Hudson v. Bishop, 32 Fed. 519; Hudson v. Bishop, 35 Fed. 820; United States use of Watson-Flagg Engineering Co. v. Winkler 162 Fed. 397; United States use of Gibson Lumber Co. v. Boomer, 106 C. C. A. 164, 183 Fed. 726; Pittsburg, C. & St. L. R. Co. v. Hine, 25 Ohio St. 629; Denver & R. G. R. Co. v. Wagner, 92 C. C. C. 527, 167 Fed. 75; Christie-Street Commission Co. v. United States, 126 Fed. 996.

It is elementary law that the obligation of the surety cannot be extended or increased or varied without its consent.

Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; Governor v. Lagow, 43 Ill. 141; People v. Tompkins, 74 Ill. 487; Grocers Bank v. Kingman, 16 Gray, 476; Schuster v. Weiss, 114 Mo. 171, 19 L.R.A. 182, 21 S. W. 438; King County v. Ferry, 5 Wash. 554, 19 L.R.A. 500, 34 Am. St. Rep. 880, 32 Pac. 538.

It is clear that the change made by the act of the legislature in this case had the effect of extending the surety's liability to a class not covered by the bond by the law in force at the time it was written.

Green v. Biddle, 8 Wheat. 1, 84, 5 L. ed. 547, 568; Planters' Bank v. Sharp, 6 How. 326, 12 L. ed. 458.

By the contract which plaintiff in error made, it was under no obligation to indemnify any person who did not give it notice as therein required. The legislature, by attempting to impose such liability where the notice was not given, or not given until a different time, impaired its obligation.

Golden v. Prince, 3 Wash. C. C. 313, Fed. Cas. No. 5,509; Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132.

Mr. Arcadius L. Agatin submitted the cause for defendant in error:

The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.

*Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529.

The legislation, to be objectionable, must affect the contract directly, and not incidentally or only by consequence.

Van Hoffman v. Quincy, 4 Wall. 553, 18 L. ed. 409; Oshkosh Waterworks Co. v. Oshkosh, 109 Wis. 208, 95 Am. St. Rep. 870, 85 N. W. 376, affirmed in 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234.

Over mere remedies the power of the legislature is absolute; laws regulating remedies involve the consideration of public convenience and welfare to such an extent that individuals cannot be conceded vested rights therein.

Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

It is only in the event of a surety's breach of its express obligation to pay, that the statute in question comes into operation, and gives rise to a new right, for the enforcement of the obligation, which is purely a remedial right.

Pom. Rem. & Rem. Rights, §§ 1, 2.

In order to invoke the protection of the Constitution, as is sought here, it is not enough for the plaintiff in error to show an impairment of its remedial rights, but it must further satisfy the court that its substantive rights have been actually and directly affected by the offending statute.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Story, Const. §§ 1381, 1385.

The obligation of a contract is not something shifting, existing at one time and absent at another, but is coeval with the undertaking to perform it, and continues until it is fully performed, while the remedy operates merely upon the broken contract, and enforces a pre-existing obligation.

State ex rel. Hahn v. Young, 29 Minn. 532, 9 N. W. 737; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

The most that the surety can claim here is an impairment of a remedial right, which in reality is in the nature of a technical defense to an action to enforce the contract. But it is settled that any defense resting upon inability to enforce a contract as made may be taken away by the legislature.

15 Am. & Eng. Enc. Law, 1053, note 3.

So, a defense of usury can be taken away.

Ewell v. Daggs, 108 U. S. 151, 27 L. ed. 685, 2 Sup. Ct. Rep. 408; Gross v. United States Mortg. Co. 108 U. S. 488, 27 L. ed. 798, 2 Sup. Ct. Rep. 940.

There is no vested right in a defense based on informalities not affecting substantive equities.

Danforth v. Groton Water Co. 178 Mass. 477, 86 Am. St. Rep. 495, 59 N. E. 1033; Farnsworth Loan & Realty Co. v. Common-

wealth Title Ins. & T. Co. 84 Minn. 62, 86 N. W. 877; Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; Cooley, Const. Lim. p. 378.

There is no vested right in any particular remedy. It is well settled that the legislature may prescribe new remedies to enforce rights under contracts, or may alter the form of administering right or justice.

Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 137, 83 N. W. 36; Henley v. Myers, 76 Kan. 736, 17 L.R.A. (N.S.) 779, 93 Pac. 168, affirmed in 215 U. S. 373–385, 54 L. ed. 240, 246, 30 Sup. Ct. Rep. 148; Doehla v. Phillips, 151 Cal. 488, 91 Pac. 330; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; 8 Cyc. 910–918.

One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation designed only to enforce the performance of his obligation.

New Orleans City & Lake R. Co. v. Louisiana, 157 U. S. 219–224, 39 L. ed. 679, 681, 15 Sup. Ct. Rep. 581.

Conditions precedent to an action to enforce a contract or other right may be modified, enlarged, limited, or taken away.

8 Cyc. 911, 917, 918; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234.

The repeal of a law regulating the manner in which notice of protest of promissory notes shall be given does not impair the obligation of a contract.

Levering v. Washington, 3 Minn. 323, Gil. 227.

Even where a contract expressly provides for a particular remedy, the abolishment of it by legislation does not impair its obligation.

Conkey v. Hart, 14 N. Y. 22; Worsham v. Stevens, 66 Tex. 89, 17 S. W. 404.

The enforcement of a mechanics' lien is probably more nearly analogous to the enforcement of the bond in this case, said bond being a substitute for mechanics' liens. It is everywhere held that while the rights of the parties under mechanics' lien laws are to be ascertained and fixed by the law in force when the contract was made, yet such rights are to be established and enforced by the law existing at the bringing of the suit.

Phillips, Mechanics' Liens, 3d ed. § 24; Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120.

The position of the surety in this case is that of a debtor; and what it really seeks is to avoid its obligation, merely because the change in the remedy affords better facilities for compelling it to perform its engagement. This cannot be done.

Henley v. Myers, 76 Kan. 736, 17 L.R.A. (N.S.) 779, 93 Pac. 168, 215 U. S. 373–385, 54 L. ed. 240, 246, 30 Sup. Ct. Rep. 148.

Mr Justice Pitney delivered the opinion of the court:

This is an action to recover damages for the breach of a bond made by the plaintiff in error as surety together with one Henricksen as principal, given to a certain school district of the state of Minnesota, conditioned that Henricksen should pay all just claims for work, materials, etc., furnished for the completion of a school building, for the construction of which he had made a contract with the district; the bond being given, according to its own recitals, for the use of the school district and of all persons doing work or furnishing materials under the contract. The contract and bond were made in the year 1908. The bond was executed and delivered pursuant to the provisions of the Minnesota statutes found in Rev. Laws *(Minn.) 1905, §§ 4535 to[279 4539, inclusive, which in effect require every public corporation of the state, on entering into a contract for the doing of any public work, to take a bond for its own use and for the use of all persons furnishing labor or material under or for the purpose of the contract, and which entitle any person so furnishing labor or material to maintain an action upon the bond, under certain conditions.

The defendant in error, during the months of July and August, 1909, performed certain services and furnished certain materials to Henricksen for use in carrying out his contract, for which a sum exceeding $1,000 remained due and unpaid, and to recover the amount so due this action was brought.

By § 4539, above referred to, which was in force at the time the contract for building the school was made and the bond given, it was enacted that—"no action shall be maintained on any such bond unless within ninety days after performing the last item of work, or furnishing the last item of skill, tools, machinery, or material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

On April 22, 1909, this section was amended by chap. 413, Gen. Laws 1909, so as to require the notice of claim to be given within ninety days "after the completion of the contract and acceptance of the building by the proper public authorities," instead of within ninety days "after perform-

ing the last item of work or furnishing the last item of skill, tools, machinery, or material," and further amended by requiring the action to be begun within one year "after the service of such notice," instead of within one year "after the cause of action accrues."

It will be observed that this change in the 280]law went *into effect before the defendant in error performed the services and furnished the materials upon which the present action is based.

Defendant in error did not give notice to plaintiff in error in time to comply with § 4539, Rev. Laws 1905, but did give such notice in time to comply with the amended act, if that be the applicable law.

The supreme court of the state of Minnesota in the present case held that the act of 1909 controlled, although passed after the bond in question was given, overruling the contention of plaintiff in error that the statute as so construed impairs the obligation of the contract contained in the bond, and is therefore contrary to § 10 of art. 1 of the Federal Constitution. 115 Minn 382, 132 N. W. 289.

The only question that need be here considered is whether the act of 1909, as thus construed, does impair the obligation of the contract.

Sections 4535–4539, Rev. Laws 1905, originated in chap. 354 of the General Laws of 1895 and chap. 307 of the General Laws of 1897. Prior to this legislation the supreme court of Minnesota had held in Breen v. Kelly (1891) 45 Minn. 352, 47 N. W. 1067, that although a municipal corporation, having authority to cause certain public work to be done and to make contracts for the doing of it, probably had implied authority to take security for its own protection, it had no authority to take security for third persons, nor capacity to act as trustee in a contract made for their benefit, without express legislative authority; and that such a bond, although voluntarily given, was void. The same principle was adhered to in Park Bros. & Co. v. Sykes (1897) 67 Minn 153, 69 N. W. 712.

By chap. 354 of the Laws of 1895, which first created the statutory right of action in favor of third persons upon such a bond, no notice by the third person to the principal or sureties was required as a condition precedent to his right to sue. He 281]was merely obliged to bring his *action within one year after the cause of action accrued. Notice by the plaintiff to the principal and sureties was first required by chap. 307 of the Laws of 1897, the 3d section of which contained the same provisions that were afterwards embodied in the Revision of 1905 as § 4539, above quoted.

The supreme court of Minnesota, in the year 1904, in Grant v. Berrisford, 94 Minn. 45, 49, 101 N. W. 940, 1133, construed Gen. Laws 1897, chap. 307, § 3, as follows: "The provision in the general law requiring notice within ninety days after the last item of labor or materials is done or performed, before bringing an action on the bond, is not analogous to a statute of limitations, but it is a condition precedent which must be performed before the right to bring an action on the bond accrues. Or, in other words, it is a condition or burden placed upon the beneficiaries of the bond, which they must perform or remove before they can avail themselves of its benefits. It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond."

The argument for plaintiff in error is to the effect that since the right of action by a third party upon such a bond is of statutory origin, and since the statute in force at the time the bond in suit was given required a preliminary notice given to the obligors within a certain time, which notice (under Grant v. Berrisford) constituted a condition precedent to the action as much as if it had been set out as a proviso in the bond, a subsequent act of legislation dispensing with such notice, or changing the time within which it was required to be given, impairs the validity of the contract, within the meaning of § 10 of art. 1 of the Constitution

The argument rests at bottom upon the proposition that because it required legislation to render such a bond actionable in behalf of third parties, the obligation of the bond as a contract is of statutory origin. But this *is not entirely clear.[282 Treating the bond as voluntarily made, and aside from the statute, it is, in its essence, a contract between the obligors (including the Surety Company), on the one hand, and "all persons doing work or furnishing materials" for the construction of the school building (including the Decorating Company as one of those persons), on the other hand. The circumstance that the obligee in the bond as written was a public corporation named as trustee for the workman and materialmen affects the form, and not the substance, of the obligation. The decision in Breen v. Kelly, denying the third party's right of action, and holding such a bond void as to him, was not based upon any illegality or want of consideration in the contract, nor upon any incapacity of the obligors to make it; nor, indeed, upon any incapacity on the part of the real obligees to accept and rely upon such an undertaking. It proceeded wholly upon the ground of the legal incapacity of the mu-

nicipal corporation to act as trustee for the persons beneficially interested.

But where parties have, in good faith and for a valuable consideration, entered into an engagement that is not contrary to good morals, and is invalid only because of some legal impediment, such as the incapacity of a nominal party or the omission of some merely formal requirement, there is ground for maintaining that the legislature may, by subsequent enactment, provide a legal remedy, and thus give vitality to the obligation that the parties intended to create. Cooley, Const. Lim. **293, 374; Sutherland, U. S. Const. 428, 429; Ewell v. Daggs, 108 U. S. 143, 151, 27 L. ed. 682, 685, 2 Sup. Ct. Rep. 408; Gross v. United States Mortg. Co. 108 U. S. 477, 488, 27 L. ed. 795, 798, 2 Sup. Ct. Rep. 940.

Nevertheless, granting, for the sake of the argument, the contention of the plaintiff in error that the contract in suit, so far as pertains to its obligation, is of statutory origin, it by no means follows that the provision respecting a preliminary notice to 283]the obligors, as a condition *precedent to suit thereon, although contained in the law as it stood at the time the bond was given, cannot be constitutionally modified by subsequent legislation. The decision must turn, we think, upon the familiar distinction between a law which enlarges, abridges, or modifies the obligation of a contract, and a law which merely modifies the remedy, by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself.

As Chief Justice Marshall observed in Ogden v. Saunders, 12 Wheat. 213, 349, 6 L. ed. 606, 653, the obligation and the remedy originate at different times: "The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation."

The distinction was well expressed by Mr. Justice Harlan, speaking for this court, as follows: "It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus in effect destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass enforcement of rights under the contract, according to the usual course of justice as established when the contract was made. *Neither could be done without* impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies, or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract" Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 439, 47 L. ed. 249, 250, 23 Sup. Ct. Rep. 234, citing many previous cases.

*In Bernheimer v. Converse, 206 U.[284 S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, this court held that a statute of Minnesota, enacted for the purpose of giving a more efficient remedy to enforce the contractual liability of stockholders to creditors, by enabling a receiver to maintain an action for the benefit of creditors outside of the jurisdiction of the court appointing him,—a remedy that, by the laws of Minnesota, was not available at the time the stock liability in question arose,—did not impair the obligation of the contract. Mr. Justice Day, speaking for the court, said (at p. 530): "Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy, enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made."

Again, in Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148, where defendants became stockholders in a Kansas corporation at a time when, by the laws of that state, the stockholders of an insolvent corporation were liable to pay for the *benefit of creditors an amount equal[285 to the par value of their stock, and the stock

of the corporation was transferable only on the books of the corporation in such manner as the law prescribed; and afterwards, and before defendants sold their stock, the previous statute was amended so as to require the officers of a corporation, as soon as any transfer of stock was made upon its books, to at once file a statement thereof with the secretary of state, and so that no transfer of stock should be legal or binding until such statement was made; and defendants, before insolvency of the corporation, transferred their stock upon the books of the corporation, but did not procure a statement of the transfer to be filed with the secretary of state, and were therefore held liable in the state court to an action in favor of the receiver for the benefit of creditors,—this court held that the act requiring stock transfers to be noted upon the public records, and providing that no transfer of stock should otherwise be legal or binding, did not impair the obligation of the contract under which the defendants acquired their stock.

In the case now before us, we agree with the Minnesota supreme court in the view that the requirement of a preliminary notice to the obligors as a condition precedent to an action upon the bond affects the remedy, and not the substantive agreement, of the parties. And although the statute as it stood when the bond was given (Rev. Laws 1905, § 4539) must, under Grant v. Berrisford, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore, the subsequent statute (Gen. Laws 1909, chap. 413) effected merely a change in the remedy, without substantial modification of the obligation of the contract.

Judgment affirmed.

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286] *UNITED STATES OF AMERICA, upon the Application of the Attorney General, at the Request of the Interstate Commerce Commission, Appt.,

v.

UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO et al. (No. 621.)

CHICAGO JUNCTION RAILWAY COMPANY, Appt.,

v.

UNITED STATES OF AMERICA, upon the Application of the Attorney General, at the Request of the Interstate Commerce Commission. (No. 622.)

(See S. C. Reporter's ed. 286-309.)

**Interstate carriers — what are — Federal regulation — filing tariffs.**

*1. A railway company operating as lessee upon the basis of a division of profits the railroad system owned by a stock yard company for the transportation of cars to and from trunk lines in the course of their transportation from beyond the state, and to points outside of the state, is an interstate carrier within the meaning of the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), and as such is obliged to file its tariffs with the Interstate Commerce Commission, as required by § 6 of that act.*

[For other cases, see Carriers, III. b, III. g, in Digest Sup. Ct. 1908.]

**Interstate carriers — what are — stock yard company — Federal regulation — filing tariffs.**

2. A corporation organized for the purpose of maintaining a stock yard, with the usual facilities of such yards as to loading and unloading and caring for freight, which lawfully owns and operates a railroad system for the transportation of cars to and from trunk lines, in the course of their transportation from beyond the state and to points outside of the state, is an interstate railway carrier, within the meaning of the interstate commerce act of February 4, 1887, and as such is obliged to file its tariffs with the Interstate Commerce Commission, as required by § 6 of that act.

[For other cases, see Carriers, III. b; III. g, in Digest Sup. Ct. 1908.]

**Interstate carriers — what are — stock yard company — Federal regulation — filing tariffs.**

3. A stock yard company owning and operating under its charter a railway system for the transportation of cars to and from trunk lines in the course of their transportation from beyond the state and to points outside of the state did not cease to be an interstate railway carrier within the meaning of the interstate commerce act of February 4, 1887, and as such obliged to file its tariffs with the Interstate Commerce Commission, as required by § 6 of that act, by leasing its railway and equipment to another corporation upon the basis of a division of profits, both companies being under a common stock ownership, with its consequent control.

[For other cases, see Carriers, III. b; III. g., in Digest Sup. Ct. 1908.]

**Injunction — against discrimination by carrier — power of commerce court.**

4. In the absence of objection to the manner and form of invoking jurisdiction the commerce court may entertain and grant the relief sought by a bill to enjoin the performance of a contract which offends against the provisions of the interstate commerce act of February 4, 1887, § 2, and the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), § 2, intended to prevent undue advantages or unlawful discrimination.

[Power of Federal courts to issue injunction, see Courts, V. c, in Digest Sup. Ct. 1908.]

**Carriers — discrimination — bonus.**

5. An undue advantage and an unlawful discrimination, forbidden by the interstate

commerce act of February 4, 1887, § 2, and the act of June 29, 1906, § 2, are accorded by a contract between a packing house firm and a stock yard company operating, through its lessee, a railway system carrying on interstate commerce, by which such company agreed to pay a bonus of $50,000 to the packers, provided they would erect their new plant in Chicago adjacent to the stock yard, instead of in Kansas City, as was proposed, and would maintain and operate the plant for fifteen years, and buy and use in their business such live stock only as moves through such stock yard, and pay the regular charges on live stock not so bought, as if the same had moved into the stock yard and had there been purchased.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

[Nos. 621 and 622.]

Argued October 24, 1912. Decided December 9, 1912.

CROSS APPEALS from the United States Commerce Court to review a decree which granted only as to a railway company the relief sought by a bill to require a stock yard company, a railway company, and a holding company to file tariffs with the Interstate Commerce Commission, and to restrain the performance of a contract alleged to accord an undue advantage and unlawful discrimination. Reversed on the government's appeal, and affirmed on the cross appeal.

See same case below, 192 Fed. 330.

The facts are stated in the opinion.

Assistant Attorney General Adkins and Mr. William E. Lamb, Special Assistant to the Attorney General, argued the cause and filed a brief for appellant in No. 621 and appellee in No. 622:

Property is in interstate commerce from its delivery to the carrier for shipment into another state until it is there delivered to the consignee.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Henderson v. New York (Henderson v. Wickham) 92 U. S. 271, 23 L. ed. 548; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130.

Both companies are engaged in transportation. Their activities are within both the judicial and legislative definitions.

Missouri P. R. Co. v. Wichita Wholesale Grocery Co. 55 Kan. 525, 40 Pac. 899; Peoria & P. Union R. Co. v. Chicago, R. I. & P. R. Co. 109 Ill. 135, 50 Am. Rep. 605; United States v. Chicago & N. W. R. Co. 157 Fed. 619; Moran v. New Orleans, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38.

Such transportation is wholly by railroad and from one state to another.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 162 U. S. 184, 40 L. ed. 935, 59 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; Leonard v. Kansas City Southern R. Co. 13 Inters. Com. Rep. 573; Standard Oil Co. v. United States, 103 C. C. A. 172, 179 Fed. 614; Denver & R. G. R. Co. v. Interstate Commerce Commission, 195 Fed. 968.

Both the Stock Yard Company and the Junction Company are common carriers.

(a) Definition of common carriers.

The Niagara v. Cordes, 21 How. 7, 22, 16 L. ed. 41, 46; Redfield, Carriers & Bailments, 1; Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133; Wiggins Ferry Co. v. East St. Louis Union R. Co. 107 Ill. 450; Gordon v. Hutchinson, 1 Watts & S. 285, 37 Am. Dec. 464; Myrick v. Michigan C. R. Co. 107 U. S. 106, 27 L. ed. 326, 1 Sup. Ct. Rep. 425.

(b) Under their charters and by reason of their activities both corporations come within these definitions.

Randolph County v. Post, 93 U. S. 502, 23 L. ed. 957; Kentucky Improv. Co. v. Slack, 100 U. S. 648, 25 L. ed. 609; Union Trust Co. v. Kendall, 20 Kan. 515; Union Stockyards Co. v. United States, 94 C. C. A. 626, 169 Fed. 406.

The courts have held stock yards to be common carriers engaged in interstate commerce.

United States v. Union Stock Yards Co. 161 Fed. 919, affirmed in 94 C. C. A. 626, 169 Fed. 404; United States v. Sioux City Stock Yards Co. 162 Fed. 556; Belt R. Co. v. United States, 168 Fed. 542, 22 L.R.A.(N.S.) 582, 93 C. C. A. 666; McNamara v. Washington Terminal Co. 37 App. D. C. 384; Covington Stock-Yard Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; Walker v. Keenan, 19 C. C. A. 668, 34 U. S. App. 691, 73 Fed. 755; United States v. Illinois Terminal R. Co. 168 Fed. 546.

The Stock Yard Company and Junction Company are in reality partners, and are but one system in the eyes of the law.

Meehan v. Valentine, 145 U. S. 623, 36 L. ed. 841, 12 Sup. Ct. Rep. 972; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed.

679, 24 Sup. Ct. Rep. 436; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247, 145 Fed. 1007; Kendall v. Klapperthal Co. 202 Pa. 596, 52 Atl. 92.

The payment under the Pfaelzer contract would constitute a rebate, concession, and unlawful discrimination.

Interstate Commerce Commission v. Reichmann, 145 Fed. 235; Thomas v. United States, 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247, 145 Fed. 1007; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; United States v. Delaware, L. & W. R. Co. 152 Fed. 269; Atchison, T. & S. F. R. Co. v. United States, 95 C. C. A. 446, 170 Fed. 250; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 398, 50 L. ed. 524, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 71, 52 L. ed. 690, 28 Sup. Ct. Rep. 428.

Mr. Ralph M. Shaw argued the cause and filed a brief for appellees other than Louis Pfaelzer & Sons in No. 621, and for appellant in No. 622:

A common carrier by railroad wholly within one state can so transact its business as not to subject itself to the provisions of the act to regulate commerce.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 191, 40 L. ed. 935, 937, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

The Chicago Junction Railway Company, otherwise known as "The Junction Company," is not a common carrier subject to the provisions of the act to regulate commerce, because it is not engaged in the transportation of passengers or property from one state to another.

Interstate Commerce Commission v. Bellaire, Z. & C. R. Co. 77 Fed. 942; United States ex rel. Interstate Commerce Commission v. Chicago, K. & S. R. Co. 81 Fed. 783; Gracie v. Palmer, 8 Wheat. 605, 5 L. ed. 696.

The relation of the Junction Company to freight cars loaded with interstate commerce, which it hauls with its own motive power from receiving tracks in Illinois to unloading platforms in Illinois, is analogous to and identical with the relationship of a tugboat to an incoming steamer. A tugboat is not a common carrier.

The Webb (The William H. Webb v. Barling) 14 Wall. 406, 414, 20 L. ed. 774, 775; The Margaret, 94 U. S. 494, 24 L. ed. 146; The L. P. Dayton, 120 U. S. 337, 30 L. ed. 669, 7 Sup. Ct. Rep. 368; The Burlington, 137 U. S. 386, 34 L. ed. 731, 11 Sup. Ct. Rep. 138; The J. P. Donaldson, 167 U. S. 599, 603, 42 L. ed. 292, 294, 17 Sup. Ct. Rep. 951.

The Union Stock Yard & Transit Company of Chicago, otherwise known as the "Stock Yard Company," is not subject to the provisions of § 1 of the act to regulate commerce because: (a) It is not a common carrier; (b) it is not engaged in the transportation of property or passengers from any point in one state to any point either in or without a state.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Cattle Raisers' Asso. v. Ft. Worth & D. C. R. Co. 7 Inters. Com. Rep. 536.

When an act of Congress has been construed by the courts, and thereafter the act is amended or re-enacted, and the amendments do not affect in any way whatsoever the provisions so construed, thereafter the courts will assume that Congress has approved and adopted the judicial interpretation placed upon its language; also

When a statute has been officially interpreted by the body charged with its execution, and thereafter the act is amended, and the amendments of Congress do not in any respect change the particulars so interpreted, the courts will assume that Congress has approved and adopted such interpretation irrespective of what the courts might have originally determined to be the correct interpretation.

United States v. Mooney, 116 U. S. 104, 106, 29 L. ed. 550, 551, 6 Sup. Ct. Rep. 304; Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; The Abbotsford, 98 U. S. 444, 25 L. ed. 170; Diaz v. United States, 223 U. S. 442, 454, 56 L. ed. 500, 505, 32 Sup. Ct. Rep. 250; Standard Oil Co. v. United States, 221 U. S. 1, 59, 55 L. ed. 619, 644, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 402, 50 L. ed. 515, 525, 526, 26 Sup. Ct. Rep. 272; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 479, 51 L. ed. 1143, 1147, 27 Sup. Ct. Rep. 695; United States v. G. Falk & Bro. 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532.

Irrespective of what the decision of the court may be either as to the "Stockyard Company" or as to "The Junction Company," the mere fact that "The Investment Company" owns shares of stock of the two companies does not destroy its identity, or merge it into the identity of either of the other two companies.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Coal Belt Electric R. Co. v. Peabody Coal Co. 230 Ill. 164, 13 L.R.A.(N.S.) 1144, 120 Am. St. Rep. 282, 82 N. E. 627.

When the jurisdiction of a court of equity is invoked in good faith, the court will decide all of the questions presented by the case, even though it decides the jurisdictional question against the person invoking the jurisdiction.

Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Michigan R. Tax Cases, 138 Fed. 223; Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Hopkins v. Grimshaw, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 180; 2 Current Law, pp. 623, 624.

The assailed contract is not illegal. It is made for the purpose of maintaining a desirable customer at the live stock market at the stock yards. (a) It is not made by a common carrier or on behalf of a common carrier with a shipper. (b) It is not based upon the transportation of any property whatsoever. (c) It has nothing to do with the rates charged or paid for the transportation of any property.

Willoughby v. Chicago Junction R. & Union Stockyards Co. 50 N. J. Eq. 656, 25 Atl. 277.

The interstate commerce act should be interpreted *in pari materia* with the anti-trust act. It should be held that a contract, not made by a common carrier subject to the act to regulate commerce, is not prohibited by law if its main purpose and chief effect is to promote the lawful business of the parties making it.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Bigelow v. Calumet & H. Min. Co. 167 Fed. 704; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

Messrs. Willard M. McEwen and Joseph Weissenbach filed a brief for Louis Pfaelzer & Sons, appellees in No. 621:

Discrimination backed by a sound reason (as distinguished from motive) in a matter where an individual has no right to demand the privilege as a public service undertaken to be furnished by a carrier, as such, to all alike, and *which deprives him of nothing* which he is entitled to, or subjects him to no disadvantage in the public service rendered to him, is not forbidden by the law.

Memphis Freight Bureau v. Ft. Smith & W. R. Co. 13 Inters. Com. Rep. 1; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 10 Inters. Com. Rep. 193; United States v. Wells-Fargo Exp. Co. 161 Fed. 606; Interstate Commerce Commission v. Alabama Midland R. Co. 21 C. C. A. 51, 5 Inters. Com. Rep. 685, 41 U. S. App. 453, 74 Fed. 715; Cole v. Rowen, 88 Mich. 219, 13 L.R.A. 848, 50 N. W. 138; Donovan v. Pennsylvania R. Co. 199 U. S. 279, 50 L. ed. 192, 20 Sup. Ct. Rep. 91; Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 21 L.R.A.(N.S.) 982, 94 C. C. A. 217, 16 Ann. Cas. 613, 168 Fed. 164; United States ex rel. Northwestern Warehouse Co. v. Oregon R. & Nav. Co. 159 Fed. 982; Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; Missouri P. R. Co. v. Nebraska, 164 U. S. 404, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Northern P. R. Co. v. Railroad Commission, 58 Wash. 360, 28 L.R.A.(N.S.) 1021, 108 Pac. 938; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

What a donation is depends both upon its (1) effect as to all concerned, and (2) the intention of the parties as to its application. These are the elements of the discrimination, and are questions of fact to be proved by the petitioner.

Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45; Root v. Long Island R. Co. 114 N. Y. 300, 4 L.R.A. 331, 4 Inters. Com. Rep. 576, 11 Am. St. Rep. 643, 21 N. E. 403; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37, affirmed in 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

The presumption is in favor of fairness and legality.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

Mr. Justice Day delivered the opinion of the court:

These are appeals from a decree entered

by the commerce court in an action begun by the United States on the application of the Attorney General, at the request of the Interstate Commerce Commission, against the Union Stock Yard & Transit Company of Chicago, an Illinois corporation (hereinafter called the "Stock Yard Company"), the Chicago Junction Railway Company, an Illinois corporation (hereinafter called the "Junction Company"), and the Chicago Junction Railways & Union Stock Yards Company, a New Jersey Corporation (hereinafter called the "Investment Company"), and David Pfaelzer, Abe Pfaelzer, and Jones L. Pfaelzer, a copartnership doing business under the firm name and style of Louis Pfaelzer & Sons. The bill sought to enjoin violations of §§ 2, 6, and 20 of the interstate commerce act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284; 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288; 36 Stat. at L. 539, chap. 309), and of § 1 of the Elkins law (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309). Its prayer was that an injunction should issue to restrain the Stock Yard Company and the Junction Company from further engaging in interstate commerce until they had filed tariffs, as required by § 6 of the act, and to restrain the performance of a certain contract with the Pfaelzers, and that the Stock Yard Company and the Junction Company be required to file the statements and reports provided by § 20 of the 296]act. *The commerce court held that neither the Stock Yard Company nor the Investment Company was a common carrier, and that it had no jurisdiction to determine whether the contract would amount to an unlawful discrimination or advantage, or rebate, and dismissed the bill as to the Stock Yard Company and the Investment Company and as to the Pfaelzers. As to the Junction Company, it held that it was a common carrier subject to the interstate commerce act, and obliged to file its tariffs as required by the statute. It further held that, since there was no allegation in the bill that the Interstate Commerce Commission had by general or special order required the Stock Yard Company or the Junction Company to file statements and reports under § 20, it could not issue mandamus to make such statements and reports. 192 Fed. 330.

The government appealed from the dismissal of the bill as to the Stock Yard Company, the Investment Company, and the Pfaelzers, which is case No. 261. It, however, makes no contention against the holding of the commerce court as to the construction of § 20. The Junction Company appealed from the decision of the commerce court as to it, which appeal is case No. 622.

The correctness of the decision and decree of the commerce court is submitted upon facts which are practically undisputed. The Stock Yard Company was incorporated under a special act of the legislature of Illinois, February 13, 1865, which authorized it to locate, construct, and maintain near the southerly limits of the city of Chicago:

" . . . All the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches, and turnouts, aqueducts, for the reception, safe-keeping, feeding, and watering, and for the weighing, delivery, and transfer of cattle and live stock of every description, and also dead and undressed animals that may be at or passing *through or near the city of[297 Chicago, and for the accommodation of the business of a general union stock yard for cattle and live stock, including the erection and establishment of one or more hotel buildings, and the right to use the same; . . . to make advances of money upon such cattle and live stock for freight or other purposes as may become expedient . . . ."

The charter further provided:

"That said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the city of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the city on the south between the lake shore and the southwest corner of said city, . . . and to make connections with such suitable sidetracks, switches, and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; . . . and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, . . . freight and property of every kind as well as stock and cattle . . . "

After its creation it acquired real estate, constructed and operated stock yards, with a stock market, built a hotel for the ac-

commodation of its patrons, and constructed in the stock yards district about 300 miles of railroad track, consisting of main 298]lines connecting with the *trunk lines entering Chicago, and a large number of switches to the various industries which had been established adjacent to such tracks.

Prior to December 15, 1897, the Stock Yard Company carried on the stock yards and railroad business, and, although it had regular charges for the services it performed, it filed no tariffs with the Interstate Commerce Commission and concurred in none. On December 15, 1897, the Stock Yard Company leased all of its railroad tracks and equipment for a term of fifty years to a corporation known as the Chicago & Indiana State Line Company (hereinafter called the "State Line Company"), retaining for itself the loading and unloading platforms and facilities used in connection with its stock yards business. This lease covered all its railroad and railroad tracks, switches, etc.; roundhouse, repair shops, machine shops, coal shutes, etc., then in existence or theretofore used by the Stock Yard Company in connection with its railroad; and all and singular the equipment and the telegraph lines, instruments, and appurtenances owned or possessed by the Stock Yard Company and used by it in conducting its railroad business. By the terms of the lease, the State Line Company was given the right in the future to maintain and operate upon the lands of the Stock Yard Company additional side tracks and switch tracks and other appurtenances necessary to reach industrial plants.

Afterwards the State Line Company consolidated with the Chicago, Hammond, & Western Railroad Company, and the consolidated company became known as the Chicago Junction Railway Company (defendant herein), and, in addition to the railroad leased from the Stock Yard Company, operated a belt line around the city of Chicago. In November, 1907, the Junction Company sold the belt line to the East Chicago Belt Railroad Company, retaining the tracks which had been leased by the Stock Yard Company. The equipment 299]operated by the Junction *Company, consisting of locomotives and rolling stock, is owned by the Stock Yard Company, but the Junction Company employs its own engineers and crews.

The tracks of the Junction Company are frequently used by the trunk lines to connect the eastern and western systems and to deliver shipments originating without the state to the platforms of the Stock Yard Company, for which service they pay the Junction Company a trackage charge of a fixed sum per car. Large numbers of carload lots of dead freight from points without the state are placed on the receiving tracks of the Junction Company, bearing transfer cards showing the destination of the cars, and the Junction Company delivers the cars either to the consignee, if situated on its tracks, or to the receiving track of the forwarding carrier. It is paid by the trunk lines a fixed charge for this service, which the latter absorb. The Junction Company, upon the order of the trunk lines, places cars for loading by shippers in the stock yards district, and after they are loaded hauls them to the receiving tracks of the trunk lines, and it receives from the trunk lines a fixed amount for this service, which is absorbed by the latter. Less than carload lot freight is delivered at the freight depot known as the Union Freight Station, and placed in cars by the Junction Company, which transports them to the receiving tracks of trunk lines, and for this service the trunk lines pay the Junction Company 5 cents per hundredweight. Sometimes such freight is hauled from the industries in the stock yards district to the Union Freight Station by the Junction Company and distributed in the cars. The Junction Company receipts for the less than carload lot freight in the name of the trunk lines, such receipts being exchangeable for bills of lading at the office of the trunk lines, and all charges paid to the Junction Company are receipted for in the name of the trunk lines and remitted to them. The Junction Company has an arrangement with the Baltimore *&[300 Ohio Railroad Company whereby it performs a like service for such company as to the less than carload lot freight brought by it to the Union Freight Station and destined to points beyond the state. Shipments of horses are transported by the trunk lines to the loading platforms of the Stock Yard Company, and there picked up by the Junction Company and hauled to the unloading chutes for horses, and the Junction Company receives, besides the trackage charge, a certain amount per car for this service. A large part of the service thus performed by the Junction Company is in connection with interstate shipments. The Junction Company does not issue any bills of lading with respect to any kind of freight.

After leasing its railroad property to the Junction Company, the Stock Yard Company continued to operate its stock yard facilities for loading and unloading cattle and other live stock bound for and coming from points outside the state, and to feed and water live stock in transit over the lines of trunk line carriers, and also to feed, bed, and water live stock shipped to cor

signees doing business in the stock yards district.

The employees of trunk lines bringing live stock to the stock yards turn over the waybills accompanying such shipments, with what are called "live stock stubs" attached, to the employees of the Stock Yard Company, who use the waybills in unloading and counting the stock, and the waybills and stubs are then sent to the auditor of the Stock Yard Company (being also the auditor of the Junction Company), who retains the stubs and forwards the waybills to the local agents of the trunk lines. The Stock Yard Company advances the charges on such shipments to the trunk lines and collects from the consignees, usually commission men doing business at the stock yards, the moneys it has so advanced for their accommodation.

The Junction Company publishes tariffs showing the charges which it exacts for its [301] services, such tariffs being *in general circulation in Chicago, especially about the stock yards district, but they were not filed with the Interstate Commerce Commission. Prior to 1907, the Junction Company, while owning railroad facilities in Indiana, had filed tariffs with the Interstate Commerce Commission, but upon the sale of such properties canceled the tariffs. It was the belief of the government and of the Junction Company that all tariffs and concurrences had been canceled, but it is shown by a stipulation which the parties have filed that since the issues were made up it has been discovered that one particular concurrence, through inadvertence, was not canceled.

The Investment Company is a holding company and owns over 90 per cent of the shares of the Stock Yard Company and practically all of the shares of the Junction Company.

As to the contract with the Pfaelzers: They were members of a copartnership (since incorporated) engaged in the slaughtering business, their plant being located in the vicinity of the tracks operated by the Junction Company and the cattle pens of the Stock Yard Company. They purchased cattle from time to time outside the city of Chicago and in states other than Illinois, and shipped them to the partnership at the stock yards, where they were handled as hereinbefore stated for delivery to the consignee. The freight charges on such business averaged for the five years prior to the filing of the Pfaelzers' answer about $2,800 annually. The amount of freight consigned to the Pfaelzers tends to increase the business of the Stock Yard Company and the Junction Company, and therefore the revenue of each.

In 1906 the Department of Agriculture required the Pfaelzers to make changes in their plant; in 1908 it directed them to erect a new plant; and in 1909 they were notified that the government would deny to them further inspection of the products of their plant. They then proposed *to locate in Kansas City, Missouri, [302] but upon negotiation with the Stock Yard Company made the contract under consideration here. This contract provided that upon the erection by the Pfaelzers of a modern slaughtering, packing, and canning plant adjacent to the stock yards in Chicago, costing a certain sum and having a required capacity, the Stock Yard Company would pay them $50,000, and the Pfaelzers agreed that all live stock slaughtered or canned by them within a radius of 200 miles would either be purchased at such stock yards or pass through and use them, the customary yardage, tolls, and charges to be paid thereon, or that the Pfaelzers would pay full tolls and charges on live stock the same as if it had been sent to the stock yards for sale and had there been bought by them; and that for fifteen years they would conduct all their slaughtering, packing, and canning business at such plant, and not interest themselves directly or indirectly in any other plant or in any other stock yards. The Investment Company guaranteed the performance of the contract by the Stock Yard Company.

It is stated in the answer of the Stock Yard Company and stands admitted in the case that there are other competitive stock yards in the United States which have built up their business in competition with it by offering and giving inducements, either in the shape of land or money, to packing houses and other industries to locate at or near their yards.

From this statement it is apparent that the Stock Yard Company was organized for the purpose of maintaining a stock yard, with the usual facilities of such yards as to loading and unloading and caring for freight, and it was authorized to and did own and operate a railroad system, transporting cars to and from trunk lines in the course of their transportation from beyond the state and to points outside of the state. This service, so far as the railroad *and its operation is concerned, is now [303] performed by the Junction Company. The Stock Yard Company still continues to perform the customary stock yard operations, but by means of the lease to the Junction Company it has devested itself of the operation of the railroad system which it was authorized by its charter to construct and operate, and which for many years before the lease it did in fact operate. The Stock Yard Company, under the lease, still gets,

however, two thirds of the profits received by the Junction Company for performing the service in connection with the railroad transportation. This joint service now takes the place of the single service formerly rendered by the Stock Yard Company. The stock of both these companies is held in common ownership by the Investment Company, and it appears that the Investment Company guarantees the contracts, or at least some of them, of the Stock Yard Company.

In view of this continuity of operation, the manner of compensation and the performance of services in connection with interstate transportation by railroads such as are described, are the Stock Yard Company and the Junction Company subject to the terms of the act to regulate commerce, and bound to conform to its requirements?

The interstate commerce act, as amended by the Hepburn act (34 Stat. at L. 584, § 1, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1285), applies to common carriers engaged in the transportation of persons or property from state to state wholly by railroad, and the term "railroad" is defined to include "all switches, spurs, tracks, and terminal facilities of every kind, used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property;" and transportation is defined to include "cars and other vehicles and all instrumentalities and facili-304]ties of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

That the service is performed wholly in one state can make no difference if it is a part of interstate carriage. "The transportation of live stock," said this court in Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461, in treating of the duties of common carriers, irrespective of the act to regulate commerce, "begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee." In this connection see Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279.

The fact that the performance of the service is distributed among different corporations having *common ownership in a* holding company which controls an interstate system was held in Southern P. Terminal Co. v. Interstate Commerce Commission, supra, to make no difference, where the service to be performed was a part of the carriage of freight by railroad in interstate commerce. Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service. Ibid.; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under *a through rate and bill[305 furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such, and constantly act in that capacity, and because they are so treated by the great railroad systems which use them. In Union Stock Yards Co. v. United States, 94 C. C. A. 626, 169 Fed. 404, Mr. Justice Van Devanter (while a circuit judge), speaking for the court of appeals, said (406):

"Its [the Stock Yards Company's] operations . . . include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens, and *vice versa*, is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stock

yards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire, a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

306] *We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits, and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a state. In view of this purpose, and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two thirds of the profits of that company, and both companies are under a common stock ownership, with its consequent control. We therefore think the commerce court was right in holding that the Junction Company should file its rates with the Interstate Commerce Commission, and that it should also have held the Stock Yard Company subject to the provisions of the interstate commerce acts.

As to the contract, both parties concede the authority of the commerce court to pass upon this subject, and no objection was made as to the manner and form in which the jurisdiction of that court was invoked. There being no objection taken to the method of proceeding, we think, if this contract is within the prohibitions of the act, that the commerce court had the right to entertain the bill and to enjoin the performance of the contract. (Sections 2 and 3 of the Elkins Act.) It is contended that this contract is violative of certain features of the act to regulate commerce and of the Elkins act. Section 2 of the former and § 2 of the latter provide:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, 307] *demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or person for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Sec. 2. . . . It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall, by any devise whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practised. . . . "

This court has had frequent occasion to comment upon the purpose of Congress in the passage of these laws to require equal treatment of all shippers and to prohibit unjust discrimination in favor of any of them. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648.

By § 2 of the act to regulate commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the *transportation of prop-[308 erty than it does another for a like service. The Elkins act makes it an offense for any person or corporation to give or receive any rebate, concession, or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff, or whereby any other advantage is given or discrimination is practised. By the very terms of the contract it is evident that the

interest of the Stock Yard Company and also of the Junction Company is in the profit to be made in receiving and delivering, handling and caring for and transporting live stock, shipments of which, to the extent stated, are made in interstate commerce. The contract provides that if the Pfaelzers construct a packing plant adjacent to the stock yards of the Stock Yard Company they shall receive $50,000, and it obligates them to maintain and operate the plant for a period of fifteen years, and buy and use in their slaughtering business such live stock only as moves through such stock yards, and if not so brought, to pay the regular charges thereon as if the same had moved into the stock yards and had been there purchased by them. In other words, this plant in effect may pay for the services of the Stock Yard Company, up to the sum of $50,000, with the bonus given to the Pfaelzers for the location of their plant in juxtaposition to the stock yards. The only interest which the Stock Yard Company has in Pfaelzer & Sons' interstate business is compensation for its services in handling their freight and its share of the profits realized by the Junction Company in rendering its service. Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered, without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which 309]receives no such bonus, there has *been an undue advantage given to and an unlawful discrimination practised in favor of Pfaelzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins act as to departures from published rates,—and we must consider the case in that light,—and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the interstate commerce law and the Elkins act to prevent favoritism by any means or device whatsoever, and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the commerce court should have enjoined the carrying out of this contract.

It follows that in case No. 621 the judgment of the Commerce Court should be reversed and the case remanded for the entry of a decree in conformity to this opinion. In No. 622 the judgment of the Commerce Court should be *affirmed.*

STATE OF FLORIDA ON THE RELATION OF SIDNEY I. WAILES, Plff. in Err.,

v.

A. C. CROOM, Comptroller of the State of Florida.

(See S. C. Reporter's ed. 309, 310.)

**Abatement — action against public official — death.**

The death of the state comptroller, against whom in his official character an action in mandamus had been instituted, precludes the suing out of a writ of error to review a decree denying the writ.

[For other cases, see Abatement and Revival, 26–29, in Digest Sup. Ct. 1908.]

[No. 646.]

Submitted December 2, 1912. Decided December 16, 1912.

IN ERROR to the Supreme Court of Florida to review a judgment which affirmed a judgment of the Circuit Court of Leon County, in that state, denying a writ of mandamus directed to the state comptroller. Dismissed.

See same case below, 62 Fla. 284, 57 So. 420.

**Mr. Fred Beall** submitted the cause for plaintiff in error.

**Messrs. W. S. Jennings, E. J. L'Engle, and Park M. Trammell** submitted the cause on the motion to dismiss:

This cause abated by the death of defendant in error while in office.

United States ex rel. Bernardin v. Butterworth, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441; The Secretary v. McGarrahan (Cox v. United States) 9 Wall. 298, 19 L. ed. 579; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225.

In the absence of statutory provision to the contrary, mandamus against a public officer abates on the death of defendant.

United States ex rel. Bernardin v. Butterworth, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441; People ex rel. Hatch v. Lantry, 88 App. Div. 583, 85 N. Y. Supp. 193; 26 Cyc. 420.

This rule applies as well after judgment, and pending appeal therefrom, as before.

26 Cyc. 421; Seymour v. Nelson, 11 App. D. C. 58; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225.

There is nothing in the state laws or decisions to prevent this court from following the rule of the Federal courts.

State ex rel. Williams v. Bloxham, 42 Fla. 501, 28 So. 762.

No brief was filed in opposition.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

This is an action in mandamus. The party proceeded against in the state court was A. C. Croom, sued in his official character as comptroller of the state of Florida. On January 16, 1912, the supreme court of Florida affirmed a judgment denying the writ. On April 11, 1912, this writ of error was sued out by the relator below, and Croom, comptroller, was named as defendant in error. Citation was served by delivering a copy to the attorney general of the state of Florida. The attorneys who represented the defendant in the state courts, acting as friends of the court, have placed upon the files evidence establishing that A. C. Croom died on February 7, 1912, and that William V. Knott was thereafter appointed and duly qualified as comptroller of the state of Florida, and has been acting as such since February 17, 1912. Under the circumstances thus detailed it results that the writ of error was improvidently sued out, and it must therefore be dismissed.

Writ of error dismissed.

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311]*FREDERICK C. ROBERTSON, Appt.,

v.

HUGH M. GORDON, Marion Butler, and Josiah M. Vale, Individually and as Partners under the Firm Name and Style of Butler & Vale.

(See S. C. Reporter's ed. 311–317.)

**Attorneys — contract for division of fees — construction.**

1. A sum allowed by the court of claims conformably to an act of Congress, for services rendered by lawyers in the prosecution of an Indian claim, was comprehended by the terms of an agreement between two of such lawyers to share equally in all moneys appropriated by Congress or allowed by the Interior Department as attorney fees growing out of the rendition of such services.

[For other cases, see Attorneys, III. a; Claims, I. d, 2, d, in Digest Sup. Ct. 1908.]

**Attorneys — contract for division of fees — change or extinguishment.**

2. An agreement between two of several attorneys interested in the prosecution of an Indian claim to share equally in all moneys appropriated by Congress or allowed by the Interior Department as attorney fees for their services was not superseded by subsequent contracts entered into with the other attorneys with reference to the distribution of such fees in the event of certain contingencies which never in fact happened.

[For other cases, see Attorneys, III. a; Claims, I. d, 2, d, in Digest Sup. Ct. 1908.]

**Attorneys — contract for division of fees — construction.**

3. An adjudication by the court of claims on a *quantum meruit* under a subsequent act of Congress does not satisfy the condition of an agreement between the attorneys interested in the prosecution of an Indian claim to submit their respective claims for services to the conference committee of the Senate and House of Representatives on a *quantum meruit*, and to abide by any award which should be made.

[For other cases, see Attorneys, III. a; Claims, I. d, 2, d, in Digest Sup. Ct. 1908.]

**Claims — attorneys' fees — jurisdiction.**

4. Jurisdiction to decide the respective rights as between themselves of the attorneys entitled to share in the fees allowed for their services in prosecuting an Indian claim was not conferred upon the court of claims by the act of June 21, 1906 (34 Stat. at L. 325, chap. 3504), authorizing that court to render judgment in favor of two of such attorneys for all services by all lawyers to the Indians, the amount to be paid out of the fund, and to be apportioned among such lawyers by agreement among themselves.

[For other cases, see Claims, 216–230, in Digest Sup. Ct. 1908.]

[No. 56.]

Argued November 15, 1912. Decided December 16, 1912.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing the bill in a suit on a contract for the division of attorneys' fees. Reversed.

See same case below, 34 App. D. C. 539.

The facts are stated in the opinion.

Mr. George H. Lamar argued the cause, and, with Mr. George H. Patrick, filed a brief for appellant:

An appropriation was made, within the meaning of the contract, for the payment of counsel.

Brashear v. Mason, 6 How. 99–101, 12 L. ed. 360, 361; Reeside v. Walker, 11 How. 287, 291, 13 L. ed. 699, 701; Hart v. United States, 118 U. S. 62, 30 L. ed. 96, 6 Sup. Ct. Rep. 961; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373; 1 Words & Phrases, p. 71; Felton v. Hamilton County, 38 C. C. A. 432, 97 Fed. 823; People ex rel. McCauley v. Brooks, 16 Cal. 11; Proll v. Dunn, 80 Cal. 220, 22 Pac. 143; Henderson v. State Soldiers' & Sailors' Monument, 129 Ind. 92, 13 L.R.A. 169, 28 N. E. 127.

A judgment or decree set up as a bar by

plea or relied on as evidence by way of estoppel, to be conclusive must have been made (1) by a court of competent jurisdiction, upon the same subject-matter; (2) between the same parties; and (3) for the same purpose.

Aspden v. Nixon, 4 How. 467, 497, 498, 11 L. ed. 1059, 1073, 1074.

Even if the court of claims had undertaken to determine the comparative right of appellant and appellee, as between themselves, which it did not do, any such action would have been and should be treated by this court as a nullity, as beyond the power and jurisdiction of that court.

Hickey v. Stewart, 3 How. 750, 762, 11 L. ed. 814, 819.

The court of claims could not determine any controversy between the appellant and the appellee, based upon said contracts, because the same were not involved in any issue before that court.

Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Munday v. Vail, 34 N. J. L. 418.

The defense that the contract was predicated wholly upon the condition that the appellant should secure a new contract with the Indians is contrary to the terms of the written instrument itself, which cannot be attacked by oral testimony under the pleadings, and was not sustained by the evidence.

9 Enc. U. S. Sup. Ct. Rep. 14–17; Walden v. Skinner, 101 U. S. 577–585, 25 L. ed. 963, 966; De Witt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; 17 Cyc. 596–598; Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212; Simpson v. United States, 199 U. S. 397, 50 L. ed. 245, 26 Sup. Ct. Rep. 54; Brawley v. United States, 96 U. S. 168–173, 24 L. ed. 622–624; Gavinzel v. Crump, 22 Wall. 308, 319, 22 L. ed. 783, 785; Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201–206, 10 L. ed. 419–421; Brown v. Slee, 103 U. S. 828, 834–838, 26 L. ed. 618, 620–622.

The original contract was not superseded by subsequent contracts or proceedings.

Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749; McDaniels v. Robinson, 26 Vt. 317, 340, 62 Am. Dec. 574, 4 Enc. U. S. Sup. Ct. Rep. 577; Utley v. Donaldson, 94 U. S. 29, 49, 24 L. ed. 54, 57; Murray v. Harway, 56 N. Y. 347; Robinson v. Page, 3 Russ. Ch. 122 27 Revised Rep. 26; Howard v. Carpenter, 22 Md. 249; Darnley v. London C & D. R. Co. L. R. 2 H. L. 60, 36 L. J. Ch. N. S. 404, 16 L. T. N. S. 217, 15 Week. Rep. 817; United States Coal Co. v. Pinkerton, 95 C. C. A. 34, 169 Fed. 536.

Mr. Henry E. Davis argued the cause and filed a brief for appellee Gordon.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit upon the following contract:

March 28, 1906.

This agreement made between F. C. Robertson and Hugh H. Gordon witnesseth, that they shall share equally in all monies appropriated by Congress, or allowed by the Interior Department, which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir by a reasonable compensation. The fees to be divided between said Robertson and said Gordon, as herein provided, shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon.

F. C. Robertson.
Hugh H. Gordon.

There is also a claim upon a receipt signed by Gordon for $150, given by Robertson to Gordon "with which to pay expenses of trip to Washington, District of Columbia, to look after the interests of Gordon, Gwydir, & Robertson in the matter of the claim of the Indians of the Colville Reservation against the U. S. government. In case we succeed in collecting said claim, I agree that out of my share of the *profits, I will repay to said Robert-[313 son the said $150." This was dated March 21, 1906, a few days earlier than the one first set forth.

By an act of June 21, 1906, chap. 3504, 34 Stat. at L. 325, 377, 378, a million and a half dollars were set aside by Congress for payment to the Indians in respect of the matter as to which the contract contemplated that services would be rendered to them. This statute also gave jurisdiction to the court of claims to render a judgment in favor of Butler and Vale, attorneys, for all services by all lawyers to the Indians; the amount to be paid out of the fund, and to be apportioned among such lawyers by agreement among themselves. One fifth of the fund was paid over to the Indians under an act of March 1, 1907 [34 Stat. at L. 1015, chap. 2285]. By an act of April 30, 1908, chap. 153, 35 Stat. at L. 70, 96, U. S. Comp. Stat. Supp. 1911, p. 90, another fifth was directed to be paid over in pur

suance of the statute of 1906. Meantime Butler and Vale had brought their suit in the court of claims, and on May 25, 1908, the court gave judgment for a total of $60,000 of which it undertook to apportion $14,000 to Gordon and $2,000 to the plaintiff and appellant. 43 Ct. Cl. 497, 525. Thereafter, in August, 1908, this bill was filed to secure payment out of the Indian fund, and to establish the plaintiff's right to an equal share in the amount allotted to Gordon, and a lien upon that amount for such share and for the $150 additional advanced as above set forth.

The controversy is wholly between Robertson and Gordon, and it is unnecessary to refer to the other parties or other aspects of the case. The Maish-Gordon contract with the Indians had expired at the time of the agreement in suit, and one of the defenses is that the agreement was made upon the implied understanding and condition that Robertson should get a new contract with the Indians, which never came to pass. The other defenses are that the matter is concluded by the judgment of the court of 314] *claims, and that the agreement was superseded by two other agreements of a little later date, made when the matter of an appropriation for the Indians was pending in Congress. The first of these, dated April 3, 1906, and signed by Gordon, Robertson, Butler, and Vale, was that the parties would submit to the conference committee of the Senate and House their respective claims for services, on a *quantum meruit*, and would abide by any award that should be made, "and in case no award shall be made the rights of the said parties shall remain unaffected." The second agreement, dated April 12, 1906, between Marion Butler and R. W. Nuzum, each on behalf of himself and others not named, and Gordon and Robertson, was that, provided the sum of $150,000 was allowed for payment of attorneys representing the Indians, $18,750 should be paid to Nuzum, $9,375 to Gordon, and $9,375 to Robertson; the remainder to be distributed by Butler as he elected. "Should the appropriation be less, then this agreement is to be the basis of distribution, sharing *pro rata* in such diminished sum, as the percentage is thereby diminished." Both of the last two defenses seem to have been sustained by the court of appeals. 34 App. D. C. 539. See for details not material here, Butler v. Indian Protective Asso. 34 App. D. C. 284; Gordon v. Gwydir, 34 App. D. C. 508.

We are of opinion that the decree must be reversed and that the plaintiff is entitled to prevail. He starts with a contract of *definite meaning*. We perceive no ground *for the doubt suggested in the court of first* instance whether this agreement applies to a sum allowed by the court of claims. That court merely rendered certain the amount appropriated in terms by Congress out of the Indian fund. The argument that there was a condition precedent that a new contract should be made with the Indians, although no doubt such a contract was hoped and worked for, is irreconcilable with the instrument as it stands, and appears*[315 to us not to be supported by the evidence, if that evidence were admissible without even a cross bill. Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201, 206, 10 L. ed. 419, 421; Brown v. Slee, 103 U. S. 828, 26 L. ed. 618; Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212. Again, there is no doubt that Robertson did some work, whether more or less does not matter, so that there was no failure of consideration, according to the common rather inaccurate phrase. The only questions, then, are those concerning the effect of the later contracts and the decree of the court of claims.

The contract of April 3, proposing to submit all claims to the conference committee of the Senate and the House, came to nothing, because the parties were informed that the committee would not undertake to settle disputes between lawyers. By the express terms of this instrument, therefore, no rights were affected. It appears to us wholly unpermissible to bring in the subsequent attempt of the court of claims to adjudicate on a *quantum meruit* under an act of Congress that had not then been passed, as satisfying the conditions of the contract, and binding the parties by virtue of the agreement, if not by its own proper force.

The second contract was not made until nine days later,—not improbably on the footing that the attempt of April 3 had failed. This contemplated a fixing of the attorney's fees by Congress,—again a different course from that taken by events. We see no reason for supposing that it was intended to change the relations between Robertson and Gordon. Primarily they were on one side of the agreement against Butler and associates on the other. Secondarily they were recognized as entitled to equal shares. Neither do we see reason for connecting this with the contract of April 3, as alternatively intended to cover the whole ground and to supersede that of March 28 in suit. These later contracts were on their face successive; the earlier one applied only to an event that has *not happened, and the latter, if ap-[316 plicable in any degree, does not help the defendants' case. It is not to be supposed that it tacitly overrode the agreements of the parties in March to pay certain other law-

yers out of their respective shares, and if not, the March contract remained on foot.

Finally, as to the defense of *res judicata*, the short answer is that the court of claims had no jurisdiction of either the subject-matter or the parties. Of course, jurisdiction could not be claimed unless the special act of June 21, 1906, heretofore mentioned, conferred it. That act authorized the court to "render final judgment in the name of Butler and Vale . . . for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim." It then directed that Butler and Vale should file a petition, and that the Secretary of the Treasury should pay them the sum awarded on final judgment out of the sum appropriated for the Indians; payment to be in full compensation of all attorneys who had rendered services to the Indians in the matter, "the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves," provided that before any attorney having an agreement with Butler and Vale should be paid, he should deliver to the Secretary of the Interior a discharge of all demands for services in the matter of this Indian claim.

Argument hardly can make the intent of the statute clearer. The question before 317]the court of claims was the *amount and the whole amount to be deducted from an Indian appropriation before it should be paid over for the Indians by the United States. That necessarily concerned the United States. The manner in which the fund should be distributed did not concern it at all. Therefore it selected representatives of all claimants against the fund, ordered the sum deducted to be paid to them, and transferred all claims outstanding against the Indians to the sum so paid over, —a method familiar to our legislation. United States v. Dalcour, 203 U. S. 408, 422, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58. The reference to contracts with the Indians merely permitted the court to take them into consideration in determining what was a fair total, without being governed by them; as, for instance, the expired Butler and Vale contract, which allowed 10 per cent; and to the same end other services were to be taken *into account. But the act* itself determined what parties were to be before the court, namely, Butler and Vale, they being the only ones necessary for the object in view. The plaintiff could not have made himself a party if he had wanted to, and he did not want to and did not,—he rightly understood that his claim was to be satisfied outside of the suit before the court. We do not think a discussion of the evidence necessary, although we think that the courts below mistook its effect. It is enough to say that the decree of the court of claims perhaps was not intended to have effect, and certainly could not have effect, in deciding the rights of the parties among themselves.

Decree reversed.

Mr. Justice Pitney was not present at the argument, and took no part in the decision of this case.

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*JAMES A. MURRAY, Doing Busi-[318
ness as the Pocatello Water Company, Plff. in Err.,

v.

CITY OF POCATELLO.

(See S. C. Reporter's ed. 318–324.)

**Error to state court — following decision below — impairing contract obligation.**

1. A decision of the highest state court that the Constitution of the state in force when a municipal ordinance respecting the method of fixing water rates was passed made it impossible for the city to make a contract on the subject beyond the power of the legislature to change will not be disturbed by the Federal Supreme Court, where such Constitution declared the use of water distributed for a beneficial use to be a public use and subject to the regulation and control of the state, and the right to collect rates for water to be a franchise that could not be exercised except by authority of and in the manner prescribed by law, and further declared that the legislature should provide by law the manner in which reasonable maximum rates might be established.

[For other cases, see Appeal and Error, 4994, 4995, in Digest Sup. Ct. 1908.]

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

As to what questions the Federal Supreme Court will consider in reviewing the judgment of a state court—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

**Judgment — res judicata — dismissal on demurrer.**

2. A decree dismissing on demurrer a bill brought by a municipality, seeking to have the court fix reasonable water rates, conformably to a state statute, upon the ground that the court was without jurisdiction to exercise the legislative or administrative power to determine in advance what would be a reasonable schedule of water rates for the following three years, is not *res judicata* on the question whether a prior municipal ordinance prescribing the method of fixing water rates could constitutionally be affected by such statute.

[For other cases, see Judgment, 289-324, in Digest Sup. Ct. 1908.]

[No. 575.]

Argued December 3 and 4, 1912. Decided December 16, 1912.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment awarding a writ of mandate requiring the owner of a waterworks company to appoint commissioners to act with commissioners appointed by the municipality in fixing water rates. Affirmed.

See same case below, 21 Idaho, 180, 120 Pac. 812.

Mr. William V. Hodges argued the cause, and, with Messrs. Clayton C. Dorsey, Gerald Hughes, A. A. Hoehling, Jr., and N. M. Ruick, filed a brief for plaintiff in error:

The judgment on demurrer is conclusive of matters actually decided.

Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 396, 410, 35 L. ed. 1055, 1060, 12 Sup. Ct. Rep. 188; Durant v. Essex Co. 7 Wall. 107, 19 L. ed. 154; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Baker v. Cummings, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578; Swan Land & C. Co. v. Frank, 148 U. S. 612, 37 L. ed. 581, 13 Sup. Ct. Rep. 691; Aurora v. West, 7 Wall. 82, 7 L. ed. 42.

Resort may be made to the opinion to determine what was actually decided.

Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; Baker v. Cummings, 181 U. S. 117, 45 L. ed. 776, 21 Sup. Ct. Rep. 578; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205.

It cannot be said that, because the court strengthened its conclusion by further showing that in no event could the further relief prayed for be granted, or further strengthened its opinion by additional reasons why any of the relief prayed for should not be granted, therefore it did not decide the constitutional question involved.

Ontario Land Co. v. Wilfong, 223 U. S. 543, 56 L. ed. 544, 32 Sup. Ct. Rep. 328; Union P. R. Co. v. Mason City & Ft. D. R. Co. 222 U. S. 237, 56 L. ed. 180, 32 Sup. Ct. Rep. 86.

The court had jurisdiction of the parties and of the subject-matter. It had jurisdiction to decide any question it might think material in reaching its conclusions as to the right of the complainant to equitable relief, and anything so decided became an adjudicated matter, notwithstanding the result of the decision was a dismissal of the bill for lack of grounds for equitable relief.

Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 367, 33 L. ed. 178, 183, 9 Sup. Ct. Rep. 781; Insley v. United States, 150 U. S. 512, 515, 37 L. ed. 1163, 1165, 14 Sup. Ct. Rep. 158.

The defendant in error cannot question the jurisdiction of the court to decide the constitutional questions and render judgment.

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

In the absence of an express restriction or limitation in the Constitution of the state, restricting the power of the legislature to authorize a municipality to contract for water for public use for a fixed period, and to agree upon rates, the legislature of the state may contract by statute or may empower a municipality to contract for water for public use for a stated period, and fix the rates to be paid during such term for the same.

New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 508, 51 L. ed. 1161, 27 Sup. Ct. Rep. 762; Freeport v. Freeport Water Co. 180 U. S. 608, 45 L. ed. 692, 21 Sup. Ct. Rep. 493; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23.

The city had power to enter into the contract contained in ordinance No. 86.

Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 384, 46 L. ed. 592, 607, 22 Sup. Ct. Rep. 410; Dill. Mun. Corp. 5th ed. § 1212; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 5; Pikes Peak Power

Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 1; Des Moines v. Welsbach Street Lighting Co. 110 C. C. A. 540, 188 Fed. 906; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

The reserve power of a general assembly to alter, amend, or repeal has its limits. Alterations under it must be reasonable, must be in good faith, and consistent with the purpose and scope of the act of incorporation. Oppression and wrong must not be inflicted under the guise of amendment or alteration, and vested rights of property of corporations are surrounded by the same sanctions, and are as sacred as other rights.

1 Watson, Const. p. 822; Shields v. Ohio, 95 U. S. 324, 325, 24 L. ed. 359; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 213, 48 L. ed. 413, 24 Sup. Ct. Rep. 241.

Mr. D. Worth Clark argued the cause, and, with Messrs. Jesse R. S. Budge, Eldis B. Browne, Alexander Britton, and Evans Browne, filed a brief for defendant in error:

In order to render a matter *res judicata* there must be not only an identity of parties, but an identity of the question litigated. Where the second action is upon a different claim or demand, the question determined in the first action must have been necessarily involved so that the decision of the court could not have been rendered in that suit without determining it.

Lillis v. Emigrant Ditch Co. 95 Cal. 553, 30 Pac. 1108; Cromwell v. Sac County, 94 U. S. 351, 354–356, 24 L. ed. 195, 198, 199; Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. ed. 550; 23 Cyc. 1309; Brown v. McKie, 185 N. Y. 303, 78 N. E. 64; Cauhape v. Parke, 121 N. Y. 152, 24 N. E. 185; Fulton v. Hanlow, 20 Cal. 450; People ex rel. Reilly v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770.

The fact that the court discussed the statute is not sufficient to render his conclusion as to its constitutionality *res judicata*.

23 Cyc. 1218; Braun v. Wisconsin Rendering Co. 92 Wis. 245, 66 N. W. 196.

Because the city had mistaken its remedy,—the court being without the jurisdiction to grant the relief sought,—the bill was dismissed. A judgment rendered under such a condition is not *res judicata*.

Hughes v. United States, 4 Wall. 232–237, 18 L. ed. 303–305; Walden v. Bodley, 14 Pet. 156, 161, 10 L. ed. 398, 401; Barnsdall v. Waltemeyer, 77 C. C. A. 515, 142 Fed. 415; Water, Light & Gas Co. v. Hutchinson, 19 L.R.A. (N.S.) *219, 90 C. C. A. 547, 160 Fed.* 41; Barnett v. Smart, 158 Mo. 167, 59 S. W. 235.

If it appears from the bill of complaint that the court is powerless to grant any relief, the ground of dismissal will be lack of jurisdiction.

Richards v. Lake Shore & M. S. R. Co. 124 Ill. 516, 16 N. E. 909.

Municipal corporations possess no power except such as is conferred upon them by statute, either in express terms or by necessary implication.

Dill. Mun. Corp. 4th ed. § 89; Lewisville Natural Gas Co. v. State, 135 Ind. 49, 21 L.R.A. 734, 34 N. E. 702; Re Pryor, 55 Kan. 724, 29 L.R.A. 398, 49 Am. St. Rep. 280, 41 Pac. 958; St. Louis v. Bell Teleph. Co. 96 Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197.

The power to regulate rates is a governmental power exercised under the police powers of the state.

Munn v. Illinois, 94 U. S. 113, 124, 24 L. ed. 77, 84.

This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent.

Railroad Commission Cases, 116 U. S. 307, 325, 49 L. ed. 636, 642, 6 Sup. Ct. Rep. 334, 388, 1191; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 628, 629, 45 L. ed. 702, 705, 706, 21 Sup. Ct. Rep. 490; Ruggles v. Illinois, 108 U. S. 526, 531, 27 L. ed. 812, 815, 2 Sup. Ct. Rep. 832; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Danville Water Co. v. Danville City, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505.

In the case at bar defendant took his franchise under a constitutional provision which commanded the legislature to "provide by law the manner in which reasonable maximum rates may be established, to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose." This constitutional provision was as much a part of the franchise as if it had been written into it. The city was powerless to provide any "manner in which reasonable maximum rates may be established" that would in any manner conflict with such as might be established by the legislature. Any regulations in relation to that matter which the city would make could at most continue in force only until such time as the legislature might by law

carry out the constitutional provision above referred to.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Jack v. Grangeville, 9 Idaho, 313, 74 Pac. 969; Zanesville v. Zanesville Gaslight Co. 47 Ohio St. 1, 23 N. E. 55; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23.

Such a constitutional provision is self-executing to the extent that contracts made after it went into effect are subject to the possibilities of the exercise of the power conferred on the legislature by such provision.

Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531.

Under constitutional provisions similar to those of Idaho it has been held that the legislature has a right to change the methods by which water rates are to be determined.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490.

Although a city is given power to contract for a water supply, the legislature may subsequently supply a manner of readjusting or fixing rates.

Dansville v. Dansville Water Co. 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118, 180 Ill. 235, 54 N. E. 224, 186 Ill. 326, 57 N. E. 1129, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505.

Memorandum opinion by direction of the court. By Mr. Justice Holmes:

This was an application by the defendant in error for a mandate requiring the plaintiff in error, Murray, to appoint commissioners to act with commissioners appointed by the city in determining water rates to be charged by Murray. Murray relied upon an ordinance of June 6, 1901, as establishing by contract the only method of fixing rates. The city relied upon a subsequent statute, § 2839, Rev. Code. The supreme court of the state held that the 323] *Constitution in force when the ordinance was passed made it impossible for the city to make a contract on the matter beyond the power of the legislature to change. The Constitution declared the use of waters distributed for a beneficial use to be a public use, and subject to the *regulation and control* of the state, and *also declared the right to collect rates* for water to be a franchise that could not be exercised except by authority of and in the manner prescribed by law. It then ordained that the legislature should provide by law the manner in which reasonable maximum rates might be established. Art. 15, §§ 1, 2, 6. The court relied upon Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50, and Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265, which so far sustain its conclusion that we think further discussion unnecessary. We are not prepared to overrule the construction of the legislative power as continuing and irrevocable, adopted by the supreme court of the state.

A defense more relied upon was *res judicata*. In 1909 the city brought a bill in equity in the circuit court, seeking to have the court fix reasonable rates. The defendant demurred for want of jurisdiction to give relief in equity and multifariousness. The decree was that the demurrer be sustained and the bill dismissed. The dismissal was in general terms, but with a reference to the opinion, reported in 173 Fed. 382. In the opinion, it is true, the court expressed the view that the ordinance relied upon by the defendant was not affected by the subsequent statute, but the point decided, and the only point that could be decided, was that the demurrer should be upheld, and that the court was without jurisdiction to "take upon itself the exercise of the 'legislative or administrative' power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years." 173 Fed. 385. The *demurrer[324 excludes a decision upon the merits, and even if the decree referring to it did not have the same effect by itself, the opinion to which the decree also refers would show the same thing. Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. The two grounds are not on the same plane, as they were in Ontario Land Co. v. Wilfong, 223 U. S. 543, 559, 56 L. ed. 544, 551, 32 Sup. Ct. Rep. 328, and when jurisdiction to grant equitable relief was denied, the ground of the merits could not be reached. In Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665, jurisdiction had been taken in the earlier decision relied upon. Here it was refused.

Judgment affirmed.

UNITED STATES, Appt.,
v.
READING COMPANY et al. (No. 198.)

TEMPLE IRON COMPANY, Appt.,
v.
UNITED STATES. (No. 206.)

READING COMPANY et al., Appts.,
v.
UNITED STATES. (No. 217.)

(See S. C. Reporter's ed. 324–373.)

**Monopoly — combination by carriers — defeating projected line.**

1. Carriers possessing a substantial monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and tide-water distributing points, and also controlling, with the aid of their subsidiary coal-mining and selling companies, nearly three fourths of the annual supply of anthracite, must be deemed to have combined to restrain interstate trade, contrary to the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), where, with the purpose and result of defeating the construction of a projected independent competing railway line, and thus preserving their existing monopoly of transportation, they purchased, through another corporation whose capital stock they first acquired, the coal properties and collieries controlled by certain independent coal operators who were the chief supporters of the projected railway enterprise, although the acquisition of such property, considered alone, may have been lawful under the local law.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

**Monopoly — combination by carriers — legality of particular acts.**

2. Parts of a general scheme of railway carriers to combine to restrain the freedom of interstate commerce, either in the transportation or sale of anthracite, contrary to the act of July 2, 1890, however lawful when considered alone, *e. g.*, the acquisition of the stock of another corporation, and the purchase by it of the capital stock of certain coal properties and collieries, are parts of an illegal combination under the statute, which it is the duty of the courts to dissolve, irrespective of how the legal title to the shares is held.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

**Monopoly — combination by carriers — percentage coal contracts.**

3. An undue and unreasonable restraint of interstate commerce, forbidden by the act of July 2, 1890, results from the concerted scheme of railway carriers possessing a substantial monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and tide-water distributing points, and also controlling, with the aid of their subsidiary coal-mining and selling companies, nearly three fourths of the annual supply of anthracite, whereby a large number of the independent coal operators were induced to enter singly into uniform perpetual agreements for the sale to some one of such carriers, or its subsidiary coal company, of the entire output of their several mines and any others they might thereafter acquire, at a fixed percentage of the general average price prevailing at tide-water points at or near New York, which would net the operator slightly more than if he shipped and sold on his own account, the necessary result being to secure to the carriers the control at tide-water markets of the sale of a large part of the independent output.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

**Relief under pleading — injunction against monopoly — multifariousness.**

4. Injunctive relief against minor combinations between some only of the defendants, and not in furtherance of the general scheme attacked as constituting a restraint of interstate commerce forbidden by the act of July 2, 1890, cannot be granted without condemning the bill for multifariousness and misjoinder of parties and of causes of suit.

[For other cases, see Injunction, I. g; Pleading, I. l, I. t, in Digest Sup. Ct. 1908.]

[Nos. 198, 206, and 217.]

Argued October 10 and 11, 1911. Decided December 16, 1912.

CROSS APPEALS from the Circuit Court of the United States for the Eastern District of Pennsylvania to review a decree granting in part the relief sought by a bill seeking to enjoin an alleged combination of railroad and coal-mining properties as amounting to an unlawful restraint of interstate commerce. Affirmed in part and reversed in part.

See same case below, 183 Fed. 427.

The facts are stated in the opinion.

Mr. J. C. McReynolds, Special Assistant to the Attorney General, argued the cause, and, with Attorney General Wickersham and Mr. G. Carroll Todd, Special Assistant to the Attorney General, filed a brief for the United States:

All the defendants are engaged in a combination of general scope (referred to in the record as the general combination) by which defendant Reading Company and defendant railroads and their affiliated coal companies control, restrain, and monopolize the production, transportation, and sale of

NOTE.—As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act—see note to Loewe v. Lawlor, 52 L. ed. U. S. 488.

As to illegal trusts under modern anti-trust laws generally—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

anthracite coal among the states, and dominate the industry, in violation of the act of July 2, 1890.

To sustain this charge the proof need not disclose that the combination here assailed possesses a complete monopoly of the anthracite trade.

United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249.

It is enough if it embraces a sufficient volume to be "unreasonably restrictive of competitive conditions," or if its purpose was to control the trade.

Standard Oil Co. v. United States, 221 U. S. 1, 58, 55 L. ed. 619, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann Cas. 1912 D 734.

Therefore more than this need not be proved, though a complete monopoly were alleged, since "it is sufficient to prove so much of the charge as constitutes an offense punishable by law."

Com. v. Griffin, 21 Pick. 525; Com. v. O'Brien, 107 Mass. 208; Rex v. Hunt, 2 Campb. 585; Hall v. United States, 168 U. S. 632, 639, 42 L. ed. 607, 609, 18 Sup. Ct. Rep. 237.

Nor is it necessary to prove that defendants formally met and in terms, written or verbal, agreed to do the things denounced by the statute, and with equal formality continued their agreement.

Noyes, Intercorporate Relations, 2d ed. § 375; Kelley v. People, 55 N. Y. 576, 14 Am. Rep. 342; Reg. v. Murphy, 8 Car. & P. 310.

The form of the 65 per cent contracts having been agreed upon at meetings between their representatives, the parties to each knowing that theirs was one of an identical series, and a common agent having been appointed to compute the purchase price, it follows that such contracts are connected as parts of a plan.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376.

These contracts restrain and monopolize trade and commerce.

Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 408, 55 L. ed. 502, 518, 31 Sup. Ct. Rep. 376; Cousins v. Smith, 13 Ves. Jr. 541, 9 Revised Rep. 217; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Thomsen v. Union Castle Mail S. S. Co. 92 C. C. A. 315, 166 Fed. 251; Interstate Commerce Commission v. Chesapeake & O. R. Co. 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Interstate Commerce Commission v. Baird, 194 U. S. 25, 43, 44, 48 L. ed. 860, 868, 869, 24 Sup. Ct. Rep. 563, 123 Fed. 969; Lehigh Valley R. Co. v. Rainey, 112 Fed. 487; Meeker v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964, 50 N. J. Eq. 489, 25 Atl. 942; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 410, 424, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Buie v. Chicago, R. I. & P. R. Co. 95 Tex. 51, 55 L.R.A. 861, 65 S. W. 27; Chicago Union Traction Co. v. Chicago, 199 Ill. 626, 65 N. E. 470; Columbus, H. V. & T. R. Co. v. Burke, 20 Ohio L. J. 287; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; Atty. Gen. v. Great Northern R. Co. 6 Jur. N. S. 1006, 1 Drew & S. 154, 29 L. J. Ch. N. S. 794, 8 Week. Rep. 556; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Northern Securities Co. v. United States, 193 U. S. 197, 404, 48 L. ed. 679, 727, 24 Sup. Ct. Rep. 436.

The trade so affected is interstate.

United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Hall v. De Cuir, 95 U. S. 485, 488, 24 L. ed. 547, 548; Swift & Co. v. United States, 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 400, 55 L. ed. 502, 515, 31 Sup. Ct. Rep. 376; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co. 92 C. C. A. 318, 166 Fed. 254.

Existing, continuing acts, otherwise within the prohibition of a lawful regulation of commerce by Congress, are not saved because their genesis and development antedated its enactment.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836,

29 Sup. Ct. Rep. 527; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

If the contracts are sufficient in themselves to produce a result which the act of Congress seeks to prevent, then good intentions, if they existed, cannot save them.

Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Northern Securities Co. v. United States, 193 U. S. 197, 331, 48 L. ed. 679, 697, 24 Sup. Ct. Rep. 436; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 342, 41 L. ed. 1007, 1027, 1028, 7 Sup. Ct. Rep. 548; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96.

If the contracts are sufficient in themselves to accomplish what the act of Congress denounces, it does not save them that they are for the purchase of property.

Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; United States v. American Tobacco Co. 221 U. S. 106, 176, 55 L. ed. 663, 692, 31 Sup. Ct. Rep. 632.

The combination of defendant railroads and affiliated coal companies in the Temple Iron Company, with the purpose and effect of forestalling the construction of a projected competitive line, and permanently shutting out competition amongst such railroads and also amongst their coal companies, restrains and monopolizes trade and commerce among the states, in violation of §§ 1 and 2 of the act of July 2, 1890.

Thomsen v. Union Castle Mail S. S. Co. 92 C. C. A. 315, 166 Fed. 251; Interstate Commerce Commission v. Philadelphia & R. R. Co. 123 Fed. 969; United States v. Union P. R. Co. 188 Fed. 117; Pennsylvania R. Co. v. Com. 3 Sadler (Pa.) 83, 7 Atl. 372; Hartford & N. H. R. Co. v. New York & N. H. R. Co. 3 Robt. 411.

This is a case of continuous co-operation to bring to pass the thwarting of a projected competitive railroad, not only for today, but continuously,—indefinitely.

United States v. Kissel, 218 U. S. 601, 607, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124.

Mr. Everett Warren argued the cause and filed a brief for the Temple Iron Company:

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

The railroad serving the colliery had legal and equitable grounds to prevent its loss of such traffic.

Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239.

To bring any transaction within the condemnation of the 1st section of the anti-trust law, it must be a contract in restraint of interstate commerce; not possibly, but actually. This actual restraint must be substantial in character, and the direct and immediate effect of the transaction complained of that is charged in the petition.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Mr. James H. Torrey argued the cause and filed a brief for the Enterprise Coal Company et al.:

The 65 per cent contracts do not concern directly interstate commerce, and are therefore not cognizable in this proceeding.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737.

A contract does not become void because of the design in the mind of one of the contracting parties to use it for an illegal purpose. And this is so, even though the other party to the contract may know of that illegal purpose, so long as he does not actively participate in carrying it out.

Graves v. Johnson, 179 Mass. 53, 58, 88 Am. St. Rep. 355, 60 N. E. 383; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Hodgson v. Temple, 5 Taunt. 181, 1 Marsh. 5, 14 Revised Rep. 738; Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5,755; Adams v. Coulliard, 102 Mass. 167.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179–184, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

Contracts binding the products of mines owned by railroad companies owning ore lands to shipment over the lessor railroad were expressly sustained in the case of Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239.

Mr. Adelbert Moot argued the cause, and, with Mr. George F. Brownell, filed a brief for the Erie Railroad Company et al.

Mr. John G. Johnson argued the cause, and, with Messrs. Charles Heebner, Frank H. Platt, Adelbert Moot, Robert W. DeForest, Jackson E. Reynolds, and William S. Jenney, filed a brief for the Reading Company et al.:

The 65 per cent contracts are intrastate, and not interstate contracts, they do not affect interstate commerce except indirectly and incidentally, and so are not in violation of the anti-trust act.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 242, 44 L. ed. 136, 148, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Northern Securities Co. v. United States, 193 U. S. 197, 331, 48 L. ed. 679, 698, 24 Sup. Ct. Rep. 436; Loewe v. Lawlor, 208 U. S. 274, 297, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721; United States v. Standard Oil Co. 173 Fed. 177, 221 U. S. 1, 66, 55 L. ed. 619, 647, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Hopkins v. United States, 171 U. S. 578, 594, 600, 43 L. ed. 290, 296 299, 19 Sup. Ct. Rep. 40; United States v. E. I. Dupont De Nemours & Co. 188 Fed. 127.

Messrs. James H. Torrey and William S. Opdyke filed a separate brief for the Delaware & Hudson Company:

The contracts made by the Delaware & Hudson Company with the Hillside Coal & Iron Company for the sale of anthracite coal in limited amounts and in limited periods to the Hillside Coal & Iron Company violated no law of the United States.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; The Daniel Ball, 10 Wall. 557, 565, 19 L. ed. 999, 1002; Kidd v. Pearson, 128 U. S. 1, 24, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; United States v. E. C. Knight Co. 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 578, 592, 603, 43 L. ed. 290, 297, 300, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 247, 44 L. ed. 136, 150, 20 Sup. Ct. Rep. 96; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 623, 48 L. ed. 1142, 1154, 24 Sup. Ct. Rep. 784; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721.

The present proceeding is under a statute of a penal character requiring the strictest proof.

*Northern Securities Co. v. United States,* 193 U. S. 197, 401, 48 L. ed. 679, 726, 24 Sup. Ct. Rep. 436.

Certainly, in the absence of any proof that such sale was, upon the part of the Delaware & Hudson Company, a portion of an illegal combination to which it was itself intentionally a party, the company is entitled to enforce such contract against the other party thereto, and that right cannot be taken away from it without its consent, no question of police power being involved.

Tracy v. Talmage, 14 N. Y. 167, 67 Am. Dec. 132; Ganson v. Tifft, 71 N. Y. 57; Graves v. Johnson, 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383; National Distilling Co. v. Cream City Importing Co. 86 Wis. 356, 39 Am. St. Rep. 902, 56 N. W. 864; Metcalf v. American School Furniture Co. 122 Fed. 120; Carter-Crume Co. v. Peurrung, 30 C. C. A. 174, 58 U. S. App. 388, 86 Fed. 442; Adams v. Coulliard, 102 Mass. 167; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Messrs. Robert W. DeForest and Jackson E. Reynolds filed a separate brief for the Central Railroad Company of New Jersey et al.

Mr. Charles Heebner filed a separate brief for the Reading Company.

Mr. William W. Green filed a brief for the Mercantile Trust Company.

Mr. Justice Lurton delivered the opinion of the court:

This is a petition in equity, filed by the United States in the circuit court of the United States for the eastern district of Pennsylvania, for the purpose of enforcing the provisions of the act of July 2, 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], known as the Sherman anti-trust act, against an alleged combination of railroad and coal-mining companies formed and continued for the purpose of restraining competition in the production, sale, and transportation of anthracite coal in commerce among the states.

The defendants originally made such, and alone referred to hereafter as the defendants, were the following:

The Philadelphia & Reading Railway Company; the Philadelphia & Reading Coal & Iron Company; the Lehigh Valley Railroad Company; the Lehigh Valley Coal Company; the Delaware, Lackawanna & Western Railroad Company; the Central Railroad Company of New Jersey; the Erie Railroad Company; the New York, Susquehanna, & Western Railroad Company; the New York, Susquehanna, & Western Coal Company; the Lehigh & Wilkesbarre Coal

Company; the Pennsylvania Coal Company; the Hillside Coal Company; the Reading Company; and the Temple Iron Company. By an amendment certain other defendants were brought in, consisting of holders of contracts made by independent operators of coal mines, and trustees holding securities which might be affected by the relief sought against the carrier and coal-mining companies, the original defendants. A list of these later defendants is set out in the margin,† and when they are referred to herein they will be specifically mentioned.

338] *The bill alleges that anthracite coal is an article of prime necessity as a fuel, and finds its market mainly in the New England and middle Atlantic states. The deposits of the coal, with unimportant exceptions, lie in the state of Pennsylvania, but do not occupy a continuous field, though found in certain counties adjoining in the eastern half of the state, and embrace an area of 484 square miles. This coal region is from 150 to 250 miles from tide water. The region itself is broken and mountainous, and the natural conditions and character of the deposits are such that the mining and reduction of the coal to suitable sizes for domestic use require very large amounts of capital. Its value commercially is dependent, in a large degree, upon quick and cheap transportation to convenient shipping points at tide water, from whence it may be distributed to the great consuming markets of the Atlantic coast states.

The whole problem of advantageously developing these deposits and supplying the eastern demand for fuel was one which presented enormous difficulties. From an early day it has been the settled policy of the state 339]of Pennsylvania *to encourage the development of this coal region by canal and railroad construction, which would furnish transportation to convenient shipping points at tidewater. One of the defendant carriers, the Delaware, Lackawanna, & Western Company was given the power to acquire coal lands and engage in the business of mining and selling coal in addition to the business of a common carrier, and all railroad companies were permitted to aid in the production of coal by assisting coal mining companies through the purchase of capital stock and bonds. Thus, it has come about that the defendant carriers not only dominate the transportation of coal from this anthracite region to the great distributing ports at New York harbor, but also through their controlled coal-producing companies, produce and sell about 75 per cent of the annual supply of anthracite. As a further direct consequence of the state authorized between coal-producing and coal-transporting companies, it has come about that the defendant carrier companies and the coal-mining companies affiliated with the carrier companies now own or control about 90 per cent of the entire unmined area of anthracite, distributed, according to the averments of the petition, as follows:

| | | |
|---|---|---|
| Reading Company | 44. | per cent |
| Lehigh Valley Company | 16.87 | per cent |
| Del. L. & Western Company | 6.55 | per cent |
| Cent. Railroad of New Jersey | 19. | per cent |
| Erie Railroad | 2.59 | per cent |
| N. Y. S. & Western Railroad | .54 | per cent |
| | 89.55 | per cent |

It further appears that, in addition to the great coal-mining companies subsidiary to one or another of the defendant carrier companies, there are a large number of independent coal operators whose aggregate production *from coal lands, in part[340 leased from the railroad companies or the railroad-controlled coal-producing companies, amounts to about 20 per cent of the annual anthracite supply. These independent operators are said to no longer have the power to compete with the carrier defendants and their subsidiary coal companies, because a large proportion of them have severally entered into contracts with one or the other of the carrier or coal-mining companies defendant for the sale of the entire product of their mines for the consideration of 65

†The Delaware & Hudson Company; Elk Hill Coal & Iron Company; St. Clair Coal Company; Enterprise Coal Company; Buck Run Coal Company; Llewellyn Mining Company; Clear Spring Coal Company; Pancoast Coal Company; Price-Pancoast Coal Company; Mount Lookout Coal Company; People's Coal Company; George F. Lee Coal Company; North End Coal Company; Melville Coal Company; Parrish Coal Company; Red Ash Coal Company; Raub Coal Company; Mid Valley Coal Company; Austin Coal Company; Clarence Coal Company; Nay Aug Coal Company; Green Ridge Coal Company; Excelsior Coal Company; Lackawanna Coal *Company; Dolph Coal* Company, Limited; Mary F. W. Howe, Frank Pardee, and Sarah Drexel Van Rensellaer, constituting A. Pardee & Company; Lafayette Lentz, William O. Lentz, and Lewis A. Riley, constituting Lentz & Company; William Law and John M. Robertson, constituting Robertson & Law; Richard White, W. R. McTurk, and Robert White, constituting E. White Company; Joseph J. Jermyn, George B. Jermyn, Emma J. Jermyn, constituting John Jermyn Estate; Joseph J. Jermyn, Michael F. Dolphin; the Pennsylvania Company for Insurance on Lives and Granting Anuities; and the Mercantile Trust Company.

per cent of the average market price at tide water.

Thus, there exists, independently of any agreement, combination, or contract between the several defendant carrier companies for the purpose of suppressing competition among them, this condition:

First: Excluding two carrier companies not made defendants, which reach but a limited number of collieries,—the Pennsylvania Railroad Company and the New York, Ontario, & Western Railroad Company,—the six carrier companies who are defendants are shown to control the only means of transportation between this great anthracite deposit and tide water, from whence the product may be distributed by rail and water to the great consuming markets of the Atlantic coast states.

Second: These carriers and their subsidiary coal-mining and selling companies produce and sell about 75 per cent of the total annual supply of anthracite coal. Of the remainder, the independent operators mentioned above produce about 20 per cent.

The chief significance of the fact that the six carrier defendants control substantially the only means for the transportation of coal from the mines to distributing points at tide water is in the fact that they, collectively, also control nearly three fourths of the annual supply of anthracite which there finds a market. The situation is therefore one which invites concerted action 341]and makes exceedingly *easy the accomplishment of any purpose to dominate the supply and control the prices at seaboard. The one fourth of the total annual supply which comes from independent operators in the same region has been sold in competition with the larger supply of the defendants. If, by concert of action, that source of competition be removed, the monopoly which the defendants, acting together, may exert over production and sale, will be complete.

This bill avers that the defendants have combined for the purpose of securing their collective grip upon the anthracite coal supply by exerting their activities to shut out from the district any new line of transportation from the mines to tide water points, and to shut out from competition at tide water the coal of independent operators with their own coal. The steps said to have been taken having this end in view, we shall now consider:

The community of interest which has resulted from the charter powers of the carrier companies to directly or indirectly engage in the business of mining and selling *coal has produced* the relation between the *carrier and coal-mining defendants* shown by the several groups into which we have arranged them, thus:

1. The Reading Company is a Pennsylvania corporation, and apparently nothing more than a holding company. That company holds:

a. The entire capital stock of the Philadelphia & Reading Railway, one of the defendant carriers.

b. The entire capital stock of the Philadelphia & Reading Coal & Iron Company, a coal-mining company.

The three companies have the same president.

2. The Lehigh Valley Railroad Company owns all of the capital stock of the Lehigh Valley Coal Company, and the two companies have the same president.

3. The Central Railroad of New Jersey owns 90 per cent of the capital stock of the Lehigh & Wilkesbarre *Coal Company,[342 and the two companies have the same president, who is also the president of the Reading Company and its two controlled companies.

4. The Erie Railroad Company owns all of the capital stock of the Pennsylvania Coal Company and a large majority of the stock of the Hillside Coal Company, and the three companies have the same president.

5. The New York, Susquehanna, & Western Railroad Company owns nearly the entire capital stock of the New York, Susquehanna, & Western Coal Company, and they have the same president, who is also the president of the Erie Railroad Company and of its two allied coal companies mentioned above.

6. The Delaware, Lackawanna, & Western Railroad Company is itself an owner and producer of anthracite, and seems to have no subsidiary coal company.

7. The Temple Iron Company. The relation of this company to the several carrier companies will be considered separately.

Excluding the Temple Iron Company, the groups as arranged are independent of each other, and each group, in the absence of any agreement or combination, possesses the power to compete with every other in the production, sale, and transportation of coal from the mines to tide water. Indeed, the plain averment of the bill is that, prior to 1896, they were actually competing in the market reached at New York harbor, and that the competition continued, except as interrupted by abortive or abandoned efforts to combine, until they entered into the general combination which it is the purpose of this proceeding to dissolve.

That the Delaware, Lackawanna, & Western Railroad Company was itself the owner of coal lands, and was engaged in mining, transporting, and marketing its own coal,

and that the other railway defendants were also engaged, through their subsidiary coal 343]companies, in mining and *selling coal, as well as in transporting the coal so mined, is not determinative of any issue here presented, since this bill was filed before the commodities clause of the Hepburn act of June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288], became effective, which forbids any carrier engaged in interstate transportation from transporting coal for market, when the coal at the time of transportation is owner by the carrier company. See United States ex rel. Atty. Gen. v. Delaware, & H. R. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. Any relief against a continuance of such forbidden transportation must therefore be sought in another proceeding based upon the act of Congress referred to.

The scope and theory of the bill.

The theory upon which the bill is framed and upon which the case has been presented by counsel is, that there exists between the defendants a *general combination* to control the anthracite coal industry, both in respect of mining and transportation from the mines to the general consuming markets reached from shipping points at New York harbor, and the production and sale of coal throughout the United States.

The contention is that this *general combination* is established, first, by evidence of an agreement between the carrier defendants to apportion between themselves the total coal tonnage transported from the mines to tide water according to a scale of percentages; second, by a combination between them, through the instrumentality of the defendant, the Temple Iron Company, to prevent the construction of a new and competing line of railroad from the mines to tide water; third, by a combination between the defendants by means of a series of identical contracts for the control of the coal produced by independent coal operators, thereby preventing competition in the markets of other states between the coal of such independent operators and that pro-344]duced by the defendants; and, *finally, by certain so-called contributary combinations, already referred to, between some, but not all, of the defendants.

Aside from the particular transactions averred as "steps" or "acts in furtherance" of a presupposed *general combination*, the charge of such a combination is general and indefinite.

The case is barren of documentary evidence of solidarity. The fact of such general combination, if it exists, must be deduced from specific *acts or transactions* in which the companies have united and from which such a general combination may be inferred. When and how did such a combination come about? We start with the proposition that if any such combination exists, it had an origin not earlier than 1896. Attempts to bring about a suppression of competition prior to that time, indicated by some of the evidence, had either proved abortive or had been abandoned. Thus, it is stated that in 1890 and 1891 the price of coal of certain sizes at tide water was from $3.71 to $3.85 per ton; that in 1892 the Philadelphia & Reading Railroad Company, the predecessor in title of the defendant the Philadelphia & Reading Railway Company, leased the lines of the Lehigh Valley Railroad Company and of the Central Railroad Company of New Jersey for nine hundred and ninety-nine years, and that the three companies together owned or controlled about 80 per cent of the coal deposits of this anthracite region and transported nearly 50 per cent of the entire tonnage; that while these leases were in force the price of coal was advanced to $4.15 and $4.19 per ton for the same sizes. It is then averred that in a proceeding in the courts of New Jersey these leases of the Central Railroad Company of New Jersey were held null and void, and that in 1893 this decree was followed by a rescission of the lease of the Lehigh Valley Railroad Company to the Philadelphia & Reading Railroad Company. It is then averred that, *under the influence of competition[345 thereby restored, the price of the same grade of coal in 1894 fell to $3.60 per ton and in 1895 to $3.12 per ton. "*Whereupon*," the petition avers, "in violation of the provisions of §§ 1 and 2, respectively, of the act of Congress of July 2, 1890, . . . the defendants the Reading Company and the defendant carriers and the defendant coal companies, owning or controlling 90 per cent, more or less, of all the anthracite deposits, and producing 75 per cent, more or less, of the annual supply of anthracite, and controlling all the means of transportation between the anthracite mines and tide water, save the railroads operated by the Pennsylvania Railroad Company and the New York, Ontario, & Western Railroad Company, which, as aforesaid, reach only a limited number of collieries (not defendants here), entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states, and its prices an

sale throughout the several states, with the result that competition in the transportation and sale of anthracite has been wholly suppressed and the price thereof greatly enhanced."

1. We come first to the evidence relied upon to show such a general combination through an agreement between the carriers to distribute the total tonnage of coal from this region to shipping points at New York harbor according to a scale of percentages spoken of as the "presidents' percentages."

There is some evidence tending to show that early in 1896 there was an effort made at a conference of the presidents of the carrier companies to distribute the coal tonnage between the several carriers, based 346]upon the *average percentage of coal carried in prior years by each carrier. The limited character of the coal field, the control of so large a proportion of the deposits and of the transportation, was such as to invite agreements and combinations. A pooling arrangement would largely prevent competition between the otherwise independent groups of carriers and producers. That any such pooling agreement was made is denied most earnestly by all of the defendants. That there occurred a conference in 1896 looking to such an arrangement seems probable on the evidence. But the weight of proof satisfies us that whatever might have been contemplated or attempted, the scheme proved abortive, or, if attempted, was abandoned long before this bill was filed. We do not set out the circumstances which are pointed out as tending to show such an illegal agreemnt, nor do we deem it necessary to discuss the conflicting direct testimony. We have gone through the record. The facts are discussed and largely set out in the opinion of the court below. Though its judges differed in respect to the relief which might be granted upon other grounds, they agreed in holding that the government had failed to show any contract or agreement for the distribution of tonnage. In this we concur.

The Temple Iron Company combination.

2. We come, then, to the several acts, agreements, or transactions set out in the seventh paragraph of the bill, two of which are said to have been participated in by all of the defendants, and therefore to constitute evidence of the general combination charged, and to be, in and of themselves, illegal combinations between all of the principal defendants which come under the frame of the bill as in violation of the act of July 2, 1890.

*The transactions referred* to are introduced *immediately following the general* charge, and are characterized in the *bill as[347 "steps in the development of this illegal combination, and in furtherance of its illegal purposes." It is then averred, that "the defendants, or some of them, became parties to the following additional acts, schemes, and contracts, among others, in violation of the aforesaid act of July 2, 1890." This is followed by five distinct paragraphs, each setting out some distinct contract, combination, or agreement alleged to have been the act of all of the defendants, or of two or some number less than all. These alleged "steps" and "additional acts, schemes, and contracts," in violation of the Sherman law and in furtherance of the alleged illegal general scheme or purpose,—are: (a) the making of the 65 per cent contracts with the independent operators; (b) the absorption by the Erie Railroad of the New York, Susquehanna, & Western Railroad Company; (c) the acquisition by the Reading Company of the majority of the capital stock of the Central Railroad of New Jersey; (d) the acquisition of the Temple Iron Company, and through it of a large number of collieries, for the purpose of defeating a projected independent line of railway into the coal region; and (e) the acquisition by the Erie Railroad Company, while controlling the Hillside Coal & Iron Company, of all of the shares of the Delaware Valley & Kingston Railroad Company, a projected common carrier, and all of the shares of the Pennsylvania Coal Company.

As we have already stated, two of these transactions are averred to be transactions into which all of the defendants entered in pursuance of a common purpose and general design to suppress competition and restrain commerce in coal between the states.

The first which we shall consider is the alleged combination through the Temple Iron Company. Concerning this, the petition, in substance, states, that in 1898 many of the independent coal operators in the Wyoming or northern field became dissatisfied with the transportation *and market[348 conditions under which they were obliged to conduct their collieries. Many contracts for the sale of their coal to the defendant coal companies had expired or were about to expire, and they demanded either lower freight rates or better prices from the coal companies. A competing line of railway from the northern or Wyoming zone of the anthracite region to a point on the Delaware river, where connection would be made with two or more lines extending to shipping points at New York harbor, was projected as a means of relieving the situation. The New York, Wyoming & Western Railroad was accordingly incorporated. Large

subscriptions of stock were taken, the line in part surveyed, parts of the right-of-way procured, and a large quantity of steel rails contracted for. As the road was to be mainly a coal-carrying road, support from coal-mining companies was essential. Its chief backing came from independent coal operators. The most important and influential of them was the firm of Simpson & Watkins, who controlled and operated eight collieries in the region, having an annual output of more than a million tons. The time for such a competing means of transportation was auspicious. Much of the output of the district not tied up by contracts of sale or transportation was pledged to this project and much more was promised.

The petition alleges that the construction of the projected independent railroad would not only have introduced competition into the transportation of anthracite coal to tide water, but it would have enabled independent operators reached by it to sell their coal at distributing points in free competition with the defendant coal companies "*Wherefore,*" avers the pleading, "the defendants the Reading Company, owning the entire capital stock of the Philadelphia & Reading Railway Company, and the other carrier companies defendants herein, controlling collectively all means of transporta-[349]tion between the mines *and shipping points at New York harbor, combined together for the purpose of shutting out the proposed railroad, and preventing competition with them in the transportation of coal from the mines to other states, and the sale of coal in competition with their own controlled coal in the markets of other states." The plan devised was to detach from the enterprise the powerful support of Simpson & Watkins and the great tonnage which their co-operation would give to the new road, by acquiring for the combination the coal properties and collieries controlled by that great independent firm of operators. This would not only strangle the project, but secure them forever against new schemes induced by the large tonnage produced by these eight collieries, and secure not only that tonnage for their own lines, but keep the coal forever out of competition with that of their controlled coal-producing companies.

The scheme was worked out with the result foreseen and intended. The capital stock of the Temple Iron Company, aggregating only $240,000, was all secured. That company was then operating a small iron furnace near Reading. Its assets were small, but its charter was a special legislative charter which gave it power to engage in almost any sort of business, and to increase its capital substantially at will. Control of that company having been secured, it was used as the instrument for the purpose intended.

The plan by which the defendant carriers were enabled to carry out this scheme and apportion among themselves proportionate interests in the property acquired and the burden to be assumed was not simple, but elaborate. The financial arrangements seem to have been made through Mr. Baer, who was the president of and a large stockholder in the Temple Company, and Mr. R. J. Bacon, of the firm of J. P. Morgan & Company. Shortly stated, it was this: The Temple Company increased its *capital[350] stock to $2,500,000 and issued mortgage bonds aggregating $3,500,000. Simpson & Watkins agreed to sell to the Temple Company their properties for something near $5,000,000. They accordingly transferred to the Temple Company the capital shares in the several coal companies, holding the title to their eight collieries, and received in exchange $2,260,000 in the shares of the Temple Company, and $3,500,000 of its mortgage bonds. By contemporaneous instruments Simpson & Watkins transferred to the defendant the Guaranty Trust Company of New York, as trustee, this capital stock and $2,100,000 of the bonds of the Temple Company, and received from the Guaranty Company, $3,238,396.66 in money and $1,000,000 in certificates of beneficial interest in the stock of the Temple Company. The Guaranty Company seems to have been but a medium and was accordingly protected by a contemporaneous contract with the Reading Company and the other carrier defendants by which they severally contracted with the Guaranty Company to purchase the Temple Company's capital stock in a certain agreed proportion or percentage of the total capital stock, and to guarantee the bonded debt of the Temple Company in the same proportion. A large proportion of the bonds and of the beneficial certificates of interest in stock of the Temple Company was later guaranteed, or underwritten, as the stock phrase goes, by a syndicate including J. P. Morgan, William Rockefeller, the Guaranty Company, and others.

Thus it came about that when this bill was filed the stock of the Temple Company, which, as seen, is a mere holding company for the several defendant carrier companies, was owned by the defendants, and the obligations of that company were guaranteed by them in proportions based on the percentage of the total anthracite tonnage carried annually by each of the defendant carriers, namely: The Reading Company and the Reading Railway *Company, being[351] treated as one and the same in this matter, 29.96 per cent; the Lehigh Valley Railroad

Company, 22.88 per cent; the Central Railroad of New Jersey, 17.12 per cent; the Delaware, Lackawanna, & Western Railroad Company, 19.52 per cent; the Erie Railroad Company, 5.84 per cent; the New York, Susquehanna, & Western Railroad Company, 4.86 per cent. At the time this proof was taken the average annual output of the collieries thus acquired was about 1,600,000 tons, and in the last year the output had risen to 1,950,000 tons. This combination of the defendants through the Temple Iron Company was effective in bringing about the desired result. The New York, Wyoming, & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained.

The projected competing railroad was undoubtedly a good faith proposition, and held out promise to independent coal operators not only of the prospect of competition in transportation from the mines to tide water, but the possibility of selling their coal either to the controlled coal companies defendant at better prices, or to the consuming public at tide water in competition with that of the controlled coal companies. But if we assume that its construction was doubtful, the result must be the same as characterizing the purpose and design of the concerted action of the defendants. They were so far convinced of the threatening character of the enterprise that they were moved at great cost to thwart it and at the same time remove the temptation for like competition by securing to themselves forever the product of the collieries named.

That the collieries to be reached by the new road were not all reached by each of the defendants is true. The great bulk of tonnage from them seems to have been carried by the Erie, the Lehigh, and the Lackawanna. But the preservation of the monopoly 352]of transportation *from the mines to tide water held by the six lines which were serving the region was plainly a common interest,—a collective monopoly by which the profits in coal could be secured and the monopoly maintained by shutting out any new line to tidewater. The extent of the interest of each in the desired result seems to have been estimated by themselves as fairly measured by the percentage of the total tonnage theretofore carried annually by each. Thus it was that they became owners of the shares in the Temple Company, and guarantors of its obligations in the same proportions.

It has been suggested that since the New *York, Wyoming,* & Western Railroad has *been effectively strangled that it* will be idle to enjoin the doing of an act already accomplished. But that is a narrow view of the relief which may be granted under the statute and the frame of this bill.

The combination by means of the Temple Company still exists. It has been and still is an efficient agency for the collective activities of the defendant carriers for the purpose of preventing competition in the transportation and sale of coal in other states.

That under the law of Pennsylvania each of the defendant carrier companies has the power to acquire and hold the stock of coal-producing companies may be true. That the Temple Company may, under the same law, have the power to acquire and hold the capital stock of the Simpson & Watkins' collieries may also be conceded. But if the defendant carriers did, as we have found to be the fact, combine to restrain the freedom of interstate commerce either in the transportation or in the sale of anthracite coal in the markets of other states, and adopted as a means for that purpose the Temple Company, and, through it, the control of the great Simpson & Watkins' collieries, the parts of the general scheme, however lawful, considered alone, become parts of an illegal combination *un-[353 der the Federal statute which it is the duty of the court to dissolve, irrespective of how the legal title to the shares is held. Northern Securities Case, 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493. So long as the defendants are able to exercise the power thus illegally acquired, it may be most efficiently exerted for the continued and further suppression of competition. Through it, the defendants, in combination, may absorb the remaining output of independent producers. The evil is in the combination. Without it the several groups of coal-carrying and coal-producing companies have the power and motive to compete. That each may for itself advance the price of coal or cut down the production is true. But in the power which each other group would have to compete would be found a corrective. The statute forbids the concerted action which has already brought about the strangling of a projected competing railroad and the complete control of the sale of an immense tonnage of independent coal which had prior thereto not only been a menace to their collective control of the means of transportation to New York harbor points, but a large competing factor in sales at these points. The Temple Company, therefore, affords a powerful agency by means of which the unlawful purpose which induced its acquisition may be continued beyond

the mere operation of the Simpson & Watkins' collieries.

Its board of directors includes the presidents of the defendant carriers, who also are the presidents of the defendant coal companies, and these defendant companies absolutely dominate its affairs. The Temple Company also owns and dominates the great collieries obtained from Simpson & Watkins. Its board of directors, composed, as it is, of men representing the defendants, supplies time, place, and occasion for the expression of plans or combinations requiring or inviting concert of action. Though as a board it may not dictate the activities 354]of *the owning corporations, still, in view of the relation of the Temple Company to the defendant carriers and their respective coal mining companies, and of the constitution of its directors, the attitude of its board, as indicated by the proceedings spread upon the corporate minutes, is of significance upon the question of the existence of any concerted purpose to unite the activities of its corporate owners to suppress competition. There are to be found on the minutes of the Temple Company a number of entries which point strongly to combinations between the defendants. Thus, on June 27, 1899, a committee was appointed to consider the establishment of a statistical bureau, "to keep a record of all matters of interest to the anthracite companies." What resulted does not appear from any further minutes. On July 2, 1901, a resolution in these words was adopted:

"Resolved, That Mr. Cumming, Mr. Sayre, Mr. Henderson, Mr. Caldwell, and Mr. Warren be appointed a committee to consider the advisability and expediency of making a 40 per cent rate to outside shippers, or a flat rate, and, if so, what rate."

By "outside shippers" the witness says was meant "independent operators," who shipped their own coal. The witness by whom this action was proved says that he never saw the report and does not know that any was made by the committee. It is true that Mr. Baer, the president of the Temple Company, denied that the Temple Company had or undertook to exercise any power in respect of carrier rates, or in fixing prices of coal. He says that the minute entries referred to above are matters "interjected by somebody," under a misconception of the powers and duties of the directors of that company, and came to nothing. That he shortly took the presidency himself, and that the Temple Company "has been run as the most harmless mining company in the state of Pennsylvania," and has had nothing to 355]do with the *price of coal or with rates for transportation. But this disclaimer of power *does not detract from the significance* of the minutes of the board referred to as evidence bearing upon the question of the relation of the several defendants to each other.

We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the states, in plain violation of the act of Congress of July 2, 1890.

3. We come now to the 65 per cent contracts.

The charge of the petition in respect of these contracts is substantially this:

a. That the defendant carriers possessed a substantial monopoly of all of the means of transportation between the coal region and tide water.

b. That they directly or indirectly, through their controlled coal companies, produced about 75 per cent of the annual supply of anthracite coal.

c. That 20 per cent or more of the annual supply was produced by independent operators, whose collieries were located contiguous to the carrier lines of the defendant companies.

d. This being the situation, it is charged, that for the purpose of preventing the output of these independent producers "from being sold throughout the several states in competition with the output from their own mines, or of the mines of their subsidiary coal companies, the said defendant carriers, having almost a complete monopoly of the means of transportation between the anthracite mines and tide water, entered into and now maintain an agreement, combination, or conspiracy to use their power as said carriers to obtain control of the sale and disposition of the aforesaid output of the independent mines in the markets of the several states, particularly *of the great distributing market at[356 New York harbor, in violation of the aforesaid act of July 2, 1890."

It is further averred:

e. That prior to 1900 the defendants "severally made" a large number of short-term contracts for the purchase of the coal of independent operators "along their respective lines," prices ranging from 55 to 60 per cent of the average price at tide water.

That upon the termination of these contracts the defendants, "in pursuance of a previous agreement between themselves, severally offered to make, and did make and conclude with nearly all of the independent operators along their lines, new contracts containing substantially uniform provisions agreed upon beforehand by the defendant carriers in concert, some of the operators contracting with one of the defendants and some with another," by which

such operators "severally agreed" to deliver on cars at breakers "to one or the other of the defendant carriers, or its subsidiary coal company, all the anthracite coal thereafter mined from any of their mines now opened and operated, or which they might thereafter open and operate, deliveries to be made from time to time as called for," etc. In consideration, the sellers were to receive for prepared sizes 65 per cent of the general average price prevailing at tide-water points at or near New York, as computed from month to month, this average price to be settled by an expert agreed upon by the parties.

It is further averred that this price was such as to enable the independent operator entering into one of these contracts to realize upon his coal from 15 to 50 cents more than he could when shipping on his own account after paying the established rates of transportation, waste and cost of selling, in competition with the coal of the defendants. That the difference was the price paid for the privilege of controlling the [357] sale of the independent *output, "so as to prevent it from selling in competition with the output of their own mines."

It is then further alleged that the result of this plan, "as was intended, was to draw, if not to force, the great body of independent operators into making the aforesaid contracts, thereby enabling the defendants to control absolutely, and until the mines are exhausted, the output of most of the independent anthracite mines, and to prevent it, as aforesaid, from being sold in competition with the output of their own mines in the markets of the several states, particularly in the great tide-water markets."

It is obvious that the averments do not touch upon the legality of the contracts considered severally, and ask no relief upon the theory that each was a contract in restraint of trade. The theory and charge of the bill is that, by concerted action between the defendants, the independent operators were to be induced to enter singly into uniform agreements for the sale of the entire output of their several mines and any other they might thereafter acquire, excluding a negligible amount of unmarketable coal and coal for local consumption. And the further theory of the pleading is that by such concerted action and through the higher price offered, the defendants would obtain such control of independent coal as to prevent competition in the markets of other states.

It is not essential that these contracts, considered singly, be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other states, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and, as parts of the scheme or plot, *would be unlawful. Thus, in Swift & [358] Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276, where a plan or scheme consisting in many parts or elements was averred to constitute a combination forbidden by the act of July 2, 1890, it was said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

That the plan was calculated to accomplish the design averred, in the present case, seems plain enough. The anthracite field was very limited. The means for transportation from the mines to seaboard shipping points were in the hands of the defendant carriers. They, together with their subsidiary companies, controlled about 90 per cent of the coal deposit and about 75 per cent of the annual output. If the remaining output, that of the independent operators along their several lines, could be controlled as to production and sale at tide-water points, there would inevitably result such a dominating control of a necessity of life as to bring the scheme or combination within the condemnation of the statute.

That these 65 per cent contracts were the result of an agreement through protracted conferences between the independent operators, acting through an authorized committee, and officials of the carrier defendants, who were likewise officials of the coal companies subsidiary to the railroad companies, is plainly established. That they were designed by the defendants *as a means [359] of controlling the sale of the independent output in the market at tide-water points, thereby preventing competition with their own coal, and as a plan for removing the

great tonnage controlled by the independents from being used as an inducement for the entry of competing carriers into the district, is a plain deduction.

Some of the facts which lead to this conclusion will be referred to as briefly as the great importance of the case will permit:

That for a long time many of the independent operators had been selling their output to their great rivals, the defendant carriers and their several coal companies, is true. By means of such sales and deliveries at their own breakers, the sellers avoided freight, waste, and expense of sales through agents, etc. The price they would thereby realize was fixed, and they were not dependent upon a fluctuating market. So long, therefore, as they could sell to their rivals at their breakers to better advantage than they could ship and sell on their own account, the method appealed to them. But, obviously, buyer and seller were not upon an equal plane. The former had control of freight rates and car service. The seller must pay the rate exacted and accept the car service supplied him by the buyer, or appeal to the remedies afforded by the law. If the rate of freight to tide water was onerous, and was imposed upon the coal produced by the defendants and their allied coal producers without discrimination against the coal of the independent shipper, it would nevertheless bear upon the latter oppressively, since the rate paid would find its way into the pocket of the defendants. Therefore it was that the higher the freight rate, the greater the inducement to sell to the carrier companies. That the conditions were not accepted by the independent producers as satisfactory is evident. The majority at all times stood out, and those making such agreements as well as those refusing to do so maintained 360] *an agitation for better freight rates and better prices for those who preferred to sell at their breakers. For many years before this proceeding they maintained an organization called "The Anthracite Coal Operators' Association," and through that body endeavored to improve their situation.

The series of contracts here involved were all made since 1900, and are therefore subsequent to the combination through the Temple Iron Company, already considered. The charge is that since that combination the defendants further combined through these contracts. Prior to 1900, we find no evidence of any combination or agreement for the procurement of contracts of sale with independent operators. Upon the contrary, there is much to indicate that there was more or less competition for coal accessible to more than one of the buying defendants. The *effect of competition* is shown by the gradual rise in the price the great companies were willing to pay. In the earliest stages of the business the buying price seems to have been fixed with some relation to the varying wage scale of miners. This gave way to an agreed percentage of the current price at tide water. Thus the earlier contracts allowed the selling operator only 40 per cent of the tidewater price for prepared sizes. Through competition between the existing companies, and through that which resulted from the entry of new carrier lines with their subsidiary coal companies, the price was forced gradually up from 40 to 60 per cent of the tide-water price, and at this latter figure the price stood when the combination here averred came into existence.

We have mentioned the influence of the coming into the region of new coal-carrying railroads upon the per cent of the tidewater price which the independent operators were able to obtain from the buying coal companies. This influence, as we shall see, was a large factor in bringing about the contracts now in question. The carriers *here defendant did not all obtain their[361 footing in this anthracite field at the same time. Thus, when the New York, Susquehanna, & Western was projected, it, through its coal company, offered to buy coal on 50 per cent contracts. The price before that had been 40 to 45 per cent. The result was that the other companies came gradually up to the same price. This was late in the eighties, the exact date not being at hand. Again, it is said in the brief for the defendants, that:

"In the early 90's, the New York, Ontario, & Western Railroad built a branch into the Wyoming region and sought tonnage. Mr. Sturgis was commissioned beforehand by the coal company of that railroad to offer 60 per cent contracts on the understanding that, if he could secure a half million tons annually, the branch would be built. The branch railroad was built, and by its help large new acreages of coal lands were developed, tributary to the Ontario & Western Railroad."

As a consequence, says the same brief, "the other coal companies began to raise their rates to 60 per cent," and by 1892 that had become the settled price.

The influence of competition, actual or threatened, was also illustrated in 1898, when the New York, Wyoming, & Western was projected. A large number of coal contracts had expired or were about to expire, thus creating a great tonnage open to competition. Many of the operators in the Wyoming region of the coal field united their influence to procure the building of a competing line between the mines and New

York harbor points. To this end a large tonnage was pledged to its coal-selling company, which offered to pay 65 per cent of the tide-water price to such operators. How and why that project failed we have already shown in the section of this opinion devoted to the Temple Iron Company combination.

When that effort failed there arose a 362]movement for a *new road from the mines to tide water through the Pennsylvania Coal Company. That was one of the greatest of the independent companies, producing in 1899 about 2,000,000 tons. It controlled a coal-gathering railroad called the Erie & Wyoming Valley Railroad, and proposed its extension to Lackawaxen, and to cause the construction from that point of a railroad line to the Hudson river. To this end it caused to be organized the Delaware Valley & Kingston Railroad. Of this project, Mr. Thomas, the president of the Erie Railroad Company, said: "They were threatening and had started to build a competing road to the Hudson river." The independent operators, in an association maintained by them for their mutual protection, hailed this scheme with joy. At a meeting of the association on November 22, 1899, the following minute was made:

"Mr. E. L. Fuller, chairman of the executive committee, on being called upon, told of the efforts which have been made to induce the various anthracite railroads to offer more satisfactory terms for the purchase of the operators' coal, and of the absolute failure of these efforts to bring about any definite result. He then reported the organization of the Delaware Valley & Kingston Railroad, backed by the Pennsylvania Coal Company, and the proffer of this latter company to purchase coal from operators in the Wyoming and Lehigh region, paying 65 per cent of the tide-water price for chestnut and larger; 50 per cent for pea coal, and a flat 85 per cent freight rate on buck-wheat and smaller sizes. These contracts were to be for all of the coal in the ground, thus settling permanently the price which the operator would receive.

"After extended discussion as to the details of these contracts, and a comparison with the results obtained under the old contracts, the following resolution was offered and passed unanimously:

"'Whereas the Erie & Wyoming Valley 363]Railroad Company *has arranged to build a branch line from Hawley, Pennsylvania, to a point on the boundary line between New York and Pennsylvania at Lackawaxen, forming a connection with a railroad proposed to be constructed by the Delaware Valley & Kingston Railroad Company to tide water, at Kingston, on the Hudson river;

"'And whereas the construction of the said railroads is approved and promoted by the Pennsylvania Coal Company, which has large interests in the anthracite coal region;

"'And whereas the independent operators and the general public are now largely at the mercy of the existing railroad companies, which charge unreasonable rates for their services, owing in part to the large amounts for which the said companies have been capitalized;

"'And whereas it would be highly advantageous to all the independent owners of coal properties throughout the entire anthracite region of Pennsylvania to have the railroad connection, now proposed, completed as speedily as possible;

"'And whereas it is equally desirable, in the interests of the people of the state of New York and the public in general, that such railroad connection shall be made (since it will necessarily result in a material reduction of the price paid for anthracite coal by consumers), now, therefore it is

"'Resolved, I. That this association hereby expresses its hearty and unqualified approval of the proposed plan for the construction of the said railroads, and hereby pledges its constant support and active assistance in promoting the speedy construction and completion of the said railroads.

"'II. That a committee of three be appointed by the president, of which the president shall be a member, to take such steps as may be deemed advisable toward furthering the said plans and co-operating with the said companies *for the com-[364 pletion of the said railroads, and that a report of their proceedings be submitted to the next meeting of this association.'

"In the discussion which followed, it was the opinion of those present that, in view of the hearty assistance which had been accorded the operators by the Pennsylvania Coal Company, it was the duty of the members to give to this company all of the tonnage which they could deliver, and not to permit any more advantageous offers which the older companies might make, to divert freight from a road which was constructed to give the operators a fair share in the selling price. A vote of thanks was accorded Mr. Fuller for his labor and great success in accomplishing a work which was for the advantage of every individual operator in the anthracite regions."

It is enough to say of this project that it was abandoned when, in 1901, the Erie Railroad acquired, without any concert of action between it and the other carrier defendants, the capital stock of the Pennsyl-

vania Coal Company, which carried with it the capital stock of the Erie & Wyoming Valley Railroad and the Delaware & Kingston Railroad.

The persistent effort of the independents to bring into the field competing carrier and coal-producing companies was a menace to the monopoly of transportation from that field to tide water which the defendants collectively possessed. The independent output was one fourth of the annual supply. It was mainly sold at tide water, where it came into active competition with the larger production of the defendants; but, as we have already seen, this enormous tonnage offered a great inducement to the organization of new carrier lines from the mines to the seaboard. The contracts theretofore made for the purchase of this output had been for short terms. The expiration of a considerable number had more than once been the occasion for new carrier projects 365]backed by the *independent operators. To renew the contracts for short terms would not postpone the day of competition. The control in perpetuity of such a large proportion of the output as would prevent in the future effective competition in the selling markets of the coast, and at the same time remove inducement to the entry of other lines of carriers, was the obvious solution of the situation. The necessary control could only come about through concerted action. If one of the several independent groups of defendants, or two, or any less number than all, had sought to obtain control, it would have been resisted by those not included. Therefore, it is plain that if the coal of these operators was to be placed in such situation as that it could not affect the price of their own coal, nor longer constitute a mass of tonnage sufficient to invite the construction of new lines from the mines to the sea, it must be brought about through the concerted action of the defendants.

In 1900 there occurred the great strike of the coal miners. Settled by arbitration in the fall of that year, the miners obtained a 10 per cent increase in wages. Of course, this affected the railroad coal-producing companies and the independent coal companies alike. The great companies took the lead in the arbitration and accepted the result. The independent companies were compelled to follow this lead. The latter, as we have seen, had before the strike been particularly urgent in their efforts to secure better conditions from the railroads and their allied coal companies. This rebellious attitude is partially shown by the resolution of the Anthracite Coal Operators' Association of November 22, 1899, heretofore set out. When the strike settlement was made, there was some hesitation among the independent operators about posting notice of the advance in wages, and through committees they urged upon the defendants that such advance in wages justified a reduction in freight rates and a price of not less *than 65 per cent for coal[366 sold to the defendant companies. The committees reported back that they could not obtain "any definite promise," but there has been "an intimation" that something would be done to improve the present conditions. It was thereupon resolved that the advance scale should be posted, and that a committee should be appointed "to confer with the various carrier companies, relative to a new contract." At the same meeting a number of the operators present signed an agreement empowering the committee named "to adjust all differences with certain transportation companies," and agree upon a basis of contract which should definitely and for a period of years fix the commercial relations between the said operators and the transportation companies, "each of the parties agreeing to make a particular contract for himself with the proper transportation company." This agreement, after being signed by those present, was placed in the hands of Mr. McNulty to secure further signatures. These matters appear on the minutes of the individual operators of October 5th. There ensued a number of conferences between the representatives of the sellers and buyers. The result was that a form of contract and a price was mutually agreed upon, being the form of the 65 per cent contracts, which were thereafter entered into as the short term agreements theretofore made expired. Thus the independents put in force the advance wage scale imposed by the strike arbitrators before any agreement whatever was made or promised by the defendants. This increased scale which the arbitration imposed having been accepted by the large companies could not be successfully resisted by the independents. It only operated to make them more persistent in their demand for some improvement in the methods and prices theretofore prevailing.

That the defendant companies should offer such terms is not surprising. The contracts to be made would be not *only for the[367 life of the mines being operated at the date of the sale, but was to extend to any other mines thereafter opened by the seller. The menace of the independent output as an invitation to competing carriers and as a competing coal at tide water would be removed forever.

Upon this aspect of the case we find ourselves in agreement with Judge Buffington,

who concluded a discussion of the evidence by saying:

"By such perpetual contracts . . . these defendant railroads, through their subsidiary coal companies, severally made with other collieries, these combiners withdrew and still continue to withdraw, such product, for all time, from competition, either in interstate transportation or sale. To my mind there is no more subtle and effective agency for the gradual, unnoted absorption by interstate carriers of the remaining interstate product than these perpetual contracts. Holding, then, that they are, in the words of the statute, 'contracts . . . in restraint of trade or commerce among the states,' I record my dissent to the action of the court in refusing to enjoin them." [183 Fed. 474.]

The coal contracts acquired when this proceeding was begun aggregated nearly one half the tonnage of the independent operators. Much of the coal so bought was sold in Pennsylvania, and all of the contracts were made in that state, and the coal was also there delivered to the buying defendants. That the defendants were free to sell again within Pennsylvania, or transport and sell beyond the state, is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tide water, and the sales were made upon the basis of the average price at tide water. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between 368]the mines and the *general consuming markets of other states. "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." Swift & Co. v. United States, 196 U. S. 396, 398, 49 L. ed. 524, 525, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815. The purchase and delivery within the state was but one step in a plan and purpose to control and dominate trade and commerce in other states for an illegal purpose. As was said by the Chief Justice, in Loewe v. Lawlor, cited above:

"Although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves, as a part of their obvious purpose and effect, beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and at the other end after the physical transportation ended, was immaterial."

The general view which this court took of the effect of these contracts upon interstate traffic in the coal of this region is indicated in Interstate Commerce Commission v. Baird, 194 U. S. 25, 42, 48 L. ed. 860, 868, 24 Sup. Ct. Rep. 563. The concerted plan concerned the relations of these railroads to their interstate commerce, and directly affected the transportation and sale and price of the coal in other states. The prime object in engaging in this scheme was not so much the control and sale of coal in Pennsylvania, but the control of sales at New York harbor.

That per cent of the average price at tide water retained by the buyer was assumed to cover the freight, waste, and cost of sale. There is evidence tending strongly to show that an independent accepting one of these contracts *realized slightly more than[369 he could realize if he had shipped and sold on his own account. This advanced price, therefore, as charged in the bill, constituted a great inducement to draw the independents within the control of the defendants, and makes it highly probable that. if not enjoined, they will absorb the entire independent output.

The defendants insist that these contracts were but the outgrowth of conditions peculiar to the anthracite coal region, and are not unreasonably in restraint of competition, but mutually advantageous to buyer and seller.

That the act of Congress does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the Standard Oil Case, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502. In that case it was also said that the words "restraint of trade" should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect. We reaffirm this view of the plain meaning of the statute, and in so doing limit ourselves to the inquiry as to whether this plan or system of contracts entered into according to a concerted scheme does not operate to unduly

suppress competition and restrain freedom of commerce among the states.

Before these contracts there existed not only the power to compete, but actual competition between the coal of the independents and that produced by the buying defendants. Such competition was, after the contracts, impracticable. It is, of course, obvious that the law may not compel competition between these independent coal operators and the defendants, but it may at [370] least *remove illegal barriers resulting from illegal agreements which will make such competition impracticable.

Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. United States v. Terminal R. Asso. 224 U. S. 383, 394, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition, and of a purpose to unduly restrain the freedom of production, transportation, and sale of the article at tide water markets.

The case falls well within not only the Standard Oil & Tobacco Cases (221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632), but is of such an unreasonable character as to be within the authority of a long line of cases decided by this court. Among them we may cite: Northern Secur. Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; and the recent case of United States v. Union P. R. Co. 226 U. S. 61, ante, 124, 33 Sup. Ct. Rep. 53.

We are thus *led to the conclusion that the* defendants did combine for two distinct purposes,—first, by and through the instrumentality of the Temple Iron Company, *with the object of preventing the con-[371] struction of an independent and competing line of railway into the anthracite region; and, second, by and through the instrumentality of the 65 per cent contracts, with the purpose and design of controlling the sale of the independent output at tide water.

The acts and transactions which the bill avers to have been committed by some of the defendants in furtherance of the illegal plan and scheme of a general combination are these:

a. The absorption in January, 1898, of the New York, Susquehanna, & Western Railroad, through the purchase by the Erie Railroad of a large majority of its shares, whereby two lines of competing railroad came under one control and management.

b. The acquisition in 1901 of a controlling majority of the capital stock of the Central Railroad of New Jersey by the Reading Company, which then owned the entire capital stock of the Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company, "thereby uniting and bringing together under a common head and source of control the said Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey, operating parallel and competitive lines of railroad, and the said Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkesbarre Coal Company," theretofore owned and controlled by the Central Railroad of New Jersey, thereby destroying competition between former competing carriers and coal-producing companies.

c. The absorption in 1899 by the Erie Railroad Company of the Pennsylvania Coal Company, thereby acquiring the stock control of the Erie & Wyoming Railroad Company and of the Delaware Valley & Kingston Railroad, thus defeating a projected construction of the last-named railroad.

*These were all minor combinations [372] in which only some of the defendants participated. The accomplishment of these several subordinate transactions only completed one or another of the several groups of carriers and coal-producing companies, which several groups thereafter not only possessed of the power to compete with every other group, but, as we have already seen, were actually engaged in competing, one with another, prior to the general combination through the Temple Iron Company and the 65 per cent contract scheme.

So far as this record shows, not one of these transactions was the result of any general combination between all of the de-

fendants, and constituted no part of any such general combination. None of the defendants had any part or lot in bringing them about except the particular combining companies.

It is true that the bill asks injunctions against the continuance of each of these minor combinations. But if, as we conclude, they did not constitute any part of any general plan or combination entered into by all of the carrier companies, their separate consideration as independent violations of the act of Congress is not admissible under the general frame of this bill. To treat the bill as one seeking to apply the prohibition of the act of Congress to each one of these independent combinations would condemn the pleading as a plain misjoinder of parties and of causes of suit, and a plain confession of multifariousness. All of the defendants had a common interest in the defense of the Temple Iron Company combination, and that of the 65 per cent contracts, because it was alleged that all had joined therein. But all of the defendants did not have a common interest in the defense of these three minor combinations, unless it appear that they were, as charged, "steps," or acts and agreements in furtherance of the general combination to which they were all parties. This we find not to be 373]the fact. If, therefore, we shall *treat the bill as broad enough to involve combinations which were not steps or acts in furtherance of any general combination, we shall overrule the objection of multifariousness, made below and here, for we shall then maintain a bill setting up three separate and distinct causes of action against the distinct groups of defendants, one having no interest in or connection with the other. The grounds of each suit would be different and the parties defending different. See the discussion and cases cited in Simkins, Fed. Eq. Suit, pp. 290, et seq.

Having failed to show that these minor combinations were acts in furtherance of the general scheme, or the acts of the combiners in the two combinations condemned, we are asked to deal with them as separate illegal combinations by such of the defendants as participated. This the court below declined to do, and we in this find no error.

As to the legality of the minor combinations, we therefore express no opinion. We affirm the action of the court below in declining to enjoin them, because to construe the bill as directed against them as independent combinations, between some, but not all, of the principal defendants, would make the pleading objectionably multifarious. *We therefore* direct that the bill *be dismissed, without prejudice, in so far* as it seeks relief against the three alleged minor combinations.

The decree of the court below is affirmed as to the Temple Iron Company combination. It is reversed as to the 65 per cent contracts, and the case will be remanded with direction to enter a decree canceling each of these contracts, and perpetually enjoining their further execution, and for such proceedings as are in conformity with this opinion.

Mr. Justice Day, Mr. Justice Hughes, and Mr. Justice Pitney did not participate in the consideration or decision of this case.

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*SARAH K. McLEAN, Widow of[374
Nathaniel H. McLean, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 374-383.)

**Claims — cumulative jurisdiction.**

1. Jurisdiction of the court of claims to entertain a claim against the United States under a private relief act was not excluded because that statute directed the proper accounting officers to settle and adjust the claim.

[For other cases, see Claims, 97-100, in Digest Sup. Ct. 1908.]

**Statutes — construction — committee reports.**

2. The reports of committees of the House of Representatives and the Senate may be consulted as an aid to ascertaining the motive of Congress in passing a statute.

[For other cases, see Statutes, 154-160, in Digest Sup. Ct. 1908.]

**Army — pay — emoluments — reinstatement.**

3. Commutation for forage for two horses, actually kept and used by an ex-Army officer after his resignation from the Army, and servants' pay for not more than two servants in his private employ, are embraced in the private relief act of February 24, 1905 (33 Stat. at L. 806, chap. 777), by which the proper accounting officers were directed to settle and adjust to the widow of such officer all back pay and emoluments which would have been due and payable to him from the date of his resignation to the date of his reinstatement, since these are "emoluments" to which he would have been entitled, under the acts of March 30, 1814 (3 Stat. at L. 114, chap. 37), April 24, 1816 (3 Stat. at L. 299, chap. 69), July 17, 1862 (12 Stat. at L. 594, chap. 200), and March 3, 1865 (13 Stat. at L. 487, chap. 79), had he remained in actual service.

[For other cases, see Army and Navy, VI. b, in Digest Sup. Ct. 1908.]

[No. 33.]

Argued November 6, 1912. Decided December 23, 1912.

APPEAL from the Court of Claims to review a judgment granting a part of the relief claimed under a private relief act. Reversed and remanded for further proceedings.

See same case below, 45 Ct. Cl. 95.

The facts are stated in the opinion.

Mr. Archibald King argued the cause and filed a brief for appellant:

The statute is remedial in character, and should be liberally construed.

Collins v. United States, 14 Ct. Cl. 568, 15 Ct. Cl. 22; Kilburn v. United States, 15 Ct. Cl. 41; Jones v. United States, 4 Ct. Cl. 197.

"Emoluments" is a most comprehensive term.

Apple v. Crawford, 105 Pa. 300, 51 Am. Rep. 205; Reg. v. Postmaster General, L. R. 3 Q. B. Div. 428, 47 L. J. Q. B. N. S. 435, 38 L. T. N. S. 89, 26 Week. Rep. 322; Hoyt v. United States, 10 How. 109, 135, 13 L. ed. 348, 359.

These allowances were more than reimbursement.

United States v. Temple, 105 U. S. 97, 26 L. ed. 967; Thomas v. United States, 38 Ct. Cl. 70; Reichherzer v. United States, 43 Ct. Cl. 359.

Reference to congressional reports was proper.

Church of The Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 671; Northern P. R. Co. v. Washington, 222 U. S. 370, 380, 56 L. ed. 237, 240, 32 Sup. Ct. Rep. 160; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 40, 39 L. ed. 601, 612, 15 Sup. Ct. Rep. 508; The Delaware, 161 U. S. 459, 472, 40 L. ed. 771, 776, 16 Sup. Ct. Rep. 516; Buttfield v. Stranahan, 192 U. S. 470, 495, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; Binns v. United States, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816.

The accounting officers' action was not conclusive.

Thomas v. United States, 16 Ct. Cl. 522; Reed v. United States, 11 Wall. 591, 20 L. ed. 220; Shaw v. United States, 93 U. S. 235, 23 L. ed. 880; Smithmeyer v. United States, 147 U. S. 342, 37 L. ed. 196, 13 Sup. Ct. Rep. 321; United States v. Harmon, 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327; Wisconsin C. R. Co. v. United States, 164 U. S. 190, 205, 41 L. ed. 399, 404, 17 Sup. Ct. Rep. 45; Medbury v. United States, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503; United States v. Jordan, 113 U. S. 418, 28 L. ed. 1013, 5 Sup. Ct. Rep. 585, affirming 19 Ct. Cl. 120; United States v. American Tobacco Co. 166 U. S. 468, 41 L. ed. 1081, 17 Sup. Ct. Rep. 619, affirming 32 Ct. Cl. 207; Vigo's Case (Ex parte United States) 21 Wall. 648, 22 L. ed. 690; Huffman v. United States, 17 Ct. Cl. 55; Blount v. United States, 21 Ct. Cl. 274; Sowle v. United States, 38 Ct. Cl. 525; Miller v. United States, 34 Ct. Cl. 335; Pursell v. United States, 46 Ct. Cl. 509; Bogert v. United States, 3 Ct. Cl. 18; Thomas v. United States, 16 Ct. Cl. 522; Longwill v. United States, 17 Ct. Cl. 288; Webster v. United States, 32 Ct. Cl. 362; Hardie v. United States, 39 Ct. Cl. 250; Cox v. United States, 41 Ct. Cl. 86; United States v. Shipley, 116 C. C. A. 627, 197 Fed. 265.

The words "settle and adjust" in the act now to be construed mean the same thing as they mean in U. S. Rev. Stat. § 236, U. S. Comp. Stat. 1901, p. 130; namely, that the proper auditor shall make what is known in departmental language as a "settlement;" *i. e.*, a debit and credit statement of account.

The Abbotsford, 98 U. S. 440, 25 L. ed. 168; Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655.

Mr. William W. Scott argued the cause, and, with Mr. John Q. Thompson, Assistant Attorney General, filed a brief for appellee:

This court will not go behind the findings of fact as made by the court of claims, and will not consider the evidence upon which they were founded.

De Groot v. United States, 5 Wall. 419, 18 L. ed. 700; 17 Wall. XVII, 20 L. ed. 910; Desmare v. United States, 93 U. S. 605, 23 L. ed. 959; Carver v. United States, 111 U. S. 609, 28 L. ed. 540, 4 Sup. Ct. Rep. 561; Union P. R. Co. v. United States, 116 U. S. 154, 29 L. ed. 584, 6 Sup. Ct. Rep. 325; Sisseton & W. Sioux Indians v. United States, 208 U. S. 561, 566, 52 L. ed. 621, 623, 28 Sup. Ct. Rep. 352; Sac. & F. Indians v. Sac. & F. Indians, 220 U. S. 481, 55 L. ed. 552, 31 Sup. Ct. Rep. 473.

The finding and conclusion reached by the accounting officers of the Treasury is final and conclusive, and the court of claims was without authority to review it.

United States v. California & O. Land Co. 148 U. S. 31, 43, 37 L. ed. 354, 360, 13 Sup. Ct. Rep. 458; Foley v. Harrison, 15 How. 433, 446, 14 L. ed. 761, 766; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447–451, 27 L. ed. 226–228, 1 Sup. Ct. Rep. 389; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 229, 41 L. ed. 683, 698, 17 Sup. Ct. Rep. 305; Marshall v. United States, 21

Ct. Cl. 307; Plummer v. United States, 24 Ct. Cl. 517; United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81.

An officer resigning is not entitled to commutation of allowances.

United States v. Sweet, 189 U. S. 471, 47 L. ed. 907, 23 Sup. Ct. Rep. 638.

An Army officer at his own home, awaiting orders, and having no public duty to perform, has been held not entitled to commutation for quarters or fuel.

United States v. Phisterer, 94 U. S. 219, 24 L. ed. 116.

What are pay and emoluments?

Sherburne's Case, 16 Ct. Cl. 490; Wilson v. United States, 44 Ct. Cl. 428.

Mr. Justice McKenna delivered the opinion of the court:

The question in the case is the extent of relief to which appellant is entitled under the following act of Congress, passed February 24, 1905:

377] *"That the proper accounting officers be, and they are hereby, directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant Colonel Nathaniel H. McLean, all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major from July twenty-third, eighteen hundred and sixty-four, to the date of his reinstatement, March third, eighteen hundred and seventy-five, and that the amount found due by said adjustment is hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated." 33 Stat. at L. 806, chap. 777.

McLean entered the United States Military Academy July 1, 1844, graduated therefrom, and was appointed brevet second lieutenant in the Army July 1, 1848, and served until the year 1864, when, having attained the rank of major and assistant adjutant general, he resigned, his resignation being accepted July 23, 1864. By act of March 3, 1875 (18 Stat. at L. chap. 187, p. 515), Congress authorized the President to appoint Major McLean to fill the first vacancy which might occur in the lowest grade of the adjutant general's department, "or, if he shall deem it best, to reinstate and retire him with the rank to which he would have attained in service at the date of the passage of this act." Under this authority Major McLean was reinstated and placed on the retired list as lieutenant colonel and assistant adjutant general, to rank from March 3, 1875. He continued in that rank until his death, which occurred June 28, 1884. From the date of the acceptance of his resignation, July 23, 1864, to the date of his reinstatement, March 3, 1875, he received no pay. This interval is provided for by the act of February 24, 1905, supra.

Under that act appellant presented a claim to the Auditor of the War Department, who allowed her pay and personal subsistence which would have been due her husband from the date of the acceptance of his resignation, *July 23, 1864, to[378 the date of his reinstatement, March 3, 1875, but disallowed a claim made by her for forage and servants' pay. The disallowance was confirmed by the Comptroller of the Treasury. This action was then brought in the court of claims. The court sustained the accounting officers as to forage and servants' pay, saying: "As an officer of his grade, plaintiff's intestate was entitled to two servants and to forage for two horses had he remained in the military service. But the officer resigned, and such voluntary retirement from the service operated to deprive the officer, by his own act, of the opportunity to draw the allowances incident to the keep of two servants and two horses." As to those two items the petition was dismissed. The court, however, decided that the claim for a ration is analogous to longevity pay and is on a different basis. The court said: "The officer, by the act of reinstatement, became entitled to compensation for and during the whole period of service, with the consequent ration increase incident to the services supposed to have been rendered for the time set forth in the petition. It is all, strictly speaking, 'pay proper' . . . This entitles the plaintiff to $682.75 in addition to the amount allowed by the accounting officers." Judgment was ordered and entered for that sum. 45 Ct. Cl. 95.

The jurisdiction of the court of claims to entertain the action was attacked in that court and is attacked here, the contention being that the act for the relief of appellant "constituted the accounting officers, and not the courts, the tribunal to settle the accounts." The court ruled against the contention, and rightly. It is not necessary to repeat its reasoning. The duties of the accounting officers were, as the court said, administrative, not judicial, and as the rights of appellant arose under an act of Congress, the court had jurisdiction to determine them. Medbury v. United States, 173 U. S. 492, 43 L. ed. 779, 19 Sup. Ct. Rep. 503.

Upon the merits certain acts of Congress besides that *for the relief of appellant[379 are pertinent to be considered.

The act of July 17, 1862 (12 Stat. at L. 594, chap. 200), provides that majors shall

be entitled to draw forage in kind for two horses, and that in case forage in kind cannot be furnished by the proper department, officers may commute the same according to existing regulations. The act of April 24, 1816, § 12 (3 Stat. at L. 299, chap. 69), fixes the money value of forage at $8 per month for each horse when the same shall be commuted. But it is provided "that neither forage nor money shall be drawn by officers but for horses actually kept by them in the service." The act of July 15, 1870 (16 Stat. at L. 320, chap. 294), provides a new pay system for officers of the Army, abolishing commuted forage and all such emoluments by including them in pay proper.

Under the acts of March 30, 1814, §§ 9 and 10 (3 Stat. at L. 114, chap. 37), April 24, 1816, supra and March 3, 1865 (13 Stat. at L. 487, chap. 79), and the Army Regulations in force from July 24, 1864, to July 14, 1870, there would have been due and payable to McLean, as an emolument in the grade of major, servants' pay and allowance for as many servants, not exceeding two, as were actually kept by him at his expense, at the rate of pay, ration, and clothing allowance of a private soldier in the Army for each servant so kept. By other acts of Congress commissioned officers other than general officers were entitled to receive one additional ration *per diem* for every five years of service, which had a commuted value at various sums until July 28, 1867, when it became 30 cents.

The court of claims found that from the date of the acceptance of McLean's resignation until September 23, 1864, he had one servant in his employment on the trip from Portland, Oregon, the place of his resignation, to his home in Cincinnati, Ohio,—time, two months. From the latter date to July 14, 380]1870, inclusive, he had servants in *his private employ, but how many is not satisfactorily established from the evidence. The servants were not enlisted men of, or connected with, the Army. From the dates before mentioned he owned two horses, one used occasionally for a saddle horse, but they were generally used for his private carriage.

The question, then, is whether, under the facts as found and the acts of Congress above stated in regard to officers' pay and allowance and the act for the relief of appellant, she is entitled to the commuted value of forage which would have been due and payable to her husband as a major from September 24, 1864, to July 14, 1870, and servants' pay. Urging the negative of the question, and in support of the decision of the court of claims, it is contended that, for the period specified, *McLean was not in the* service of the United States, and therefore did not have, and could not have had, any horses or servants "actually kept in service" by him, as required by the act of April 24, 1816, supra. To the contention appellant opposes the purpose and words of the statute. She asserts that the prompting of the act was to repair an injustice done to Major McLean, and, to support the assertion, she refers to the reports of the committees of the House of Representatives and that of the Senate, Fifty-third Congress. The reference is justified (Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 671; Northern P. R. Co. v. Washington, 222 U. S. 370, 380, 56 L. ed. 237, 240, 32 Sup. Ct. Rep. 160), and gives support to the contention that the circumstances which preceded and provoked Major McLean's resignation appealed to Congress, and to redress its consequences Congress authorized his reinstatement, and, to make it complete, passed the act of February 24, 1905.

It certainly may be assumed that the act was not a simple gratuity. Public moneys are not appropriated as mere gifts. They are appropriated in recognition and reward of merit or in recompense for service, or, as it may *be inferred in the present case,[381 reparation for injustice done. Keeping this in mind, the extent of the relief granted to appellant may be determined. Indeed, the plain directness of the act of Congress leaves nothing to interpretation. The proper accounting officers are directed to settle and account to her "all back pay and emoluments that would have been due and payable" to her husband as a major of the United States Army from July 23, 1864, to March 3, 1875. The words are all-comprehensive. They embrace all the compensation, perquisites, and dues to which he was entitled as an officer. About back pay there is no question. The accounting officers allowed the pay of the designated rank and the personal subsistence which would have been due and payable to the deceased officer. The court of claims extended the definition of "pay" somewhat farther, and included in it "ration increase incident to the service supposed to have been rendered for the time set forth in the petition." And, necessarily, for "service supposed" is the attribution of the act of Congress, not service rendered or possible to be rendered. But the supposition which is made efficient to give pay is sought to be halted at "emoluments," and the contention is advanced, as we have seen, that they must be considered as including only allowances or reimbursement for expenses actually incurred while in the service of the United States. The

contention is not justified. The act, in order to make its relief complete, treats the officer and compensates him as though he had been in actual service from the date of his retirement to the date of his reinstatement. It is in this aspect that we must apply it. He is to be regarded for the time stated to have been in the Army of the United States, entitled to pay, entitled to emoluments, the latter as much as the former. The words of the statute make no distinction between them. Whatever is directed to be settled—pay or emoluments—is for compensation, not for actual serv-
382]ice, but for attributed *service. This, we repeat, is the scheme of the statute and the test of its application. It is difficult to deal with a distinction between pay and emoluments. Both are rewards or compensation, the one no more than the other, for "service supposed." To say that one is certain and the other contingent has no meaning in the situation of Major McLean. He could not have performed the condition upon which either depended under the then-existing law, and to distinguish between them notwithstanding is to enter a maze of irrelevant considerations. The enactment is—and we return to it as its own best interpreter—"that the proper accounting officers be, and they are hereby, directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant Colonel Nathaniel H. McLean, all back *pay* and *emoluments* that would have been due and payable" to him "as major, from July 23, 1864, to the date of his reinstatement, March 3, 1875. . . ." It is manifest that the supposition of service by the officer is attributed to both pay and emoluments. Under that supposition, what essential difference is there between them? Pay and emoluments are but expressions of value used to give complete recompense to a deserving officer. Their association was deliberate; emoluments were additive to pay, and the direction as to them is as substantive as the direction as to it, and qualified by no other condition. Of what consequence, then, how they may be defined? They may be called "indirect or contingent remuneration," as they have been called; it may be said, as it has been said, that "they are sometimes in the nature of compensation and sometimes in the nature of reimbursement." But, however they be defined, Congress has granted them, and advisedly, knowing Major McLean's situation, knowing that they included allowance for servants and forage for horses, and knowing that while the servants and horses could not have been used by him in the service of the United States,
383]*they could* *have been used, as they *were used, and ascribed to that* service.
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With this knowledge and with full understanding of what it was doing, Congress directed the accounting officers "to settle and adjust all back pay and emoluments." To decide otherwise is to say that Congress gave a right and took it away at one and the same instant; or, in some confusion of mind, intended to withhold it by using the aptest word to confer it.

The government realizes the situation and attempts to explain or escape it. Its argument is somewhat peculiar. Its contention is that Major McLean, by his resignation, "must be considered as having intentionally [and the word is especially emphasized] placed himself without the service of the United States," and so, having voluntarily separated himself from the servvice, he was, and his widow is, unable to furnish the certificate required by statute to secure commutation for forage and servants' pay. Of course, he was out of the Army. If he had not been out of the Army there would have been no necessity for the act of Congress; and we cannot consider the condition which made the act necessary a reason for defeating it. The plain motive of the act exposes the weakness of the contention. If we keep in mind the purpose which impelled the enactment in behalf of Mrs. McLean, we will have no difficulty in deciding how adequate its language is to accomplish it. "All back . . . emoluments" are the words used. "All" excludes the idea of limitation, and the word "emoluments" is the most adequate that could have been used. It especially expresses the perquisites of an office, and its use in conjunction with "pay" makes the restitution of the statute complete.

Judgment dismissing the petition as to forage and servants' pay reversed, and the case remanded for further proceedings in accordance with this opinion.

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*WALLACE WOOD, JR., Trustee in[384
Bankruptcy of Edward D. Leche, Appt.,
v.
A. WILBERT'S SONS SHINGLE & LUMBER COMPANY and Frederic Wilbert.

(See S. C. Reporter's ed. 384–390.)

**Appeal — questions not raised below — necessity of assigning error.**

1. Objections not made in the court below, or not assigned as error on appeal, cannot be considered in the appellate court. [For other cases, see Appeal and Error, 3577–3594, 4507–4520, in Digest Sup. Ct. 1908.]

**Bankruptcy — jurisdiction — adverse suit — consent of defendant.**

2. The consent of the defendant is still

essential to sustain the jurisdiction of a Federal district court of a suit by a trustee in bankruptcy to recover the property of the bankrupt in the possession of a third person, under a conveyance which was neither given as a preference nor, assuming it to be fraudulent, made within four months of the bankruptcy proceedings, notwithstanding the changes made by the act of February 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1911, p. 1493), in the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), by adding to § 23b, which requires such consent, the words, "except suits for the recovery of property under § 60, subdivision b, and § 67, subdivision e," which sections relate to preferential or fraudulent conveyances made within four months of the bankruptcy proceeding, and amending § 70e, so as to give the bankruptcy court concurrent jurisdiction with the state courts of suits by the trustee to set aside any transfer which any creditor might have avoided, since these provisions must be construed to confer jurisdiction of the subject-matter of the suit, but not of the person of the defendant.

[For other cases, see Bankruptcy, 19-23, 35-47, in Digest Sup. Ct. 1908.]

[No. 61.]

Argued December 5, 1912. Decided December 23, 1912.

APPEAL from the District Court of the United States for the Eastern District of Louisiana to review a decree dismissing, for the want of jurisdiction over the defendant, a suit by a trustee in bankruptcy to recover property of the bankrupt in the possession of a third person. Affirmed.

The facts are stated in the opinion.

Mr. Benjamin Rice Forman argued the cause, and, with Mr. William Lee Hughes, filed a brief for appellant.

Mr. Clarence Samuel Hebert argued the cause, and, with Mr. Walter Guion, filed a brief for appellees.

Mr. Justice McKenna delivered the opinion of the court:

385] *The case is here on a question of jurisdiction. Appellant brought suit in the district court November 3, 1909, as trustee of one Edward Douglas Leche, to set aside a sale of lands made by Leche to appellee, A. Wilbert's Sons Shingle & Lumber Company, herein called the shingle and lumber company, and to account for the rents thereof or the proceeds of the land that may have been sold, and to otherwise render a full account to appellant of the transactions with Leche, *individually or otherwise.*

Appellees, on the 3d of December, 1909, filed an exception to the jurisdiction of the court, alleging as cause thereof that they were domiciled in the parish of Iberville, and that the court was without jurisdiction over their persons and over the subject-matter of the litigation. A demurrer to like effect was filed on the 10th of December, and stated that it was "by way of amendment to the form of demurrer filed herein on December 3, 1909."

The demurrer was sustained. The court said: "From the oral argument and brief filed it is evident the trustee brings his action under the provisions of § 70, subdivision e, of the bankruptcy act, and the bill does not disclose any cause of action under either § 60, subdivision b, or § 67, subdivision e; and therefore, by virtue of the authority of Hull v. Burr, 83 C. C. A. 61, 153 Fed. 945, this court has no jurisdiction to entertain the suit except by the consent of the defendants." The bill was dismissed without prejudice to complainant.

The certificate of the judge recites that the sole question decided by him and certified to this court was whether or not the district court "has jurisdiction in behalf of the trustee in bankruptcy to recover assets of the bankrupt from a third person under a revocatory action allowed under the law of Louisiana, of an insolvent, without the consent of the defendant, under the bankrupt act as amended in 1903 [32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1911, p. 1493]."

There are some minor questions presented by the brief *of counsel of which we[386 must first dispose. It was contended in the court below that the appellees, by entering a formal appearance, waived their right to object to the jurisdiction. But they at the same time filed an exception to the jurisdiction, and the district court decided that the two papers should be considered together, and, so considering them, held that they could not be regarded as a consent on the part of the defendants to submit themselves to the jurisdiction of the court. The ruling is not assigned as error. It is urged further that neither the exception nor the demurrer complied with the thirty-first equity rule, in that the appellees did not make affidavit that they were not interposed for delay. It is sufficient to answer that the objection was not made in the court below and is not assigned as error on this appeal. We therefore pass to the consideration of the question certified.

The bill charges with much circumstantial detail, which it is not possible to briefly state or analyze, that the lumber and

shingle company and its president, Frederic Wilbert, had entered into a conspiracy with the bankrupt and certain other parties by which, on June 6, 1906, the shingle and lumber company acquired title to certain plantations belonging to the bankrupt, situated in the parish of Iberville, Louisiana. The purpose of the conspiracy, it is charged, was to conceal from his creditors the bankrupt's assets and property, and to protect them from the pursuit of his creditors, with the understanding that when he got his discharge in bankruptcy the property was to be transferred to him. It was prayed that the sale to be set aside and the defendants be decreed to convey the lands to complainant in trust for the creditors of the bankrupt. Without further detail of the bill, we shall assume, for the purpose of the consideration of the question, that it states facts sufficient to constitute a ground of relief if the court have jurisdiction.

387] *The bankruptcy act is very comprehensive of the whole subject of bankruptcy. It creates courts of bankruptcy and is full in its provisions for the collection and preservation of the estate of the bankrupt through trustees appointed by creditors, who are given power to bring suits to recover the property of the bankrupt which has been conveyed by him in fraud of his creditors, or to give a preference to any of them; the purpose of the act being to secure an equality of distribution of the assets of the bankrupt among his creditors.

Section 23a gives jurisdiction of such suits to the circuit courts of the United States which involve controversies at law or in equity, as distinguished from proceedings in bankruptcy, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts" and the "adverse claimants." [30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1499]. By subdivision b of § 23 it is provided that suits by the trustee shall only be brought or prosecuted where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant; "*except suits for the recovery of property under § 60, subdivision b, and § 67 subdivision e.*" The words in italics were added as amendment by act of February 5, 1903, chap. 487, § 8, 32 Stat. at L. 797, U. S. Comp. Stat. Supp. 1911, p. 1493. Upon them the question in the case turns. Prior to the amendment, and passing on § 23 as originally enacted, this court decided in Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, that that section controlled and limited the jurisdiction of all courts over suits brought by trustees to collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent against creditors, and that the district courts of the United States could, by the proposed defendant's consent, but not otherwise, entertain jurisdiction of such suits. Harris v. First Nat. Bank, 216 U. S. 382, 54 L. ed. 528, 30 Sup. Ct. Rep. 296.

*What, then, is the effect of the[388 amendment? Section 60 defines what shall constitute a preference, with provisions for preventing or defeating them. Section 67 is concerned with liens, their extent, limitation, and regulation. By subdivision b of § 60 it is provided that a conveyance of property by the bankrupt within four months before the filing of a petition in bankruptcy, or after the filing or before adjudication, for the purpose of giving preference to a creditor, shall be voidable by the trustee, and he may recover the property or its value from the creditor. Subdivision e of § 67 relates to conveyances made by the bankrupt within four months prior to filing the petition, with the intention and purpose to hinder, delay, or defraud his creditors. It is provided that such conveyance shall be null and void except as to purchasers in good faith and for a present fair consideration. The property so conveyed is declared to be part of the assets of the bankrupt's estate, and it is made the duty of the trustee to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. It is also provided that conveyances and transfers void as against creditors by the laws of the state, territory, or district in which the property is situated shall be deemed null and void against the creditors of the bankrupt, and to be recovered by the trustee. By an amendment of 1903 (32 Stat. at L. 800, chap. 487, U. S. Comp. Stat. Supp. 1911, p. 1506), it was provided that, for the purpose of such recovery, any court of bankruptcy and any state court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction. The present suit does not fall within either of the sections or either of the subdivisions. The conveyance sought to be set aside was not given as a preference within the meaning of the law, nor was it, assuming it to have been fraudulent, made within four months of the filing of the petition in bankruptcy. The same limitation

of time would apply even if the transfer of the property or any of the transactions 389]connected with *it might be regarded, in some of their aspects, as giving a preference, as counsel suggest that they might be so regarded.

Subdivision e of § 70 is invoked as sustaining the jurisdiction of the district court. That subdivision provides that the trustee may avoid any transfer made by the bankrupt of his property which any creditor might have avoided, and may recover it unless the purchaser was a bona fide holder for value prior to the date of adjudication. This was the provision of the section as originally enacted. In 1903 these words were added: "And for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." 32 Stat. at L. 800, chap. 487, U. S. Comp. Stat. Supp. 1911, p. 1506. The language of the amendment seems to have no limitation, except that the transfer must be one which any creditor could avoid, and, giving it such generality, the question occurs, can it be reconciled with § 23, subdivisions a and b? The amendment was a part of the same act and passed at the same time that the amendment to subdivision b of § 23 was, and we must assume that they were intended not to conflict, but to be in accord, as provisions for different situations. In other words, that it was the intention that each should have its proper application, distinct from and harmonious with that of the other. Such application is observed by distinguishing between jurisdiction over the subject-matter and jurisdiction over the person, as pointed out by the circuit court of appeals for the fifth circuit in Hull v. Burr, 83 C. C. A. 61, 153 Fed. 945, approving and following Gregory v. Atkinson, 127 Fed. 185. In other words, the respective sections and their subdivisions confer jurisdiction on the designated courts so far as it is dependent upon the character of the suits, but when the condition expressed in subdivision b of § 23 exists, the consent of the defendant determines the court, except when the suit is "for the re-390]covery of property *under § 60, subdivision b, and § 67, subdivision e." These special exceptions exclude any other. And this is the view of the respective sections and their relation expressed in Skewis v. Barthell, 152 Fed. 534; Palmer v. Roginsky, 175 Fed. 883; Parker v. Sherman, 195 Fed. 648. *Contra:* Hurley v. Devlin, 149 Fed. 268.

Judgment affirmed.

HENRY G. DARNELL,† Executor of the Estate of Isaac M. Darnell, Deceased, and Walter S. Darnell, Plffs. in Err.,

v.

STATE OF INDIANA.

(See S. C. Reporter's ed. 390-398.)

**Statutes — who may assail validity.**

1. A resident owner of shares in a foreign corporation which has no taxable property in the state cannot complain that the provisions of Burns's Anno. Stat. (Ind.) 1908, §§ 10,143, 10,233, 10,234, for the taxation of such shares, deny the equal protection of the laws because they make no allowance, as they do in the case of domestic corporations, where the corporation has property taxed within the state.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — taxing shares of foreign corporation.**

2. Taxing shares of foreign corporations when owned by inhabitants of the state, as is done by Burns's Anno. Stat. (Ind.) §§ 10,143, 10,233, 10,234, does not deny the owner the equal protection of the laws because, in the case of domestic corporations, it is the property, and not the shares, which is taxed.

[For other cases, see Constitutional Law, 299-312, in Digest Sup. Ct. 1908.]

**Commerce — state taxation — shares of foreign corporation.**

3. Taxation of shares in foreign corporations, owned by inhabitants of the state, as is done by Burns's Anno. Stat. (Ind.) §§ 10,143, 10,233, 10,234, while shares in domestic corporations are only taxable when the property of the corporation is not exempt, and not taxable to the corporation itself, does not violate the commerce clause of the Federal Constitution.

[For other cases, see Commerce, III. d., in Digest Sup. Ct. 1908.]

[No. 78.]

Argued December 9, 1912. Decided December 23, 1912.

†Appearance of W. S. Darnell, administrator, etc., of the estate of Isaac M. Darnell, deceased, filed and entered on December 9, 1912.

NOTE.—Who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

Taxation of capital stock of corporations in the United States—see note to State Bd. of Equalization v. People, 58 L.R.A. 513.

Constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

Corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Marion Circuit Court, enforcing a tax on the shares of stock in a foreign corporation, owned by a resident of the state. Affirmed.

See same case below, 174 Ind. 143, 90 N. E. 769.

The facts are stated in the opinion.

Mr. Joseph F. Cowern argued the cause, and, with Mr. Merrill Moores, filed a brief for plaintiffs in error:

Shares of stock in a corporation are property. The owner of such shares owns and holds them as property, separate and distinct from the capital stock and tangible property of the corporation.

Seward v. Rising Sun, 79 Ind. 351; Darnell v. State, 174 Ind. 143, 90 N. E. 769; Hasely v. Ensley, 40 Ind. App. 598, 82 N. E. 809; Bank of Commerce v. Tennessee, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456; Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. ed. 558, 561.

As such shares have a value independent of the party owning them, and are transported, held, bought, sold, and taxed like other property, they are subjects of interstate commerce.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. ed. 558, 561; Bank of Commerce v. Tennessee, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 657, 6 Ann. Cas. 515, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Hasely v. Ensley, 40 Ind. App. 598, 82 N. E. 809; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Judson, Interstate Commerce, §§ 9, 10.

When the statute of a state, as construed by the courts of that state, places a greater or more onerous burden upon property coming from a foreign state than is imposed upon like property of domestic origin, it is void in so far as it discriminates, because in conflict with the commerce clause of the Constitution of the United States.

I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

The protection afforded by the commerce clause of the Constitution is not withdrawn or suspended after the property of foreign origin has acquired a permanent situs in the state, and is commingled with and merged into the general mass of property therein. It continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247.

The powers granted to the Federal government, and the corresponding limitations of the powers of the various states, are not confined to the instrumentalities of commerce known or in use when the Constitution was adopted They keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

The commerce clause was made a part of the Constitution to insure, as nearly as was consistent with the reserved police powers of the states, absolute freedom of commercial intercourse within the boundaries of the United States. Under it the states are powerless to avail themselves of the protective principle or theory, directly or indirectly.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

As the taxing statutes of Indiana, as construed by her courts, require all shares of stock in foreign corporations to be listed for taxation, while exempting from taxation like shares of stock in domestic corporations, they violate the commerce clause of the Constitution of the United States.

I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

The supreme court of Indiana has practically admitted that the taxing statutes of

that state were so framed as to call into play the protective theory.

Cook v. Marion County, 175 Ind. 708, 92 N. E. 879.

And the Indiana appellate court has frankly stated, and the case has been expressly approved by the supreme court in Cook v. Marion County, supra, that the acts of the legislature manifest a clear intent and purpose to distinguish between shares of stock in a foreign corporation and shares of stock in a domestic corporation.

Hasely v. Ensley, 40 Ind. App. 598, 82 N. E. 809.

The question presented here was not raised, discussed, or decided in Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401, or Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16.

While the equal protection clause of the Constitution permits classification for purposes of taxation, it forbids an arbitrary classification,—a classification without substantial basis. Like property under like circumstances and conditions must be treated alike, both in the privileges conferred and the liabilities imposed. Where an act of the legislature discriminates, it is void to that extent.

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 291, 19 Ann. Cas. 1247; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

The case at bar is to be distinguished from the case of Kidd v. Alabama, 188 U. S. 730, 47 Sup. Ct. Rep. 669, 23 Sup. Ct. Rep. 401, and Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16, upon two grounds: First, in those cases stock in foreign corporations was not required to be listed for taxation, if the foreign corporation was doing business and was taxed in the state whose statute was attacked, while under the Indiana statute all stock in foreign corporations must be listed. Second, in Indiana the manifest intent and purpose of the act is the development of home industries, not by legitimate inducements, but by discrimination carried so far as to even penalize the owners of stock in domestic corporations when such corporations go out of the state to do business.

Stroh v. Detroit, 131 Mich. 109, 90 N. W. 1029.

The mere fact that property is not actually moving in the channels of interstate commerce, or is not actually being offered for sale at the particular time that it is taxed, does not excuse a *discriminating* tax based upon its foreign origin; for even after it is at rest and has acquired a permanent situs, the constitutional protection continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; I. M. Darnell & Sons Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; Judson, Interstate Commerce, § 16.

The case at bar does not differ, so far as the principle involved is concerned, from State v. Zophy, 14 S. D. 119, 86 Am. St. Rep. 741, 84 N. W. 391.

Nothing could so disastrously affect commerce as a construction of the commerce clause that would impair its efficacy.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

The fact that the act would have been valid if limited to the particular circumstances shown in the declaration did not prevent the railroad from taking advantage of the fact that the whole act was void because by general words it also embraced that which Congress had no power to regulate.

State v. Missouri P. R. Co. 212 Mo. 658, 111 S. W. 500; United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Baldwin v. Franks, 120 U. S. 685, 690, 30 L. ed. 768, 7 Sup. Ct. Rep. 656, 763; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co. 120 Ind. 575, 6 L.R.A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; Griffin v. State, 119 Ind. 520, 22 N. E. 7; Logan v. Stogsdale, 123 Ind. 372, 8 L.R.A. 58, 24 N. E. 135; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686; Poindexter v. Greenhow, 114 U. S. 270, 302, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Steffens, 100 U. S. 82, 25 L. ed. 550; Spraigue v. Thompson, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988.

Mr. Morton S. Hawkins argued the cause, and Mr. Thomas H. Honan, Attorney General of Indiana, and Messrs. James E. McCullough, Edward B. Raub,

and Martin M. Hugg, filed a brief for defendant in error:

A state has jurisdiction of all persons and things which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in use by the United States, and such state may tax, as part of their general estate attached to their persons, its residents for personal property owned by them but situated within another state, even though the latter state also taxes such property.

Coe v. Errol, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475; Bonaparte v. Appeal Tax Court, 104 U. S. 592, 26 L. ed. 845.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194–202, 50 L. ed. 150–152, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

In cases of intangible personal property, the tendency of modern authorities is to apply the maxim, *Mobilia sequuntur personam*, and to hold that such property may be taxed at the domicil of the owner as the real situs of the property.

Ibid.

A tax in the state of Tennessee is no tax in the state of Indiana.

Wright v. Louisville & N. R. Co. 195 U. S. 219–222, 49 L. ed. 167, 168, 25 Sup. Ct. Rep. 16; Kidd v. Alabama, 188 U. S. 730–733, 47 L. ed. 669–673, 23 Sup. Ct. Rep. 401.

In corporations, four elements of taxable value are sometimes found: (1) Franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders.

Tennessee v. Whitworth, 117 U. S. 129–136, 29 L. ed. 830–832, 6 Sup. Ct. Rep. 645; New Orleans v. Houston, 119 U. S. 265–277, 30 L. ed. 411–414, 7 Sup. Ct. Rep. 198; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664–682, 43 L. ed. 850, 857, 19 Sup. Ct. Rep. 537; Bank of Commerce v. Tennessee, 161 U. S. 134–146, 40 L. ed. 645–649, 16 Sup. Ct. Rep. 456.

The capital stock of a corporation is separable from the property of the corporation, and the stockholders may be taxed upon their stock as for any other property they may own.

Gordon v. Appeal Tax Court, 3 How. 133–150, 11 L. ed. 529–537; Sturges v. Carter, 114 U. S. 511–521, 29 L. ed. 240–243, 5 Sup. Ct. Rep. 1014.

The capital stock is another property,—corporately associated, for the purpose of banking,—but in its parts is the individual property of the stockholders in the proportions they may own it. Being their individual property, they may be taxed for it, as they may for any other property they may own.

Gordon v. Appeal Tax Court, 3 How. 133–150, 11 L. ed. 529–537.

Shares of stock in a corporation follow the domicil of the owner, like any other personal property.

1 Cooley, Taxn. 3d ed. 86; 2 Cook, Corp. § 565; San Francisco v. Fry, 63 Cal. 470; Hart v. Smith, 159 Ind. 193, 58 L.R.A. 949, 95 Am. St. Rep. 280, 64 N. E. 661; Greenleaf v. Morgan County, 184 Ill. 228, 75 Am. Rep. 168, 56 N. E. 295; Kirtland v. Hotchkiss, 100 U. S. 491–499, 25 L. ed. 558–562.

Bonds secured by mortgage held by a nonresident of the state in which the mortgaged property is situate are personal property, and follow the domicil of the owners.

State Tax on Foreign-held Bonds, 15 Wall. 300, 323, 21 L. ed. 179, 188.

A tax on the property of a corporation is not a tax upon its capital stock.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573–583, 18 L. ed. 229–234.

The owner of shares of stock in a corporation may dispose of them at his pleasure, and in so doing works no change or modification in the title of the corporate property; upon his death such shares go to his administrator, although the entire capital of the corporation may consist of real estate, and will be distributed according to the law of the domicil of the owner, and not the law of the domicil of the corporation.

Judy v. Beckwith, 137 Iowa, 24, 15 L.R.A. (N.S.) 142, 114 N. W. 565, 15 Ann. Cas. 890; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

The taxation by one state of shares of stock in a corporation of another state owned by a resident of the former state is a matter of policy for the legislature to determine, in the absence of constitutional prohibition.

Kirtland v. Hotchkiss, 100 U. S. 491–499, 25 L. ed. 558–562; Bacon v. State Tax Comrs. 126 Mich. 26, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 247; Greenleaf v. Morgan County, 184 Ill. 227, 75 Am. St. Rep. 168, 56 N. E. 295.

Indiana taxed the shares because they were owned by one of its residents and within

its jurisdiction, not because they were employed in interstate commerce.

Pulman's Palace Car Co. v. Pennsylvania, 141 U. S. 18–25, 35 L. ed. 613–617, 11 Sup. Ct. Rep. 876.

The tax upon the shares of Issac M. Darnell was not a tax on or because of the transportation, or the right of transit of said shares to the state, or through the state to other states or countries.

Ibid.

Isaac M. Darnell was not engaged in commerce between the states; his shares of stock were not in transit between or through any of the states; he had not gone into Indiana to sell his shares; and therefore the shares were not interstate commerce.

New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

Indiana did not impose the tax upon the shares owned by Isaac M. Darnell, as imported articles, or on their sale.

New York v. Roberts, 171 U. S. 658–664, 43 L. ed. 323–326, 19 Sup. Ct. Rep. 58.

Deposits and debts in one state owing to a resident of another state, which are delayed within the jurisdiction of the former state an indefinite time, are not *in transitu* so as to withdraw them from the taxing power of such state.

Blackstone v. Miller, 188 U. S. 189–203, 47 L. ed. 439–444, 23 Sup. Ct. Rep. 277.

After an article has ceased to be an import from another state by being mingled with other property in the state into which it was sent, it is subject to taxation by the latter state.

Nathan v. Louisiana, 8 How. 73–80, 49 L. ed. 992–995.

Whenever property has become incorporated into the bulk of the property of a state, it is subject to taxation by such state.

Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577–589, 39 L. ed. 538–544, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Brown v. Houston, 114 U. S. 622–633, 29 L. ed. 257–261, 5 Sup. Ct. Rep. 1091.

It is not a violation of the interstate commerce clause of the Constitution for a state to tax her resident citizens for debts held by them against nonresidents.

Kirtland v. Hotchkiss, 100 U. S. 491–499, 25 L. ed. 558–562.

The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce; and the intent of the manufacturer does not determine when the article or product passes from the control of the state and belongs to commerce.

United States v. E. C. Knight Co. 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249.

Where goods shipped from one state into another had arrived at their destination, and were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed, without discrimination, like all other property, this tax did not amount to a regulation of interstate commerce in the sense of the Constitution, although the levy of such tax might remotely or indirectly affect interstate commerce.

American Steel & Wire Co. v. Speed, 192 U. S. 500–521, 48 L. ed. 538–546, 24 Sup. Ct. Rep. 365.

The rule of equality, in respect to the subject, only requires the same means to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

Kentucky R. Tax Cases, 115 U. S. 321–337, 29 L. ed. 414–419, 6 Sup. Ct. Rep. 419; Home Ins. Co. v. New York, 134 U. S. 594–606, 33 L. ed. 1025–1031, 10 Sup. Ct. Rep. 593; Southwestern Oil Co. v. Texas, 217 U. S. 114–126, 54 L. ed. 688–694, 30 Sup. Ct. Rep. 496.

The 14th Amendment does not prevent the classification of property for taxation,—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate,—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property.

Home Ins. Co. v. New York, 134 U. S. 594–606, 33 L. ed. 1025–1031, 10 Sup. Ct. Rep. 593; Southwestern Oil Co. v. Texas, 217 U. S. 114–123, 54 L. ed. 688–694, 30 Sup. Ct. Rep. 496.

Under a law of New York imposing a transfer tax upon personal property within the state belonging to a nonresident at the time of his death, such transfer tax may be levied upon debts and deposits owing to such decedent by citizens of New York; and such transfer tax does not deprive the executrix and legatees of such decedent of any of the privileges and immunities of the citizens of New York.

Blackstone v. Miller, 188 U. S. 189–207, 47 L. ed. 439–445, 23 Sup. Ct. Rep. 277.

The taxation by one state of shares of stock owned by a resident in a corporation of another state, when the property of the corporation is taxed in the state in which it is incorporated and does business, is not double taxation.

Sturges v. Carter, 114 U. S. 511–521, 29 L. ed. 240–243, 5 Sup. Ct. Rep. 1014; New Orleans v. Houston, 119 U. S. 265–277, 30 L. ed. 411–415, 7 Sup. Ct. Rep. 198; San Francisco v. Fry, 63 Cal. 471; Porter v. Rockford, R. I. & St. L. R. Co. 76 Ill.

566; Greenleaf v. Morgan County, 184 Ill. 227, 75 Am. St. Rep. 168, 56 N. E. 295; Thrall v. Guiney, 141 Mich. 396, 113 Am. St. Rep. 528, 104 N. W. 646; Judy v. Beckwith, 137 Iowa, 24, 15 L.R.A.(N.S.) 142, 114 N. W. 565, 15 Ann. Cas. 890.

To be double taxation the same state must tax the corporation for its property, and also tax its shares in the hands of the owners.

Thrall v. Guiney, 141 Mich. 396, 113 Am. St. Rep. 528, 104 N. W. 646; Judy v. Beckwith, 137 Iowa, 24, 15 L.R.A.(N.S.) 142, 114 N. W. 565, 15 Ann. Cas. 890; Bradley v. Bauder, 36 Ohio St. 35, 38 Am. Rep. 547.

A tax may lawfully be levied on the shares of a foreign corporation held and owned by a resident of the state which imposes the tax.

Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Cooley, Taxn. 3d ed. 86; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Bacon v. State Tax Comrs. 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 247; San Francisco v. Fry, 63 Cal. 470; Greenleaf v. Morgan County, 184 Ill. 228, 75 Am. St. Rep. 168, 56 N. E. 295; Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145; Newark City Bank v. Fourth Ward Assessor, 30 N. J. L. 20; Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16; Kirtland v. Hotchkiss, 100 U. S. 491–499, 25 L. ed. 558–562; Thrall v. Guiney, 141 Mich. 397, 113 Am. St. Rep. 528, 104 N. W. 646; Com. v. Lovell, 125 Ky. 491, 101 S. W. 970; Judy v. Beckwith, 137 Iowa, 24, 15 L.R.A.(N.S.) 142, 114 N. W. 565.

Whether the state of Indiana shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected under the Constitution and laws of the United States), is a matter which concerns only the people of that state, with which the Federal government cannot rightly interfere.

Kirtland v. Hotchkiss, 100 U. S. 491–499, 25 L. ed. 558, 562; Liverpool & L. & G. Ins. Co. v. Bd. of Assessors, 221 U. S. 346–356, 55 L. ed. 762–768, 31 Sup. Ct. Rep. 550.

The taxation of shares of stock in a foreign corporation by the state in which the owner resides is not a violation of the 14th Amendment to the Federal Constitution.

Kirtland v. Hotchkiss, 100 U. S. 491–499, 25 L. ed. 558–562; Thrall v. Guiney, 141 Mich. 392, 113 Am. St. Rep. 528, 104 N. E. 646.

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Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the state of Indiana for taxes on stock of a Tennessee corporation, owned by the principal defendant. The Indiana statutes purport to tax all shares in foreign corporations except national banks, owned by inhabitants of the state, and all shares in domestic corporations when the property of such corporations is not exempt or is not taxable to the corporation itself. If the value of the stock exceeds that of the tangible taxable property, this excess also is taxed. Burns's Anno. Stat. (Ind.) 1908, §§ 10,143, 10,233, 10,234. The declaration was demurred to on the ground that the statutes were contrary to the commerce clause, art. 1, § 8, and *the 14th Amendment of the Con-[398 stitution of the United States. Judgment was entered for the plaintiff (174 Ind. 143, 90 N. E. 769), and a writ of error was allowed.

The case is pretty nearly disposed of by Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401, where the real matter of complaint, that the property of the corporation presumably is taxed in Tennessee, is answered. See also Wright v. Louisville & N. R. Co. 195 U. S. 219, 222, 49 L. ed. 167, 168, 25 Sup. Ct. Rep. 16. But it is said that the former decision does not deal with the objection that the statutes work a discrimination against stock in corporations of other states, contrary to principles often recognized. I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247. The most serious aspect of this objection is that the statutes of Indiana do not make allowance if a foreign corporation has property taxed within the state. But, as to this, it is enough to say that, however the statutes may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and that, as they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground. Smiley v. Kansas, 196 U. S. 447, 457, 49 L. ed. 546, 551, 25 Sup. Ct. Rep. 289; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736. If Spraigue v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988, contains an intimation contrary to this rule, the decision was supported on other grounds, and the rule no longer is open to dispute. Lee v. New Jersey, 207 U. S. 67, 70, 52 L. ed. 106, 107, 28 Sup. Ct. Rep. 22; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 77, 78, 55 L. ed. 369,

377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. Dec. 2, 1912 [226 U. S. 217, ante, 193, 33 Sup. Ct. Rep. 40].

The only difference of treatment disclosed by the record that concerns the defendants is that the state taxes the property of domestic corporations and the stock of foreign ones in similar cases. That this is consistent with substantial equality notwithstanding the technical differences was decided in Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401.

Judgment affirmed.

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399] *EDWIN M. KEATLEY, as Receiver of American Guaranty Company of Chicago, under Appointment of the Circuit Court of Kanawha County, West Virginia, Appt.,

v.

CARRIE REBECCA FUREY, as Executrix of the Will of Charles La Tour Furey, and also in Her own Right; Edwin A. Potter, as Receiver of the American Guaranty Company of Chicago, by Appointment of the Circuit Court of the United States for the Northern District of Illinois, et al.

(See S. C. Reporter's ed. 399–404.)

**Error to circuit court — jurisdiction below.**

A decision of a Federal circuit court in a suit against a foreign corporation, dismissing a petition in intervention filed by the foreign receiver of such corporation, in which the question of the jurisdiction of the court over the defendant was raised, cannot be reviewed in the Federal Supreme Court, as presenting a question of jurisdiction, where the decision is based upon the ground that no title to the corporate assets passed to the receiver under the law of the state of his appointment, and that therefore he had no standing in court.

[For other cases, see Appeal and Error, 879–937, in Digest Sup. Ct. 1908.]

[No. 84.]

Argued December 12, 1912. Decided December 23, 1912.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing a petition in intervention filed by a foreign receiver. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. F. W. Houghton argued the cause and filed a brief for appellant:

The motion to dismiss the appeal should be denied because the record clearly shows that the sole question decided by the court below was a single, definite question of jurisdiction, and it also clearly appears, from the petition for appeal and the order granting it, that this appeal was taken to the Supreme Court to review the question of jurisdiction alone, and hence is sufficient without a certificate.

Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; Re Lehigh Min. & Mfg. Co. 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

The record clearly shows that the sole question decided by the court below was one of jurisdiction, and no certificate is in such case required.

Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; United States v. Larkin, 208 U. S. 333, 338, 52 L. ed. 517, 519, 28 Sup. Ct. Rep. 417; Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; Re Lehigh Min. & Mfg. Co. 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Shields v. Coleman, 157 U. S. 177, 39 L. ed. 663, 15 Sup. Ct. Rep. 570.

The jurisdiction of the circuit court as a Federal court was involved in this controversy, because no lawful voluntary general appearance by the defendant was or could

NOTE.—On direct review, in Federal Supreme Court, of judgments of district or circuit courts—see note to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

be made therein, and because of the failure to lawfully serve the defendant with any process.

Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Kendall v. American Automatic Loom Co. 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740.

The entire controversy in the court below was whether or not the decree of dissolution of the American Guaranty Company of Chicago, and the appointment of receiver Black of the assets of such corporation within the jurisdiction of such court, under the provisions of §§ 57–59 of the Code of West Virginia, so ended the life and power of such corporation and its officers that it could not thereafter, by such officers or attorneys, enter a general appearance in the Federal court so as to give such court jurisdiction in such action.

Alderson, Receivers, pp. 4, 19, 20, 79, 80; 2 Clark & M. Priv. Corp. § 319, pp. 912, 913; Conklin v. United States Shipbuilding Co. 140 Fed. 219; American Nat. Bank v. National Ben. & Casualty Co. 70 Fed. 420; Pendleton v. Russell, 144 U. S. 640, 644, 645, 36 L. ed. 574, 576, 12 Sup. Ct. Rep. 743; White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

Mr. W. E. Chilton also argued the cause, and, with Messrs. F. W. Houghton, George B. Edgerton and Thomas H. Gill, filed a brief for appellant.

Mr. Levy Mayer argued the cause and filed a brief for appellees:

This appeal should be dismissed because no certificate of jurisdiction was obtained from the circuit court, and no equivalent of a certificate of jurisdiction is shown by the record.

Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Filhiol v. Torney, 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698; Chappell v. United States, 160 U. S. 507, 40 L. ed. 513, 16 Sup. Ct. Rep. 397; The Bayonne, 159 U. S. 687, 693, 40 L. ed. 306, 309, 16 Sup. Ct. Rep. 185; Shields v. Coleman, 157 U. S. 168, 176, 39 L. ed. 660, 663, 15 Sup. Ct. Rep. 570.

The jurisdiction of the circuit court as a Federal court was not involved within the meaning of the act allowing a direct appeal to this court. The subject-matter was a controversy as to the possession of the property of a corporation, between a receiver appointed by the Federal court, and a receiver subsequently appointed by a state court, and involved the construction of the West Virginia statutes, and a question of general law.

Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from the circuit court, taken by an intervener on the ground that the court never had obtained *ju-[402 risdiction over the defendant. The petition to intervene was dismissed, the decree declaring that the court had jurisdiction, that there was no equity in the petition, and that the petitioner was not entitled to any of the relief prayed for. The court allowed the appeal, but certified that, in its opinion, no question of jurisdiction was involved. The appellant contends that the contrary appears on the face of the record. United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; The Jefferson, 215 U. S. 130, 137, 54 L. ed. 125, 128, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; Herndon-Carter Co. v. James N. Norris, Son & Co. 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550.

The material facts are these. On February 1, 1909, there was filed in a local court of West Virginia a bill for the dissolution of the American Guaranty Company, a corporation of that state. The corporation appeared and consented, and on the same day a decree was entered dissolving the corporation, appointing a receiver to whom Keatley is successor, and directing him to take the steps necessary to secure possession of the company's property within the jurisdiction of the court. By the charter of the company its principal office was to be in Chicago, and in fact its bank deposits, bonds, etc., were almost wholly there. On February 2 the suit now before this court was brought in the circuit court of the United States for the northern district of Illinois on the ground that the West Virginia receiver had no authority outside of his state, praying for a receiver and the distribution of the assets collected. There was an appearance and consent in the name of the corporation, a receiver was appointed, and he proceeded to collect the assets.

It is stated by the judge in his opinion that more than 7,000 out of the 7,030 claims against the company had been presented in the cause. On October 27, 1909, the West Virginia receiver filed his petition of intervention, setting up that the corporation, having been dissolved, could not appear in the suit.

403] *Whether the exception to the general rule concerning jurisdiction of appeals like this, established by Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214, and Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740, applies to the present case, and what may be the merits of the argument against the right to appear in the name of the corporation, if the question is open, cannot be considered until the petitioner's right to present that argument is made out. On that matter we will assume that, if the petitioner had a case below, the denial of the right to intervene was not a discretionary decision, and final on that ground. Credits Commutation Co. v. United States, 177 U. S. 311, 315, 316, 44 L. ed. 782, 785, 786, 20 Sup. Ct. Rep. 636. But of course the petitioner's standing in the lower court depended on his having title, and was not a consequence of his Virginia appointment alone, unless at least he got a title by virtue of it, as it was provided by statute in express terms that the receiver should, in Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 26 L. ed. 337. See Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 574, 49 L. ed. 1163, 1167, 25 Sup. Ct. Rep. 770. The effect of such a provision need not be considered in this case. In some instances, at least, it would be enforced outside of the state. Bernheimer v. Converse, 206 U. S. 516, 534, 51 L. ed. 1163, 1176, 27 Sup. Ct. Rep. 755; Converse v. Minnesota Thresher Mfg. Co. 212 U. S. 567, 53 L. ed. 654, 29 Sup. Ct. Rep. 691; Converse v. Hamilton, 224 U. S. 243, 257, 56 L. ed. 749, 754, 32 Sup. Ct. Rep. 415. See Chipman v. Manufacturers' Nat. Bank, 156 Mass. 147-149, 30 N. E. 610; Haskell v. Merrill, 179 Mass. 120, 124, 60 N. E. 485. The statute of West Virginia, on the other hand, provides for the appointment of receivers to "take charge of and administer" the assets, and for the bringing of suit and the conveyance of property in the corporate name thereafter. Code, chap. 53, §§ 58, 59. It seems, to be sure, that in September and October the local West Virginia court purported to authorize and confirm a deed by a special commissioner to the receiver, but if the statute did not itself constitute the receiver the universal successor of the corporation (see Chipman v. 404]Manufacturers' *Nat. Bank, 156 *Mass.* 147-149, 30 N. E. 610), it may be doubted whether the deed had extraterritorial effect. See Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853. The argument is strong to support the judgment of the court below that no title passed.

Right or wrong, that was the decision of the circuit court, and it is obvious that a dismissal of the petition on that ground does not warrant a direct appeal, whether the court had jurisdiction or not. The court had jurisdiction over the intervention and decided against it on the merits. That question logically and chronologically preceded any question of jurisdiction in the principal case. The question of jurisdiction in the principal case was not yet open, as there had been no final decree therein, and as, by virtue of the decision that the intervener had no standing, the question could not be raised by him. The form of the decree really made it impossible for this appeal to be entertained, but we have discussed the case and stated the facts more at length in order to explain that the judge was right in his certificate, and could not have acted otherwise upon his view of the West Virginia law.

Appeal dismissed.

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D. G. WILLIAMS, Plff. in Err.,
v.
CITY OF TALLADEGA.

(See S. C. Reporter's ed. 404-419.)

**Taxes — Federal agency — franchise tax on telegraph company.**

1. The acceptance by a telegraph company of the provisions of the act of July, 24, 1866 (14 Stat. at L. 221, chap. 230, U. S. Rev. Stat. §§ 5263-5268, U. S. Comp. Stat. 1901, pp. 3580, 3581), giving the right to construct, maintain, and operate lines over the military and post roads of the United States, does not give it a Federal franchise, or make it an instrumentality of the government, so as to prevent a state or any of its municipalities from imposing a license tax upon the telegraph company's right to do local business within the state. [For other cases, see Taxes, 156-162, in Digest Sup. Ct. 1908.]

**Commerce — state regulation — franchise tax on telegraph company.**

2. A municipal license tax on the right of an interstate telegraph company to do local

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NOTE.—Taxation of corporate franchises in the United States—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

business within the state cannot be deemed to impose an unconstitutional burden upon its interstate business because a test for eleven months showed that the company did its intrastate business at that point at a net loss of 86 cents.

[For other cases see Commerce, 278–287, in Digest Sup. Ct. 1908.]

**Taxes — franchise of telegraph company —official telegrams.**

3. A telegraph company which has accepted the terms of the act of July 24, 1866, giving it the right to construct, maintain, and operate lines over the military and post roads of the United States, cannot be subjected to a municipal license tax imposed under state authority upon the doing of local business within the state, including the transmission of messages for the Federal government.

[For other cases, see Taxes, 156–164, in Digest Sup. Ct. 1908.]

**Statutes — effect of partial invalidity.**

4. The failure to make an exception in favor of the transmission of messages for the Federal government in a municipal ordinance imposing a license fee upon the doing of local business within the state by a telegraph company which has accepted the provisions of the act of July 24, 1866, renders the whole tax invalid.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[No. 44.]

Argued November 7 and 8, 1912. Decided December 23, 1912.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the City Court of Talladega, in that state, convicting an agent of a telegraph company of doing business without a license. Reversed and remanded for further proceedings.

See same case below, 164 Ala. 633, 51 So. 330.

The facts are stated in the opinion.

Mr. William M. Williams argued the cause, and, with Messrs. George H. Fearons, F. N. Whitney, and Ray Rushton, filed a brief for plaintiff in error:

The franchise of the company to do business in the city of Talladega is derived solely from the Federal Congress, and is therefore not taxable by the city for purposes of revenue.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 464, 26 L. ed. 1067, 1068.

Congress has the power to grant a franchise to do an intrastate, as well as an interstate, telegraph business on the post roads of the United States.

Leloup v. Mobile, 127 U. S. 640, 646, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; San Francisco v. Western U. Teleg. Co. 96 Cal. 140, 17 L.R.A. 301, 31 Pac. 10.

Congress has the power to grant a franchise to be used as a necessary and proper instrumentality of the government, and when so used a general business may be done under that franchise, free from license imposed by states and municipalities.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

By the act of 1866 Congress intended to, and did, grant to telegraph companies accepting the terms of the act the privilege to do not only interstate, but also an intrastate, business.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

Since Congress by the act of 1866 conferred upon the Western Union Telegraph Company the right to do an intrastate telegraph business along the post roads, the city of Talladega cannot impose a license tax thereon.

M'Culloch v. Maryland, 4 Wheat, 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 740, 6 L. ed. 204; Western U. Teleg. Co. v. Visalia, 149 Cal. 744, 87 Pac. 1023; Western U. Teleg. Co. v. Lakin, 53 Wash. 326, 101 Pac. 1094; Western U. Teleg. Co. v. Wright, 107 C. C. A. 356, 185 Fed. 250; Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306; Moran v. New Orleans, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; California v. Central P. R. Co. 127 U. S. 1, 45, 32 L. ed. 150, 159, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067.

The ordinance is in contravention of the laws of the United States in that it fails to exclude messages sent on government business within the state.

Charleston v. Postal Teleg. Cable Co. — S. C. —, 3 Am. Elec. Cas. 56; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

The ordinance is invalid for the reason that the license imposed is for revenue, and not for police regulation or inspection.

Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Ottumwa v. Zekind, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. Rep. 451, 64 N. W. 646; Chaddock v. Day, 75 Mich. 527, 4 L.R.A. 809, 13 Am. St. Rep. 472, 42 N. W. 977; Austin v. Murray, 16 Pick 126; Sunset

Teleph. & Teleg. Co. v. Medford, 115 Fed. 292.

When an ordinance imposes a license that is unreasonable in amount the ordinance is for that reason void.

Ex parte Byrd, 84 Ala. 17, 20, 5 Am. St. Rep. 328, 4 So. 397; Hendrick v. State, 142 Ala. 43, 46, 39 So. 203; Marion v. Chandler, 6 Ala. 899, 901; Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642, 645; Postal Teleg. Cable Co. v. New Hope, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204; Ottumwa v. Zekind, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. Rep. 450, 64 N. W. 646; Simrall v. Covington, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 400, 14 S. W. 369; Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137, 138, 49 N. W. 633; Chaddock v. Day, 85 Mich. 527, 4 L.R.A. 809, 13 Am. St. Rep. 472, 42 N. W. 977; St. Paul v. Laidler, 2 Minn. 190, Gil. 159, 72 Am. Dec. 94.

Mr. **Rush Taggart** also argued the cause, and, with Mr. John F. Dillon, filed a brief for plaintiff in error:

The construction of the act of Congress of July 24, 1866, relied upon by plaintiff in error, is that it granted to the telegraph company accepting its provisions the right to go into any state, and, as an agency of the government, to construct, operate, and maintain telegraph lines along, over, and upon the post roads, and over, under, or across the navigable waters of the United States.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 557, 9 L. ed. 773, 828; United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 980, 14 Sup. Ct. Rep. 11; Brown v. Maryland, 12 Wheat. 436, 6 L. ed. 685; California v. Pacific R. Co. 127 U. S. 1, 35, 32 L. ed. 150, 155, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

The property of a corporation of the United States may be taxed by a state, but not through its franchise.

Central P. R. Co. v. California, 162 U. S. 92, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; Carthage v. First Nat. Bank, 71 Mo. 508, 36 Am. Rep. 494; National Bank v. Chattanooga, 8 Heisk. 814.

What the city is attempting to do under this ordinance is in no respect to be distinguished in principle from what the state of Massachusetts was undertaking to do in the case of Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

The ordinance was passed clearly upon the theory that the state, or the municipality as its agent, had full power to exclude the telegraph company from doing business as described in the ordinance, "to and from the city to and from points in the state of Alabama for hire or reward." The state has no such right.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232.

The ordinance cannot be sustained as an exercise of the police power to reimburse the city for the expense incurred in the inspection and protection of its citizens against injury, within the doctrine of the cases of Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204, and Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817, or Postal Teleg. Cable v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208, because the uncontradicted evidence shows that no expense whatever was incurred in the way of police inspection or supervision.

There is no exclusion, from the ordinance, of the right to do government business within the state, and the right to transact such business is likewise clearly within the prohibitions of the ordinance until the telegraph company has paid the amount demanded.

Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Neil v. Ohio, 3 How. 720, 11 L. ed. 800.

Mr. **J. K. Dixon** argued the cause and filed a brief for defendant in error:

Notwithstanding the Western Union Telegraph Company has accepted the conditions of the act of Congress of July 24, 1866, entitled "An act to Aid in the Construction of Telegraph Lines, and to Secure to the Government of the United States the Use of the Same for Postal, Military, and Other Purposes," an ordinance is valid imposing a license fee on such company for business done exclusively within the state.

Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 9 Sup. Ct. Rep. 6; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; 37 Cyc. 1622–1625; Moore v. Eufaula, 97 Ala. 670, 11 So. 921; Williams v. Talladega, 164 Ala. 633, 51 So. 330; West-

ern U. Teleg. Co. v. Fremont, 39 Neb. 692, 26 L.R.A. 698, 58 N. W. 415.

This ordinance is not invalid because of the fact that governmental messages are not excluded from it.

Moore v. Eufaula, 97 Ala. 670, 11 So. 921.

There is nothing in the contention that the ordinance was confiscatory, and therefore void.

Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692-699, 38 L. ed. 871-875, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Troy v. Western U. Teleg. Co. 164 Ala. 482, 27 L.R.A.(N.S.) 627, 51 So. 523; Williams v. Talladega, 164 Ala. 633, 51 So. 330; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Nashville, C. & St. L. R. Co. v. Attalla, 118 Ala. 362, 24 So. 450.

Especially is this true when this feature of it has been passed on by the state court, and upheld upon an appeal from the court that tried the same, without a jury, upon findings on the facts,—under the decisions of Alabama to be given the same weight as if decided by a jury.

Wright v. State, 129 Ala. 123, 29 So. 864; Quillman v. Gurley, 85 Ala. 594, 5 So. 345.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to review the judgment of the supreme court of the state of Alabama, affirming the judgment of the city court of Talladega. 164 Ala. 633, 51 So. 330.

D. G. Williams, the plaintiff in error, was convicted of doing business in the city of Talladega, as agent of the Western Union Telegraph Company, from October 1, 1908, to December 31, 1908, without taking out and paying for a license, in violation of an ordinance of the city. The ordinance contained a schedule of licenses for divers businesses, vocations, occupations, and professions carried on in the city, among others, the following:

"158. Telegraph company.—Each person, firm, or corporation commercially engaged in business sending messages to and from the city to and from points in the state of Alabama for hire or reward, $100."

Section 2 of the ordinance declared that the license was exacted in the exercise of the police power of the city, as well as for the purpose of raising revenue for the city The 4th section provided that any person, firm, or corporation who engaged in any trade, business, or profession for which a license was required, without first having obtained such license, should be guilty of an offense, and upon conviction should be fined not less than $1 and not more than $100, and that each day should constitute a separate offense.

The record discloses that the corporation was organized *under the laws of the[412 state of New York, and had accepted the provisions of the act of Congress of July 24, 1866 [14 Stat. at L. 221, chap. 230] (Rev. Stat. §§ 5263-5268, U. S. Comp. Stat. 1901, pp. 3580, 3581), and for several years theretofore, and during the years 1907 and 1908, had had an office in the city of Talladega, and was engaged in the business of transmitting messages between private parties and between the departments and agencies of the United States government from Talladega to other points in the state of Alabama, and also from other points in the state of Alabama to Talladega; that during the months of October, November, and December, 1908, Williams was employed by the Western Union Telegraph Company as manager of its office at Talladega; that a license fee of $25 was demanded of him for the quarter ending December 31, 1908, which was refused, and that he was fined $25 and costs, and in the event of his failure to pay the fine and costs he was sentenced to labor on the streets for fifty days. It also appears that the Western Union Telegraph Company pays taxes on its property in the state. In addition to the agreed facts, from which the above statement is taken, it is shown by the testimony of the defendant that the lines of the Western Union Telegraph Company enter and leave the city over the right of way of the Southern Railroad and the Louisville & Nashville Railroad, both of which are public railroads, and that within the city of Talladega the company has lines which leave the right of way of the railroad companies and proceed along public streets to the office of the company; and also that government messages were relayed daily at the Talladega office; that it received messages between the different departments of the government of the United States at this office from points within the state; and that government messages were given a preference and were sent at reduced rates. From the testimony, the supreme court of Alabama found that for the year 1908, not including the month of January, the *company[413 did its intrastate business at a net loss of 86 cents.

This case differs from some cases which have been in this court, involving the right to tax the Western Union Telegraph Company, in that it places emphasis upon the alleged immunity from taxation of the class herein involved, because, it is contended, by the act of 1866, Congress, by virtue of the authority given it to establish post roads, conferred Federal franchises

upon the company, and made the Western Union Telegraph Company an instrumentality of the Federal government, endowed with franchises to construct, maintain, and operate telegraph lines on the post roads of the United States, with the duty in the operation of those lines not only to serve the government of the United States, but also to serve the public which might wish to transact business over its lines. This being so, it is now insisted that the attempt to impose a license tax upon the company, either by the state of Alabama or any of its municipalities, is an attempt to impose a tax on the franchises so created by the Federal government.

The question made upon this point was considered in Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094. In that case the Postal Telegraph Cable Company had accepted the provisions of the act of 1866, and the state statute imposed a license of $500 upon the telegraph company for business done exclusively within the city of Charleston, not including any business done to or from points without the state, and not including any business done by the officers of the United States. It was contended for the telegraph company that the license required by the ordinance was a tax upon it for the privilege of exercising its franchise within the city of Charleston; that the telegraph company having constructed its lines along post roads in the city of Charleston and elsewhere, no state or municipal authority 414]could collect a license fee *from it for the privilege of conducting its business, "*thus restraining the powers possessed by it under its franchises and under the acts of Congress;*" and furthermore, that the ordinance in question was in interference with interstate commerce and therefore void. It will thus be seen that in that case not only was the contention made as to the interstate commerce feature of the telegraph company's business, but it was specifically claimed that to exact such a license would restrain the powers possessed by it under the franchises created by the act of Congress. After reviewing a number of cases, Mr. Justice Shiras, who delivered the opinion of the court, said:

"It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866 (Rev. Stat. §§ 5263–5268), are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the state in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited."

In Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730, this court, again considering the act of 1866, quoting from the opinion of Mr. Justice Miller in Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, said, speaking by Mr. Justice McKenna:

"These propositions were laid down: That the company owed its existence as a corporation and its right to exercise the business of telegraphy to the laws of the state under which it was organized; that the privilege of running the lines of its wires over and along the military *and[415 post roads of the United States was granted by the act of Congress, but that the statute was merely permissive, and conferred no exemption from the ordinary burdens of taxation; that the state could not, by any specific statute, prevent a corporation from placing its lines along the post roads, or stop the use of them after they were so placed, but the corporation could be taxed in exchange for the protection it received from the state 'upon its real or personal property, as any other person would be.' And, describing the particular tax imposed it was said:

"'The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the state of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution.'"

In the latest utterance of this court upon the subject under consideration (Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449), Mr. Justice Holmes, delivering the opinion of the court said:

"The act of Congress of course conveyed no title, and did not attempt to found one by delegating the power to take by eminent domain. Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 574, 49 L. ed.

312, 324, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708. It has been held to prevent a state 416]from stopping the *operation of lines within the act by injunction for failure to pay taxes. Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961. But, except in this negative sense, the statute is only permissive, not a source of positive rights."

These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the state incorporating the company, and that this permissive grant did not prevent the state from taxing the real or personal property belonging to the company within its borders, or from imposing a license tax upon the right to do a local business within the state. Nor is there anything running counter to the former cases in the case of Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, wherein it was held that the attempt to levy a graded charter fee upon the entire capital stock of the Western Union Telegraph Company, a corporation of another state, engaged in commerce among the states, as a condition to the right to do local business within the state of Kansas, was void as an attempt, when the substance of things was reached, to tax the right of the company to do interstate business within the state, and as a tax upon property beyond the limits and jurisdiction of the state.

It is further contended that the tax is unreasonable and unjust because of its effect upon interstate business. The reasonableness of the ordinance, unless some Federal right set up and claimed is violated, is a matter for the state to determine. It is contended that the result of the tax upon the intrastate business conducted at a loss is to impose a burden upon the other business of the company, and is therefore void. 417]The supreme court of Alabama, *however, reached the conclusion that the attempted test for eleven months, showing a loss of 86 cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right.

It is further contended that this ordinance is void because it makes no exception as to the sending of government messages. In this respect it is suggested in the brief of the defendant in error that the ordinance may be construed as not to include business transacted by the company as an agency of the government, and as applying only to commercial business of a different character; but, in view of the construction which the supreme court of Alabama has placed upon it, we must consider the ordinance as construed by that court. Upon the authority of a previous case (Moore v. Eufaula, 97 Ala. 670, 11 So. 921), it held the ordinance valid, although it does not exclude messages sent for the government of the United States. In this connection it said:

"The fact that a part of the business done by the company consists in the sending of messages for the government does not affect the right of the state to impose a reasonable privilege tax, . . ."

We therefore have to consider whether a license tax by a state on the doing of business within the state, including the transmission of government messages, by a telegraph company which has accepted the terms in the act of 1866, can be lawfully imposed. By the act of 1866, government messages are given priority over all other business, and are transmitted at the rates annually fixed by the Postmaster General; and before the telegraph companies exercise any of the powers or privileges conferred by the law, they are required to file with the Postmaster *General their[418 written acceptance of the restrictions and obligations of the act (Rev. Stat. §§ 5266 and 5268, U. S. Comp. Stat. 1901, pp. 3580, 3581).

This court has had occasion to consider the effect of this legislation and the acceptance of its terms by the telegraph company, so far as the transmission of government telegrams and the transaction of government business is concerned. In the case of Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067, an ordinance was held void which required the company to pay a tax of 1 cent for all full rate messages sent, and ½ cent for every message less than full rate. This was in addition to taxes paid by the company on real and personal property in the state. The ordinance was held void as levying a tax upon interstate messages, and also void in so far as it undertook to tax the transaction of government

business. After declaring that as to such business, companies which had accepted the terms of the act became government agencies, this court, speaking by Mr. Chief Justice Waite, said:

"The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States."

And, after dealing with the interstate commerce feature of the law said:

"As to the government messages, it is a tax by the state on the means employed by the government of the United States to execute its constitutional powers, and there-
419]fore *void. It was so decided in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, and has never been doubted since."

The ordinance sustained in Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094, expressly excluded interstate and government messages.

Were it otherwise, an agency of the Federal government, in the execution of its sovereign power, would be at the mercy of the taxing power of the state. It is enough, in this connection, to refer to the cases of M'Culloch v. Maryland, supra; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766.

We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business,—communication between the officers and departments of the Federal government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole, and makes the tax unconstitutional and void. In Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, Mr. Justice Bradley, speaking for the court, said:

"It is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination." And see Western U. Teleg. Co. v. Alabama Bd. of Assessment, 132 U. S. 472, 477, 33 L. ed. 409, 410, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 179, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39.

For this reason we think the judgment of the Supreme Court of Alabama should be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

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## *EX PARTE IN THE MATTER OF [420
## THE UNITED STATES, Petitioner.

(See S. C. Reporter's ed. 420–425.)

**Courts — organization — expedition act — effect of Judicial Code.**

1. The abolition of the Federal circuit courts by the Judicial Code of March 3, 1911 (36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128), does not repeal by implication the provision of the act of February 11, 1903 (32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1911, p. 1383), for the organization of a circuit court of at least three circuit judges for the expedition of certain specified cases, in view of the express provision of § 291 of the Code, that "wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

[For other cases, see Courts, V. b, 1; Statutes, III. b, in Digest Sup. Ct. 1908.]

**Courts — organization — expedition act — hearing — enforcing mandate.**

2. A proceeding to enforce the mandate of the Federal Supreme Court directing the entry of a decree under which a combination of railroad terminal facilities, found to violate the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), shall be reorganized so as to act as the impartial agent of every railway line which must use such facilities, is within the intendment of the provisions of the act of February 11, 1903, for the expedition of the "hearing" of cases brought under the anti-trust act, by the organization of a circuit court of at least three circuit judges, where such mandate, notwithstanding its specific directions as to the

scope and character of the decree to be entered, affords an opportunity to the defendants to submit a plan, and gives to the United States an opportunity to be heard in opposition, leaving to the court a serious and important duty to be discharged in any event, and especially in case of controversy on the subject.

[For other cases, see Courts, V. b, 1; Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

[No. 10, Original.]

Submitted December 16, 1912. Decided January 6, 1913.

ON PETITION for a Writ of Prohibition to the District Judge of the United States for the Eastern District of Missouri raising the question of his power as a single judge to enter a decree pursuant to the mandate of the Supreme Court, which on appeal from the Circuit Court of the United States for the Eastern District of Missouri had reversed a decree dismissing a bill to enforce the provisions of the Sherman anti-trust act. Writ of prohibition to issue.

The facts are stated in the opinion.

Attorney General **Wickersham** and Mr. **Edward C. Crow** submitted the cause for petitioner:

Where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilable and inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, as far as the latter comes within its particular provisions.

1 Sutherland, Stat. Constr. 2d ed. § 274, p. 528.

When there are two or more provisions of statutes relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both.

Ibid.

A general statute without negative words will not repeal, by implication from their repugnancy, the provisions of a former one which is special, local, or particular, or which is limited in its application, unless there is something in the general law, or in the course of legislation upon its subject-matter, that makes it manifest that the legislature contemplated and intended a repeal.

1 Sutherland, Stat. Constr. 2d ed. § 274, pp. 526, 527.

The courts will not hold the policy of Congress to be changed by reason of the adoption of a general judicial code, unless the intention to change the policy and remove the provisions for expediting the hearing and decision of these cases is clearly expressed.

*Ex parte Crow Dog (Ex parte* Kang Gi Shun Ca) 109 U. S. 557, 27 L. ed. 1031, 3 Sup. Ct. Rep. 396; United States v. Nix, 189 U. S. 199, 47 L. ed. 775, 23 Sup. Ct. Rep. 495.

Before this court would be justified in holding that the general provisions of the Judicial Code removed the power of the four circuit judges to further hear this case, it must be shown to the court that Congress has clearly expressed its intention to remove the power to further hear the case from the said four circuit judges.

Ex parte Crow Dog (Ex parte Kang Gi Shun Ca) 109 U. S. 557, 27 L. ed. 1031, 3 Sup. Ct. Rep. 396; 1 Sutherland, Stat. Constr. 2d ed. § 274, pp. 526, 527; United States v. Nix, 189 U. S. 199, 47 L. ed. 775, 23 Sup. Ct. Rep. 495.

The change as to the circuit courts was merely a substitution of the district courts for the circuit courts.

United States v. Haynes, 29 Fed. 696.

In view of the saving clauses in § 299, it is entirely immaterial whether said act of February 11, 1903, was repealed, either in express terms or by implication, by the provisions of the Code; but as there is no direct repealing provision in said Code, and nothing in it inconsistent with said act, it remained in force notwithstanding it was not included therein.

1 Sutherland, Stat. Constr. 2d ed. § 272, p. 522; Great Northern R. Co. v. United States, 84 C. C. A. 93, 155 Fed. 945; Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 Sup. Ct. Rep. 143; Com. v. Grinstead, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471; Gibson v. Ackermann, 70 Ill. App. 399.

A statute is to be taken or construed as prospective, unless its language is inconsistent with that interpretation.

1 Sutherland, Stat. Constr. 2d ed. § 335, p. 641; McEwen v. Den, 24 How. 242, 16 L. ed. 672; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255.

Where it appears that the courts whose action is sought to be prohibited clearly had no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction, and has no other adequate remedy, is entitled to a writ of prohibition as of right.

Re Oklahoma, 220 U. S. 191, 208, 55 L. ed. 431, 435, 31 Sup. Ct. Rep. 426; Re Massachusetts, 197 U. S. 482, 488, 49 L. ed. 845, 848, 25 Sup. Ct. Rep. 512; Re Alix, 166 U. S. 136, 137, 41 L. ed. 948, 949, 17 Sup. Ct. Rep. 522; Re Rice, 155 U. S. 396, 402, 403, 39 L. ed. 198, 200, 201, 15 Sup. Ct. Rep. 149; Re Cooper, 143 U. S. 472, 495, 36 L. ed. 232, 239, 12 Sup. Ct. Rep. 453; Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602, 6 Sup. Ct. Rep. 576; Re Morrison, 147

U. S. 14, 36, 37 L. ed. 60, 68, 13 Sup. Ct. Rep. 246.

Mr. H. S. Priest submitted the cause for respondent.

421] *Mr. Chief Justice White delivered the opinion of the court:

The matter before us concerns the execution of the decree in United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507. That case, which involved violations of the Sherman anti-trust act [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], was commenced in the circuit court of the United States for the eastern district of Missouri, was there decided by four circuit judges in consequence of the filing by the Attorney General of the United States of the certificate provided for by the act of 1903, commonly known as the expedition act (chap. 544, 32 Stat. at L. 823, U. S. Comp. Stat. Supp. 1911, p. 1383). While the case was here pending, the Judicial Code of March 3, 1911 [36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128], was adopted, and hence our mandate was directed to the district court of the United States for the eastern district of Missouri, the successor of the circuit court.

Upon the filing of the mandate in that court, the judge of the district court being disqualified, District Judge Trieber, of the district court of Arkansas, was assigned to sit in the cause. Disagreement between the parties having arisen as to what plan of reorganization should be adopted to carry out the mandate of this court, and the court below having expressed its intention to adopt by a final decree a plan to which the government did not assent, objection was made by the United States to proceeding further, upon the ground thus stated by the court below in its opinion:

"As a certificate under the expedition act was filed when the action was originally instituted, the decree on the mandate could not be entered by a single judge, but only by at least three circuit judges, in conformity with the expedition act above referred to." [197 Fed. 447.]

The suggestion having been overruled by a formal order, and fruitless effort hav-422]ing been made to induce action *by the senior circuit judge, who was also the senior circuit judge who had participated in the original decision of the cause, the interposition of this court by the proceeding before us was invoked. The judge below, evidently only desirous of being informed as to his duty, after leave to file the application for prohibition was here granted, has submitted the issue on the opinion of the court *below and upon printed* argument for both parties, as if on a return to a rule to show cause why the writ should not issue.

In refusing to apply the expedition act the court below, "assuming, without deciding, that the Judicial Code does not repeal the expedition act," based its refusal upon the ground that the proceeding to enforce the mandate of this court was not within the intendment of the expedition act, because not a matter requiring the hearing contemplated by that act. This view was maintained by conclusions as to the general nature of the duty to give effect to a decree already rendered, and by considerations based upon the opinion that the decree of this court was so specific as to leave no room for discussion, and therefore to afford no occasion for organizing a tribunal constituted in accordance with the requirements of the expedition act. In the printed argument, however, upon which the matter has been here submitted, the action of the court is sought to be sustained upon a much broader ground; *viz.*, that as, by the Judicial Code, the circuit courts were abolished, it has become no longer possible to organize a court in accordance with the expedition act, because that act by implication has been repealed by the Judicial Code. Thus, after commenting upon the provisions of the Judicial Code, it is said:

"The Judicial Code (§ 1, chap. 1) provides for a district judge for each district court.

"There is no provision for the exercise of any judicial authority by any circuit judge, except by special appointment, pursuant to the provision of § 18, chap. 1, of *the Code. He then derives his power[423 from such appointment, and from no other source. As circuit judges they have no authority in the enforcement of the jurisdiction of the district courts.

"After devolving upon the district courts the jurisdiction formerly possessed by the abolished circuit courts, the code (chap. 6) creates a circuit court of appeals, and provides (§ 117):

" 'There shall be in each circuit a court of appeals which shall consist of three judges, . . . which shall be a court of record with appellate jurisdiction as hereinafter limited and established.'

"It must be conceded, in view of this legislation, if this suit was now instituted, it could only be heard by a district judge unless some circuit judge should be appointed under the provisions of § 18, chap. 1, to discharge the functions of a district judge, and the case be brought before him in that capacity."

But the contention is faulty, because although the premise upon which it rests be

conceded, the deduction drawn from it is unwarranted. It is of course undoubted that chapter 13 of the Judicial Code, while not interfering with the tenure of office of the circuit judges, abolished the circuit courts. It is also undoubted that by that act the district courts provided for were made the successors of both the circuit and districts courts which had theretofore existed, and were in a general sense endowed with the jurisdiction and power theretofore vested in such prior courts. It is moreover, beyond question, that the statute, while contemplating as a general rule the holding of district courts by district judges, and as a general rule for holding circuit courts of appeal by circuit judges, nevertheless expressly directs when the occasion requires (§ 18) the assignment by the senior judge, or the circuit justice, or the chief justice, of a circuit judge to hold a district court, and endows a judge so 424]assigned with all *the authority of a district judge (§ 19), giving power in case of such designation to hold separately at the same time a district court in such district, and to discharge all the judicial duties of the district judge therein. (§ 14.) The statute therefore clearly gives to the circuit judges the rights and powers of judges of the new district courts, and calls such powers into play when assigned according to law.

The question, therefore, reduces itself to this: Were the special provisions of the expedition act, requiring in a particular class of cases the organization of a court constituted in a particular manner, repealed by the Judicial Code? This is the only question, because if that act was not repealed by the Code, then its provisions amount to an assignment by operation of law of the circuit judges to sit as judges of the district court for the purpose of discharging the duties imposed by the act. When the issue is thus narrowed, solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible. Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 497, 50 L. ed. 281, 286, 26 Sup. Ct. Rep. 133. That the new district court created by the judicial act was vested with the duty of hearing and disposing of the cases provided for in the expedition act as the successor of the formerly existing circuit court, as we have already stated, is undoubted. The mere fact that the expedition act in terms refers to the organization of a circuit court would be, as a general rule, under the circumstances, of no importance, and becomes absolutely without significance, in view of the express provision of chapter 13, § 291, of the judicial act, saying: "Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, *upon the[425 taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

The expedition act being therefore still in force, and its provisions being applicable to the district courts which the Judicial Code created, we think the court below erred in concluding that the United States was not entitled to a district court organized in the mode pointed out in the expedition act, unless it be, as stated by the lower court in its opinion, the subject in hand was of such a character as not to be within the scope of the expedition act. Coming to consider that question without going into any elaboration, we are of opinion that error was committed in so holding. While it is true that the mandate of this court gave certain specific directions as to the scope and character of the decree to be entered, it afforded an opportunity to the defendants to submit a plan in order to carry out the decree, and gave to the United States an opportunity to be heard in opposition to that plan, and left to the court a serious and important duty to be discharged in any event, and especially in case of controversy on the subject. These considerations, we think, brought the subject within the scope of the expedition act, and justified the request of the United States that the case be considered and a decree entered by a court composed as provided in that act.

Writ of prohibition to issue.

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*CHICAGO, ROCK ISLAND, & PA-[426 CIFIC RAILWAY COMPANY, Plff. in Err.,

v.

HARDWICK FARMERS ELEVATOR COMPANY.

(See S. C. Reporter's ed. 426-435.)

**Commerce — state and Federal regulations — congressional inaction.**

1. Any power which a state has over in-

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NOTE.—On state regulations requiring carrier to furnish cars to shipper as interference with interstate commerce—see notes to St. Louis Southwestern R. Co. v. Arkansas, 54 L. ed. U. S. 699; Southern R. Co. v. Com. 17 L.R.A.(N.S.) 364; and Chicago,

terstate commerce because of congressional inaction ceases to exist from the moment that Congress exerts its paramount authority over the subject.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

**Commerce — conflicting state and Federal regulations — state demurrage law.**

2. Congress has so taken possession of the subject of the delivery, when called for, of railroad cars to be used in interstate traffic, by the provisions of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), imposing a specific duty upon railway carriers to furnish cars for such traffic upon reasonable request, and giving remedies for violations of that duty, as to invalidate, when applied to cars demanded for interstate transportation, the provisions of Minn. Laws 1907, chap. 23, requiring railway companies to furnish freight cars on demand, under penalty for each day's delay not due to certain excepted causes.

[For other cases, see Commerce, I. c; III. j, in Digest Sup. Ct. 1908.]

[No. 25.]

Argued November 5, 1912. Decided January 6, 1913.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Rock County in that state imposing a statutory penalty upon a carrier for its failure to furnish freight cars on demand to be used in interstate traffic. Reversed and remanded for further proceedings.

See same case below, 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088.

Statement by Mr. Chief Justice White:

A statute passed by the legislature of the state of Minnesota, and known as the Minnesota reciprocal demurrage law, became effective on July 1, 1907. Laws of Minnesota, 1907, chap. 23.

The law, among other things, made it the duty of a railway company subject to its provisions, on demand by a shipper, to furnish cars for transportation of freight, at terminal points on its line of road in Minnesota, within forty-eight hours, and at intermediate points within seventy-two hours, after such demand, Sundays and legal holidays excepted. For each day's delay in furnishing cars when so demanded—except when prevented by strikes, public calamities, accident, or any cause not within the power of the railroad to prevent—the defaulting company was made liable to pay to the shipper $1 *per car, together[427 with the damages sustained and a reasonable attorney's fee.

Alleging that, in respect of delays in the deliveries to it of fourteen freight cars, pursuant to eight applications made for such cars between September 19, 1907, and October 22, 1907, the 1st section of the act in question had been violated, the Hardwick Farmers Elevator Company, defendant in error here, commenced this action in a district court of Minnesota to recover from the railway company, plaintiff in error here, penalties aggregating $218 and an attorney's fee of $50, together with the costs and disbursements of the action. As a defense, the railway company set up that the cars in question were demanded for the purpose of interstate traffic, and that the delays complained of were occasioned solely by an unusual and unprecedented congestion of traffic and a consequent scarcity of cars, arising from their use in moving traffic and commerce between the states, and that such delays therefore arose from causes not within the control and power of the company. It was also claimed that if the statute in question embraced interstate commerce, and was applied to the requisitions for cars referred to in the complaint, it would be repugnant to the commerce clause and to the due process and equal protection clauses of the Constitution of the United States. The action was tried to a jury. The trial judge refused to give instructions asked for by the railway company, embodying the constitutional objections made in its answer. A verdict was returned for the plaintiff for the amount claimed, including an attorney's fee; and a judgment entered on the verdict was affirmed by the supreme court of the state. 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088.

Mr. McNeil V. Seymour argued the cause, and, with Messrs. Edward C. Stringer and Edward S. Stringer, filed a brief for plaintiff in error:

The Minnesota reciprocal demurrage law is in violation of the laws of Congress and of the Constitution of the United States,—especially the so-called "commerce clause."

Wilson Produce Co. v. Pennsylvania R. Co. 14 Inters. Com. Rep. 170; St. Louis, I. M. & S. R. Co. v. Hampton, 162 Fed. 693; Oliver v. Chicago, R. I. & P. R. Co. 89 Ark. 466, 117 S. W. 238; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; St. Louis & S. F. R. Co. v. State, 26 Okla. 62, 30 L.R.A.(N.S.) 137, 107 Pac. 929; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup.

R. I. & P. R. Co. v. Beatty, 42 L.R.A.(N.S.) 984.

As to duty of railroad company to furnish cars to shippers—see note to Houston, E. & W. T. R. Co. v. Campbell, 43 L.R.A. 225.

Ct. Rep. 802; Atlantic Coast Line R. Co. v. Com. 102 Va. 599, 46 S. E. 911; Southern R. Co. v. Com. 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; Pennsylvania R. Co. v. M. O. Coggins Co. 38 Pa. Super. Ct. 129; Southern P. Co. v. Campbell, 189 Fed. 696; Bethlehem Steel Co. v. United States, 110 C. C. A. 513, 188 Fed. 879; People v. Central R. Co. 18 Inters. Com. Rep. 33; Michie v. New York, N. H. & H. R. Co. 151 Fed. 694; United States v. Standard Oil Co. 148 Fed. 719; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Union P. R. Co. v. Updike Grain Co. 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169.

Mr. C. H. Christopherson argued the cause and filed a brief for defendant in error:

The validity of such a statute as the one here involved is sustained by text-book writers, railroad commissioners, the Interstate Commerce Commission, legislatures, attorney generals, and courts.

Watkins, Shippers & Carriers, § 306; Calvert, Regulation of Commerce, pp. 4 et seq.; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Southern R. Co. v. Com. 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; Oliver v. Chicago, R. I. & P. R. Co. 89 Ark. 466, 117 S. W. 238; Patterson v. Missouri P. R. Co. 77 Kan. 236, 15 L.R.A.(N.S.) 733, 94 Pac. 138; Southern R. Co. v. Atlanta Sand & Supply Co. 135 Ga. 35, 68 S. E. 807; St. Louis Southwestern R. Co. v. State, 85 Ark. 311, 122 Am. St. Rep. 33, 107 S. W. 1180; Martin v. Oregon, R. & Nav. Co. 58 Or. 198, 113 Pac. 16; Chicago, R. I. & P. R. Co. v. Beatty, — Okla. —, 42 L.R.A.(N.S.) 984, 118 Pac. 367.

Congress has not legislated on the subject, nor has the Interstate Commerce Commission been vested with power in the premises.

Mason v. Chicago, R. I. & P. R. Co. 12 Inters. Com. Rep. 61; Richmond Elevator Co. v. Pere Marquette R. Co. 10 Inters. Com. Rep. 629.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

The argument at bar has been primarily concerned with the question of the validity of the Minnesota statute, considered as having been enacted in the exercise of a power assumed to exist to legislate reasonably in the absence of action by Congress on the subject of the delivery when called for, of cars to be used in interstate traffic. Thus, counsel for the defendant in error urges the correctness of the action of the supreme court of Minnesota in sustaining the statute, upon the hypothesis that Congress had not legislated on the subject, and that the act was a reasonable exertion of the power of the state. On the contrary, on behalf of the railroad company it is insisted that even upon the assumption that the state had power to deal with the subject for which the statute provides, in the absence of legislation by Congress, the enactment is nevertheless void, since it but expresses a policy which by penalization, fines, and forfeitures will substitute for a free and unrestrained flow of commerce a service favoring a particular locality and shippers within the confines of one state, to the disadvantage of others. We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the act of June 29, 1906, known as the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288], amendatory of the act to regulate commerce, Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act.

In the original act [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284] to regulate commerce the term "transportation" was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn act it was declared

that the term "transportation" (italics ours)—

434] *"shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; *and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor*, and to establish through routes and just and reasonable rates applicable thereto." [§ 1.]

The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement § 1 of the original act, imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections "shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper." Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by § 8 it is provided "that in case any common carrier subject to the provisions of this act . . . shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the 435]costs in the case." *Further, by § 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages; and by § 10 it is made a criminal offense for an employee of a corporation carrier to "wilfully omit or fail to do any act, matter, or thing in this act required to be done."

As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within *that class of powers* concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the state impotent to deal with a subject over which it had no inherent, but only permissive, power. Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140.

The judgment of the Supreme Court of Minnesota must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

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*WILLIAM G. HANNUM, Appt., [436

v.

UNITED STATES.

(See S. C. Reporter's ed. 436-439.)

**Army and Navy — pay of naval officer — retirement.**

The assimilative provisions of the Navy personnel act of March 3, 1899, § 13 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), equalizing the pay and allowances of officers of the line of the Navy and those of officers of corresponding rank in the Army, cannot be held to repeal the provisions of U. S. Rev. Stat. §§ 1454, 1593, (U. S. Comp. Stat. 1901, pp. 1023, 1087), under which naval officers retired on furlough pay for incapacity not of service origin shall receive only one half the pay to which they would have been entitled if on leave of absence on the active list, in view of §§ 8, 9, 11, of the Navy personnel act, retaining and adding to the standards of retirement fixed for naval officers, which differ from those fixed for the Army.

[For other cases, see Army and Navy, VI. b, 1, in Digest Sup. Ct. 1908.]

[No. 30.]

Argued December 9, 1912. Decided January 6, 1913.

APPEAL from the Court of Claims to review a judgment granting a part only of the relief claimed by the petition of a naval officer retired on furlough pay for incapacity not of service origin for additional pay. Affirmed.

See same case below, 43 Ct. Cl. 320.

The facts are stated in the opinion.

Mr. George A. King argued the cause and filed a brief for appellant:

The court of claims puts its decision adverse to this claim upon the ground that it is only the pay of officers on the active list of the Navy that is assimilated to that of officers of the Army, and that officers on the retired list are not affected. This holding is at war with the uniform current of decision in this court as well as the court of claims, and with the practice of the executive departments under this very act.

United States v. Tyler, 105 U. S. 244, 246, 26 L. ed. 985, 986; Re Tyler, 18 Ct. Cl. 25; Franklin v. United States, 29 Ct. Cl. 6; 5 Comp. Dec. 811, May 12, 1899; 6 Comp. Dec. 585, 669, Jan. 6, 1900; 13 Comp. Dec. 630, 631, March 20, 1907; 9 Comp. Dec. 681; Welle's Case, 15 Ops. Atty. Gen. 444; De Lancy's Case, 11 Comp. Dec. 576; Delehanty's Case, 6 Comp. Dec. 557; United States v. Crosley, 196 U. S. 327, 49 L. ed. 497, 25 Sup. Ct. Rep. 261; United States v. Miller, 208 U. S. 32, 52 L. ed. 376, 28 Sup. Ct. Rep. 199; United States v. Farenholt, 206 U. S. 226, 51 L. ed. 1036, 27 Sup. Ct. Rep. 629.

Mr. Frederick De Courcy Faust argued the cause, and, with Assistant Attorney General John Q. Thompson, filed a brief for appellee:

The special provisions of the prior law contained in U. S. Rev. Stat. §§ 1454, 1593, 1594, U. S. Comp. Stat. 1901, pp. 1023, 1087, are not inconsistent with, and therefore repealed by, the general terms of § 13 of the Navy personnel act.

Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; Elmer v. United States, 45 Ct. Cl. 90; Denig v. United States, 37 Ct. Cl. 383; Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133.

It is true that in several decisions rendered shortly after the passage of the personnel act the Comptroller of the Treasury held that, under the personnel act, time on the retired list was to be counted in computing the pay of the retired officers of the Navy. These decisions were, however, in effect overruled by the court of claims in the case of Faust v. United States, *42 Ct. Cl. 94; and also* by the Comptroller *in 11 Comp. Dec. 419.*

Mr. Chief Justice White delivered the opinion of the court:

By an order dated October 22, 1900, the President approved the finding of a retiring board, and directed "that Lieutenant William G. Hannum, U. S. Navy . . . be retired from active service and placed on the retired list on furlough pay, in conformity with the provisions of § 1454 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1023)." Thereafter Lieutenant *Han-[437 num was paid the compensation fixed by § 1593 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1087) *viz.*: "One half of the pay to which they" (officers placed on the retired list on furlough pay) "would have been entitled if on leave of absence on the active list."

Upon the contention that, in virtue of the opening clause of § 13 of the personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), providing that officers of the line of the Navy shall receive the same pay and allowances as officers of corresponding rank in the Army, this action was brought to recover the difference between the sums actually paid to Lieutenant Hannum and the pay fixed by Rev. Stat. § 1274 (U. S. Comp. Stat. 1901, p. 905) of an officer of corresponding rank in the Army when placed on the retired list; *viz.*, 75 per cent of the pay of the rank upon which retired.

The court of claims held that the assimilating clause of § 13 of the personnel act applied only to officers on the active list of the Navy, and did not repeal the prior law respecting the pay of that particular class of officers compulsorily retired under § 1454, Revised Statutes, for incapacity not resulting from any incident of the service. In other words, the court decided that growing out of the differences between the distinct classifications made for the retirement of Navy officers, and the pay allowed to such retired officers depending upon the causes for retirement, and the differences in this respect existing between statutory regulations as to the retirement of Army officers, that the provision of the personnel act had not repealed the specific provisions as to the retirement of Navy officers and the retired pay to which such officers were entitled. Applying the construction which it thus gave to the statute, the court denied the relief claimed, except for the sum of $31.42, balance of pay due for a short period of active service after retirement, and the government has acquiesced in such allowance. 43 Ct. Cl. 320.

We think the court was right in the view which it took *of the so-called[438 personnel act. The provisions of §§ 8, 9, and 11 of the act not only created a new class of

retired officers of the Navy, but § 9 contains an express reference to "the provisions of law now in force," relating to retirements in the Navy. As said by counsel for the government:

"By those laws the pay of all officers retired for age, or incapacity resulting from long and faithful service, or wounds or injuries received in the line of duty, or from sickness and exposure therein, receive 75 per centum of the sea pay of their rank at the time of retirement, while all other officers on the retired list receive one half the sea pay of the rank held by them at the time of retirement (Rev. Stat. § 1588, U. S. Comp. Stat. 1901, p. 1086), except officers retired on furlough pay for incapacity not of service origin, who receive only one half the pay to which they would have been entitled if on leave of absence on the active list (§§ 1454 and 1593)."

It thus being plain that the attention of Congress, when it adopted the personnel act, was specially drawn to the existing statutory regulations relating to the retirement of Navy officers and to the causes for which retirement should be allowed, and the amount of the retired pay of such officers, and that provision was made as to these subjects varying radically from the system of Army retirement, by providing different proportions of pay for different causes of Navy retirement, it is not open, in reason, to hold that Congress intended by the provision in question of the personnel act to destroy the legislation which it sedulously incorporated and made a part of that act. In other words, as the personnel act itself emphasizes the plain intention of Congress not only not to destroy the standards of retirement fixed for Navy officers, but, on the contrary, to retain and add to those standards, as distinguished from the standards of retirement fixed for the Army, we think the claim here made was properly 439]disallowed. *Nothing could more aptly illustrate the necessity for this conclusion than by directing attention to the result which would inevitably follow from taking another view. Thus, it may not be doubted that the express object of the personnel act was to give a right of retirement for long and distinguished services, for wounds contracted in the course of the service, as distinguished from the ordinary right to retire. And yet, if the construction of the statute now urged were to be upheld, it would follow that an assimilation was made by the personnel act not only between the pay of officers on the active list of the Navy and those of the Army, but also between officers of the Navy themselves, by putting on a parity as to retirement and retired pay all officers of the Navy, *irrespective of the meritorious or nonmeritorious character of their services*, and despite the clear distinction in that regard expressly provided for by the terms of the personnel act.

Affirmed.

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ELLA ANDERSON, Administratrix, etc., Plff. in Err.,
v.
J. PAUL SMITH.

(See S. C. Reporter's ed. 439-441.)

**Trial — directed verdict — evidence.**

The court properly directs a verdict for defendant in an action to recover damages from an employer for the death of an employee alleged to have been caused by the employer's failure to exercise reasonable care to provide proper appliances or a safe place for the work, where, adopting the view of the evidence most favorable to the plaintiff, it affords not even a shadow of ground for concluding that the injury suffered was caused by the employer's negligence in these respects.

[For other cases, see Trial, VI. d, 3, e, in Digest Sup. Ct. 1908.]

[No. 91.]

Argued December 17, 1912. Decided January 6, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District entered upon a verdict directed in favor of the defendant in a negligence action. Affirmed.

See same case below, 35 App. D. C. 93.

Mr. Leonard J. Mather argued the cause, and, with Mr. John Doyle Carmody, filed a brief for plaintiff in error.

Mr. H. Prescott Gatley argued the cause, and, with Messrs. Samuel Maddox and Barry Mohun, filed a brief for defendant in error.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

Charles P. Anderson was one of several workmen engaged in tearing down an old building in Georgetown, in the District of Columbia. The building had been demolished as far as the first floor, and it became necessary to take down a large door frame. While Anderson was engaged with others in that work the frame fell upon him and caused injuries from which he died. An administratrix was appointed and brought

NOTE.—As to when a verdict may be directed by the court—see note to Grand Chute v. Winegar, 21 L. ed. U. S. 174.

this action against the employer of Anderson to recover damages, basing the right of action upon alleged negligence in failing "to provide a reasonably fit, proper, and safe place" for Anderson to work, and also in failing "to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of such door frame." At the trial, on the close of the evidence for the plaintiff, the court, being of opinion that there was an utter failure of the proof to sustain the allegations of negligence, directed the jury to return a verdict for the defendant, and the judgment entered on the verdict was affirmed by the court of appeals of the District. (35 App. D. C. 93). This writ of error was then prosecuted.

Without attempting to state the evidence, we think there is no room whatever for the contention that the court below erred in affirming the action of the trial court in taking the case from the jury. We say this because, adopting the view most favorable to the plaintiff of the evidence, it affords not even a shadow of ground for concluding 441] *that the injury suffered was caused by the failure of the master to perform the positive duty resting on him to exercise reasonable care to provide a safe place for the work or proper appliances.

Affirmed.

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ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plff. in Err.,

v.

HENDERSON ELEVATOR COMPANY.

(See S. C. Reporter's ed. 441–447.)

**Carriers — interstate freight rates — posting — erroneous quotation.**

The erroneous quotation, by the agent of an interstate railway carrier, of a lower freight rate for an interstate shipment than the rate fixed by the published tariff on file with the Interstate Commerce Commission, gives no right of action to a shipper who sustains injury by acting on the faith of the quoted rate, although such tariff was not posted or on file in the carrier's local station.

[For other cases, see Carriers, III. g, in Digest Sup. Ct. 1908.]

[No. 105.]

Argued and submitted December 19, 1912. Decided January 6, 1913.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Henderson County in that state in favor of plaintiff in an action by a shipper to recover damages sustained by him as the result of an erroneous quotation of an interstate freight rate. Reversed.

See same case below, 138 Ky. 220, 127 S. W. 779.

Mr. **Edmund F. Trabue** argued the cause, and, with Mr. Blewett Lee, filed a brief for plaintiff in error:

If the judgment below can stand, an effective way has at last been found to guarantee shippers against future changes of railroad rates, and the decision in Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; approved in Philadelphia B. & W. R. Co. v. Schubert, 224 U. S. 603, 615, 56 L. ed. 911, 917, 32 Sup. Ct. Rep. 589, has become a dead letter.

The carrier confidently relies on the case of Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, in which the facts cannot be distinguished from the case at bar.

Posting the tariff was not essential.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 594,

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NOTE.—Shipper's right of action against carrier for damages resulting from erroneous quotation of interstate freight rate.

Prior decisions are generally in accord with ILLINOIS C. R. CO. v. HENDERSON ELEVATOR CO. in holding that a shipper has no right of action for a loss occasioned because of the erroneous quotation by the carrier of a lower interstate freight rate than that on file with the Interstate Commerce Commission.

Thus, in Schenberger v. Union P. R. Co. 84 Kan. 79, 33 L.R.A.(N.S.) 391, 113 Pac. 433, it was held that a carrier which, through innocent mistake, quotes a rate on merchandise which is less than that on file with the Interstate Commerce Commission, in response to a request for a rate in order to fix a selling price at destination, is not liable for the loss occasioned by the shipper being compelled to pay the correct rate in order to get possession of his goods.

So, in Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418, rehearing denied in 12 Inters. Com. Rep. 469, the Interstate Commerce Commission said: "The question of the liability of carriers for the mistakes of their agents in quoting freight rates to shippers seems not to be open to further discussion. . . . While shippers rely largely upon the rates quoted by freight agents and billing clerks, the law charges them with knowledge of the lawful rates. And they will not be heard before this Com-

56 L. ed. 556, 567, 32 Sup. Ct. Rep. 316; Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358; United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.

United States v. Freeman, 3 How. 556, 564, 565, 11 L. ed. 724, 727, 728; Cope v. Cope, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222; Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158; Wetmore v. Markoe, 196 U. S. 68, 77, 49 L. ed. 390, 394, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 309, 55 L. ed. 738, 747, 31 Sup. Ct. Rep. 578.

The court should adopt the ruling of the Commission.

Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 423. See also United States v. Alexander, 12 Wall. 177, 180, 20 L. ed. 381, 382; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272; Louisiana R. & Nav. Co. v. Holly, 127 La. 615, 53 So. 882; Schenberger v. Union P. R. Co. 84 Kan. 79, 33 L.R.A.(N.S.) 391, 113 Pac. 433; Atchison, T. & S. F. R. Co. v. Bell, 31 Okla. 238, 38 L.R.A.(N.S.) 351, 120 Pac. 987; Haurigan v. Chicago & N. W. R. Co. 80 Neb. 132, 113 N. W. 983, 117

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mission to claim the benefit of a lower than the lawful rate on the ground that some railroad clerk has made a mistake in quoting a lower rate for a particular shipment. To permit shippers to impute negligence to carriers in quoting rates, and on that ground to enjoy the rate quoted, instead of paying the lawfully published rate, would open a broad and ample way for the payment of rebates, and for other unlawful practices, and might, in its practical results, work a repeal of the essential feature of this legislation." It was accordingly held that where a grain dealer desiring to purchase wheat at points along the line of a certain railroad, for shipment to and sale at certain points in other states, inquired of the carrier's freight agents as to the rate between such points, and the agents negligently quoted a rate lower than the rate duly published in accordance with the interstate commerce act, and the dealer purchased and sold wheat on the basis of the quoted rate, he could recover, against the carrier, on the ground of the negligence of its agents in misquoting the rates, the loss caused him by his having to pay a higher rate than that on the basis of which he purchased and sold.

So, in Forster Bros. Co. v. Duluth, S. S. & A. R. Co. 14 Inters. Com. Rep. 232, where it appeared that a shipper had assembled certain property at certain stations for shipment, in reliance upon information had from representatives of the carrier as to the rate to be applied on such shipments, and that subsequently he was notified that this rate did not apply, the Commission said: "It is unfortunate that shippers should be misled to their injury by erroneous information furnished by representatives of carriers as to the rate in effect. It is, of course, the duty of carriers' agents to furnish correct information as to the proper application of the lawful established rates. However, the law requires that tariffs shall be open to public inspection, and therefore shippers are themselves charged with notice of the rate lawfully applicable. The Commission cannot consider an erroneous rate quotation made by an agent of a carrier as the basis for an award or reparation to a shipper who thereby suffers damage. Collusion between the carrier and a shipper which it desired to favor, for protection of other than the tariff rates, would be rendered too easy of acomplishment."

And in Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, it was held, reversing 98 Tex. 352, 107 Am. St. Rep. 633, 83 S. W. 800, that where a carrier has negligently made and quoted to a shipper rates on interstate shipments of coal, upon which he has relied in contracting for the coal, selling at prices based on such rates, which were lower than the rates which had been duly published, printed, and posted as required by the interstate commerce act, and the carrier, as required by the act, collects the prescribed rates, the shipper cannot recover against the carrier for damages occasioned by its misrepresentation of the rate.

To the same effect are Alabama Lumber & Export Co. v. Philadelphia, B. & W. R. Co. 19 Inters. Com. Rep. 295, and Texas & P. R. Co. v. Leslie, — Tex. Civ. App. —, 131 S. W. 824, motion for rehearing overruled 131 S. W. 827.

Failure to post the rate in the carrier's local station was regarded both by the state court in the principal case (130 Ky. 220, 127 S. W. 779), and by a Federal circuit court of appeals in Chandler v. Andrews, 113 C. C. A. 15, 192 Fed. 543, as sufficient to change the result, on the theory that the shipper was thereby prevented from actually learning the facts for himself.

A somewhat analogous case is Atlanta, K. & N. R. Co. v. Horne, 106 Tenn. 73, 59 S. W. 134, where it was held that where an initial carrier has negligently misquoted a through rate on an interstate shipment, approved by the Interstate Commerce Commission, the shipper is entitled to a delivery of the goods from the connecting carrier at the point of destination upon payment or tender of the rate quoted, in

N. W. 100, 16 Ann. Cas. 450; Savannah, F. & W. R. Co. v. Bundich, 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S. E. 995; Chesapeake & O. R. Co. v. Maysville Brick Co. 132 Ky. 643, 116 S. W. 1183; Chesapeake & O. R. Co. v. Morton, 143 Ky. 201, 136 S. W. 158; Louisville & N. R. Co. v. Coquillard Wagon Works, 147 Ky. 530, 144 S. W. 1080.

Messrs. James W. Clay and J. F. Clay submitted the cause for defendant in error. Mr. A. Y. Clay was on the brief.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

The Henderson Elevator Company, defendant in error, as plaintiff below, brought this action to recover damages from the railroad company, the plaintiff in error, because of a loss alleged to have been sustained by an erroneous quotation by the agent of the railroad company of the freight rate on corn shipped in interstate commerce from the station of the railroad company at Henderson, Kentucky. A rate of 10 cents per hundred pounds was quoted by the agent when in fact, the rate as fixed by the published tariff on file with the Interstate Commerce Commission, and effective at the time, was 13½ cents per hundred pounds. On the trial before a jury the court instructed that if the loss sustained by the plaintiff "was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Kentucky, its freight tariff rate in question, and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff complains," "there should be a verdict for[447 the plaintiff. A verdict having been rendered for the plaintiff in accordance with this instruction, and the judgment entered thereon having been subsequently affirmed by the court of appeals of Kentucky (138 Ky. 220, 127 S. W. 779), this writ of error was sued out.

It is to us clear that the action of the court below in affirming the judgment of the trial court, and the reasons upon which that action was based, were in conflict with the rulings of this court, interpreting and applying the act to regulate commerce. New York C. & H. R. R. Co. v. United States, 212 U. S. 504, 53 L. ed. 627, 29 Sup. Ct. Rep. 309; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 594 (a), 56 L. ed. 567, 32 Sup. Ct. Rep. 316.

Reversed.

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the absence of proof by the latter carrier that it has published the approved rate in the manner directed by the Commission, so as to bring it to the attention of the public. But the Federal Supreme Court in the principal case holds that the failure to post is unimportant, citing Kansas City Southern R. Co. v. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316, which holds that posting is not essential to make rates legally operative, and is required only as a means of affording special facilities to the public for ascertaining the rate actually in force.

Reparation will be awarded when, because of indefiniteness or ambiguity in published tariffs, a rate higher than the proper one is charged. The classification of an article of commerce should be plainly and clearly stated in terms that the shipping public may readily understand. Pacific Coast Biscuit Co. v. Spokane, P. & S. R. R. Co. 20 Inters. Com. Rep. 546.

And reparation will be awarded when both carrier's agent and shipper are misled as to rates because of a defect in the company's tariff in not distinguishing between two different stations of the same name in the same state, whereby a higher rate is collected than was understood to be in force over another road which the shipper would have used had the defect not existed. Larson Lumber Co. v. Great Northern R. Co. 21 Inters. Com. Rep. 474.

Though strictly not within the scope of this note because the rate involved was not controlled by the Interstate Commerce Commission, mention may appropriately be made of the case of Urquhart v. Canadian P. R. Co. 2 Alberta L. Rep. 280, which, as set out in Canadian Ten Year Dig. 1901–1911 col. 3127, holds that if the station agent in the ordinary course of his duty, upon request of a prospective shipper, misrepresents, even though innocently and without fraud, the rate of freight on the goods to be shipped, knowing that the shipper intends to rely upon the rate quoted in making contracts for the sale of the goods, the railway company is liable in an action of deceit for the damage occasioned to the shipper by his reliance upon the agent's statement,—and this even where the agent was supplied with full and accurate information by the company, and the agent made such untrue representation without the knowledge of the company.

Generally, as to contracts fixing rates other than those established in accordance with the interstate commerce act, see note to Atchison, T. & S. F. R. Co. v. Bell, 38 L.R.A.(N.S.) 351.

CHARLES T. PRESTON, Plff. in Err.,
v.
CITY OF CHICAGO et al.

(See S. C. Reporter's ed. 447–450.)

**Error to state court — Federal question — statutory construction.**

1. A judgment of the highest state court that the claim of a policeman who has been dropped from the pay rolls, that he was an officer of the classified service, and could not be summarily removed from office without denying him due process of law, was not well founded, because, upon a proper construction of the state statutes, the officer was not in the classified service, and was therefore subject to removal, presents no Federal question which will sustain a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1584–1594, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — decision on non-Federal ground.**

2. A judgment of a state court denying the petition for a writ of mandamus to compel the restoration to the pay rolls of the name of a policeman who had been removed from office, which rests in part upon the ruling that the right to the relief prayed was in any event barred by long delay and laches, cannot be reviewed by a writ of error from the Federal Supreme Court, although it was contended that he was denied due process of law by his summary removal.

[For other cases, see Appeal and Error, 1465–1528, in Digest Sup. Ct. 1908.]

**Error to state court — jurisdiction — question not involved in record.**

3. The question, What rights, if any, of a policeman in a pension fund are protected by the Federal Constitution? is not so involved in a proceeding by mandamus to compel the restoration to the pay rolls of the name of a policeman who had been summarily removed from office, as to sustain a writ of error from the Federal Supreme Court to the highest court of a state to review a judgment denying the writ.

[For other cases, see Appeal and Error, 2267–2276, in Digest Sup. Ct. 1908.]

[No. 195.]

Submitted December 16, 1912. Decided January 6, 1913.

IN ERROR to the Supreme Court of State of Illinois to review a judgm which affirmed a judgment of the Supe Court of Cook County in that state den a petition for a writ of mandamus to pel the restoration to the pay rolls of name of a policeman who had been marily removed from office. Dismissed want of jurisdiction.

See same case below, 246 Ill. 26, 9 E. 591.

Messrs. Allen B. Chilcoat and Step A. Day submitted the cause for plai in error:

A motion to dismiss will be denied w a claim of Federal right under the Co tution of the United States has been cially set up and denied by the decisio the state court, whether such question pears to have been expressly passed u or must have been denied by the state c in reaching its conclusion.

Missouri, K. & T. R. Co. v. Elliott, U. S. 530, 46 L. ed. 673, 22 Sup. Ct. 446; Kaukauna Water Power Co. v. G Bay & M. Canal Co. 142 U. S. 254, L. ed. 1004, 12 Sup. Ct. Rep. 173; Det Ft. W. & B. I. R. Co. v. Osborn, 189 U 383, 47 L. ed. 860, 23 Sup. Ct. Rep. Schlemmer v. Buffalo, R. & P. R. Co. U. S. 1, 11, 51 L. ed. 681, 685, 27 Sup. Rep. 407; Terre Haute & I. R. Co. v. diana, 194 U. S. 579, 48 L. ed. 1124 Sup. Ct. Rep. 767; Louisville Gas Co Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 515, 6 Sup. Ct. Rep. Chicago L. Ins. Co. v. Needles, 113 U 574, 579, 28 L. ed. 1084, 1087, 5 Sup. Rep. 681; Bohanan v. Nebraska, 118 U 231, 30 L. ed. 71, 6 Sup. Ct. Rep. 1049; Chicago Street R. Co. v. Illinois, 201 U 506, 519, 520, 50 L. ed. 845, 850, 851, Sup. Ct. Rep. 518.

The Federal question presented is whe the decision of the state court permit petitioner to be deprived of his rights policeman in good standing and with ab to perform the duties of his office, witho hearing and without charges prefe against him, is not a denial of due pro of law, and equal protection of the l

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when question must be ra and decided in a state court in order make a case for a writ of error from Supreme Court of the United States— note to Mutual L. Ins. Co. v. McGrew L.R.A. 33.

On writs of error to state courts in c involving questions of due process of la see note to Burt v. Smith, 51 L. ed. U 121.

and the abridgment of his privileges and immunities as a citizen of the United States.

United States ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. ed. 165, 32 Sup. Ct. Rep. 37; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; United States v. Wickersham, 201 U. S. 390, 397, 50 L. ed. 798, 800, 26 Sup. Ct. Rep. 469; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62.

Whether the proceedings taken by the defendants in error amounted to due process of law must be determined by this court for itself, since the jurisdiction of this court has been properly invoked by the petitioner.

Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 696, 29 L. ed. 510, 515, 6 Sup. Ct. Rep. 265; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 579, 28 L. ed. 1084, 1087, 5 Sup. Ct. Rep. 681; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 11, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407.

The opinion in the case at bar does not pass upon the so-called question of "laches," except by reference to the cases of Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155, and Schultheis v. Chicago, 240 Ill. 167, 88 N. E. 563.

It has been held in Illinois, in unmistakable terms, that mandamus is a civil action.

Langan v. Milk's Grove Special Drainage Dist. 239 Ill. 438, 88 N. E. 182; Cleary v. Hoobler, 207 Ill. 99, 69 N. E. 967; Roodhouse v. Briggs, 194 Ill. 435, 62 N. E. 778; Chicago G. W. R. Co. v. People, 179 Ill. 441, 53 N. E. 986.

Laches plays no part, and cannot be considered in this connection.

Wehrman v. Conklin, 155 U. S. 314, 326, 39 L. ed. 167, 173, 15 Sup. Ct. Rep. 129; Abraham v. Ordway, 158 U. S. 422, 39 L. ed. 1040, 15 Sup. Ct. Rep. 894.

Where there is a clear Federal question in the case, and the attempt is made to defeat the jurisdiction of this court by a claim of an independent ground of local or general law sufficient to sustain the judgment, this court will examine such question to see whether it is sound and well founded. And the state court cannot arbitrarily inject such a ground into its opinion to defeat the jurisdiction of this court.

Leathe v. Thomas, 207 U. S. 93, 99, 52 L. ed. 118, 121, 28 Sup. Ct. Rep. 30; Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111; Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767.

Messrs. William H. Sexton and John W. Beckwith submitted the cause for defendants in error:

*If the decision of the state court is upon grounds broad enough to support the judgment, independent of any Federal question, there is no Federal issue involved in the case so as to give this court jurisdiction, and it will not entertain a writ of error.*

Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; Klinger v. Missouri, 13 Wall. 263, 20 L. ed. 637; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Seneca Nation of Indians v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

This court will not disturb the judgment of a state court rendered upon the question of laches.

Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856; Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co. 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931; Marrow v. Brinkley, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113.

The opinion of the state court is to be looked to for the purpose of showing whether a particular question was considered and decided, in determining whether this court may take jurisdiction.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 487; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Kreiger v. Shelby R. Co. 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; Crossley v. New Orleans, 108 U. S. 105, 27 L. ed. 667, 2 Sup. Ct. Rep. 300; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757.

While the ascertainment of the existence

of due process of law is the final province of this court, nevertheless, where the state court has decided that a particular formality was or was not essential under the state statute, such decision presents no Federal question.

Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Kentucky R. Tax Cases, 115 U. S. 322, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

Upon the assertion that he had been wrongfully dropped "from the pay roll of the policemen of the city of Chicago," plaintiff in error commenced proceedings in mandamus in the state court to compel the placing of his name upon the said pay rolls, to the end that he might thereafter draw the pay alleged to be due him as a police patrolman "as the other police patrolmen in said city of Chicago are paid." This writ of error is prosecuted to a judgment of the supreme court of Illinois (246 Ill. 26, 92 N. E. 591), affirming a judgment sustaining a demurrer to the petition in mandamus and denying the writ.

Among other contentions made by the 450]plaintiff in error *and passed upon by the supreme court of Illinois was one to the effect that he had become an officer of the classified service, and entitled to the protection against removal conferred by an act styled the civil service act, and that hence his removal from office without written charges preferred against him, and without notice and an opportunity to be heard, amounted to a denial of due process of law within the purview of the state Constitution and of the 14th Amendment to the Constitution of the United States. But the court below held these claims not maintainable, on the ground that, upon a proper construction of the state statutes, the petitioner was not in the classified service, and was subject to removal. This ruling is binding upon us and presents no Federal question. Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009. Even, however, if we were at liberty to disregard the action of the state court and attribute to the plaintiff in error the status claimed by him, as in addition the court below held that the right to the relief prayed was in any event barred by long delay and laches, this would be sufficient to prevent us from reviewing the alleged Federal question. Moran v. Horsky, 178 U. S. 205, 207, 44 L. ed. 1038, 1039, 20 Sup. Ct. Rep. 856.

It is strenuously insisted in argument that the plaintiff in error was entitled to participate in a police pension fund to which he had contributed from his wages for a long period of time, and therefore to remove him was additionally to deprive him of property without due process of law, in violation of the 14th Amendment. But the specific relief prayed was a writ of mandamus to restore plaintiff in error to the pay rolls as a policeman. What, if any, rights in the pension fund referred to were protected by the Constitution of the United States we therefore may not here consider, and that question, from a Federal point of view, is not concluded by the judgment dismissing the writ of error which we shall enter.

Writ of error dismissed.

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*PEOPLE OF THE STATE OF[451
ILLINOIS EX REL. CHARLES H. GERSCH, Plff. in Err.,
v.
CITY OF CHICAGO et al.

(See S. C. Reporter's ed. 451.)

**Error to state court — dismissal — defective record.**

A writ of error from the Federal Supreme Court to the highest court of a state must be dismissed where the record does not contain the final judgment to which the writ of error is directed.

[For other cases, see Appeal and Error, VII. 1, 4, in Digest Sup. Ct. 1908.]

[No. 474.]

Submitted December 16, 1912. Decided January 6, 1913.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Superior Court of Cook County in that State denying a petition for a writ of mandamus to compel the restoration to the pay rolls of the name of a policeman who had been summarily removed from office. Dismissed for want of jurisdiction.

See same case below, 250 Ill. 551, 95 N. E. 630.

Messrs. **Allen B. Chilcoat** and **Stephen A. Day** submitted the cause for plaintiff in error.

Messrs. **William H. Sexton** and **John W. Beckwith** submitted the cause for defendants in error.

For contentions of counsel, see their briefs as reported in Preston v. Chicago, ante, 293.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

This is a companion case to Preston v. Chicago, No. 195, just disposed of [226 U. S. 447, ante, 293, 33 Sup. Ct. Rep. 177]. Unlike the record in the Preston Case, however, the record in this case does not contain the final judgment to which the writ of error is directed. As we cannot assume that a judgment was in fact entered in the supreme court of Illinois, it results that we are without authority to exert jurisdiction.

Writ of error dismissed.

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452] *PATRICIO UBEDA, Appt.,
v.
AGAPITO ZIALCITA.

(See S. C. Reporter's ed. 452–455.)

**Trademarks — infringement — imposition on public as defense.**

1. The prohibition against any action founded upon the infringement of a trademark, which is made by Philippine Commission act No. 666, § 9, where the complaining party is himself guilty of imposing upon the public, defeats an infringement suit brought by a person who is infringing an earlier trademark of a third person, in widespread use and well known, although the owner thereof may have had no registered title.

[For other cases, see Trademark, IV. b, in Digest Sup. Ct. 1908.]

**Statutes — retrospective laws — treaty rights.**

2. The application to defeat a suit founded upon the infringement of a trademark acquired under a grant from the Spanish governor general, of the rule laid down by the Philippine Commission act No. 666, § 9, denying any recovery if the complaining party is himself guilty of imposition upon the public, does not give a retrospective effect to that section as against the earlier Spanish grant, contrary to general principles of interpretation and to the treaty of Paris of April 11, 1899 (30 Stat. at L. 1760), art. 13, providing that the rights of property secured by copyrights and patents shall continue to be respected, since the treaty, if applicable, cannot be supposed to have been intended to contravene the principle of § 9, which only codifies common morality and fairness, and is therefore not retrospective in any sense, as it introduces no new rule.

[For other cases, see Statutes, II. v; Treaties, II., in Digest Sup. Ct. 1908.]

**Trademarks — registration — deceptive use.**

3. The provisions of the Philippine Commission act No. 666, § 14, making a Spanish certificate of registration of a trademark conclusive evidence of title, must be taken to be subject to general principles of law embodied in other sections, *e. g.*, § 9, prohibiting any action founded upon the infringement of a trademark when the complaining party has himself been guilty of imposing upon the public.

[For other cases, see Trademark, VI., in Digest Sup. Ct. 1908.]

[No. 77.]

Submitted December 6, 1912. Decided January 6, 1913.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which affirmed a decree of the Court of First Instance of the City of Manila, in favor of defendant in a suit founded upon the infringement of a trademark. Affirmed.

See same case below, 13 Philippine, 11.

The facts are stated in the opinion.

Messrs. Aldis B. Browne, Alexander Britton, Evans Browne, and W. A. Kincaid submitted the cause for appellant.

No appearance for appellee.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff and appellant is a manufacturer of gin, and sues to restrain the use of a trademark like his own, *and[453 to recover double damages. The trademark consists of two concentric circles having the words Ginebra de Tres Campanas, and the plaintiff's name between them, and in the center a device of three bells (tres campanas) connected at the top by a ribbon and some ears of grain, with the words Extra Superior under the mouth of the bells. The plaintiff's autograph is reproduced across the middle of the circular space and the bells. More detail is unnecessary; but it may be mentioned that the plaintiff claims title under a grant from the Governor General dated December 16, 1898, and that the mark covered by the alleged grant had underneath the circles the word Amberes (Antwerp), indicating imported gin, while that now used has Manila in the same place, and is applied to gin made in the Philippines.

It may be assumed that the defendant's design has a deceptive resemblance to the plaintiff's notwithstanding a change from Tres Campanas to Dos Campanas, and the substitution of the defendant's autograph for the plaintiff's. And whether the plaintiff has a title to the mark now used or

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NOTE.—On deception as bar to relief for infringement of trademark—see notes to Clinton E. Worden & Co. v. California Fig Syrup Co. 47 L. ed. U. S. 282; Joseph v. *Macowsky*, 19 L.R.A. 53; Johnson v. Seabury, *12 L.R.A. (N.S.) 1201*; and Nelson v. *I. H. Winchell & Co. 23 L.R.A. (N.S.)* 1151.

not, it also may be assumed that he might recover under the Philippine act of March 6, 1903, No. 666, § 4, Compiled Acts, p. 180, § 58, but for the following facts, on which the defendant had judgment in both courts below.

The plaintiff's trademark in its turn closely imitates in most particulars a much earlier and widely known trademark of Van Den Bergh & Company of Antwerp. It is true that in the latter there is but one bell, and that the title correspondingly is Ginebra de la Campana, but the intent to get the benefit of the Van Den Bergh device is too obvious to be doubted. We do not go into the particulars of the different registrations, etc., of this latter, beginning with a Spanish certificate to the Antwerp firm in 1873. For although the plaintiff elaborately argues that under the Spanish *régime* trademark rights could be 454] *acquired only by statutory registered grant; that Van Den Bergh & Company never acquired any such rights in the Philippines; that if they did they lost them by failing to register or lapse of time; and that he was free to get a registered title as against any certificate of theirs,—those questions are immaterial in this case. With or without right, the earlier trademark was in widespread use and well known, and the obvious intent and necessary effect of imitating it was to steal some of the good will attaching to it and to defraud the public. The courts below found the fraud and that both plaintiff's and defendant's marks were nothing more than variations upon the earlier mark.

In such a case the Philippine act denies the plaintiff's right to recover. Act No. 666, § 9. See § 12, and No 744, § 4. Compiled Acts, §§ 63, 66. It is said that to apply the rule there laid down would be giving a retrospective effect to § 9 as against the alleged Spanish grant of December 16, 1898, to the plaintiff, contrary to general principles of interpretation and to article 13 of the treaty of Paris, April 11, 1899 [30 Stat. at L. 1760], providing that the rights of property secured by copyrights and patents shall continue to be respected. But the treaty, if applicable, cannot be supposed to have been intended to contravene the principle of § 9, which only codifies common morality and fairness. The section is not retrospective in any sense, for it introduces no new rule. See Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436. Imposition on the public is not a ground on which the plaintiff can come into court, but it is a very good ground for keeping him out of it. Even if Van Den Bergh & Company had no registered title and *no such other rights* under Spanish colonial law as they have under act No. 666, § 4, the imposition on the public was still there, and though not a matter of which the defendant could complain, it was a matter to which he could refer when the plaintiff sought to exclude him from doing just what the plaintiff had done himself. This *certainly would[455 have been our law, and we should assume, if material, that the same doctrine would have prevailed in Spain, in the absence of the clearest proof to the contrary, which we do not find in the record or the brief.

What we have said with reference to the plaintiff's claim under the treaty applies in substance to his argument that, by § 14 of act No. 666, the Spanish certificate is conclusive evidence of the plaintiff's title. That section must be taken to be subject to general principles of law embodied in other sections to which we have referred.

If there was any claim intended to be put forward on the ground of unfair competition, the prayers of the complaint and the plaintiff's testimony show that such claim depended fundamentally on the alleged infringement of trademark. Any matters of fact in dispute were sufficiently disposed of by the concurrent findings of the courts below.

Judgment affirmed.

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PITTSBURG STEEL COMPANY, Plff. in Err.,
v.
BALTIMORE EQUITABLE SOCIETY.

(See S. C. Reporter's ed. 455–459.)

**Constitutional law — impairing contract obligation — change of remedy — stockholder's liability.**

1. The change in the remedy afforded to a creditor of a corporation, where stockholders have not fully paid their subscriptions for stock, by substituting for the existing right of any creditor to recover in an action at law against any such stockholder up to the extent of the balance due on his unpaid subscription an exclusive remedy by bill in equity on behalf of all the creditors who may come in against the resident shareholders, as is done by Md. act of 1908, chap. 305, which abates all pending actions, saving to the creditor in such actions the right to become a party to the bill, does not impair the obligation

NOTE.—On impairment of contract obligations by changing mode of enforcing stockholder's liability—see notes to Henley v. Myers, 54 L. ed. U. S. 240, and Myers v. Knickerbocker Trust Co. 1 L.R.A.(N.S.) 1171.

of any contract existing between creditor and shareholder.

[For other cases, see Constitutional Law, 1507–1516, in Digest Sup. Ct. 1908.]

**Statutes — who may assail validity.**

2. One whose rights are not affected by the period of limitation established by a statute cannot be heard to question the constitutionality of such limitation.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

[No. 103.]

Argued December 18 and 19, 1912. Decided January 6, 1913.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment which affirmed a judgment of the Superior Court of the City of Baltimore, dismissing an action brought by a creditor of a corporation upon a stockholder's unpaid subscription. Affirmed.

See same case below, 113 Md. 77, 77 Atl. 255.

The facts are stated in the opinion.

Mr. Edgar Allen Poe argued the cause, and, with Messrs. J. Kemp Bartlett, L. B. Keene Claggett, and R. Howard Bland, filed a brief for plaintiff in error:

Prior to the passage of Md. Laws 1908, chap. 305, a creditor of a Maryland corporation had the choice of two remedies against a stockholder whose subscription was unpaid in whole or in part; he could either proceed at law, as the plaintiff in error did in this case, or he could proceed by bill in equity in the nature of a creditors' bill.

Pittsburg Steel Co. v. Baltimore Equitable Soc. 113 Md. 81, 77 Atl. 255; Matthews v. Albert, 24 Md. 527; Norris v. Johnson, 34 Md. 485.

The court of appeals of Maryland had expressly held that the proceeding by bill in equity (which is the only remedy left to the creditor since the passage of this statute ) was by no means as adequate and efficacious as a suit at law.

Norris v. Wrenschall, 34 Md. 492; Colton v. Mayer, 90 Md. 716, 47 L.R.A. 617, 78 Am. St. Rep. 436, 45 Atl. 874.

Contract obligations were impaired by this statute.

Myers v. Knickerbocker Trust Co. 1 L.R.A. (N.S.) 1171, 71 C. C. A. 199, 139 Fed. 111; McCracken v. Hayward, 2 How. 608, 611, 11 L. ed. 397, 398; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 294, 30 L. ed. 1161, 1165, 7 Sup. Ct. Rep. 1190; Louisiana v. New Orleans, 102 U. S. 203, 206, 26 L. ed. 132, 133; Bryan v. Virginia, 135 U. S. 685, 693, 34 L. ed. 312, 314, 10 Sup. Ct. Rep. 972; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Dexter v. Edmands, 89 Fed. 469; Western Nat. Bank v. Reckless, 96 Fed. 70.

The constitutionality of the limitation provision of chapter 305 is not to be determined by ascertaining whether or not the claim of the plaintiff in error would have become barred during the interval in question.

Ulman v. Baltimore, 72 Md. 596, 11 L.R.A. 224, 20 Atl. 141, 21 Atl. 709.

Messrs. Wilton Snowden, Jr., and Vernon Cook argued the cause and filed a brief for defendant in error:

One cannot complain of the unconstitutionality of a statute if he is not damaged by its passage and the operation of the terms thereof.

6 Am. & Eng. Enc. 1090; 8 Cyc. 787, 788; Cooley, Const. Lim. 7th ed. p. 232; Lampasas v. Bell, 180 U. S. 283, 284, 45 L. ed. 530, 531, 21 Sup. Ct. Rep. 368; Red River Valley Bank v. Craig, 181 U. S. 558, 45 L. ed. 1000, 21 Sup. Ct. Rep. 703; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Brown v. Ohio Valley R. Co. 79 Fed. 176; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234; Com. v. Wright, 79 Ky. 22, 42 Am. Rep. 203; McKinney v. State, 3 Wyo. 719, 16 L.R.A. 710, 30 Pac. 293; Marshall v. Donovan, 10 Bush, 681.

The rights which the creditor obtained when he was allowed to institute an individual action against a stockholder were rather precarious.

Emmert v. Smith, 40 Md. 129; Strauss v. Heiss, 48 Md. 292; Republic Iron & Steel Co. v. Carlton, 189 Fed. 126; Norris v. Johnson, 34 Md. 489; Crawford v. Rohrer, 59 Md. 599.

The remedy subsisting in a state when and where the contract is made and is to be performed is a part of its obligation, but the construction given by the highest court of the state to the statute, at and before the contract, was made determines the meaning of the contract.

Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Sauer v. New York, 206 U. S. 549, 51 L. ed. 1182, 27 Sup. Ct. Rep. 686; Republic Iron & Steel Co. v. Carlton, 189 Fed. 126.

There can be no vested right to a particular remedy.

Cooley, Const. Lim. p. 515; Sturges v. Crowninshield, 4 Wheat. 122, 200, 4 L. ed. 529, 549.

A state can modify, change, enlarge, or

repeal an existing remedy, provided that it does not thereby impair substantial rights.

Sturges v. Crowninshield, supra; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Bronson v. Kinzie, 1 How. 315, 11 L. ed. 144; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; Hill v. Merchants Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Von Hoffman v. Quincy, 4 Wall. 535, 553, 18 L. ed. 403, 409.

There is a strong presumption in favor of the constitutionality of a statute.

Fletcher v. Peck, 6 Cranch. 87, 128, 3 L. ed. 162, 175; Ex parte Garland, 4 Wall. 333, 382, 18 L. ed. 366, 371; Pine Grove Twp. v. Talcott, 19 Wall. 666, 674, 22 L. ed. 227, 232; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

Statutes pertaining to the remedy are merely such as relate to the course and form of proceedings, but do not affect the substance of a judgment when pronounced.

Morton v. Valentine, 15 La. Ann. 150.

The state may abolish one class of courts, and create another. It may give a new and additional remedy for a right or equity already in existence; and it may abolish old remedies and substitute new, or even without substituting any, if a reasonable remedy remains.

Cooley, Const. Lim. 7th ed. p. 516; Stocking v. Hunt, 3 Denio, 274; Van Rensselaer v. Read, 26 N. Y. 558; Lennon v. New York, 55 N. Y. 361; Parker v. Shannonhouse, 1 N. C. (Phill. L.) 209.

An existing remedy may be modified, and the modified remedy made applicable to existing rights.

Phelps's Appeal, 98 Pa. 546.

If a particular form of proceeding is prohibited, and another is left or provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Huntzinger v. Brock, 3 Grant, Cas. 243; Evans v. Montgomery, 4 Watts & S. 218; Read v. Frankfort Bank, 23 Me. 318.

The rule seems to be that in modes of proceeding and of forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions as seriously to impair the value of the right.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610.

Were this court to lean towards the decisions of any other state tribunal, it would naturally incline towards the established law of the state of Maryland, as declared by its court of appeals in the following cases:

Miners & M. Bank v. Snyder, 100 Md. 58, 68 L.R.A. 312, 108 Am. St. Rep. 390, 59 Atl. 707; Murphy v. Wheatley, 100 Md. 358, 59 Atl. 704; Pittsburg Steel Co. v. Baltimore Equitable Soc. 113 Md. 77, 77 Atl. 255; Bettendorf Axle Co. v. Field, 114 Md. 487, 79 Atl. 724; Pittsburg Forge Co. v. Safe Deposit & Trust Co. 116 Md. 697, 84 Atl. 335.

Among the most striking examples of changes of the form of remedy that do not impair the obligation of the contract are the following cases:

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Penniman's Case, 103 U. S. 714, 26 L. ed. 602; Antoni v. Greenhow, 107 U. S. 775, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; Hill v. Merchants' Mut. Ins. Co. 134 U. S. 527, 33 L. ed. 998, 10 Sup. Ct. Rep. 589; Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; Oshkosh Water Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234; Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. Rep. 345; Bernhiemer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148; Conkey v. Hart, 14 N. Y. 23; Kirkman v. Bird, 22 Utah, 100, 58 L.R.A. 669, 83 Am. St. Rep. 774, 61 Pac. 338; Story v. Furman, 25 N. Y. 214; Cutts v. Hardee, 38 Ga. 350; Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185; Bird v. Keller, 77 Me. 270.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the plaintiff in error as a creditor of the South Baltimore Steel Car & Foundry Company to recover its claim from the defendant, a holder of stock in that company, the subscription for which had not been fully paid. The action was begun on February 26, 1908, and at that date it could be maintained. But in April a statute was enacted (act of 1908, chap. 305) *making the stock-[458 holder's liability assets of the corporation, saving the rights of creditors at the date of the act, but providing that the exclusive remedy for such rights, as against Maryland

stockholders, should be by bill in equity on behalf of such creditors as might come in. This provision was made operative as of July 1, 1907, and was to cause all actions at law of this kind brought since then to abate, saving the right to become party to a bill. On this statute the defendant moved to dismiss the suit. The motion was granted and the judgment was affirmed by the court of appeals, which sustained the constitutionality of the act as so applied. 113 Md. 77, 77 Atl. 255.

Of course the objection is that the law impairs the obligation of the plaintiff's contract. If the stockholder's liability were purely local, and no more than matter of remedy for the collection of the principal debt, still this objection would have to be considered. See Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776; Brown v. Eastern Slate Co. 134 Mass. 590, 592. But the case was argued on the footing of a contract between the creditor and the stockholder; and as the statute seems to assume that the stockholder's liability may follow him into other jurisdictions, and the court of appeals affirmed that a contract between the parties is presumed, we in turn assume that view to be correct. Bernheimer v. Converse, 206 U. S. 516, 529, 51 L. ed. 1163, 1174, 27 Sup. Ct. Rep. 755. In either view the question put in the form most favorable for the plaintiff is the same; whether the remedy against the defendant is impaired so materially as to affect the plaintiff's rights. McGahey v. Virginia, 135 U. S. 662, 693, 34 L. ed. 304, 314, 10 Sup. Ct. Rep. 972.

The plaintiff's supposed contract was subject to peculiar infirmities. His right was shared equally by all other creditors of the corporation, and not only might some other creditor by diligence have got in ahead of the plaintiff and have exhausted the fund for which the defendant could be held, but the right depended on the stock-459]holder's *will. As was observed by Judge Rose, following the Maryland cases, in Republic Iron & Steel Co. v. Carlton, 189 Fed. 126, 137, the statute does no more than the stockholder was free to do before. He could have paid the corporation or a receiver or other creditors. The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact,—of what the remedy amounted to in practice. It is admitted that bringing the action gave the plaintiff no lien, as it seems mistakenly to have been assumed to do in Myers v. Knickerbocker Trust Co. 1 L.R.A.(N.S.) *1171, 71 C. C. A. 199, 139* Fed. 111, 116. *The court of appeals states* that the remedy has been found in practice an uncertain one, less efficacious than that which is substituted. There is nothing to contradict their statement as to what experience has taught. With that fact before us and also the absolute dependence of the creditor upon the will of the stockholder, we cannot go into nice speculation as to the probable result of this particular case, or say that the decision was wrong. The power of the state to make similar changes of remedy is asserted in more general terms than we have employed, in Fourth Nat. Bank v. Franklyn, 120 U. S. 747, 755, 30 L. ed. 825, 828, 7 Sup. Ct. Rep. 757. See also Henley v. Myers, 215 U. S. 373, 385, 54 L. ed. 240, 246, 30 Sup. Ct. Rep. 148.

A further objection is based upon the period of limitation established by the act. But as it does not appear that the plaintiff was hurt by it, this objection is not open. Darnell v. Indiana, Dec. 23, 1912 [226 U. S. 390, ante, 267, 33 Sup. Ct. Rep. 120.]

Judgment affirmed.

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*MARSHALL DENTAL MANUFAC-[460
TURING COMPANY, Plff. in Err.,
v.
STATE OF IOWA.

(See S. C. Reporter's ed. 460-462.)

**Error to state court — reversal of facts —concurrent findings below.**

1. The Federal Supreme Court, on writ of error to a state court, will not, even if it can, go behind the successive findings of the courts below that a so-called lake was an unnavigable body of water, proper to be meandered, where such lake was meandered in the original government survey, and the Secretary of the Interior has refused to have the land under water surveyed as swamp land, because it did not appear sufficiently that there was not a lake there, as indicated at the time of the survey.

[For other cases, see Appeal and Error, 2175-2208, in Digest Sup. Ct. 1908.]

**Waters — riparian rights — title to bed of lake.**

2. Grants by the United States of land adjoining an unnavigable lake did not convey the land under water, where, under the state law, riparian owners take title only to the water's edge.

[For other cases, see Waters, I. d, 2, a, in Digest Sup. Ct. 1908.]

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NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571. On review of questions of fact by writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

As to title to land under water—see note to Goff v. Cougle, 42 L.R.A. 161.

States — suits by — necessary interest.

3. The state of Iowa, by virtue of its sovereignty, has an interest in the condition of a non-navigable lake within its borders sufficient to enable it to maintain a suit to enjoin the drainage of such lake by an intruder without title, whether the state or the United States owns the bed of the lake.

[For other cases, see States, IX. a, in Digest Sup. Ct. 1908.]

[No. 104.]

Argued December 19, 1912. Decided January 6, 1913.

IN ERROR to the Supreme Court of the State of Iowa to review a decree which affirmed a decree of the District Court of Greene County, in that state, enjoining, at the instance of the state, the drainage of a non-navigable lake by a person claiming title to the bed as being swamp land. Affirmed.

See same case below, 143 Iowa, 398, 122 N. W. 241.

The facts are stated in the opinion.

Mr. E. B. Evans argued the cause and filed a brief for plaintiff in error:

The decisions of the supreme court of Iowa have been a practical invitation to individuals to purchase the swamp land title of the beds of non-navigable lakes.

Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449; Noyes v. Collins, 92 Iowa, 566, 26 L.R.A. 609, 54 Am. St. Rep. 571, 61 N. W. 250; Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52.

The United States is the owner of the public domain, however acquired, and this ownership is without condition.

Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681; Fletcher v. Peck, 6 Cranch, 142, 143, 3 L. ed. 179, 180; 1 Kent, Com. 257; Irvine v. Marshall, 20 How. 558, 15 L. ed. 994.

All land covered by water, within the public domain, is owned by the United States.

Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509.

Upon the admission of a new state the ownership and power over lands within its borders, covered by navigable waters, passed to the state, and this right is secondary only to the paramount right of the government in the exercise and control of commerce with foreign nations and interstate commerce.

Pollard v. Hagan, 3 How. 212, 11 L. ed. 565.

As to the land under navigable waters, there is no longer any question but what rights in the use of the water or the land under them must be determined with reference to the law of the state in which such navigable waters are situated, and that the state law will be sustained unless it should interfere with the power of the United States government with reference to commerce.

Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337.

In states following the common-law rule as to riparian ownership, the title to the soil under non-navigable water is in the riparian property.

Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840.

In states which do not follow the common law as to riparian ownership, the title to the soil under non-navigable waters is in the United States.

Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449; Grant v. Hemphill, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; Carr v. Moore, 119 Iowa, 157, 97 Am. St. Rep. 292, 93 N. W. 52.

The title to the soil under the non-navigable inland lakes of Iowa passed to the state under the swamp land grant.

Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449; Carr v. Moore, 119 Iowa, 157, 97 Am. St. Rep. 292, 93 N. W. 52.

This case is not concluded by the running of the meander line.

Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; French Glen Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124.

Mr. George Cosson, Attorney General of Iowa, argued the cause and filed a brief for defendant in error:

The decision of the Secretary of the Interior is conclusive.

French v. Fyan, 93 U. S. 169, 23 L. ed. 812; McCormick v. Hayes, 159 U. S. 332, 339, 40 L. ed. 171, 173, 16 Sup. Ct. Rep. 37; Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Young v. Charnquist, 114 Iowa, 122, 86 N. W. 205; Ogden v. Buckley, 116 Iowa, 352, 89 N. W. 1115; Barringer v. Davis

141 Iowa, 419, 120 N. W. 65; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449.

Grants of public lands by the United States, bounded upon waters, will be construed according to the law of the state in which the lands lie.

Frellsen v. Crandell, 217 U. S. 71, 54 L. ed. 670, 30 Sup. Ct. Rep. 490; Kansas v. Colorado, 206 U. S. 46, 93, 51 L. ed. 956, 973, 27 Sup. Ct. Rep. 655; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; Hardin v. Jordan, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838.

There is no decision of the supreme court of the state of Iowa which holds that the title to the beds of meandered non-navigable lakes passes under the swamp Land Act.

Rood v. Wallace, 109 Iowa, 8, 79 N. W. 449; Haight v. Keokuk, 4 Iowa, 199; Noyes v. Collins, 92 Iowa, 566, 26 L.R.A. 609, 54 Am. St. Rep. 571, 61 N. W. 250; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; State v. Thompson, 134 Iowa, 25, 111 N. W. 328.

If this were a case in which plaintiff in error was claiming through a title direct from the United States government,—in other words, if the United States government, in its plenary power to dispose of public lands, had conveyed the meandered lake in question, and the state was asserting title,—a difficult problem might arise, but even then, the later decisions make it clear that the United States would waive its right in favor of the state.

United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 451, 52 L. ed. 881, 887, 28 Sup. Ct. Rep. 579; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition brought by the state of Iowa to enjoin the defendant from draining the waters of Goose lake, in Greene county, 461] Iowa. The defendant, now *plaintiff in error, set up title, on the ground that the so-called lake, a tract of several hundred acres, was swamp land and was granted to the state by the act of September 28, 1850, chap. 84, 9 Stat. at L. 520, Rev. Stat. § 2479, U. S. Comp. Stat. 1901, p. 1586; that it passed to Greene county by an act of the legislature of January 13, 1853, and thence by mesne conveyances to this defendant. After a trial, the court of first instance entered a decree for the plaintiff, and the decree was affirmed by the supreme court of the state. 143 Iowa, 398, 122 N. W. 241.

The material facts are few. In the original survey by the government in 1853 the lake was meandered, which meant under the instructions to surveyors then in force that it was a lake or deep pond, and no patent ever has issued from the United States. In 1903 the plaintiff in error applied to the Secretary of the Interior to have the land surveyed as swamp land, but the application was refused, on the ground that it did not appear sufficiently that there was not a lake there, as indicated, at the time of the survey. If the question of fact was open under Hannibal & St. J. R. Co. v. Smith, 9 Wall. 95, 19 L. ed. 599, the state courts found that Goose lake was an unnavigable body of water proper to be meandered, and we see no sufficient reason for going behind these successive findings, if we had power to do so. Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 668, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389. See French v. Fyan, 93 U. S. 169, 23 L. ed. 812; McCormick v. Hayes, 159 U. S. 332, 40 L. ed. 171, 16 Sup. Ct. Rep. 37. It follows that the plaintiff in error shows no title. By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining land by the United States did not convey the land under the lake. Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; Whitaker v. McBride, 197 U. S. 510, 512, 49 L. ed. 857, 860, 25 Sup. Ct. Rep. 530. It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the state.

The question as to the title to the bed is treated as open *in Hardin v. Shedd, [462 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685, and Whitaker v. McBride, 197 U. S. 510, 515, 49 L. ed. 857, 861, 25 Sup. Ct. Rep. 530, and there is no need to decide it now. It is enough to say that by virtue of its sovereignty the state of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the state owns the bed or not. This principle has been affirmed and acted on by the court so recently that it does not require further argument here. Georgia v. Tennessee Copper Co. 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488; Hudson County Water Co. v. McCarter, 209 U. S. 349, 356, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 Ann. Cas.

560; See also Kansas v. Colorado, 206 U. S. 46, 93, 51 L. ed. 956, 973, 27 Sup. Ct. Rep. 655; McGilvra v. Ross, 215 U. S. 70, 79, 54 L. ed. 95, 100, 30 Sup. Ct. Rep. 27.

Decree affirmed.

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JONAH KALANIANAOLE, Plff. in Err.,
v.
GEORGE E. SMITHIES, Trustee of Stella Keomailani Cockett, and Stella K. Cockett, Beneficiary.

(See S. C. Reporter's ed. 462, 463.)

**Error to Hawaiian supreme court—scope of review — local practice.**

1. The question whether the original judgment creditors alone can sue on a judgment rendered in favor of a trustee and the beneficiary, where a new trustee has since been appointed successor in the trust, and the former trustee has assigned the judgment to him, is a pure matter of form, on which the Federal Supreme Court, when reviewing a judgment of the Hawaiian supreme court, will not go behind the local practice.

[For other cases, see Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

**Parties — misjoinder — effect.**

2. Joining the executor of one of the judgment debtors as a party defendant when suing on a judgment as a joint judgment is simply a mistake which does no harm.

[For other cases, see Parties, II. b, in Digest Sup. Ct. 1908.]

[No. 109.]

Argued and submitted December 20, 1912. Decided January 6, 1913.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a judgment of the Circuit Court of the First Circuit of such Territory, in favor of plaintiffs in a suit on a deficiency judgment. Affirmed.

See same case below, 20 How. 138.

Mr. C. W. Ashford submitted the cause for plaintiff in error.

Mr. Ralph P. Quarles argued the cause, and, with Mr. A. L. C. Atkinson, filed a brief for defendants in error.

Memorandum opinion by direction of the court. By Mr. Justice Holmes:

This is a suit on a deficiency judgment rendered upon foreclosure of the mortgage that was under consideration in Kawananakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834, 27 Sup. Ct. Rep. 526. The judgment was in favor of Polyblank, trustee, and Cockett, sole beneficiary, against Kawananakoa and the plaintiff in error Kalanianaole. Before the present suit was begun, the trustee resigned, Smithies was duly appointed successor in the trust, and the former trustee assigned the judgment to him. Smithies and his beneficiary then brought this action against the plaintiff in error and the executor of Kawananakoa, who had died. The executor demurred and had judgment. The plaintiff in error then answered, setting up the discharge of the executor and that the plaintiffs allowed the claim against the latter to be barred by time before bringing suit. The case was heard upon mutual admissions of the facts set up in the declaration and answer. In argument the plaintiff in error also objects that only the original judgment creditors could sue. Both objections were sufficiently answered in the court below. That, as to the plaintiffs, is pure matter of form, on which we should not go behind the local practice. The whole interest in the judgment was before the court. As to the second, the judgment was sued upon as a joint judgment, but it ceased to be joint by the death of one of the parties bound, as is the nature of joint obligations. Edsar v. Smart, T. Raym. 26; Y. B. 3 Edw. III. 11, pl. 37. See Towers v. Moor, 2 Vern. 99. The joinder of the executor was simply a mistake that did no harm. See William W. Bierce v. Hutchins, 205 U. S. 340, 347, 51 L. ed. 828, 833, 27 Sup. Ct. Rep. 524.

Judgment affirmed.

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*RALPH A. EWING, Plff. in Err., [464
v.
CITY OF LEAVENWORTH.

(See S. C. Reporter's ed. 464–469.)

**Commerce — state taxation — transportation between local points — route passing out of state.**

An annual privilege tax levied by a municipality upon the business of an express company, expressly excluding commerce of an interstate character and business done for the government, and covering solely the local business done at that point in receiving packages transported from other points in the state, and in transporting

NOTE.—On the appellate jurisdiction of Federal Supreme Court over Hawaiian courts—see note to Toyota v. Hawaii, ante, 180.

NOTE.—On interstate character of transportation between points in same state over a route, part of which is in another state—see notes to Hanley v. Kansas City Southern R. Co. 47 L. ed. U. S. 333, and Missouri, K. & T. R. Co. v. Leibengood, 28 L.R.A. (N.S.) 985.

packages to like points, is not invalid because such transportation is over a route which, for a short distance, passes out of the state.

[For other cases, see Commerce, III. d; I. b, in Digest Sup. Ct. 1908.]

[No. 66.]

Argued and submitted December 6, 1912.
Decided January 6, 1913.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a conviction in the District Court of Leavenworth County, in that State, of the violation of a municipal ordinance imposing a tax on the business of express companies. Affirmed.

See same case below, 80 Kan. 58, 101 Pac. 664.

The facts are stated in the opinion.

Mr. Branch P. Kerfoot argued the cause, and, with Messrs. George W. Field, Frank H. Platt, and John T. O'Keefe, filed a brief for plaintiff in error:

The transportation of express packages between Leavenworth, Kansas, and other stations in Kansas, over railroad lines a large part of which are in Missouri, is interstate commerce.

Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 621, 47 L. ed. 333, 336, 23 Sup. Ct. Rep. 214; Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806.

The ordinance as construed by the supreme court of Kansas is invalid because it requires an express company to take out a license to conduct interstate commerce.

Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851.

The license tax specified in the ordinance is invalid because it is a burden on interstate commerce. It is directly imposed upon the right to do the business. It is not a property tax measured by the amount of receipts. It cannot, therefore, be sustained upon the authority of those cases which hold that a state may collect a property tax based on receipts from interstate transportation.

Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211.

Mr. Arthur M. Johnson submitted the cause for defendant in error. Mr. Benjamin F. Endres was on the brief:

The business of the express company taxed under the ordinance is not interstate commerce, and the city of Leavenworth had the right to levy the tax as a police regulation.

Topeka v. Jones, 74 Kan. 164, 86 Pac. 162, 87 Pac. 1133; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; Western U. Teleg. Co. v. Hughes, 104 Va. 240, 51 S. E. 225; Patterson v. Missouri P. R. Co. 77 Kan. 236, 15 L.R.A.(N.S.) 733, 94 Pac. 138.

Mr. Justice Day delivered the opinion of the court:

Plaintiff in error was the agent of the United States Express Company at Leavenworth, Kansas. He was convicted of violating an ordinance of the city imposing a tax on the business of express companies. The conviction was affirmed in 80 Kan. 58, 101 Pac. 664, and the case is brought here.

*Under the ordinance a tax was im-[466
posed on the business and occupation of express companies as follows:

"The sum of $50 per year on the business and occupation of express company, corporation or agency, in receiving packages in this city from persons in the city, and transmitting the same by express from this city, within this state, to persons and places within this state, and receiving in this city packages by express transmitted within the state from persons and places in this state to persons within this city, and delivering the same to persons in this city, excepting the receipt, transmission, and delivery of any such packages to and from any department, agency, or agent of the United States, and excepting the receipt, transmission, and delivery of any such packages which are interstate commerce; the business and occupation of receiving, transmitting, and delivering of the packages herein excepted is not taxed hereby."

The United States Express Company receives express packages at Leavenworth and forwards them by railroad to other cities and towns, some without the state and some within the state, and also delivers packages which have been forwarded to Leavenworth from like cities and towns. All such express packages are required to be brought into or sent out of Leavenworth, which lies west of the Missouri river in Kansas, over the Rock Island Railroad, which runs along the Missouri side

of the Missouri river, with a branch across the river to Leavenworth. The express company has no other means of transportation of packages in or out of Leavenworth. It therefore follows that every package handled by the express company at Leavenworth is brought from or carried into the state of Missouri over this branch of the Rock Island Railroad. The actual carriage in the state of Kansas over such branch is about 1 mile. The record shows that about 10 per cent of the business done at Leavenworth by the express company is 467]between Leavenworth *and other points in Kansas, but all such business is required to be transported in part, at least, within the state of Missouri.

The contention in this case is that the tax thus imposed is a regulation of and burden upon interstate commerce, and therefore in violation of the Federal Constitution, which vests in Congress the sole authority to regulate commerce among the states.

It is to be observed that the ordinance excludes interstate and government business. As the supreme court of Kansas says (80 Kan. 62): "The license tax was upon so much of the company's business as was carried on in Kansas. It had an office and local conveyances in Leavenworth for the collection of packages in that city, and it made contracts for transporting these packages to places within the state. Likewise it collected packages in other parts of the state and carried them into Leavenworth, where they were delivered to the consignees. Does the fact that in carrying these packages between points in Kansas they pass over the soil of another state for a short distance make the tax on that business invalid?"

We are of opinion that this case is controlled by Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, in which it was held that a state might tax the receipts of a railroad corporation for the portion of the transportation which was within the state, although the transportation then in question, while between points within the state, passed over the railroad which traversed for a part of the way territory of an adjoining state. It was held that a tax upon such receipts did not tax interstate commerce, and this court said (p. 202):

"It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by 468]Pennsylvania of the operations of *this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

The Lehigh Valley Case was cited with approval in United States Exp. Co. v. Minnesota, 223 U. S. 335, 342, 56 L. ed. 459, 463, 32 Sup. Ct. Rep. 211, as determinative of the proposition that the state of Minnesota might tax the receipts of an express company from the transportation of packages from points within the state to other points therein, although the transportation was in part outside of the state.

It is contended, however, that the contrary result must be reached, applying the principles laid down in Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214. In that case this court declared unconstitutional a law of Arkansas undertaking to fix rates upon railway transportation, the transportation in question in that case being a single carriage partly outside of the state of Arkansas from a point within to another point within the state. In the particular instance the transportation covered 116 miles, of which only 52 miles were within Arkansas and the rest without the state. It was held that the right to regulate such commerce was solely in Congress under the Constitution, and that the transportation was a single and entire thing, and as a subject for rate legislation was indivisible. The case of Lehigh Valley R. Co. v. Pennsylvania, supra, was called to the attention of the court, and of that case this court said (p. 621):

"That was the case of a tax, and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders. 145 U. S. 204, 36 L. ed. 676, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806. *And although it[469 was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the state.' 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep.

807, 12 Sup. Ct. Rep. 121, 163. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The distinction is applicable here. There is no attempt to fix a rate by the authority of the state, which, while single and complete in itself, covers for a considerable part interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the government, and is levied solely on the business done in the city of Leavenworth in receiving packages from points within the state and in transporting packages to like points. Applying the principles of the Lehigh Valley Case to such a situation, we are of opinion that, for the purpose of a privilege tax for business thus done the municipality, acting under authority of the state, did not exceed its just power.

Judgment affirmed.

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470] *UNITED STATES OF AMERICA, Appt.,
v.
UNION PACIFIC RAILROAD COMPANY et al.

(See S. C. Reporter's ed. 470–477.)

**Appeal — judgment — compliance with decree — dissolution of monopoly.**

The unlawful combination found by the Federal Supreme Court to exist as the result of the acquisition by the Union Pacific Railroad Company, through a subsidiary corporation, of 46 per cent of the capital stock of the Southern Pacific Company, for the purpose of obtaining the dominating control of the entire Southern Pacific system, will not be so effectually ended as to comply with the court's decree by a sale of such shares to the shareholders of the Union Pacific Railroad Company substantially in proportion to their respective holdings, or by a distribution thereof by dividend to such shareholders.

[For other cases, see Appeal and Error, IX. 1; IX. 1, in Digest Sup. Ct. 1908.]

[No. 446.]

Motion submitted December 19, 1912. Decided January 6, 1913.

ON MOTION as to form of mandate under a decree of the Federal Supreme Court which, reversing a decree of the Circuit court for the District of Utah, dismissing the bill in a suit to enforce the provisions of the Sherman anti-trust act against certain alleged conspiracies and combinations in restraint of interstate commerce, directed the dissolution of such combination. Motion denied.

See ante, 124.

The facts are stated in the opinion.

Attorney General Wickersham submitted for the United States.

Messrs. John C. Spooner, John G. Milburn, Maxwell Evarts, and N. H. Loomis submitted for the Union Pacific Railroad Company and the Oregon Short Line Railroad Company.

*Mr. Justice Day delivered the[471 opinion of the court:

On December 2, 1912, this court handed down an opinion and remanded this case to the district court of the United States, whence it came, with instructions to enter a decree which would provide an injunction as to voting the stock of the Southern Pacific Company, acquired by the Union Pacific Railroad Company, and directed the court to further hear the parties in order to make a decree effectually concluding the operating force of the combination created by the purchase of the Southern Pacific Company's stock. The parties were given three months from the receipt of the mandate of this court by the district court to propose plans, and it was directed that any one adopted by the court should be such as would effectually dissolve the unlawful combination.

The mandate of this court not having issued, on December 19, 1912, a motion was made in which the Attorney General of the United States and counsel for the appellees the Union Pacific Railroad Company and the Oregon Short Line Railroad Company (the latter holding the stock for the Union Pacific Company) joined in asking this court "to instruct the United States district court for the district of Utah, by a provision incorporated in the mandate of this court, when issued, or otherwise, whether or not a sale of the Southern Pacific Company shares held by said appellees, to the shareholders of appellee Union Pacific Railroad Company, substantially in proportion to their respective holdings, or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend, would, in the opinion of this court, constitute a disposition of said shares in compliance with the opinion herein filed on December 2, 1912."

In pursuance of the request thus preferred by the United States and the appellees named, it becomes necessary now to determine whether the distribution or sale

*Note.—On illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

472]proposed *of the Southern Pacific Company's shares will comply with the decree ordered to be entered by the former opinion of this court.

The Southern Pacific Company's stock, held by the Oregon Short Line Company for the Union Pacific Company, amounts to $126,650,000, par value, in shares of $100 each, and constitutes 46 per cent of the Southern Pacific Company's stock; enough, as we have heretofore found, to effectually control the Southern Pacific Company. As stated by the appellees, the Union Pacific Company has outstanding $99,569,300, par value, of preferred stock, and $216,646,300, par value, of common stock, all in shares of $100 each, amounting in all to $316,215-600, and also has outstanding $37,000,000 of bonds convertible into stock, and the appellees further state that its stock is distributed among over 22,000 holders.

It is contended on behalf of the appellees that the distribution of the Southern Pacific Company's stock, held, as we have stated, by the Oregon Short Line Company for the Union Pacific Company, among so many stockholders, will effectually conclude the combination decreed to be ended by the former order of the court. It is insisted that such distribution will prevent the continued operation of the combination for the control of the Southern Pacific Company by a competing company, which the Union Pacific Company was found to be, and that it is authorized under the practice in respect to such decrees, as settled by the previous decisions of this court in affirming the decree of the circuit court in Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, and Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493, and the decree of the Circuit Court in Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734.

In the Northern Securities Co. Case, after providing for orders of injunction to prevent the continued operation of the North-473]ern Securities Company, which *controlled the Northern Pacific Railway Company and the Great Northern Railway Company, it was provided:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the [stockholders of the] Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from *such stockholders in exchange* for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." [193 U. S. 355, 48 L. ed. 707, 24 Sup. Ct. Rep. 436.]

Upon the affirmation of this decree by this court in 193 U. S. 197, the Northern Securities Company proceeded to reduce its outstanding capital stock from $395,400,000 to $3,954,000, providing for such reduction by requiring each holder to surrender to the company for retirement 99 per cent of the shares held by him, and upon surrender by a stockholder the company assigned and transferred to him proportionate amounts of the stock of the Northern Pacific Company and Great Northern Company, which had been placed with the Northern Securities Company, the holding company, for the purpose of creating the combination, which the court had held to be illegal, and this plan of distribution was approved by this court in 197 U. S. 244, 49 L. ed. 739, 25 Sup. St. Rep. 493. In other words, the stock of the holding company was reduced and the surplus of assets created by such reduction, the stock of the Northern Pacific Company and the Great Northern Company, was distributed among the stockholders of the Northern Securities *Com-[474 pany, thereby effectually ending the combination.

In the Standard Oil Co. Case the majority of the stock of nineteen oil companies had been placed in the control of a holding company, the Standard Oil Company of New Jersey, with a capital stock of $100,000,000, the stock of the latter corporation being issued to the holders of the stock in the nineteen companies in exchange for their stock. This holding company was held to be a combination and conspiracy in restraint of trade and commerce, and, after awarding injunctions, it was provided:

"But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination." [173 Fed. 199.]

It is evident in that case, as in the Northern Securities Co. Case, that the distribution of the shares and stocks of the subsidiary companies, parties to the combination, among the shareholders of the Standard Oil Company of New Jersey, was to end the combination which had been de

creed to be in violation of law, and prevent the continued control of the subsidiary companies by the holding company.

As was said in the opinion filed in this case, however, each case under the Sherman act [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200] must stand upon its own facts; and we are unable to regard the decrees in the Northern Securities Co. Case and the Standard Oil Co. Case as precedents to be followed now, in view of the different situation presented for consideration.

The Southern Pacific Company's stock was mainly purchased from private parties, legatees of the Huntington estate, and it is evident that it is impossible to restore the *status quo* by the return of such stock to the persons from whom it was purchased upon such vendors refunding the purchase money.

475] *The plan proposed in the present motion of distributing the stock among the shareholders of the Union Pacific Company, or of selling it to such shareholders, will, in effect, transfer the stock from the Oregon Short Line Company, which now holds it for the Union Pacific Company, to the stockholders of the latter company, who own and control that company. Upon the face of it, this would seem to be a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company, because of the power given to the Union Pacific Company's stockholders to choose the directors of the Southern Pacific Company. The ultimate determination of the affairs of a corporation rests with its stockholders, and arises from their power to choose the governing board of directors. Unless otherwise provided by law, the stockholders may authorize the board of directors to delegate to an executive committee the authority to do any and all acts which the directors are authorized to do. The executive committee thus derives its authority from the stockholders through the board of directors. Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 597, 41 L. ed. 265, 276, 16 Sup. Ct. Rep. 1173. In the present case the record discloses this mode of management of both the Southern Pacific Company and the Union Pacific Company, and, since 1905, as the proof shows, a majority of both executive committees consisted of the same persons, and Mr. Harriman was chairman of both committees.

It is contended for the appellees, however, that, in view of the great number of widely scattered stockholders of the Union Pacific Company, there is no probability of their acting together to continue the control of the Union Pacific Company over the South-

ern Pacific Company. Indeed, this is said to be impossible. But we are unable to accede to this contention. Bearing in mind the object of the statute to end such combinations, and the duty of *the courts[476 in dealing with them to make such decrees as will most thoroughly effectuate that purpose, it is not consistent with that end to order such distribution of the stock as may fail to discontinue the control denounced, and as in all probability will fail to efficiently enforce the statute. It is by no means improbable, but quite likely, that, if the stock was transferred to the stockholders of the Union Pacific Company by distribution among them, the large stockholders could, by purchases and transfers of the stock, get into their own hands the power of choosing directors of both companies, and thus, though in a different manner, the Southern Pacific Company would continue to be in the practical control of the Union Pacific Company, which has been found to be a rival and competing company within the meaning of the law. So of the privilege of sale to the stockholders in proportion to the amount of their holdings.

In considering these questions we must bear in mind not only the number of stockholders, but the character of the distribution of the stock among them. In the brief and exhibits of the appellees, filed with this motion, it is shown that of the 22,150 stockholders of the Union Pacific Company, 68, owning 5,000 or more shares each, hold together $139,782,700 of the stock, and 300 others, owning from 1,000 to 5,000 shares each, hold together $59,020,700 of the stock, and that the two groups (comprising 368 stockholders) hold $198,843,400, or 62.8 per cent of the stock, while the remaining stockholders (21,782) control only $117,412,200 of the stock. Many small shareholders might not wish to purchase the Southern Pacific Company's stock, and the privilege might be readily acquired from them by the larger and more active interests vested in the hands of the large stockholders, and thus again the condition forbidden be created and perpetuated.

The main purpose of the act is to forbid combinations and conspiracies in undue restraint of trade or tending to *monop-[477 olize it, and the object of proceedings of this character is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies. So far as is consistent with this purpose a court of equity, dealing with such combinations, should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully

executed, and no form of dissolution be permitted that, in substance or effect, amounts to restoring the combination which it was the purpose of the decree to terminate.

In rejecting the plan for the transfer of the Southern Pacific Company's stock held for the Union Pacific Company, either by distribution or sale to the stockholders of the Union Pacific Company, we do not mean to preclude the district court from considering and acting upon plans which may be submitted to it under the former opinion and decree of the court. We are of opinion, however, and now hold, that the proposed plan of disposition of the entire stock holding of the Union Pacific Company in the Southern Pacific Company by transfer to the stockholders of the Union Pacific Company will not so effectually end the combination as to comply with the decree heretofore ordered by this court to be entered.

So ordered.

Mr. Justice Van Devanter took no part in the hearing or determination of this motion.

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478] *WARREN B. WHEELER, Plff. in Err.,
v.
UNITED STATES. (No. 658.)

STILLMAN SHAW, Plff. in Err.,
v.
UNITED STATES. (No. 659.)

WARREN B. WHEELER, Appt.,
v.
GUY MURCHIE, United States Marshal, etc. (No. 660.)

STILLMAN SHAW, Appt.,
v.
GUY MURCHIE, UNITED STATES MARSHAL, ETC. (No. 661.)

(See S. C. Reporter's ed. 478–490.)

**Constitutional law — liberty — due process of law — commitment for contempt.**

1. Former officers in a corporation which has gone out of existence after transferring to them its books and papers are not deprived of their liberty without due process of law by a commitment for contempt in refusing to obey a subpœna duces tecum directed to the corporation, requiring the production of such books and papers before a grand jury engaged in investigating the alleged criminal conduct of such former officers, where, before the order of commitment was made, they were allowed a full hearing in a court of competent jurisdiction, and no objection was taken to the technical form of the subpœna in directing it to the corporation, and not to the individuals.

[For other cases, see Constitutional Law, IV. b. 3; IV. b, 9, in Digest Sup. Ct. 1908.]

**Searches and seizures — production of corporate books and papers.**

2. A subpœna duces tecum calling for the production before a grand jury engaged in investigating the alleged criminal conduct of the former officers of a corporation of all the corporate books, letters, and telegrams in their possession, covering a specified period of fifteen months, is not so broad as to amount to an unreasonable search and seizure.

[For other cases, see Searches and Seizures, in Digest Sup. Ct. 1908.]

**Searches and seizures — production of books of dissolved corporation.**

3. Former officers of a dissolved corporation are not subjected to an unreasonable search and seizure by the compulsory production before a grand jury engaged in investigating their alleged criminal conduct, of the books and papers of the corporation, which had been transferred to them before dissolution, and which were still in their possession.

[For other cases, see Searches and Seizures, in Digest Sup. Ct. 1908.]

**Witnesses — self-crimination — former officer of dissolved corporation — production of corporate books.**

4. The privilege of corporate officers against self-crimination in the production of their own books and papers before a grand jury engaged in investigating their alleged criminal conduct does not protect the former officers of a dissolved corporation in resisting the compulsory production of the books and papers of such corporation, which had been transferred to them before dissolution, and are still in their possession.

[For other cases, see Witnesses, V. e, in Digest Sup. Ct. 1908.]

[Nos. 658, 659, 660, and 661.]

Submitted December 4, 1912. Decided January 6, 1913.

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NOTE.—On refusal to produce books or papers in response to subpœna, upon ground that they contain private matter—see note to Re Bolster, 29 L.R.A.(N.S.) 716.

On compulsory production of books and papers as unreasonable search or seizure—see note to Consolidated Rendering Co. v. Vermont, 52 L. ed. U. S. 327.

As to *constitutional protection* against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Ct. 29 L.R.A. 811.

On the right of officer of a corporation to refuse to turn over its books to a receiver upon the ground that they have a tendency to incriminate him—see note to Manning v. Mercantile Securities Co. 30 L.R.A. (N.S.) 725.

TWO WRITS OF ERROR to the District Court of the United States for the District of Massachusetts to review commitments for contempt, arising out of the refusal of the former officers of a dissolved corporation to produce the corporate books and papers before a grand jury engaged in investigating the alleged criminal conduct of such officers. Affirmed. Also

TWO APPEALS from the District Court of the United States for the District of Massachusetts to review orders denying writs of habeas corpus to inquire into detentions under such commitments. Affirmed.

The facts are stated in the opinion.

Mr. Nathan Matthews submitted the cause for plaintiffs in error and appellants. Messrs. William G. Thompson and Romney Spring were on the brief:

The subpœna imposed no legal obligation on the corporation to produce the books and papers.

Ballman v. United States, 200 U. S. 186, 194, 50 L. ed. 433, 436, 26 Sup. Ct. Rep. 212; Hale v. Henkel, 201 U. S. 43, 74, 75, 50 L. ed. 652, 665, 666, 26 Sup. Ct. Rep. 370.

The description of the books and papers in the subpœna is so broad and sweeping as to constitute an unreasonable search under the 4th Amendment.

Hale v. Henkel, 201 U. S. 43, 76, 77, 50 L. ed. 652, 666, 667, 26 Sup. Ct. Rep. 370.

The service, which was in terms expressed to have been made upon Wheeler and Shaw in their official capacity as officers of the corporation, was simply a method of enforcing the assumed obligation of the corporation, and not any obligation of Wheeler and Shaw personally.

Leavenworth County v. Sellew, 99 U. S. 624, 627, 25 L. ed. 333, 335.

That in such a case the obligation of the individual served is derivative and secondary, and not individual and primary, is the very essence of the reasoning in—

Wilson v. United States, 221 U. S. 376, 381, 382, 55 L. ed. 777, 779, 780, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Dreier v. United States, 221 U. S. 394, 55 L. ed. 784, 31 Sup. Ct. Rep. 550; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 622, 623, 55 L. ed. 878, 883, 884, 31 Sup. Ct Rep. 621.

The fact that the distinction between the nature of the two possible obligations which a subpœna duces tecum may impose upon the individual upon whom it is served is *sometimes* blurred by addressing the subpœna to the individual, when what is sought are documents held by him in an official capacity, serves only to sharpen the distinction when the subpœna is addressed, as here, to the corporation itself.

Wilson v. United States, 221 U. S. 374, 55 L. ed. 776, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Re American Sugar Ref. Co. 178 Fed. 109; Re Bornn Hat Co. 184 Fed. 508; United States v. American Tobacco Co. 146 Fed. 557.

The one advantage which the government sought to secure by choosing a summons addressed to the corporation itself, rather than one addressed to the individual custodian, illustrates the distinction. For a corporation is not protected by the 5th Amendment, and a natural person is.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Bornn Hat Co. v. United States, 223 U. S. 713, 56 L. ed. 626, 32 Sup. Ct. Rep. 521, affirming 184 Fed. 506.

Assuming that the contents of documents would, in fact, tend to incriminate an individual, his protection, under the 4th and 5th Amendments, against being compelled to produce them, depends wholly upon the capacity in which he holds them,—not at all upon their origin, or upon the character, in other respects, of the information contained in them.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Entick v. Carrington, 19 How. St. Tr. 1029; Wilson v. United States, 221 U. S. 376, 55 L. ed. 777, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Hillman v. United States, 112 C. C. A. 522, 192 Fed. 270; Re Harris, 221 U. S. 274, 55 L. ed. 732, 31 Sup. Ct. Rep. 557.

Solicitor General Bullitt and Assistant Attorney General Harr submitted the cause for defendant in error and appellee:

The 5th Amendment has no application, because appellants were not called as witnesses.

3 Wigmore, Ev. § 2263.

The order to produce the books of the corporation was not an invasion of appellants' privacy, within the meaning of the 4th Amendment.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Wilson v. United States, 221 U. S. 374, 55 L. ed. 776, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Re Grant, 198 Fed. 708.

The rule in equity, that "no man need discover matters tending to incriminate himself, or to expose him to a penalty or forfeiture," is subject to an exception in respect to frauds, and also where fiduciary relations exist.

Adams, Eq. 8th ed. p. 4; State v. Maury,

2 Del. Ch. 158; Green v. Weaver, 1 Sim. 404, 6 L. J. Ch. 1, 27 Revised Rep. 214.

Sound public policy forbids the extension of the privilege against self-incrimination to a case involving the production of corporate records.

3 Wigmore, Ev. § 2251, p. 3102.

Mr. Justice Day delivered the opinion of the court:

These cases arise from the following facts: On April 12, 1912, the Federal grand jury in Boston was investigating whether Warren B. Wheeler and Stillman Shaw, plaintiffs in error in Nos. 658 and 659 and appellants in Nos. 660 and 661, had, by means of a certain corporation known as Wheeler & Shaw, Incorporated, or otherwise, violated § 215 of the act of Congress of March 4, 1909 (35 Stat. at L. 1088, 1130, chap. 321, U. S. Comp. Stat. Supp. 1911, pp. 1588, 1653), making it a crime to use the mails of the United States for a scheme to defraud, which crime is punishable by fine or imprisonment or both. On the same day a subpœna duces tecum, without *ad testificandum* clause, was issued, summoning the corporation to appear 483]*before the grand jury and produce all the cash books, ledgers, journals, and other books of account of the company, and all copies of letters and telegrams of Wheeler & Shaw, Incorporated, whether signed or purporting to be signed by the corporation or by its president or treasurer in its behalf, for and covering the period from October 1, 1909, to January 1, 1911; all the aforesaid books and copies of letters and telegrams to be produced before the grand jurors under the penalties of law. The subpœna was served on Wheeler as treasurer, and on Shaw as president, of the corporation. The appeared before the grand jury, without any of the books or correspondence, as required in the subpœna, however; asked to be sworn for the purpose of explaining why they had not brought them, and left with the grand jurors papers containing the following statement of their reasons for the nonproduction of the books, etc. (the records are the same, *mutatis mutandis*, in the Wheeler Case and the Shaw Case):

To the Grand Jurors of the District Court of the United States for the District of Massachusetts.

Gentlemen:—There was served upon me at 12:50 P. M. to-day, April 12, 1912, a subpœna addressed to Wheeler & Shaw, Inc., a corporation doing business at Boston, in said district, and calling upon that corporation to produce before you, presumably through me, "all cash *books, ledgers,* journals, and other books of account of said Wheeler & Shaw, Inc., for and covering the period between October 1, 1909, and January 1, 1911, all copies of letters and telegrams of Wheeler & Shaw, Inc., signed or purporting to be signed by said Wheeler & Shaw, Inc., or by its president or its treasurer in behalf of said Wheeler & Shaw, Inc., during the months of October, November, and December, 1909, and the entire year of 1910; all the aforesaid books, copies of letters, and telegrams to be produced *before the grand jurors of said dis-[484 trict court in the matter of an alleged violation of the laws of the United States by Warren B. Wheeler and Stillman Shaw."

I desire to avail myself of what I understand to be my right to state to you my reasons for not producing any books, ledgers, or other papers or documents in response to said summons. My reasons are:

First: That I have not in my possession or custody any cash books, ledgers, journals, or any of the other books or things described in said subpœna which belong to Wheeler & Shaw, Inc., or are in my possession as an officer or agent of Wheeler & Shaw, Inc. The only cash books, ledgers, journals, and other books, papers, and things to which the aforesaid description in said subpœna could apply are the personal property of myself and Stillman Shaw, and are in our personal possession, and are not in the possession of either of us as officers or agents of any corporation.

Second: Even were the fact not as stated above, I am advised that the language of said subpœna quoted above is so broad, sweeping and lacking in particularity as to constitute a violation of the rights of any party to whom a subpœna is addressed to be exempt from unreasonable searches and seizures under the 4th Amendment to the United States Constitution.

Third: Whether addressed to said corporation or to me personally, I am advised that said subpœna violates the rights secured to me by the 5th Amendment to the Constitution of the United States not to be a witness against myself in any criminal case.

I make this statement in good faith, and not intending any disrespect to the grand jury, or to the officers of the government, and I venture to remind the grand jury that I am entitled under the laws of the United States not to have any inferences drawn against me by reason of the action I have taken in this matter. It is one thing to produce *private books and[485 papers in a proceeding where there is an opportunity to explain them and to examine and cross-examine witnesses concerning them; but the situation in an ex parte pro-

ceeding is so different that I feel sure the grand jury will feel that I am justified in standing upon any constitutional rights in this matter.

Warren B. Wheeler.

The grand jurors on April 13, 1912, filed in the district court a paper called a petition for attachment for contempt, in which they prayed that Wheeler and Shaw be ordered to produce the books and copies of letters and telegrams, and upon failure or refusal be adjudged guilty of contempt. Wheeler and Shaw appeared, filed motions to dismiss, which were denied, and then filed sworn answers. The cases were heard by the district judge on the grand jurors' petitions, the answers, and certain agreed facts. At the close of the hearing the court ruled that the case was governed by Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 508, and ordered Wheeler and Shaw to produce the books and papers described in the subpœna. Final orders were entered on April 18, 1912, adjudging them in contempt and committing them to the custody of the marshal until, by producing before the grand jury the books and copies of letters and telegrams, they should cease to obstruct and impede the corporation known as Wheeler & Shaw, Incorporated, from complying with the subpœna duces tecum, or otherwise purge themselves of their contempt.

From these judgments Wheeler and Shaw sued out writs of error, which constitute cases Nos. 658 and 659. They also filed petitions for writs of habeas corpus against the marshal, and from the orders denying the petitions they appealed to this court, and these cases constitute Nos. 660 and 661.

Upon the hearing the district judge made certain findings of fact, as follows:

486] *"1. A subpœna, of which a copy, with a copy of the officer's return thereon is annexed to said petition, was served upon the defendant on the 12th day of April, A. D. 1912.

"2. The corporation mentioned in the statute of the commonwealth of Massachusetts, which took effect on March 25, 1912, being statute 1912, chapter 313, and therein described by the words 'Wheeler and Shaw, Inc.,' is the same corporation that is mentioned in said subpœna. [By the statute the corporation was dissolved and its charter annulled.]

"3. On the afternoon of said April 12th the defendant appeared before said grand jury in response to said subpœna, and thereupon the questions, of which a copy is annexed to said petition, were put to him, and answers, as stated in the copy of the same annexed to said petition, were made by him, and the written statement, of which a copy is annexed to said petition, was left by him with said grand jury. The defendant did not bring with him or have before said grand jury any of the books and copies of letters and telegrams described in said subpœna. He did, when before said grand jury, ask to be sworn for the purpose of stating the reasons why he had not brought with him any of said books and copies of letters and telegrams; but he was not sworn. He did not waive or intend to waive his claim of a right to be sworn before said grand jury for the purpose aforesaid.

"4. Some time in the month of April, 1911, said corporation Wheeler & Shaw, Inc., ceased to do business, and shortly afterwards the legal title and possession of all the books and papers of said corporation then belonging to it, including all the books and copies of letters and telegrams described in the subpœna, were lawfully transferred to the defendant and to one Stillman Shaw as tenants in common, and have ever since remained in the defendant and said Shaw. Prior to the time when said statute of 1912, *chap. 313 [dis-[487 solving the corporation], took effect, the defendant was the treasurer of said corporation, and said Shaw was the president thereof, and neither the defendant nor said Shaw has ever resigned his said office in said corporation."

Wheeler and Shaw also took bills of exceptions, in which it appears that the cases were heard upon the petitions, sworn answers, and certain facts admitted by counsel in open court, which are set out and incorporated in the finding of fact appearing of record, and in which it is further made to appear that defendants at the hearing before the court repeated the claim set up by them before the grand jury that a compliance with the subpœna duces tecum would violate their right to be secure against unreasonable searches and seizures under the 4th Amendment of the United States Constitution, and their right not to be compelled to be witnesses against themselves in any criminal case, under the protection of the 5th Amendment. They also asked the court to rule that such order would violate their rights under the Massachusetts Constitution. The court overruled all of the objections of defendants, and held, as a matter of law, that the legal effect of dissolving the corporation and transferring to the defendants the books and copies of letters and telegrams described in the subpœna had not been to make the books and papers the private property of the defendants in such sense as

to exempt them from producing such books and correspondence before the grand jury, as required by the subpœna, and that the facts of the cases brought them within the rule of this Court in Wilson v. United States, supra.

The defendants reduce their contentions in this court to two propositions, namely:

"I. The orders of commitment and the imprisonment thereunder have deprived the plaintiffs in error and appellants [referred to in this opinion as defendants] of their liberty without due process of law.

488] *"II. If, as is agreed, the books and papers described in the subpœna were the private property of the plaintiffs in error and appellants, then the court's order requiring their production before the grand jury, and the judgments of contempt based upon the disobedience of that order, violated the right of each plaintiff in error and appellant under the 5th Amendment not to be compelled in any criminal case to be a witness against himself, and the right of each under the 4th Amendment to be exempt from unreasonable searches and seizures."

The proposition that the orders of the court of commitment and imprisonment deprived defendants of their liberty without due process of law seems to be based upon the contention that the corporation was in no way obliged to obey the subpœna, and that, after its dissolution, it was not subject to any subpœna requiring the production of books and papers before the grand jury. But we do not think there is any merit in this objection. If the government had the legal right to demand the production of the books and papers in question, with a view to the investigation of the alleged offense of Wheeler and Shaw in the proceedings before the grand jury, whether the subpœna was drawn in proper form or not, or whether the corporation, in view of its dissolution, could have been compelled to comply with its requirements, in the attitude which the case has taken, is immaterial. It is apparent from the facts already recited that Wheeler and Shaw were required by the subpœna duces tecum to bring before the grand jury the books and papers of the corporation which had been dissolved, and that they so understood the subpœna; that they were in possession of such books and papers which could be by them produced before the grand jury, and that, before the order of commitment was made, the defendants were allowed a full hearing in a court of competent jurisdiction. No objection was taken to the technical form of the subpœna in directing it 489] to *the corporation, and not the individuals. There is nothing to show it was so broad as to be objectionable, as was indicated of the subpœna in Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370. The defendants, in possession of the books and papers, were denying the right of the court to compel their production because of the dissolution of the corporation; because the title and possession of the books and papers had passed to the defendants individually and were their private property as tenants in common, and they had no possession or custody of the documents as officers of the corporation, and because, as against them, the compulsory production of such books and correspondence would violate their rights under the 4th and 5th Amendments to the Constitution of the United States.

We think the questions of substance now presented are whether the rights of the defendants as individuals to be exempt from unreasonable search and seizure of their property and from being compelled to be witnesses against themselves would be violated by the compulsory production of the documents in question.

We are of opinion that this case is virtually ruled by Wilson v. United States, supra. In that case it was held that there was no unreasonable search or seizure where the officer of a corporation, whose guilt of an offense against the laws of the United States was under investigation, was compelled to produce books and papers of the corporation of which he was president, because, as against the corporation, the true owner of the books and papers, their production might lawfully be compelled, and that there was no self-incrimination of such officer, because he was not compelled to produce his private books, but the books of the corporation, which were not within the protection given to the private books and papers of an individual. We are unable to see that this case differs in principle from that one. It is true the corporation in the present case had ceased to exist, but *its books and papers were [490 still in existence and were still impressed with the incidents attending corporate documents. Wheeler and Shaw had been officers of the corporation, and the books of the company had, before the dissolution, been made over to them; but this did not change the essential character of the books and papers, or make them any more privileged in the investigation of crime than they were before.

Wheeler and Shaw, it may be admitted, could no longer be officers of the corporation, although the record shows that they had never resigned their positions. The corporation, however, had gone out of existence, leaving its books and papers in

the possession of the defendants, and it may be conceded, for many purposes such books belonging to them; but, as was held in the Wilson Case, the privilege of the Constitution against unreasonable searches and seizures does not protect against the lawful examination in due course of books of this character; nor does the privilege of individuals against self-incrimination in the production of their own books and papers prevent the compulsory production of the books of a corporation with which they happen to be or have been associated. It was the character of the books and papers as corporate records and documents which justified the court in ordering their production, as this court ruled in the Wilson Case. We think the character of the books was not changed for this purpose, because the corporation had gone out of existence after making over the books to the defendants. Such books and papers still remained subject to inspection and investigation, and no constitutional right of the defendants was violated when, being found in possession of the documents, they were required to produce them for inspection by the grand jury. It follows that the judgments of commitment in Nos. 658 and 659, and the orders appealed from in Nos. 660 and 661, should be affirmed.

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491] *ADAMS EXPRESS COMPANY, Plff. in Err.,
v.
E. H. CRONINGER.

(See S. C. Reporter's ed. 491–513.)

**Commerce — exclusiveness of Federal power — superseding state legislation — carrier's liability.**

1. The intent of Congress to take possession of the subject of the liability of a carrier under contracts for interstate shipment, and to supersede all state regulations with reference to that subject, so clearly appears from the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 20, as to invalidate, as applied to interstate shipments, the provisions of any state law nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

**Carriers — liability — Carmack amendment.**

2. A liability for some default in its common-law duty as a common carrier, and not liability as an insurer, is what is imposed by the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, under which a carrier receiving property for interstate transportation is required to issue a receipt or bill of lading therefor, and is made liable to the holder for "any loss, damage, or injury to such property caused by it," or by any connecting carrier to whom the property may be delivered.

[For other cases, see Carriers, II. b, 2, in Digest Sup. Ct. 1908.]

**Commerce — conflicting state and Federal regulations — carrier's liability.**

3. Rights and remedies conferred by existing state laws, where a shipment accepted by a carrier for interstate transportation has been lost, injured, or damaged, were not continued in force by the proviso in the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, that nothing therein contained shall deprive the holder of the receipt or bill of lading of any remedy or right of action which he has under existing law, but such proviso only preserves to such holder any right or remedy which he may have had under existing Federal law at the time of his action.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — agreed value.**

4. Inquiry as to the actual value of an interstate shipment is not vital to the fairness, under the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, of a stipulation in the carrier's receipt, limiting its liability to the agreed or declared value, where such receipt, as well as the published rates on file with the Interstate Commerce Commission, plainly show that the rate charged was based upon value.

[For other cases, see Carriers, II. b, 7 b, in Digest Sup. Ct. 1908.]

**Evidence — presumption — knowledge of shipper.**

5. A shipper's knowledge that the carrier's rate was based upon the value of

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NOTE.—For state statutes regulating the liability of carriers with respect to shipments over connecting lines, as interference with interstate commerce—see note to Skipper v. Seaboard Air Line R. Co. 7 L.R.A. (N.S.) 388.

As to limitation of carrier's liability for loss to agreed valuation—see notes to Everett v. Norfolk & S. R. Co. 1 L.R.A.(N.S.) 985.

*As to carrier's power to limit amount of* 814

liability in case of negligence generally—see note to Ballou v. Earle, 14 L.R.A. 433.

As to right to limit liability by contract in the absence of negligence—see note to Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527.

And generally, as to liability of connecting carrier for loss beyond its own line—see note to Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1.

the shipment is to be presumed where this plainly appears from the terms of the bill of lading and from the published rates on file with the Interstate Commerce Commission.

[For other cases, see Evidence, II. e, 5, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — agreed value.**

6. A carrier could, at common law, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage, to an agreed value, made for the purpose of obtaining the lower of two or more rates, proportioned to the amount of the risk.

[For other cases, see Carriers, II. b, 7 b, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — agreed value — effect of Carmack amendment.**

7. A stipulation in a carrier's receipt, limiting its liability to an agreed or declared value, made to adjust the rate, is not forbidden by the provision of the Carmack Amendment of June 29, 1906, to the act of February 4, 1887, § 20, that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company, from the liability hereby imposed."

[For other cases, see Carriers, II. b, 7 b, in Digest Sup. Ct. 1908.]

[No. 18.]

Argued March 13, 1912. Ordered for reargument before full bench April 8, 1912. Reargued October 23, 1912. Decided January 6, 1913.

IN ERROR to the Circuit Court of Kenton County, State of Kentucky, to review a judgment against a carrier for the full value of an undelivered interstate shipment, notwithstanding a stipulation limiting the carrier's liability to the agreed value. Reversed and remanded for further proceedings.

Statement by Mr. Justice **Lurton**:

This was an action in the circuit court of Kenton county, Kentucky, against the express company, to recover the full market value of a small package containing a diamond ring which was delivered by the plaintiff below to the express company at its office in Cincinnati, Ohio, consigned to J. W. Clendenning at Augusta, Georgia. The package was never delivered.

The express company made defense by answer. The plaintiff demurred to the answer as not containing a defense, which demurrer was sustained. The company declined to further plead, whereupon the circuit court gave judgment for the sum of $137.52, being the full value of the ring and interest. A writ of error was sued out from this court to the *circuit court of Kenton* county, that being the highest court of the state in which a decision could be had.

The answer and accompanying exhibit were in substance as follows:

*That the defendant was an express[493 company engaged in interstate commerce within the provisions of the act of Congress of June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288]; that in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia, which schedules showed that its rates and charges, when the value of the property to be carried was in excess of $50, were graduated reasonably, according to the value, and that the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was 25 cents if the value was $50 or less, and was 55 cents if its value was $125.

It is averred that the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment, and that it (the defendant) required that the value should be declared by the shipper, and that if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of $50. It is then alleged that the package so delivered was sealed, and that defendant did not know the contents or value, and that if it had, it would not have received it for carriage for less than the lawful published rate of 55 cents. The receipt or bill of lading issued shows no value, but contains a stipulation in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding $50 unless a greater value is declared, the shipper agrees that the value of said property is not more than $50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than $50 if no value is stated herein."

Mr. **Lawrence Maxwell** argued the cause, and, with Mr. Joseph S. Graydon, filed a brief for plaintiff in error:

A public policy of the United States of uniform application is necessarily established by the acts to regulate commerce, which is inconsistent with the power, formerly existing in the states, to compel an interstate carrier to answer for more than the amount on which the rate was based, to a shipper who has secured an illegally low rate.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 395, 50 L. ed. 515, 523, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 72, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 219 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Melody v. Great Northern R. Co. 25 S. D. 606, 30 L.R.A.(N.S.) 568, 127 N. W. 543, Ann. Cas. 1912 C, 727.

Initial carriers are not subject to the liability imposed by varying state laws for loss or damage to interstate shipments, because Congress has assumed possession of the domain of such liability.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; Southern P. Co. v. Crenshaw Bros. 5 Ga. App. 675, 63 S. E. 865; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Southern R. Co. v. Reid, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145.

The Carmack amendment, construed in connection with the other sections of the act, imposes on defendant no liability in excess of the value of the goods as shown by the bill of lading, being the value on which the rate for carriage was based.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 486, 48 L. ed. 268, 271, 24 Sup. Ct. Rep. 132; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Hinton v. Dibbin, 2 Q. B. 646, 2 Gale & D. 36, 6 Jur. 601; Kidd v. Greenwich Ins. Co. 35 Fed. 351; Calderon v. Atlas S. S. Co. 64 Fed. 874; Calderon v. Atlas S. S. Co. 16 C. C. A. 332, 35 U. S. App. 587, 69 Fed. 574; The Kensington, 88 Fed. 331; Jennings v. Smith, 45 C. C. A. 249, 106 Fed. 139; Saunders v. Southern R. Co. 62 C. C. A. 523, 128 Fed. 15; Macfarlane v. Adams Exp. Co. 137 Fed. 982; Missouri, K. & T. R. Co. v. Patrick, 77 C. C. A. 434, 144 Fed. 632; Taylor v. Weir, 162 Fed. 585; Blackwell v. Southern P. Co. 184 Fed. 489; George N. Pierce Co. v. Wells Fargo Co. 110 C. C. A. 645, 189 Fed. 561; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 442, 32 L. ed. 788, 792, 9 Sup. Ct. Rep. 338; Calderon v. Atlas S. S. Co. 170 U. S. 272, 42 L. ed. 1033, 18 Sup. Ct. Rep. 588; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; O'Malley v. Great Northern R. Co. 86 Minn. 380, 90 N. W. 974; Loeser v. Chicago, M. & St. P. R. Co. 94 Wis. 571, 69 N. W. 372; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Baltimore & O. R. Co. v. Hubbard, 72 Ohio St. 302, 74 N. E. 214; Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351; Greenwald v. Barrett, 199 N. Y. 170, 35 L.R.A.(N.S.) 971, 92 N. E. 218; Travis v. Wells, F. & Co. 79 N. J. L. 83, 74 Atl. 444; Pittsburgh, C. C. & St. L. R. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996; Larsen v. Oregon Short Line R. Co. 38 Utah, 130, 110 Pac. 983; D'Arcy v. Adams Exp. Co. 162 Mich. 363, 127 N. W. 261; Oppenheimer v. United States Exp. Co. 69 Ill. 62, 18 Am. Rep. 596; Johnstone v. Richmond & D. R. Co. 39 S. C. 55, 17 S. E. 512.

Plaintiff cannot maintain the action, because it is founded on a transaction on his part which is declared to be a fraud on the defendant and a public offense by acts of Congress.

Ellison v. Adams Exp. Co. 245 Ill. 410, — L.R.A.(N.S.) —, 92 N. E. 277; Re Released Rates, 13 Inters. Com. Rep. 550; Frank v. Adams Exp. Co. 38 Pittsb. L. J. N. S. 335; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; Brown v. Tarkington, 3 Wall. 377, 18 L. ed. 255; Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439; Sprott v. United States, 20 Wall. 459, 22 L. ed. 371; The Florida, 101 U. S. 37, 25 L. ed. 898; Gibbs v. Consolidated Gas. Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Burck v. Taylor, 152 U. S. 634, 648, 38 L. ed. 578, 583, 14 Sup. Ct. Rep. 696; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272.

Mr. John Randolph Schindel argued the cause, and, with Mr. Morison R. Waite, filed a brief for defendant in error:

The contract embodied in the receipt was void.

Southern Exp. Co. v. Fox, 131 Ky. 257,

133 Am. St. Rep. 241, 115 S. W. 184, 117 S. W. 270; Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106; Louisville & N. R. Co. v. Frazee, 24 Ky. L. Rep. 1273, 71 S. W. 437; Ohio & M. R. Co. v. Tabor, 98 Ky. 503, 34 L.R.A. 685, 32 S. W. 168, 36 S. W. 18; Cincinnati, N. O. & T. P. R. Co. v. Graves, 21 Ky. L. Rep. 684, 52 S. W. 961; Illinois C. R. Co. v. Radford, 23 Ky. L. Rep. 886, 64 S. W. 511.

The purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were, as well as to have the equal benefit of them. The interstate commerce act deals primarily with rates and discriminations, and the right of a common carrier to limit its liability by special contract is not included, expressly or by implication.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 437, 51 L. ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

Unless the Congress of the United States has sought to prohibit a carrier engaged in interstate transportation from limiting, or to permit such a carrier to limit, its liability to a stipulated valuation, or has legislated upon that "precise" subject, the state of Kentucky may require common carriers, although engaged in interstate commerce, to answer for the whole loss resulting from their negligence, whether there is a contract or not.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

The plaintiff in error would have us believe that when Congress prohibited a common carrier from limiting its liability with respect to the obligations imposed by the interstate commerce act, it intended to wipe out every regulation made or upheld by the different states for the protection of their shippers. That such was not the intention of Congress is apparent from the terms of the act, and that such was not the intention is strengthened by the decisions of the supreme judicial court of Massachusetts and the court of appeals of New York in the cases of Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 11 Ann. Cas. 351, and Greenwald v. Barrett, 199 N. Y. 170, 35 L.R.A.(N.S.) 971, 92 N. E. 218.

The right of plaintiff to recover, even if the action was founded on a transaction declared to be a public offense by an act of Congress, was a question of general common law, and has been determined in his favor by the Kentucky court.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 486, 48 L. ed. 268, 271, 24 Sup. Ct. Rep. 132.

The common law of Kentucky, as interpreted by the court of appeals of that state, does not prohibit the recovery of the real value of property lost, where the only evidence of a declaration of the shipper upon which the supposed misrepresentation or fraud is founded is the contract, which, by that law, is declared to be void.

Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:

The answer relies upon the act of Congress of June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288], being an act to amend the interstate commerce act of 1887 [24 Stat. at L. 379, chap. 104], as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this court jurisdiction.

Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "unless," as said in Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106, and affirmed in Southern Exp. Co. v. Fox & Logan, 131 Ky. 257, 133 Am. St. Rep. 241, 115 S. W. 184, 117 S. W. 270, "sufficient facts are shown, independently of the special contract, to avoid the contract for fraud, or to create an estoppel at common law."

The question upon which the case must turn is whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is *governed by the local law of the state,[500 or by the acts of Congress regulating interstate commerce.

That the constitutional power of Congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury, or damage to such property, needs neither argument nor citation of authority.

But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers, and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected: Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132. In the Solan Case, cited above, it was said of such state legislation:

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

501] *In that case the court upheld the validity of an Iowa statute which made void every "contract, receipt, rule, or regulation which shall exempt any railway from liability as a common carrier, which would exist had no contract, receipt, rule, or regulation been made or entered into."

The contract there involved was for transportation of cattle with a drover in charge, and the shipper had signed a contract limiting the liability to himself or the drover to $500 for injury to the person of the drover. Proof was offered that this limitation was the consideration of a reduced rate of transportation.

In Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 487, 491, 48 L. ed. 268, 271, 273, 24 Sup. Ct. Rep. 132, there was involved a bill of lading in all essentials identical with the one here concerned, whereby it was stipulated that, in consideration of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt. The shipment was made in New York, where the stipulation was valid, to a point in Pennsylvania, where such a limitation was invalid. The loss occurred in the latter state, and the supreme court of the state upheld a judgment for the full value, declaring the limitation invalid as forbidden by the public policy of that state. That case came to this court upon the contention that the Pennsylvania court, in refusing to limit the recovery to the valuation agreed upon, had denied to the railroad company a right or privilege secured to it by the interstate commerce law. But this court, as to that, said:

"It may be assumed that under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liablity to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms *of the law relied upon we fail[502 to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error (24 Stat. at L. 379, 382, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284; 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1289) provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the Commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the Commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage, or interruption by the carrier, unless made in good faith, for some necessary purpose, without intention to evade the act, shall

prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

"While, under these provisions, it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any 503] *valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states.

The original interstate commerce act of February 4, 1887, was extensively amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288). We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in the 20th section,—an amendment bearing directly upon the carrier's liability or obligation under interestate contracts of shipment, and generally referred to as the Carmack amendment. For convenience of reference, it is set out in the margin†

504] *This amendment came under consideration in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

The significant and dominating features of that amendment are these:

First. It affirmatively requires the initial carrier to issue " a receipt or bill of lading therefor," when it receives "property for transportation from a point in one state to a point in another."

Second. Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third. It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass."

Fourth. It affirmatively declares that "no contract, receipt, rule, or regulation shall exempt such commmon carrier, railroad, or transportation company from the liability hereby imposed."

Prior to that amendment, the rule of carriers' liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law, as declared by this court and enforced in the Federal courts throughout the United States (Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151), or that determined by the supposed public policy of a particular state (Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132), or that prescribed by statute law of a particular state (Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289).

Neither uniformity of obligation nor of liability was *possible until Congress [505 should deal with the subject. The situation was well depicted by the supreme court of Georgia in Southern P. Co. v. Crenshaw Bros. 5 Ga. App. 675, 63 S. E. 865, where that court said:

"Some states allow carriers to exempt

†That any common carrier, railroad, or transportation company receiving property for transporation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

themselves from all or a part of the common-law liability by rule, regulation, or contract; others did not. The Federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when, under the same state of facts, he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed, by the state courts' obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Con-
506 gress intended to take possession of *the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading, and the liability thereby assumed, are covered in full; and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage, or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding *carrier to whom the property may be[507 delivered;" and plainly implies a liability for some default in its common-law duty as a common carrier.

But it has been argued that the nonexclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier, conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

What this court said of the 22d section of this act of 1887 in the case of Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in the 20th section, that it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, or common law, not incon-

sistent with the rules and regulations prescribed by the provisions of this act. Again, it was said of the same clause, in the same case, that it could not in reason be construed as continuing in a shipper a common-law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.

To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the 508]proviso to *destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

We come now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of $50, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding $50 unless a greater value is declared, the shipper agrees that the value of said property is not more than $50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than $50 if no value is stated herein."

The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of $50, was 25 cents, while for the same package, if its value had been declared to be $125, the amount for which the plaintiff sues as the actual value, the lawful charge, according to the rate filed and published, would have been 55 cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made *was based upon a valuation of [509 $50 unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type: "This company's charge is based upon the value of the property, which must be declared by the shipper."

That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of *charges proportioned to the amount of[510 the risk. York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151; Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 322, 29 L. ed. 873, 878, 6 Sup. Ct. Rep. 1176; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 442, 32 L. ed. 788, 792, 9 Sup. Ct. Rep. 469; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 619, 37 L. ed. 292, 305, 13 Sup. Ct. Rep. 444; Primrose v. Western U. Teleg.

Co. 154 U. S. 1, 15, 38 L. ed. 883, 889, 14 Sup. Ct. Rep. 1098; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 135, 42 L. ed. 688, 690, 18 Sup. Ct. Rep. 289; Calderon v. Atlas S. S. Co. 170 U. S. 272, 278, 42 L. ed. 1033, 1035, 18 Sup. Ct. Rep. 588; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 485, 48 L. ed. 268, 271, 24 Sup. Ct. Rep. 132.

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character, and value of the property carried.

Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151, where it is said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. 511]The *carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law, as that body of law applicable to carriers has been interpreted by this court, as well as many courts of the states. Greenwald v. Barrett, 199 N. Y. 170, 175, 35 L.R.A.(N.S.) 971, 92 N. E. 218; Bernard v. Adams Exp. Co. 205 Mass. 254, 259, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351. The exemption forbidden is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the court saying:

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject-matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty *as a carrier. It is not in any[512 proper sense a contract exempting him from liability for the loss, damage, or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

In Greenwald v. Barrett, cited above, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden, the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried; and the propriety of this practice and the legality of contracts signed by the shipper, agreeing upon a valuation of the property, were distinctly upheld by the Supreme Court of the United States in Hart v. Pennsylvania R. Co. 112 U. S. 331, 341, 28 L. ed. 717, 721, 5 Sup. Ct. Rep. 151."

To the same effect are the cases of Travis

v. Wells, F. & Co. 79 N. J. L. 83, 74 Atl. 444; Fielder v. Adams Exp. Co. 69 W. Va. 138, 71 S. E. 99; Larsen v. Oregon Short Line R. Co. 38 Utah, 130, 110 Pac. 983. See also Atkinson v. New York Transfer Co. 76 N. J. L. 608, 71 Atl. 278, as to the general rule.

That a carrier rate may be graduated by value, and that a stipulation limiting recovery to an agreed value, made to adjust the rate, is recognized by the Interstate Commerce Commission, see Re Released Rates, 13 Inters. Com. Rep. 550.

We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.

513] *The demurrer to the answer of the defendant below should have been overruled. For this reason the judgment is reversed, with direction to overrule the demurrer, and for such further proceedings as are not inconsistent with this opinion.

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CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Plff. in Err.,
v.
H. FRED MILLER.

(See S. C. Reporter's ed. 513-518.)

**Commerce — exclusiveness of Federal power — superseding state regulation — carrier's liability.**

1. Congress has so manifested a purpose in the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, to take possession of the subject of the liability of a railway carrier for loss or damage to an interstate shipment, as to supersede all state regulations upon the same subject, including the provisions of state Constitutions or laws invalidating contracts limiting the carrier's liability to an agreed value, made to adjust the rate.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.].

**Carriers — limiting liability — agreed value — effect of Carmack amendment.**

2. The shipper and carrier of an interstate shipment are not forbidden to contract to limit the carrier's liability to an agreed value, made to adjust the rate, by the provisions of the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, prohibiting exemptions from the liability imposed by that act.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 17.]

Argued March 8 and 11, 1912. Ordered for reargument before full bench April 8, 1912. Reargued October 22, 1912. Decided January 6, 1913.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Custer County, in that state, enforcing the liability of a carrier for the full value of a lost interstate shipment, notwithstanding a contract stipulation limiting the carrier's liability to the agreed value. Reversed and remanded for further proceedings.

See same case below, 85 Neb. 458, 123 N. W. 449.

The facts are stated in the opinion.

Messrs. **Arthur R. Wells** and **Robert B. Scott** argued the cause and filed a brief for plaintiff in error:

The publication and filing of the tariff schedules, and the strict prohibition of all departure therefrom, or of even engaging in commerce until they had been published and filed, were the means adopted by Congress to effectuate the purposes which Congress had in view in the enactment of the acts to regulate commerce, and to furnish a standard by which they might be enforced.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 563.

Although the Hepburn act gave the Commission power, upon complaint and hearing, to prescribe reasonable rates, rules, regulations, and practices, and to require their observance, Congress left with the carriers the right, and charged upon them the duty of making in the first instance the rates

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NOTE.—State statutes regulating the liability of carriers with respect to shipments over connecting lines, as interference with interstate commerce—see note to Skipper v. Seaboard Air Line R. Co. 7 L.R.A.(N.S.) 388.

As to limitation of carrier's liability for loss to agreed valuation—see note to Everett v. Norfolk & S. R. Co. 1 L.R.A.(N.S.) 985.

As to carrier's power to limit amount of liability in case of negligence generally—see note to Ballou v. Earle, 14 L.R.A. 433.

As to right to limit liability by contract in the absence of negligence—see note to Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527.

And, generally, as to liability of connecting carrier for loss beyond its own line—see note to Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1.

which should be charged and the rules and regulations which should govern the transportation of property in interstate commerce.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 502, 42 L. ed. 243, 252, 17 Sup. Ct. Rep. 896; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 713, 28 Sup. Ct. Rep. 493.

The carrier's rules and regulations fixing or affecting the amount of the rates charged or the value of the service rendered, when embodied in the published tariffs and filed with the Commission, became in effect regulations imposed by law, and had the same binding force upon the shipper and carrier as if they had been enacted by Congress itself.

Armour Packing Co. v. United States, 209 U. S. 56, 72, 80–83, 52 L. ed. 681, 691, 694, 695, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Arkansas Fertilizer Co. v. Interstate Commerce Commission, 193 Fed. 667; Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 422; Blinn v. Southern P. Co. 18 Inters. Com. Rep. 430.

If the plaintiff believed that the rule contained in the published classification, making the rate dependent upon the declared valuation of the animal shipped, and binding the shipper by the value he placed upon the animal, was unreasonable in any respect, it was his duty to declare the true valuation upon which he desired to rely in case of the injury or death of the animal, and pay the rate assessed upon that basis, and then apply to the Commission for an order of reparation.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co. 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

In some jurisdictions, contracts relieving the carrier from all losses not due to its gross negligence are valid and enforceable. In the majority of the states the rule is otherwise, and carriers may, for a valid consideration, limit their liability for such losses only as are not caused by their want of ordinary care. Upon this subject there has been little harmony in the decisions of the state courts.

6 Cyc. 385 et seq.; 1 Hutchinson, Carr. 3d. ed. §§ 388–492; 2 Wyman, Public Service Corp. §§ 1000–1026.

The common law as established by the Federal courts, whose decisions are alone controlling in this matter, forbids a common carrier from exempting himself from liability for his negligence and that of his servants, but does permit such special contracts restricting the full common-law responsibility of a common carrier as do not have that effect, and are otherwise just and reasonable in the eye of the law.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663.

In the absence of legislation by Congress, these conflicting state rules have governed interstate shipments.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132.

The common law of the United States, as interpreted by the Supreme Court, had long permitted carriers to offer alternative rates based upon the value of the goods, and bind the shipper by a designated valuation of the goods. Such contracts are not considered to free the carrier from the consequences of its negligence.

New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 27, 25 L. ed. 531, 533; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 15, 38 L. ed. 883, 890, 14 Sup. Ct. Rep. 1098; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 135, 42 L. ed. 688, 690, 18 Sup. Ct. Rep. 289; The Queen of the Pacific, 180 U. S. 49, 57, 45 L. ed. 419, 422, 21 Sup. Ct. Rep. 278, 1 L.R.A.(N.S.) 985, note.

It is a long-established and equitable principle of rate making, that rates and classifications shall in part be based upon the value of the commodities and the carrier's risk in case of loss or injury in transit. It has been recognized and enforced by the Commission.

Southern Cotton Oil Co. v. Louisville & N. R. Co. 18 Inters. Com. Rep. 180; National Hay Asso. v. Lake Shore & M. S. R. Co. 9 Inters. Com. Rep. 307, 19 Inters. Com. Rep. 47; Proctor & G. Co. v. Cincinnati, H. & D. R. Co. 9 Inters. Com. Rep. 482; Tift v. Southern R. Co. 10 Inters. Com. Rep. 587;

Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1015, 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

The Carmack amendment did not abrogate this rule.

Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351; Greenwald v. Barrett, 199 N. Y. 170, 35 L.R.A.(N.S.) 971, 92 N. E. 218; Fry v. Southern P. R. Co. 247 Ill. 564, 93 N. E. 906; Travis v. Wells, F. & Co. 79 N. J. L. 83, 74 Atl. 444; Larsen v. Oregon Short Line R. Co. 38 Utah, 130, 110 Pac. 983; Fielder v. Adams Exp. Co. 69 W. Va. 138, 71 S. E. 99. See also Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

The proviso cannot reasonably be given an effect which annuls the substantive rules established by the other sections of the commerce acts, which Congress enacted for the purpose of insuring equality of treatment and putting an end to discrimination.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 446, 51 L. ed. 553, 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Latta v. Chicago, St. P. M. & O. R. Co. 97 C. C. A. 198, 172 Fed. 850.

Where Congress has acted within the scope of its constitutional powers, and its regulations come in conflict with the organic or statutory law of the state, the Federal regulations are controlling, and the state law must give way.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Gibbons v. Ogden, 9 Wheat. 1, 197, 6 L. ed. 23, 70.

Messrs. Edwin E. Squires and H. M. Sullivan argued the cause, and, with Mr. Norris Brown, filed a brief for defendant in error:

The Constitution of Nebraska is self-operative and has the force of a statute. It is not merely a limitation on the power of the legislature, but acts directly upon the parties and their contracts, and prevents a carrier from contracting to limit its liability to the shipper for damages. This is settled law in Nebraska.

Missouri P. R. Co. v. Vandeventer, 26 Neb. 222, 3 L.R.A. 129, 41 N. W. 998; Chicago, B. & Q. R. Co. v. Gardner, 51 Neb. 70, 70 N. W. 508.

In Nebraska a contract limiting the liability of a common carrier is void, and cannot be the foundation of an estoppel of the shipper to collect damages.

Chicago, R. I. & P. R. Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436, 49 N. W. 183; Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968; 6 Cyc. 387, b, 391-393; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102.

While a carrier cannot exempt itself from some liability for damages it causes, neither can it limit the amount for which it will be liable. The measure of the amount recoverable by the shipper is the real extent of damage suffered, regardless of agreed value or stipulation of limitation named in the contract.

Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508; Miller v. Chicago, B. & Q. R. Co. 85 Neb. 458, 123 N. W. 449; Missouri P. R. Co. v. Vandeventer, 26 Neb. 222, 3 L.R.A. 129, 41 N. W. 998; Union P. R. Co. v. Metcalf, 50 Neb. 460, 69 N. W. 961; Pennsylvania Co. v. Kennard Glass & Paint Co. 59 Neb. 435, 81 N. W. 372.

This rule is applicable alike to interstate and intrastate shipments.

St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463, 22 L.R.A. 335, 4 Inters. Com. Rep. 494, 56 N. W. 957.

Under the Iowa statute, as construed by its courts, a carrier cannot by contract exempt itself from liability, or limit the amount of its liability to less than the real value of the property destroyed or injured. The shipper cannot be estopped by a special contract from recovering the full amount of damage he has suffered by the dereliction of the carrier.

Hart v. Chicago & N. W. R. Co. 69 Iowa, 485, 29 N. W. 597; Solan v. Chicago, M. & St. P. R. Co. 95 Iowa, 260, 28 L.R.A. 178, 58 Am. St. Rep. 430, 63 N. W. 692; Lucas v. Burlington, C. R. & N. W. R. Co. 112 Iowa, 594, 84 N. W. 673; Winn v. American Exp. Co. 149 Iowa, 259, 128 N. W. 663; Bette v. Chicago, B. & Q. R. Co. 150 Iowa, 252, 129 N. W. 962; Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387.

Nor can the shipper be estopped by the fact that he misrepresented the value of his property to procure a lower rate; that is, in that state there is no estoppel *in pais* independently of the validity or the invalidity of the contract.

Lucas v. Burlington, C. R. & N. W. R. Co. 112 Iowa, 594, 84 N. W. 673; Betts v. Chicago, B. & Q. R. Co. 150 Iowa, 252, 129 N. W. 962.

This rule in Iowa is applicable to both interstate and intrastate shipments, is an exercise of the police power of the state, and is in no proper sense a regulation of interstate commerce.

Hart v. Chicago & N. W. R. Co. 69 Iowa, 485, 29 N. W. 597; Solan v. Chicago, M. & St. P. R. Co. 95 Iowa, 260, 28 L.R.A. 718, 58 Am. St. Rep. 430, 63 N. W. 692; Lucas v. Burlington, C. R. & N. W. R. Co. 1

Iowa, 594, 84 N. W. 673; Winn v. American Exp. Co. 149 Iowa, 259, 128 N. W. 663; Betts v. Chicago, B. & Q. R. Co. 150 Iowa, 252, 129 N. W. 962; Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387.

Congress has never passed a law which is in conflict with the Iowa statute.

Winn v. American Exp. Co. 149 Iowa, 259, 128 N. W. 663; Betts v. Chicago, B. & Q. R. Co. 150 Iowa, 252, 129 N. W. 962; Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387; Latta v. Chicago, St. P. M. & O. R. Co. 97 C. C. A. 198, 172 Fed. 850; Miller v. Chicago, B. & Q. R. Co. 85 Neb. 458, 123 N. W. 449; Atchison, T. & S. F. R. Co. v. Rodgers, 16 N. M. 120, 113 Pac. 80; Chesapeake & O. R. Co. v. Pew, 109 Va. 288, 64 S. E. 35.

State statutes, such as the one in Iowa, and state rules of law of like nature, whether the same have been established by statute, Constitution, or judicial interpretation, prohibiting carriers in case of shipments, both interstate and intrastate, from limiting their liability to the shipper, have been passed upon by this court, and by it ratified and approved, and by it established as existing law.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87.

Such statutes and laws have been repeatedly held by this court to be within the police power of the state, and in no sense a regulation of interstate commerce.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815.

The carrier is made liable by the Carmack amendment for "any loss, damage, or injury." The use of this word "any" is of paramount importance. "Any" in this context means "all."

1 Words & Phrases, 421; Monongahela Nav. Co. v. Coon, 6 Pa. 379, 47 Am. Dec. 474; 2 Cyc. 472 (note 21); Jones v. Whitworth, 94 Tenn. 602, 30 S. W. 736; Louisville & N. R. Co. v. Mottley, 219 U. S. 479, 55 L. ed. 302, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

If we are right in our construction of the Carmack amendment, then it is idle to talk about estoppel. There can be no estoppel by a contract which contravenes the statute. There can be no estoppel by a rule or regulation of the carrier whether it applies to rates or anything else, when the statute says in effect that such rule or regulation shall not work an estoppel or exempt the carrier from full liability for loss caused by it.

16 Cyc. 720.

The carrier cannot, because it filed with the Commission a rate proportioned upon a declared valuation in this case, shield itself from full liability for loss caused by it.

Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387; Chesapeake & O. R. Co. v. Pew, 109 Va. 288, 64 S. E. 35.

The question of value as a basis of rates is no more a subject of contract than any other feature tending to make freight rates fixed and certain and to prevent discrimination. The value must be the true value, or so near such as to stamp the proceedings with bona fides. The Federal statute provides that there shall be no false classification and false billing. It further provides for penalties for false classification and false billing, whether done knowingly or not. To charge a rate upon a false value is to fix a false classification. Such a rate forbidden by law would bind neither carrier nor shipper.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 431, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

In a situation where the rate was fixed at a definite amount, with limited liability in a proper case on the part of the carrier, and made 20 per cent higher with full liability, the Interstate Commerce Commission condemned the discrimination as unreasonable, and directed the carriers to revise their contracts, making the discrimination less.

Re Released Rates, 13 Inters. Com. Rep. 565.

The alternative of rates presented is unreasonable, made so simply to force consent of the shipper to agree to limited liability, and therefore the contract must be construed as one designed not to procure a reasonable proportion between the risk assumed and the freight charged, but to obtain a limitation of liability for negligence, and one that is unreasonable and void.

Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387.

A reasonable alternative of fares, and an opportunity to contract, with full common-law liability at a reasonable differential rate, must be offered, or the contract will be construed as unreasonable and void.

Little Rock & Ft. S. R. Co. v. Cravens, 57

Ark. 112, 18 L.R.A. 527, 38 Am. St. Rep. 230, 20 S. W. 803, 88 Am. St. Rep. 93, note.

Even in those courts where a reasonable limitation of liability is permitted, such a variation from the true value renders the contract unreasonable and void, and a mere cloak to avoid liability.

Louisville & N. R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866; 6 Cyc. 401; 1 Hutchinson, Carr. 427; Southern R. Co. v. Jones, 132 Ala. 437, 31 So. 501; South & North Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578.

As long as the Federal statute is not in conflict with the law of the state, the latter remains operative, and a carrier cannot limit its liability in the states of Iowa and Nebraska. The state statutes forbidding limitation of liability are enacted under the police power of the state, and, so long as the state and Federal statutes are not in conflict, both may stand.

Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Gulf C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732.

517] *Mr. Justice Lurton delivered the opinion of the court:

The question in this case, as in Adams Exp. Co. v. Croninger, 226 U. S. 491, ante, 314, 33 Sup. Ct. Rep. 148, just decided, is whether the provisions of § 20 of the act of February 4, 1887 [24 Stat. at L. 386, chap. 104], as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), constitute an exclusive regulation of contracts for interstate shipments of property by railroad common carriers, superseding all state regulations upon the same subject.

The action in this case was to recover the full value of a stallion shipped from a point in Iowa to a point in Nebraska, under a valued live-stock contract. The loss occurred in the state of Nebraska through the negligence of the carrier, and the suit was in a court of that state.

The receipt or bill of lading placed a value upon the animal of $100, and was signed by the shipper's agent. It recited that the schedules of rates and regulations filed with the Interstate Commerce Commission provide alternative *rates of charges proportioned to the value of the stock* delivered for transportation, as declared by the shipper, and that the recovery of the shipper in case of loss or injury should not be in excess of the value thus agreed upon for the purpose of determining the rate.

The plaintiff's claim that the stallion was in fact of the value of $2,000, and that the limitation of recovery stipulated is void under a statute of Iowa, where the contract was made, and also illegal and invalid under a clause in the Constitution of Nebraska, the state in which the loss occurred, and of the forum.

The company relies upon the provisions of the act of 1906 as an exclusive rule regulating every contract for an interstate shipment, and declaring the liability of the carrier, and contends that the regulations provided by the 7th section of that act operate to supersede the legislation of both Iowa and Nebraska, in so far as they applied to interstate shipments.

*This defense was overruled in the[518 trial court, and the agreement in the plaintiff's bill of lading, limiting any recovery in case of loss or damage, to the value declared for the purpose of obtaining the lower or alternative rate of freight, was held to be illegal, both under the law of Iowa and Nebraska, and judgment was rendered for the full value of the animal. This judgment was affirmed by the supreme court of Nebraska, that court ruling that the case was controlled by the state regulations referred to, and that these regulations had not been superseded by acts of Congress regulating interstate commerce. For this the court cited and relied upon certain decisions by the Nebraska courts, and the cases of Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, and Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132. Both of the cases decided by this court were decided prior to the extensive amendment of the act regulating interstate commerce of 1887 by the act of June 29, 1906.

In Adams Exp. Co. v. Croninger, supra, we reached the conclusion that by the provisions of the 7th section of the latter act, Congress had manifested a purpose to take possession of the subject of the liability of a carrier by railroad for interstate shipments, and that the regulations therein had superseded all state regulations upon the same subject. This case is therefore controlled by that judgment.

It follows that the supreme court of Nebraska erred in applying to the contract here involved the provisions of the Iowa statute, and of the Constitution of the state of Nebraska, and in refusing to apply the exclusive regulation prescribed by the

7th section of the act of 1906, as that provision has been construed by this court in the Croninger Case, above referred to.

The judgment is accordingly reversed, and remanded for further proceedings not inconsistent with this opinion.

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519] *CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY, Petitioner,

v.

BUD R. LATTA.

(See S. C. Reporter's ed. 519, 520.)

This case is governed by the decision in Adams Exp. Co. v. Croninger, ante, 314, and Chicago, B. & Q. R. Co. v. Miller, ante, 323.

[No. 231.]

Argued March 8 and 11, 1912. Ordered for reargument April 8, 1912. Reargued October 22 and 23, 1912. Decided January 6, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the Circuit Court for the District of Nebraska, against a carrier, for the value of an undelivered interstate shipment, notwithstanding a contract stipulation limiting the carrier's liability to the agreed value. Reversed.

See same case below on first writ of error, 97 C. C. A. 198, 172 Fed. 850; on second writ of error, 106 C. C. A. 664, 184 Fed. 987.

The facts are stated in the opinion.

Mr. James B. Sheean argued the cause, and, with Messrs. Carl C. Wright and B. H. Dunham, filed a brief for petitioner:

State laws touching bills of lading issued on interstate shipments, or defining the liability of carriers thereunder, or prohibiting limitation on such liability, have been superseded by the commerce act as amended June 29th, 1906.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Fulgham v. Midland Valley R. Co. 167 Fed. 660; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Arkansas Fertilizer Co. v. United States, 193 Fed. 667.

An agreement fixing the value for the purpose of securing a lower rate is not an exemption from liability.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Jennings v. Smith, 45 C. C. A. 249, 106 Fed. 139; Macfarlane v. Adams Exp. Co. 137 Fed. 982; Taylor v. Weir, 162 Fed. 585; George N. Pierce Co. v. Wells, F. & Co. 110 C. C. A. 645, 189 Fed. 561; Blackwell v. Southern P. R. Co. 184 Fed. 489; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Zimmer v. New York C. & H. R. R. Co. 137 N. Y. 460, 33 N. E. 642; Pennsylvania Co. v. Shearer, 75 Ohio St. 249, 116 Am. St. Rep. 730, 79 N. E. 431, 9 Ann. Cas. 15; Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33, 50 Am. Rep. 282; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; Harvey v. Terre Haute & I. R. Co. 74 Mo. 538; Louisville & N. R. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Ballou v. Earle, 17 R. I. 441, 14 L.R.A. 433, 33 Am. St. Rep. 881, 22 Atl. 1112; Atkinson v. New York Transfer Co. 76 N. J. L. 608, 71 Atl. 278.

A declaration of value, made in the shipping contract and embodied in the tariff, does not exempt the carrier from the liability imposed by the Carmack amendment to the commerce act.

Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351; Greenwald v. Barrett, 199 N. Y. 170, 35 L.R.A.(N.S.) 971, 92 N. E. 218; Fry v. Southern P. R. Co. 247 Ill. 564, 93 N. E. 909; Travis v. Wells, F. & Co. 79 N. J. L. 83, 74 Atl. 444; Larsen v. Oregon Short Line R. Co. 38 Utah, 130, 110 Pac. 983; Fielder v. Adams Exp. Co. 69 W. Va. 138, 71 S. E. 99.

When rates are based on a declared valuation, the tariff rules or regulations must state every condition which in anywise changes, affects, or determines any part of the rate. Rates based on such valuation are authorized by the commerce act, and when properly published are binding upon all.

Re Released Rates, 13 Inters. Com. Rep. 550; George N. Pierce Co. v. Wells, F. & Co. 110 C. C. A. 645, 189 Fed. 561.

The reasonableness of rates, rules, and regulations so established is subject to the control of the Commerce Commission, and cannot be questioned in a collateral proceeding.

Texas & P. R. Co. v. Abilene Cotton Oil

Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

The proviso to the Carmack amendment does not confer power upon the states to nullify the commerce act, or keep alive the laws of the states inconsistent with that act.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

An agreement that damages shall not exceed the value declared for the purpose of securing a lower rate of transportation is not a limitation of liability as it existed at common law.

Bradley v. Waterhouse, 3 Car. & P. 318, Moody & M. 154; Clay v. Willan, 1 H. Bl. 298; Walker v. Jackson, 10 Mees. & W. 161, 12 L. J. Exch. (N.S.) 165; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Hill v. London & N. W. R. Co. 42 L. T. N. S. 513.

A declaration of value, made by a shipper for the purpose of securing a lower rate, estops him from afterwards recovering damages in excess of the value so declared.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Jennings v. Smith, 45 C. C. A. 249, 106 Fed. 139; Macfarlane v. Adams Exp. Co. 137 Fed. 982; Taylor v. Weir, 162 Fed. 585; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Daniels v. Tearney, 102 U. S. 415, 421, 26 L. ed. 187, 189; United States v. Hodson, 10 Wall. 395, 409, 19 L. ed. 937, 940; Ferguson v. Landram, 5 Bush, 230, 96 Am. Dec. 350.

A cause of action cannot be founded on an illegal transaction.

Ellison v. Adams Exp. Co. 245 Ill. 410, — L.R.A. (N.S.) —, 92 N. E. 277; Haggerty v. St. Louis Ice Mfg. & Storage Co. 143 Mo. 238, 40 L.R.A. 151, 65 Am. St. Rep. 647, 44 S. W. 1114; M'Neill v. Durham & C. R. Co. 132 N. C. 510, 67 L.R.A. 227, 95 Am. St. Rep. 641, 44 S. E. 34; George N. Pierce Co. v. Wells, F. & Co. 110 C. C. A. 645, 189 Fed. 561.

Mr. James B. Sheean also filed a separate brief for petitioner:

The Carmack amendment and the interstate commerce act supersede all state laws prescribing the terms and conditions of interstate bills of lading, and defining the rights and obligations of carriers and shippers arising thereon.

Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Latta v. Chicago, St. P. M. & O. R. Co. 97 C. C. A. 198, 172 Fed. 850.

The proviso to the Carmack amendment does not reserve to the states power to enforce laws in conflict with the amendment, or inconsistent with the purposes of the commerce act.

Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 442, 446, 51 L. ed. 559, 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 497, 54 L. ed. 292, 298, 30 Sup. Ct. Rep. 164; Southern P. Co. v. Crenshaw Bros. 5 Ga. App. 675, 63 S. E. 865; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 72, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428.

Mr. H. C. Brome argued the cause, and, with Mr. W. M. Hopewell, filed a brief for respondent:

The application by congressional enactment, of Federal authority over a subject committed to the care of the general government by the Federal Constitution, does not at all interfere with the exercise by the state, under the police power, of its authority touching the same subject, so long as this exercise of power is reasonable, and does not interfere with the full and efficient operation of the Federal rule.

Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811.

The act of Congress itself forbids the limitation of liability by the carrier.

Re Released Rates, 13 Inters. Com. Rep. 550; Winn v. American Exp. Co. 149 Iowa, 259, 128 N. W. 663; Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387.

Mr. Justice Lurton delivered the opinion of the court:

This was an action to recover the full value of two horses lost in the course of interstate transportation.

The defense in substance was that the plaintiff had declared the value of each of the animals to not exceed $100, and had signed a shipping contract wherein he agreed that that was the value, and that the company's liability in case of loss or damage should not exceed the agreed value. It was also shown that the schedule o

tariff rates was based upon values, and that a higher rate was allowable if a higher value had been declared. It was claimed that a limitation of liability, made 520] *for the purpose of obtaining the lower of alternative rates, was admissible under the provisions of the 7th section of the interstate commerce act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288).

The circuit court instructed a verdict for the agreed value, ruling that the contract was valid and was controlled by the interstate commerce acts. The circuit court of appeals reversed this judgment, upon the ground that the contract was invalid under the Constitution of the state of Nebraska, and held the plaintiff entitled to recover the full value of the animals. 97 C. C. A. 198, 172 Fed. 850. The case was remanded to the circuit court, where, in pursuance of the judgment and opinion of the circuit court of appeals, the jury was instructed that it should find the actual value of the animals lost, and return a verdict for that amount. Upon a second writ of error this judgment was affirmed by the circuit court of appeals, and the cause has come to this court upon a writ of certiorari.

The case is governed by the cases of Adams Exp. Co. v. Croninger, 226 U. S. 491, ante, 314, 33 Sup. Ct. Rep. 148, and Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, ante, 323, 33 Sup. Ct. Rep. 155, both just decided.

Judgment reversed and the case is remanded for a new trial.

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JOHN McNAMARA, Appt.,
v.
WILLIAM HENKEL, United States Marshal for the Southern District of New York, et al.

(See S. C. Reporter's ed. 520–525.)

**Habeas corpus — scope of review — extradition.**

1. The decision of a committing magistrate in foreign extradition proceedings cannot be reviewed on habeas corpus if he had jurisdiction of the subject-matter and of the accused, and the offense charged was within the treaty, and he had before him legal evidence upon which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for extradition purposes, in view of U. S. Rev. Stat. § 5270, U. S. Comp. Stat. 1901, p. 3591, providing that if, on the hearing, he deems the evidence sufficient to sustain the charge, he shall certify the same to the Secretary of State, and issue his warrant for the commitment of the accused pending surrender according to the stipulations of the treaty.

[For other cases, see Habeas Corpus, 127–139, in Digest Sup. Ct. 1908.]

**Habeas corpus — review of extradition proceedings — evidence.**

2. Competent evidence that the crime of burglary, as defined by the law of New York, where the alleged fugitive was arrested, was committed in Canada by breaking into a garage between 4 and 6 A. M., with intent to steal the automobile there kept, and that such automobile, having been taken out and moved some distance away, the accused was seen about 6 A. M., trying to crank the engine, the electric wiring of which, as was shown by a subsequent examination, had been disarranged in an apparent effort to overcome the absence of a switch plug, is sufficient, on habeas corpus, to sustain the action of the United States commissioner in issuing an order of commitment for extradition.

[For other cases, see Habeas Corpus, 127–139, in Digest Sup. Ct. 1908.]

**Evidence — burglary — unexplained possession of stolen property.**

3. Guilty participation in the burglarious entry of a garage may be inferred from the unexplained apparent possession of the automobile kept there by a person engaged, shortly after the burglary, in an effort to crank the engine of the automobile, which had been taken out of the building and moved some distance away.

[For other cases, see Evidence, XII. n; II. e, 8, in Digest Sup. Ct. 1908.]

**Habeas corpus — scope of review — error in admitting evidence.**

4. The error, if any, committed by a United States commissioner in receiving in evidence in foreign extradition proceedings certain depositions taken in the demanding country, which were certified by the Consul General of the United States as proposed to be used upon an application for extradition of the accused upon another charge, cannot be reviewed on habeas corpus, which does not operate as a writ of error.

[For other cases, see Habeas Corpus, 108–119, 127–139, in Digest Sup. Ct. 1908.]

[No. 687.]

Argued December 4, 1912. Decided January 6, 1913.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dis-

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NOTE.—As to habeas corpus in extradition cases—see notes to Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Wisener v. Burrell, 34 L.R.A.(N.S.) 755.

As to what questions may be considered on habeas corpus—see notes to Ex parte Carll, 27 L. ed. U. S. 288, and Pearce v. Texas, 39 L. ed. U. S. 164.

As to presumption of burglary from possession of recently stolen property—see note to State v. Brady, 12 L.R.A.(N.S.) 200.

missing writs of habeas corpus and certiorari to inquire into a detention under a commitment for extradition purposes. Affirmed.

The facts are stated in the opinion.

Mr. **George Gordon Battle** argued the cause and filed a brief for appellant:

The law of the state where the alleged fugitive is apprehended must dominate.

Pettit v. Walshe, 194 U. S. 205, 217, 218, 48 L. ed. 938, 942, 943, 24 Sup. Ct. Rep. 657; Wright v. Henkel, 190 U. S. 41, 58, 61, 47 L. ed. 948, 954, 955, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386; Re Frank, 107 Fed. 272; United States v. Greene, 100 Fed. 941; Re Ezeta, 62 Fed. 981.

There must be such competent evidence of probable cause as would justify a committing magistrate hearing a like proceeding in the state of New York in holding the alleged fugitive.

Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; Re Herres, 33 Fed. 165; Re Calder, 2 Edm. Sel. Cas. 374; Re Washburn, 4 Johns. Ch. 106, 8 Am. Dec. 548.

While this court will not review the weight or the effect of the evidence, it will, upon writs of habeas corpus and certiorari, pass upon the question whether there was any legal evidence upon which the commissioner acted.

Terlinden v. Ames, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

Can a magistrate hold a prisoner upon mere suspicion or speculation, or must there be some competent legal proof to establish two elements—first, that a crime has been committed, and, second, that the accused is the person who committed it?

People ex rel. Bungart v. Wells, 57 App. Div. 142, 68 N. Y. Supp. 59; Church, Habeas Corpus, p. 319; Ex parte Jenkins, 2 Wall. Jr. 521, Fed. Cas. No. 7,259; Re Henry, 13 Misc. 734, 35 N. Y. Supp. 210; People ex rel. Perkins v. Moss, 187 N. Y. 418, 11 L.R.A. (N.S.) 528, 80 N. E. 383, 10 Ann. Cas. 309; Ex parte Swartwout, 4 Cranch, 75, 2 L. ed. 555.

"Probable cause" as used in the Federal Constitution, declaring that no warrant shall issue but upon probable cause, has been held to mean that there must be a probability that a crime has been committed by the person named in the warrant. Of this probability the court issuing the warrant must be satisfied by facts supported by oath. These facts must induce a reasonable probability that all the acts have been done which constitute the crime charged.

United States v. Boling, 4 Cranch, C. C. 579, Fed. Cas. No. 14,621; United States v. Bollman, 1 Cranch, C. C. 373, Fed. Cas. No. 14,622; United States v. Tureaud, 20 Fed. 623, 9 Fed. Stat. Anno. 254, 255; Re Macdonnell, 11 Blatchf. 190, Fed. Cas. No. 8,772; Re Ezeta, 62 Fed. 982.

In a circumstantial case all the evidence must point to the defendant as having exclusive opportunity to commit the offense charged.

People v. Razezicz, 206 N. Y. 269, 99 N. E. 557.

Depositions improperly authenticated, and therefore incompetent, were erroneously introduced.

Re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369; Re McPhun, 24 Blatchf. 254, 30 Fed. 57; Re Farez, 7 Blatchf. 352, Fed. Cas. No. 4,645; Re Benson, 30 Fed. 654.

Where it appears from the proceedings that some other and underlying purpose is to be subserved by the extradition than the trial of the defendant for the particular offense alleged in the warrant, this court should not lend its assistance.

Grin v. Shine, 187 U. S. 181, 184, 47 L. ed. 130, 134, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366.

Mr. **Charles Fox** argued the cause and filed a brief for appellee:

The appeal should be dismissed for want of jurisdiction.

Sloan v. United States, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570; Kaufman v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419.

A complaint in an extradition case need not be as precise, technical, and formal as an indictment; it is sufficient if it appears that a treaty offense is charged.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356; Ex parte Sternaman, 77 Fed. 596; Yordi v. Nolte, 215 U. S. 227, 54 L. ed. 170, 30 Sup. Ct. Rep. 90.

If there was sufficient ground for the holding of the appellant by the commissioner upon the evidence before him, he is not to be discharged for defects in the original arrest or commitment.

Yordi v. Nolte, 215 U. S. 227, 54 L. ed. 170, 30 Sup. Ct. Rep. 90.

If the commissioner had jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of the treaty of extradition, and the commissioner in arriving at a decision to hold the accused has before him competent legal evidence upon which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision cannot be review

by a circuit court, or by this court on habeas corpus, either originally or by appeal.

Elias v. Ramirez, 215 U. S. 398, 54 L. ed. 253, 30 Sup. Ct. Rep. 131; Re Oteiza y Cortes, 136 U. S. 334, 34 L. ed. 466, 10 Sup. Ct. Rep. 1031, 8 Am. Crim. Rep. 241; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; Glucksman v. Henkel, 221 U. S. 508, 55 L. ed. 830, 31 Sup. Ct. Rep. 704.

Possession of fruits of a crime within a short time after the commission throws upon the possessor of the property the obligation of showing how he came by it.

People v. Wilson, 7 App. Div. 326, 40 N. Y. Supp. 107, affirmed in 151 N. Y. 403, 45 N. E. 862; People v. Kipp, 121 App. Div. 692, 106 N. Y. Supp. 307; People v. Jackson, 182 N. Y. 77, 74 N. E. 565; Knickerbocker v. People, 43 N. Y. 177.

Recent possession of stolen goods warrants the inference that the possessor is the thief, both because experience shows that usually the party so in possession is the thief, and because the knowledge of how he came into possession of the goods is generally exclusively his own.

Griffen v. Manice, 166 N. Y. 194, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925; Wilson v. United States, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895.

523] *Mr. Justice **Hughes** delivered the opinion of the court:

John McNamara, the appellant, was arrested on the complaint of the British senior vice consul at the port of New York, charging him with committing the crime of burglary at New Westminster, British Columbia, in breaking into a building occupied as a garage and stealing therefrom an automobile and rugs. Examination was demanded, and after hearing the evidence submitted on both sides, the United States commissioner found probable cause and issued an order of commitment for extradition. Writs of habeas corpus and certiorari were then sued out upon the ground that the accused was restrained of his liberty without due process of law. The district court dismissed the writs and this appeal is brought.

The question simply is whether there was any competent evidence before the commissioner entitling him to act under the statute. The weight of the evidence was for his determination. The statute provides that if, on the hearing, "he deems the evidence sufficient to sustain the charge," he shall certify the same to the Secretary of the State, and issue his warrant for the commitment of the accused pending surrender according to the stipulations of the treaty. Rev. Stat. § 5270, U. S. Comp. Stat. 1901, p. 3591. Under this provision, the rule is well established that if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purposes of extradition, his decision cannot be reviewed on habeas corpus. Re Oteiza y Cortes, 136 U. S. 330, 334, 34 L. ed. 464, 466, 10 Sup. Ct. Rep. 1031, 8 Am. Crim. Rep. 241; Benson v. McMahon, 127 U. S. 457, 463, 32 L. ed. 234, 236, 8 Sup. Ct. Rep. 1240; Re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563; *Ornelas v. Ruiz, 161 U. S.[524 502, 508, 40 L. ed. 787, 789, 16 Sup. Ct. Rep. 689; Bryant v. United States, 167 U. S. 104, 105, 42 L. ed. 94, 95, 17 Sup. Ct. Rep. 744; Terlinden v. Ames, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; Grin v. Shine, 187 U. S. 181, 192, 47 L. ed. 130, 136, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366; Yordi v. Nolte, 215 U. S. 227, 232, 54 L. ed. 170, 172, 30 Sup. Ct. Rep. 90; Elias v. Ramirez, 215 U. S. 398, 407, 54 L. ed. 253, 256, 30 Sup. Ct. Rep. 131; Gluckaman v. Henkel, 221 U. S. 508, 512, 55 L. ed. 830, 833, 31 Sup. Ct. Rep. 704.

Without setting forth in detail the facts appearing from the depositions and testimony before the commissioner, it is sufficient to say that there was competent evidence that the crime of burglary as defined by the law of New York, where the appellant was arrested (treaty with Great Britain, 1842, art. 10, 8 Stat. at L. 576; treaty of 1889, art. 1, 26 Stat. at L. 1508, 1509; penal law [N. Y.] §§ 400, 404), had been committed by a breaking into the building in question with intent to steal the automobile there kept. It was shown that this took place between 4 and 6 o'clock on the morning of September 15th, 1911. The car was taken out of the building and rolled about 40 feet down the street, where, shortly before 6 o'clock on that morning, according to testimony, the appellant was seen standing in front of the car, "trying to crank it;" "he was trying," said the witness, "to start the machine off." Three men, unidentified, were with him. On an examination of the car soon after, it was found that the cover had been removed from the spark coil and that several of the electric wires forming part of the motive equipment had been disarranged in an

effort, apparently, to operate the car despite the absence of a switch plug.

The district court held that this was evidence connecting the appellant with the crime upon which, in the light of the circumstances proved, the commissioner was entitled to exercise his judgment. We agree with this view. Wilson v. United States, 162 U. S. 613, 619, 620, 40 L. ed. 1090, 1094, 1095, 16 Sup. Ct. Rep. 895. It is objected that while possession of property recently stolen may be evidence of participation in the larceny, the apparent possession of the automobile by the appellant 525] *affords no support for a conclusion that he committed the burglary, the crime with which he was charged. The permissible inference is not thus to be limited. The evidence pointed to the appellant as one having control of the car and engaged in the endeavor to secure the fruits of the burglarious entry. Possession in these circumstances tended to show guilty participation in the burglary. This is but to accord to the evidence, if unexplained, its natural probative force. Considine v. United States, 50 C. C. A. 272, 112 Fed. 342, 349, 350; Com. v. McGorty, 114 Mass. 299; Knickerbocker v. People, 43 N. Y. 177, 181; Neubrandt v. State, 53 Wis. 89, 9 N. W. 824; State v. Fitzgerald, 72 Vt. 142, 47 Atl. 403, 14 Am. Crim. Rep. 173.

It is assigned as error that the commissioner received in evidence certain depositions taken in British Columbia which were certified by the Consul General of the United States as depositions proposed to be used upon an application for the extradition of the appellant upon another charge. We need not consider the sufficiency of this certificate, as the writ of habeas corpus does not operate as a writ of error, and mere errors are not the subject of review. Benson v. McMahon, 127 U. S. 457, 461, 462, 32 L. ed. 234, 236, 8 Sup. Ct. Rep. 1240; Terlinden v. Ames, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424. Irrespective of the depositions objected to, there was legal evidence on which to base the commissioner's action.

Affirmed.

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UNITED STATES, Plff. in Err.,
v.
JAMES A. PATTEN et al.

(See S. C. Reporter's ed. 525–544.)

**Appeal — by government in criminal case — scope of review.**

1. The Federal Supreme Court, when reviewing, under the *criminal appeals act* of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), the judgment of a Federal circuit court whose ruling sustaining a demurrer to certain counts in an indictment charging violations of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), was based upon the construction of that statute, must accept the circuit court's construction of the counts of the indictment, and can consider only whether the decision that the acts charged are not condemned as criminal by the statute is based upon an erroneous construction of that statute.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

**Appeal — by government in criminal case — construction of statute.**

2. A judgment of a Federal circuit court sustaining a demurrer to certain counts in an indictment charging violations of the anti-trust act of July 2, 1890, upon the ground that the acts charged are not within the condemnation of that statute, is based upon a construction of such statute within the meaning of the act of March 2, 1907, governing the right of the government to a review in a criminal case.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

**Monopoly — conspiracy in restraint of trade — corner in cotton.**

3. A conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of interstate trade and commerce, to be accomplished by purchases for future delivery, coupled with a withholding from sale for a limited time, thereby enhancing artificially its price to all buyers throughout the country, is within the terms of the anti-trust act of July 2, 1890, § 1, which makes it a criminal offense to engage in a conspiracy in restraint of interstate commerce, since by its necessary operation it will directly and materially impede and burden such commerce.

[For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.]

**Monopoly — conspiracy in restraint of trade — involuntary restraint.**

4. Involuntary restraints upon interstate commerce, the result of a conspiracy between persons not themselves engaged in such commerce, to compel action by others, or to create artificial conditions which necessarily impede or burden the due course

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NOTE.—As to review by government in criminal case under the act of March 2, 1907—see note to United States v. Stevenson, 54 L. ed. U. S. 153.

As to right of state to appeal in criminal case—see note to People ex rel. Hodson v. Miner, 19 L.R.A. 342.

As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act—see note to Loewe v. Lawlor, 52 L. ed. U. S. 488.

As to illegal trusts under modern anti-trust laws, generally,—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

of such commerce, or restrict the common liberty to engage therein, are comprehended by the provisions of the anti-trust act of July 2, 1890, § 1, which make it a criminal offense to engage in a conspiracy in restraint of interstate commerce, as well as voluntary restraints produced by an agreement between persons so engaged to suppress competition among themselves.

[For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.]

**Monopoly — combinations in restraint of trade — temporary stimulation of competition.**

5. A conspiracy to corner the market in a commodity, though it may tend to stimulate competition for a time, is within the provisions of the anti-trust act of July 2, 1890, making it a criminal offense to engage in a conspiracy in restraint of interstate commerce, if it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

[For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.]

**Criminal intent — conspiracy in restraint of trade.**

6. Persons engaging in a conspiracy which necessarily and directly will impede and burden interstate commerce, contrary to the act of July 2, 1890, § 1, making it a criminal offense to engage in a conspiracy in restraint of interstate commerce, are chargeable with intending that result.

[For other cases, see Criminal Law, 34-36, in Digest Sup. Ct. 1908.]

[No. 282.]

Argued November 9 and 10, 1911. Ordered for reargument before full bench April 29, 1912. Reargued October 23 and 24, 1912. Decided January 6, 1913.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to certain counts in an indictment, charging violations of the Sherman anti-trust act. Reversed and remanded for further proceedings.

See same case below, 187 Fed. 664.

The facts are stated in the opinion.

Former Solicitor General Lehmann argued the cause and filed a brief for plaintiff in error:

A corner of the entire cotton market of the United States during the last four months of the crop year, undertaken by several persons acting in concert for that purpose, and carried out by the purchase on the controlling exchange of the country, of cotton, for delivery during those months, in quantities in excess of the supply available for such delivery, thus creating an abnormal demand for cotton, with the necessary result of compelling all persons having occasion to buy cotton, as well speculative sellers who must get cotton to fill their contracts, as merchants, spinners, and manufacturers who must get cotton for their business needs, to pay excessive prices for such cotton, the persons running the corner to be beneficiaries of such excessive prices in settlements with "short" sellers and in sales to merchants and manufacturers,— is a conspiracy in restraint of trade and commerce among the states of the Union.

Ex parte Young, 6 Biss. 53, Fed. Cas. No. 18,145; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Raymond v. Leavitt, 46 Mich. 447, 41 Am. Rep. 170, 9 N. W. 525; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Kirkpatrick v. Bonsall, 72 Pa. 155; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Foss v. Cummings, 149 Ill. 353, 36 N. E. 553; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 38 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564.

A combination in the form of an agreement by several persons acting in concert for that purpose to buy enough of the cotton supply to enable them to control the price of it, and severally to demand an excessive and arbitrary price on the sale of that cotton to spinners and manufacturers during four months of the crop year, is a

conspiracy to monopolize a part of the trade and commerce among the states.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Solicitor General **Bullitt** argued the cause on reargument and filed a brief for plaintiff in error:

Contracts of purchase or sale for future delivery upon a mercantile exchange are valid, no matter how extensive, and even if made for pure speculation, and if settled by the payment of differences without actual delivery.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Sawyer v. Taggart, 14 Bush, 727; Forget v. Ostigny [1895] A. C. 318, 64 L. J. P. C. N. S. 62, 11 Reports, 474, 72 L. T. N. S. 399, 43 Week. Rep. 590.

A "corner" is the securing of such control of the immediate supply of any product as to enable those operating the "corner" arbitrarily to control and usually to advance the price of the product.

Black's Law Dict. 271; 9 Cyc. 978; Booth v. Illinois, 184 U. S. 425, 430, 46 L. ed. 623, 625, 22 Sup. Ct. Rep. 425.

Technical "corners," alike with combinations to suppress competition, are declared to be illegal as against public policy, in that they injuriously affect the natural course of trade and commerce, and tend to enhance prices; in short, are in restraint of trade.

Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 187, 8 Am. Rep. 159; Raymond v. Leavitt, 46 Mich. 447, 41 Am. Rep. 170, 9 N. W. 525; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; Samuels v. Oliver, 130 Ill. 84, 22 N. E. 499; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; Foss v. Cummings, 149 Ill. 357, 36 N. E. 553; Wright v. Crabbs, 78 Ind. 487; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781.

There is an analogous line of authorities which, while not presenting the case of a technical "corner" caused by purchases for future delivery on an exchange, illustrate very clearly that any conspiracy having the same object as a "corner," to wit, the arbitrary control of prices, whether to raise or depress them, is in restraint of trade, thus showing reflexly that the illegality in a "corner" is the *power to raise prices.*

Rex v. Norris, 2d Ld. Kenyon, 300; India Bagging Asso. v. Kock, 14 La. Ann. 164; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 186, 8 Am. Rep. 159; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Leonard v. Poole, 114 N. Y. 371, 4 L.R.A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406; People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; People v. Milk Exchange, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; People v. Goslin, 67 App. Div. 16, 73 N. Y. Supp. 520.

A review of the cases of this court will show that numerous contracts or combinations in the shape of a pooling agreement, contract, by-laws of a voluntary association, corporate charter, or verbal agreement, etc., whose object or necessary effect was (1) to suppress competition between those engaged in interstate commerce, (2) to enhance prices of an article of such commerce, (3) to burden the free transaction of such commerce by one engaged therein, (4) or to control some part of such commerce, have been decided to be in restraint of interstate trade.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 397, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; Shawnee Cou

press Co. v. Anderson, 209 U. S. 423, 434, 52 L. ed. 865, 875, 28 Sup. Ct. Rep. 572; Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120; Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845.

Temporary stimulation of competition in certain lines does not take the combination from within the terms of the Sherman law.

W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507.

The necessary and unavoidable result of the "corner" is also its direct effect.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

The "corner" restrained interstate commerce even though each purchase of cotton, taken alone, is not an act of interstate commerce.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

This court has jurisdiction of this writ of error.

United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; United States v. Heinze, 218 U. S. 532, 540, 54 L. ed. 1139, 1143, 31 Sup. Ct. Rep. 98, 21 Ann. Cas. 884; United States v. Heinze, 218 U. S. 547, 550, 54 L. ed. 1145, 1146, 31 Sup. Ct. Rep. 102; United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396; United States v. Mescall, 215 U. S. 26, 31, 54 L. ed. 77, 79, 30 Sup. Ct. Rep. 19.

Mr. George P. Merrick argued the cause, and, with Mr. Henry Wollman, filed a brief for defendant in error Patten:

This cause is not within the purview of the criminal appeals act of 1907, and this court is without jurisdiction to entertain this writ of error.

United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181.

This court had already held that the anti-trust act is not violated by an indirect interference with interstate commerce.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

There was then no room for any construction of the statute upon this point by the circuit court, and its acceptance of the construction thereof by this court afforded no ground for the application of the criminal appeals act.

Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750.

No combination, contract, or conspiracy violates the anti-trust act unless there is created or attempted to be created thereby some direct and immediate effect upon interstate commerce.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

The act of Congress (anti-trust act) must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it.

United States v. Joint Traffic Asso. 171 U. S. 568, 43 L. ed. 287, 19 Sup. Ct. Rep. 25; United States v. American Tobacco Co. 221 U. S. 106–179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632.

Suppression of competition is the essence of monopoly; its dominant thought is the notion of exclusiveness.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 Sup. Ct. Rep. 379; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

In order to constitute interstate commerce in any commodity its transit across state lines is involved.

General Oil Co. v. Crain, 209 U. S. 211, 229, 52 L. ed. 754, 764, 28 Sup. Ct. Rep. 475; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Brown v. Houston,

114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

The contracts of purchase of cotton, charged in the seventh and eighth counts to have been made by defendants, created at most but rights of action between the parties thereto, and as such could not be the subject of interstate commerce.

Ware & Leland v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238.

Messrs. George P. Merrick and William E. Church also filed a brief for defendant in error Patten:

The argument of the government is not confined to the allegations of the indictment.

Black's Law Dict. 271; Foss v. Cummings, 149 Ill. 353, 36 N. E. 553; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769.

The only effect of the government's resort to the statement of overt acts is to accentuate essential defects of the indictment. That statement cannot, in law, and does not in fact, aid the indictment.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; Smith v. United States, 85 C. C. A. 353, 157 Fed. 721; United States v. Patterson, 4 Inters. Com. Rep. 775, 55 Fed. 639; United States v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531.

Whatever restraint upon interstate commerce might result from acts charged would be but indirect, remote, and incidental. The statute only condemns acts having direct and immediate effect.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 401, 13 Ann. Cas. 815; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; United States v. Joint Traffic Asso. 171 U. S. 509, 43 L. ed. 261, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 548; United States v. Union P. R. Co. 188 Fed. 102; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; Washington & G. R. Co. v. Hickey, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661.

This court has no jurisdiction to review the judgment of the circuit court because that judgment was not based upon a construction by it of the anti-trust act, but upon repeated constructions thereof by this court.

United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396; United States v. Heinze, 218 U. S. 532, 54 L. ed. 1139, 31 Sup. Ct. Rep. 98, 21 Ann. Cas. 884; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Mescall, 215 U. S. 26, 54 L. ed. 77, 30 Sup. Ct. Rep. 19.

Even if technically this court has jurisdiction, it will not exercise it merely for the purpose of reaffirming propositions already settled by it.

Davies v. Slidell, 154 U. S. 625, and 23 L. ed. 871, 14 Sup. Ct. Rep. 1200; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123; Leonard v. Vicksburg S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750.

Mr. John C. Spooner argued the cause, and, with Messrs. Joseph P. Cotton, Jr., and George Rublee, filed a brief for defendants in error Scales, Hayne, and Brown:

A contract for the future delivery of cotton is not interstate commerce.

Ware & Leland v. Mobile County, 209 U. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031.

If there is any violation of the Sherman act it is because of an involuntary restraint of trade; *i. e.*, a restraint of someone's else interstate trade by some act of defendants.

Ibid.

In such a case the further question arises

whether the involuntary restraint of trade thus effected is immediate and direct or only incidental.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 229, 243, 244, 44 L. ed. 136, 143, 148, 149, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 311, 330, 48 L. ed. 679, 697, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 65, 55 L. ed. 647, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734.

There is nothing inherently wrong and immoral in the purchase and sale of contracts for future delivery of an article of prime necessity, like cotton, because such contracts might call for more cotton than would be available for delivery.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637.

The sole question to be considered here is whether the conspiracy charged is a necessary and direct restraint of trade and commerce among the states.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 457.

If this court were free to construe the indictment it would reach the same conclusion as the circuit court. A defective charge of conspiracy cannot be aided by averments of overt acts.

United States v. Britton, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; Pettibone v. United States, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Com. v. Shedd, 7 Cush. 514; Com. v. Hunt, 4 Met. 125, 38 Am. Dec. 346; McKenna v. United States, 62 C. C. A. 88, 127 Fed. 88; United States v. Patterson, 4 Inters. Com. Rep. 775, 55 Fed. 639; United States v. MacAndrews & F. Co. 149 Fed. 823; United States v. Milner, 36 Fed. 890; Conrad v. United States, 62 C. C. A. 478, 127 Fed. 798; McConkey v. United States, 96 C. C. A. 501, 171 Fed. 829.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a criminal prosecution under the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), the indictment being in eight counts. In the circuit court demurrers to the third, fourth, seventh, and eighth counts were sustained and those counts dismissed (187 Fed. 664); whereupon the government sued out this writ of error under the criminal appeals act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564). The case has been twice orally argued. At the second argument the government expressly abandoned the third and fourth counts and challenged only the ruling upon counts seven and eight. Thus, the propriety of the ruling upon the first two need not be considered.

In passing upon the demurrers, the circuit court proceeded first to construe the counts; that is, to ascertain with what acts the defendants are charged, and next, to consider whether those acts are denounced as criminal by the anti-trust act, the conclusion being that they are not.

The limitations upon our jurisdiction under the criminal appeals act[1] are such that we must accept the circuit court's construction of the counts, and consider only whether its decision that the acts charged are not condemned as criminal by the anti-trust act is based upon an erroneous construction of that statute.

At the outset we are confronted with the contention that the decision is not based upon a construction of the statute. But to this we cannot assent. The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute, without first ascertaining what it does condemn; which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

Each of the counts in question charges the defendants and others with engaging in a conspiracy "in restraint of, and to restrain," by the method therein described,

[1] The act is set forth in full in 211 U. S. at page 398, 53 L. ed. 244, 29 Sup. Ct. Rep. 132, and rulings thereunder are found in United States v. Bitty, 208 U. S. 393, 399, 52 L. ed. 543, 545, 28 Sup. Ct. Rep. 396; United States v. Keitel, 211 U. S. 370, 398, 53 L. ed. 230, 244, 29 Sup. Ct. Rep. 123; United States v. Biggs, 211 U. S. 507, 518, 53 L. ed. 305, 309, 29 Sup. Ct. Rep. 181; United States v. Mason, 213 U. S. 115, 122, 53 L. ed. 725, 727, 29 Sup. Ct. Rep. 480; United States v. Mescal, 215 U. S. 26, 31, 54 L. ed. 77, 79, 30 Sup. Ct. Rep. 19; United States v. Stevenson, 215 U. S. 190, 195, 54 L. ed. 153, 155, 30 Sup. Ct. Rep. 35; United States v. Heinze, 218 U. S. 532, 540, 54 L. ed. 1139, 1143, 31 Sup. Ct. Rep. 98, 21 Ann. Cas. 884; United States v. Heinze, 218 U. S. 547, 550, 54 L. ed. 1145, 1146, 31 Sup. Ct. Rep. 102; United States v. Kissel, 218 U. S. 601, 606, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124; United States v. Miller, 223 U. S. 599, 602, 56 L. ed. 538, 569, 32 Sup. Ct. Rep. 323.

"trade and commerce among the several states" in the supply of cotton available during the year ending September 1, 1910, such supply consisting of all the cotton 536]grown in the *Southern states in that year and the cotton left over from prior years. The counts are long, and the acts which the circuit court treated as charged in them are indicated by the following excerpt from its opinion, the footnotes being ours:

"These counts are alike, with the exception of the statement of overt acts,[2] and each may be, broadly speaking, divided into three parts, which may be thus summarized:

"(1) The charging part contains a general charge of conspiracy in restraint of interstate commerce, with the usual formal and jurisdictional averments.

"(2) The second part contains a 'description of the trade and commerce to be restrained.' Under this head it is stated, in substance, that cotton is an article of necessity raised in the Southern states, which moves in a large volume in interstate and foreign commerce, and that it is bought and sold upon the New York Cotton Exchange to such an extent as to practically regulate prices elsewhere in the country, so that future sales by speculators upon such exchange of more than the amount of cotton available at the time of delivery would create an abnormal demand and resultant excessive prices in all cotton markets.[3]

[2] One count contained a statement of overt acts, while the other contained no such statement,—a difference not here material.

[3] In order that the brief summary and analysis of the third part may be better understood, the second part is here reproduced:

Description of trade and commerce to be restrained.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that for many years past cotton has been grown, one crop a year, in divers of the states of the United States, among others, Virginia, North Carolia, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Kentucky, Louisiana, Oklahoma, Texas, Arkansas, Missouri, and New Mexico; that such cotton has been and is an article of prime necessity to the people of the United States, and the growing and the spinning and manufacturing of the same into yarns and fabrics have necessitated the cultivation of many millions of acres of land in the states last aforesaid, and the employment of many thousands of persons, in those states and in other states of the United States, in connection with the planting, cultivating, picking, ginning, compressing, storing, selling, shipping, and transporting of such cotton; that about 60 per cent of the cotton so grown has been shipped to and consumed in foreign countries in each crop year; that of the remaining 40 per cent of such cotton, about one half has been spun into yarns and manufactured into cotton fabrics by spinners and manufacturers in said Southern states for the use of the people of the United States and foreign countries, and the other half has been shipped to Northern states of the United States, among others, Massachusetts, Rhode Island, New York, Pennsylvania, New Hampshire, Maine, Connecticut, Maryland, New Jersey, and Delaware, in pursuance of sales of the same to spinners and manufacturers in the last-mentioned states, and there spun into yarns and manufactured into fabrics for the use of the people of the United States and foreign countries; that the demand for such cotton in foreign countries and in said Northern and Southern states has been steady and continuous throughout all portions of each crop year; that in the ordinary course of business said spinners and manufacturers have bought little or no cotton beyond that required by them for their immediate needs; that such cotton has been extensively bought and sold upon the Cotton Exchange in said city of New York for future delivery in the United States during current crop years; so much so that cotton bought and sold elsewhere in the United States than on that exchange has customarily been bought and sold at prices corresponding to the prices prevailing upon said exchange; that although, as the grand jurors aforesaid, upon their oath aforesaid charge the fact to be, the rules of said Cotton Exchange at New York city have required that all sellers and purchasers of cotton upon that exchange for future delivery should contemplate the actual delivery and receipt of cotton sold and purchased by them there, it has been possible for more cotton to be sold at a given time or at given times upon said exchange for future delivery at a given time or given times during a current crop year by speculators, that is to say, persons not having any cotton in their possession, than would be in existence at such future time or times and available to such speculators for acquisition and delivery to the purchasers thereof; that under such circumstances it has been necessary for such sellers of cotton upon said exchange for such future delivery to make settlements with purchasers in cash or its equivalent, at the prices prevailing upon said exchange at the time or times such settlements have been made, as to whatever cotton such sellers were unable to acquire and deliver to such purchasers when such delivery was due; that the artificial condition produced by such excessive purchases, when made, has invariably created such an abnormal demand for cotton on

537] *"(3) The third part contains a 'description of the method devised and adopted 538]by the conspirators for restraining *the trade and commerce.' It is alleged, at the outset, that the conspirators were to restrain trade and commerce by doing 'what is commonly called running a corner in cotton.' Averments then follow showing how the corner was to be brought about and its effect, which may be thus analyzed:

"(1) The conspirators were to make purchases from speculators upon the New York Cotton Exchange of quantities of cotton for future delivery, greatly in excess of the amount available for delivery when deliveries should become due.[1]

539] *"(2) By these means an abnormal demand was to be created on the part of such sellers, who would pay excessive prices to obtain cotton for delivery upon their contracts.

"(3) The excessive prices prevailing upon the New York Exchange would cause similar prices to exist upon other cotton markets.

"(4) 'As a necessary and unavoidable result of their acts, said conspirators were to compel' cotton manufacturers throughout the country to pay said excessive prices to obtain cotton for their needs, or else curtail their operations.

"(5) And also, as 'a necessary and unavoidable result' of said acts, an unlawful obstruction would be put upon interstate trade and commerce.[2]

"The offense charged, then, is a conspiracy in restraint of trade through the operation of a 'corner.'"

Although ruling that there was no allegation of a specific intent to obstruct interstate trade or commerce, and that the raising of prices in markets other than the Cotton Exchange in New York was "in itself no part of the scheme," the court assumed that the conspirators intended "the necessary and unavoidable consequences of their acts," and observed that "prices of cotton are so correlated that it may be said that the direct result of the acts of the conspirators was to be the raising of the price of cotton throughout the country."

Upon the second argument the defendants contended, and counsel for the government expressly conceded, that "running a corner" consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity, with the purpose of artificially enhancing the price; "one of the important features of which," to use the *language of the government's[540 brief, "is the purchase for future delivery, coupled with a withholding from sale for a limited time;" and as this definition is in substantial accord with that given by lexicographers and juridical writers, we accept it for present purposes, although observing that not improbably in actual usage the expression includes modified modes of attaining substantially the same end.

Whilst thus agreeing upon what constitutes running a corner, the parties widely differ as to whether what is so styled in this instance contained the elements necessary to make it operative. The point of difference is the presence or absence of an adequate allegation that the purchasing for future delivery was to be coupled with a withholding from sale, without which, it is conceded by both parties, the market could not be cornered. But the solution of the point turns upon the right construction of the counts, and that, as has been indicated, is not within our province on this writ of error. We must assume that the counts adequately allege whatever the circuit court treated them as alleging. Its opinion, given at the time, although not containing any express ruling upon the point of difference, shows that the counts were treated as alleging an operative

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the part of such sellers that very excessive prices therefor have prevailed upon said exchange, and upon all other exchanges and in all cotton markets, until after such settlements have been made, so that bona fide purchasers of cotton for consumption in spinning and manufacturing have been compelled for a time to pay the same excessive prices in order to obtain cotton for their needs; that the cotton crop for the crop year beginning September 1, 1909, and ending September 1, 1910, approximated 10,500,000 bales; that about 265,000 bales of cotton were left over and available at the beginning of said crop year of the crops of prior crop years; that the foregoing allegations of this paragraph of this count of this indictment apply to the cotton of said crop year and to that of prior crop years; and that each of said conspirators, when so conspiring, as in this count of this indictment set forth, well knew all the premises in this count aforesaid."

[1]The language of the charge is: "They were to make purchases from day to day upon said Cotton Exchange at New York city, from speculators, of quantities of cotton for future delivery at different times during said crop year, greatly in excess of the amount of cotton which would be in existence and available for delivery to them by the sellers thereof when such deliveries were due, reference being had to the usages and requirements of said trade and commerce, which are in this count above set forth."

[2]Of these allegations the court said in its opinion: "We must also assume that the allegations of the results to follow the conspiracy are more than the conclusions or economic theories of the pleader, and amount to allegations of fact."

scheme,—one by which the market could be cornered. The court spoke of it as "contrary to public policy," as "arbitrarily controlling the price of a commodity," and as "positively unlawful in any state having a statute against corners." Evidently, it was assumed that every element of running a corner was present. We accordingly indulge that assumption, but have the parties free to present the question to the district court for its decision in the course of such further proceedings as may be had in that court.

We come, then, to the question whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the states, and thereby to en-[541] hance *artificially its price throughout the country, and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of § 1 of the anti-trust act, which makes it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several states." The circuit court, as we have seen, answered the question in the negative; and this, although accepting as an allegation of fact, rather than as a mere economic theory of the pleader, the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy. The reasons assigned for the ruling, and now pressed upon our attention, are (1) that the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce, and agree to suppress competition among themselves, (2) that running a corner, instead of restraining competition, tends, temporarily at least, to stimulate it, and (3) that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not be to a restraint in the sense of the statute.

Upon careful reflection we are constrained to hold that the reasons given do not sustain the ruling, and that the answer to the question must be in the affirmative.

Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein. *Loewe v. Lawlor*, 208 U. S. 274, 293, 301, 52 L. ed. 488, 496, 502, 28 Sup. Ct. Rep. 301. As was said of this section in Standard Oil Co. v. United States, 221 U. S. 1, 59, 55 L. ed. 619, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734:

*"The context manifests that the[542] statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice have come to be considered as in restraint of trade in a broad sense."

It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view.

It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton,—a product of the Southern states, largely used and consumed in the Northern states. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern states. The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy *upon the attainment of which it[543] is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

Bearing in mind that such was the nature, object, and scope of the conspiracy,

we regard it as altogether plain that, by its necessary operation, it would directly and materially impede, and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent. See Swift & Co. v. United States, 196 U. S. 375, 396–400, 49 L. ed. 518, 524–526, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 243, 44 L. ed. 136, 148, 20 Sup. Ct. Rep. 96; United States v. Reading Co. 226 U. S. 324, 370, ante, 243, 33 Sup. Ct. Rep. 90.

The defendants place some reliance upon Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, as showing that the operation of the conspiracy did not involve interstate trade or commerce; but we think the case does not go so far and is not in point. It presented only the question of the effect upon interstate trade or commerce of the taxing by a state of the busi-544]ness of a broker who was dealing *in contracts for the future delivery of cotton, where there was no obligation to ship from one state to another; while here we are concerned with a conspiracy which was to reach and bring within its dominating influence the entire cotton trade of the country, and which was to be executed, in part only, through contracts for future delivery. It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. W. W. Montague & Co. v. Lowry, 193 U. S. 38, 45, 46, 48 L. ed. 608, 611, 612, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 386, 387, 49 L. ed. 518, 521, 522, 25 Sup. Ct. Rep. 276.

*As we are of opinion that the statute* does embrace the conspiracy which the circuit court treated as charged in counts seven and eight, as construed by it, its judgment upon those counts is reversed and the case is remanded for further proceedings in conformity with this opinion.

Reversed in part.

Mr. Justice Lurton, dissenting:

The majority seem to base a judgment of reversal upon the assumption that the court below interpreted the counts in question as charging all the elements essential to a technical "corner." To this view of the opinion of the court below I do not assent. As I interpret that opinion, the court held the count bad because it did not charge a "corner." Thus interpreted there was no error in quashing the count. I am authorized to say that the Chief Justice concurs in this dissent.

Mr. Justice Holmes also dissents.

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*SAMUEL M. PLUMLEY, Appt., [545
v.
UNITED STATES. (No. 35.)

UNITED STATES, Appt.,
v.
SAMUEL M. PLUMLEY. (No. 36.)

(See S. C. Reporter's ed. 545–548.)

**Public contracts — extra work.**

1. One contracting to complete an unfinished public work in accordance with the original contract and duly authorized changes is not entitled to compensation for extra work, where the Secretary of the Interior has decided against his claim, conformably to a provision in his contract that if there be any discrepancy between plans and specifications, or between his contract and the original contract, the matter shall be referred to such Secretary, whose decision shall be conclusive.

[For other cases, see United States, VI. f; Contracts, V. e, in Digest Sup. Ct. 1908.]

**Public contracts — extra work.**

2. Failure to comply with the provisions of a contract for a public work that changes increasing or diminishing the cost must be agreed on in writing by the contractor and architect, with a statement of the price of the substituted materials and work, and must, in every instance, be approved by the Secretary of the Interior, defeats any claim of the contractor for compensation for extra work.

[For other cases, see United States, VI. f; Contracts, V. e, in Digest Sup. Ct. 1908.]

**Public contracts — damages for delay.**

3. Damages caused by delay are not recoverable from the United States by the contractor for a public work, who failed to notify the Secretary of the Interior when

the delay occurred, as was required by the contract.

[For other cases, see United States, VI. f; Contracts, V. e, in Digest Sup. Ct. 1908.]

[Nos. 35 and 36.]

Argued December 9, 1912. Decided January 6, 1913.

CROSS APPEALS from the Court of Claims to review a judgment disallowing claims of a public contractor for compensation for extra work, but awarding him damages for delay. Reversed as to the damages for delay, and otherwise affirmed.

See same case below, No. 35, 43 Ct. Cl. 266; No. 36, 45 Ct. Cl. 185.

The facts are stated in the opinion.

Mr. George A. King argued the cause, and, with Mr. William B. King, filed a brief for Plumley:

The allowance for delay was proper.

United States v. Smith, 94 U. S. 214, 24 L. ed. 115; United States v. Mueller, 113 U. S. 153, 28 L. ed. 946, 5 Sup. Ct. Rep. 380; United States v. Barlow, 184 U. S. 124, 137, 46 L. ed. 463, 469, 22 Sup. Ct. Rep. 468; William Cramp & Sons Ship & Engine Bldg. Co. v. United States, 216 U. S. 494, 54 L. ed. 587, 30 Sup. Ct. Rep. 392.

There can be no estoppel arising from the fact that the claimant examined a plan showing the ventilation system prior to bidding. This plan was not a portion of the letting plans. No reference is made to it in the specifications or contract. There was no "meeting of minds" upon it.

United States v. Ellicott, 223 U. S. 524, 56 L. ed. 535, 32 Sup. Ct. Rep. 334.

In completing the construction of this work the several bidders were bound to place their proposals upon the drawings, plans, and specifications annexed to the McLaughlin contract. These are the only ones referred to in the new contract, and the only ones upon which the advertisement of the government or the proposals of the bidders were or could be lawfully based.

Dill. Mun. Corp. 5th ed. 1911, § 807.

The Secretary of the Navy could not require of a contractor the performance of a large amount of extra work nowhere alluded to in the specifications, by a mere assertion that it is within them.

Salt Lake City v. Smith, 43 C. C. A. 637, 104 Fed. 457; King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 826, 43 Fed. 768; Lewis v. Chicago, S. F. & C. R. Co. 49 Fed. 710; Lyons v. United States, 30 Ct. Cl. 352.

The work having been done under the direct orders of the Secretary of the Navy, the claimant is clearly entitled to be paid for it.

United States v. Barlow, 184 U. S. 123, 136, 137, 46 L. ed. 463, 469, 470, 22 Sup. Ct. Rep. 468.

The laying of the drain pipe was ordered in such a way as to make it binding upon the government to pay for it as an extra.

Merchants' Exch. Co. v. United States, 15 Ct. Cl. 275.

Specifications, like all legal instruments, are entitled to a sensible construction in accordance with the usages of the business with reference to which they are made. A contractor cannot justly be required to do work which can be of no advantage to anyone.

Atlantic Terra Cotta Co. v Masons' Supply Co. 103 C. C. A. 462, 180 Fed. 332.

The orders for extra work were given by competent and proper authority, the work to be performed was outside of the contract, and it is only just that the government should pay for it.

Wood v. Ft. Wayne, 119 U. S. 312, 316, 30 L. ed. 416, 417, 7 Sup. Ct. Rep. 219; United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 422, 423, 50 L. ed. 251, 254, 255, 26 Sup. Ct. Rep. 69; Wyandotte & D. R. Co. v. King Bridge Co. 40 C. C. A. 325, 100 Fed. 198; Venable Constr. Co. v. United States, 114 Fed. 763; Caldwell & Drake v. Schmulbach, 175 Fed. 437; Re Urban Dist. Council, 2 Hudson's Bldg. & E. Contr. 3d ed. 1907, 400; Grant v. United States, 5 Ct. Cl. 85; Dialogue v. United States, 22 Ct. Cl. 204.

Mr. William W. Scott argued the cause, and, with Assistant Attorney General John Q. Thompson, filed a brief for the United States:

Knowing, as Plumley did, that the ventilation system was partly installed at the time of the forfeiture of the McLaughlin contract, he was thereby warned that he would be required to complete the installation of the ventilation system when he contracted to complete the naval observatory buildings in accordance with the McLaughlin contract and the duly authorized changes.

Huse v. United States, 222 U. S. 496, 56 L. ed. 285, 32 Sup. Ct. Rep. 119.

It is competent for the parties to a contract similar to this to make provision that the decision of an engineer or other officer in all or specified matters of dispute which may arise during the performance of the contract work shall be final and conclusive; and in the absence of fraud or mistake so gross as necessarily to imply bad faith, such decision will not be subject to the revisory power of the courts.

Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 24 L. ed. 917, 11 Sup. Ct. Rep. 290; United States v. Gleason, 175 U. S. 602, 44 L. ed. 290, 20 Sup. Ct. Rep. 228; United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128.

None of the alleged extra work was agreed to in writing, as the contract required.

McLaughlin v. United States, 37 Ct. Cl. 197; Churchyard v. United States, 100 Fed. 920; United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128.

The court of claims erred in rendering judgment against the government for premiums paid for insurance by claimant during the extended period of his contract.

Merchants' Loan & T. Co. v. United States, 40 Ct. Cl. 117; United States v. Bethlehem Steel Co. 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. Rep. 450; United States v. Gleason, 175 U. S. 588, 609, 44 L. ed. 284, 292, 20 Sup. Ct. Rep. 228.

Mr. Justice Lamar delivered the opinion of the court:

In October, 1888, P. H. McLaughlin & Company contracted to build the Naval Ob-546]servatory in Washington *for $307,811. After most of the work had been done, the contract was forfeited for failure to make satisfactory progress. 37 Ct. Cl. 150. The government advertised for bids to complete the work. After examining the contract and documents Plumley agreed to complete the building in accordance with the McLaughlin contract, and "duly authorized changes" by June 1st, 1892, for the sum of $25,840. Having finished the work, he sued the government for damages by delay and for extra work amounting to $12,813. The court rendered judgment in his favor for $502 insurance paid during the period he was delayed in finishing the work. All of the other items were disallowed. Both parties appealed.

1. The largest item is a claim for extra compensation for installing a ventilator system, which McLaughlin agreed to do for a given sum. The proposed change and this offer were submitted by the architect to the Bureau of Equipment, with the statement that, if approved, McLaughlin would enter into a formal written contract to do the work for the prices named. The plans and bid were approved. McLaughlin was directed to proceed, and did some work thereon. Later his contract was forfeited. *Plumley (and his partner, Davis, a former member of McLaughlin & Company)* knew these facts at the time the bid was made to complete the work, but when required to build the ventilating system, Plumley insisted that it was not within McLaughlin's original contract, and not a "duly authorized change" because no written contract had been signed by both parties, as required by the terms of the contract. This contention was rejected by the architect, and, on appeal, by the Secretary of the Navy. The court of claims at first sustained this position, but on a rehearing held that Plumley was estopped from claiming that the change had not been duly authorized, and, under his contract to complete the work, was bound to finish *what[547 McLaughlin had begun. Beyond this the contract provided that if there was any discrepancy between plans and specifications, or between the contract of McLaughlin and the contract of Plumley, the matter should be referred to the Secretary, Plumley agreeing "to abide by his decision in the premises." The Secretary decided against him, and under the circumstances his construction is binding on the contractor.

2. This same provision prevents a recovery for the drain pipe included in the original contract. For some reason, not stated, it appears that McLaughlin was requested to make a bid for laying drain pipe. It was accepted and then countermanded. Plumley was likewise requested to make a bid, which was accepted and then countermanded. When required to lay the pipe he demanded extra compensation, but his appeal was overruled by the Secretary, possibly for the reason suggested in argument, —that asking a bid did not relieve Plumley from the obligation to furnish labor and material actually included in the contract. What facts were submitted to the Secretary is not in this record, but his ruling is conclusive, in view of Plumley's agreement to abide by his decision.

3. The other items for extra work were properly disallowed. The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500. In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract. *Rev. Stat. § 3744, U. S.[548 Comp. Stat. 1901, p. 2510; Hawkins v.

United States, 96 U. S. 689, 24 L. ed. 607; Ripley v. United States, 223 U. S. 695, 56 L. ed. 614, 32 Sup. Ct. Rep. 352; United States v. McMullen, 222 U. S. 460, 56 L. ed. 269, 32 Sup. Ct. Rep. 128.

4. The government appeals from so much of the judgment as gave Plumley a judgment for damages caused by delay. The court found that Plumley was delayed by the failure to have the architect on hand promptly for decision pertaining to the work, while it also found that the Secretary extended the time for the reason that Plumley's failure to finish was on account of circumstances beyond the contractor's control. But Plumley, at the time of the occurrence of the delay, did not notify the Secretary of the facts, nor of the extent to which the work would be delayed. The contract required that such notice should be given to the Secretary when the delay occurred, evidently for the purpose of informing the Department, and enabling it, at the time, to remove the cause of the delay. It operated to prevent claims for damage, and for failure to comply with this requirement of the contract. (United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228) the plaintiff is not entitled to recover. The judgment in that respect must be reversed, and is otherwise affirmed.

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BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 548–550.)

**Mines — cutting timber — effect of invalid homestead entry.**

1. A homestead entry of mineral lands, though subject to cancelation by the United States, so far segregates the land from the public domain and makes it so far private as to withdraw it from the operation of the act of June 3, 1878 (20 Stat. at L. 88, chap. 150, U. S. Comp. Stat. 1901, p. 1528), authorizing any citizen to enter upon public lands, being mineral lands open to mineral entry, in order to cut timber therefrom for mining purposes.

[For other cases, see Mines, I. a; Public Lands, I. b, in Digest Sup. Ct. 1908.]

**Estoppel — inconsistent claims — homestead or mineral land.**

2. A homestead entryman and his vendee, when sued by the United States for cutting timber, are estopped to claim that the land could not be entered as a homestead, but was subject to the provisions of the act of June 3, 1878, which authorize any citizen to enter upon public lands, being mineral lands, open to mineral entry, in order to cut timber therefrom for mining purposes.

[For other cases, see Estoppel, III. c, in Digest Sup. Ct. 1908.]

**Public lands — cutting timber — liability of vendee.**

3. The vendee of a trespasser upon the public lands, buying with notice, is liable to the United States for the timber unlawfully removed by the vendor.

[For other cases, see Public Lands, I. b, in Digest Sup. Ct. 1908.]

[No. 101.]

Submitted December 17, 1912. Decided January 6, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Idaho, Northern Division, in favor of the United States in a suit to recover the value of timber cut from the public lands. Affirmed.

See same case below, 102 C. C. A. 292, 178 Fed. 914.

The facts are stated in the opinion.

Mr. Myron A. Folsom submitted the cause for plaintiff in error:

The expression "public lands" does not always mean lands to which no claim has attached, but, on the contrary, when used alone, may be the equivalent of "lands of the United States."

Shiver v. United States, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; United States v. Blendaur, 63 C. C. A. 636, 128 Fed. 910; United States v. Bisel, 8 Mont. 20, 19 Pac. 251; Peterson v. Baker, 39 Wash. 275, 81 Pac. 681; United States v. Elliot, 12 Utah, 119, 41 Pac. 720; Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; United States v. Saucier, 5 N. M. 569, 28 Pac. 791.

Would the construction contended for defeat the purpose of Congress, and prevent others than the homestead claimant from exercising their right to cut timber?

Manners Constr. Co. v. Rees, 31 Land Dec. 408.

Is the plaintiff in error, who purchased the timber and paid Messenger for it, estopped from claiming that the land was mineral land?

Barden v. Northern P. R. Co. 154 U. S. 313, 38 L. ed. 996, 14 Sup. Ct. Rep. 1030; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; United States v. Saucier, 5 N. M. 569, 25 Pac. 791; Stephens v. M'Cargo, 9 Wheat. 502, 6 L. ed. 145.

Was the rule of the Secretary, to the el-

NOTE.—As to right to cut timber on public lands—see note to King-Ryder Lumber Co. v. *Scott, 70 L.R.A. 873.*

fect that no timber shall be cut less than 8 inches in diameter, a valid rule?

United States v. Rossi, 66 C. C. A. 442, 133 Fed. 380; United States v. Price Trading Co. 48 C. C. A. 331, 109 Fed. 239; Morgan v. United States, 94 C. C. A. 518, 169 Fed. 242; United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222.

Assistant Attorney General Knaebel submitted the cause for defendant in error:

The cutting was a wilful trespass.

United States v. Cook, 19 Wall. 591, 594, 22 L. ed. 210, 211; Northern R. Co. v. Lewis, 162 U. S. 366, 376, 40 L. ed. 1002, 1003, 16 Sup. Ct. Rep. 831; Stone v. United States, 167 U. S. 178, 192, 42 L. ed. 127, 133, 17 Sup. Ct. Rep. 778; Shiver v. United States, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54.

No title passed to the trespasser before or after manufacture; the stulls and cordwood remained the absolute property of the United States.

United States v. Cook, 19 Wall. 591, 593, 22 L. ed. 210, 211; E. E. Bolles Woodenware Co. v. United States, 106 U. S. 432, 435, 27 L. ed. 230, 231, 1 Sup. Ct. Rep. 398; Shiver v. United States, 159 U. S. 491, 498, 40 L. ed. 231, 233, 16 Sup. Ct. Rep. 54; Northern P. R. Co. v. Lewis, 162 U. S. 366, 374, 40 L. ed. 1002, 1006, 16 Sup. Ct. Rep. 831; Schulenberg v. Harriman, 21 Wall. 44, 64, 22 L. ed. 551, 555; United States v. Steenerson, 1 C. C. A. 552, 4 U. S. App. 332, 50 Fed. 504; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 6; Nitz v. Bolton, 71 Mich. 388, 39 N. W. 15; Hanselman v. Kegel, 60 Mich. 550, 27 N. W. 678.

The lands were not proved to be "mineral lands."

United States v. Plowman, 216 U. S. 372, 54 L. ed. 523, 30 Sup. Ct. Rep. 299; Magruder v. Oregon & C. R. R. Co. 28 Land Dec. 174; Re Elda Min. & Mill. Co. 29 Land. Dec. 279; Northern P. R. Co. v. Lewis, 162 U. S. 376, 40 L. ed. 1006, 16 Sup. Ct. Rep. 831.

The lands were not "public lands."

Hodges v. Colcord, 193 U. S. 192, 48 L. ed. 677, 24 Sup. Ct. Rep. 433; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Bardon v. Northern P. R. Co. 145 U. S. 535, 538, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 856; Whitney v. Taylor, 158 U. S. 85, 88, 39 L. ed. 906, 907, 15 Sup. Ct. Rep. 796; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 603; United States v. Bagnell Timber Co. 102 C. C. A. 243, 178 Fed. 795; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 1; 1 Lindley, Mines, § 322; McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 670; Re Elda Min. & Mill. Co. 29 Land Dec. 279.

The defendant acquired no right or title by the attempted purchase from the trespasser.

E. E. Bolles Woodenware Co. v. United States, 106 U. S. 432, 436, 27 L. ed. 230, 232, 1 Sup. Ct. Rep. 398.

Mr. Justice Lamar delivered the opinion of the court:

In 1903 Messenger made a homestead entry in the Cœur D'Alene land district. He claimed to have entered in good faith, and testified that he lived on the land with his family for some time. While thus in possession he cut many of the trees into stulls, which, with the cordwood, he sold to the Bunker Hill Company. In 1905 he abandoned the land and the government brought suit against the mining company and recovered judgment for the value of the timber in its improved state. 102 C. C. A. 292, 178 Fed. 914.

In this court, plaintiff in error claims that the land, not being suited for agricultural purposes, could not be entered as a homestead (Rev. Stat. § 2302, U. S. Comp. Stat. 1901, p. 1410), but, being mineral land in fact, was open to mining location and subject to the provisions of the act of June 3, 1878 (20 Stat. at L. 88, chap. 150, U. S. Comp. Stat. 1901, p. 1528), which authorizes any citizen to "enter upon public lands, being mineral lands," open to mineral entry, in order to cut timber therefrom for mining purposes. It argues that the *homestead entry was void, and[550 that any citizen, Messenger included, could treat the land as public, and cut the timber for mining purposes. It offered evidence tending to sustain its contention as to the character of the land, and excepts to the court's ruling that Messenger and his vendee were estopped from making such claim.

The statute on which the mining company relies applies only to public lands, while this was no longer public in the full sense, although the title remained in the government, which could have canceled Messenger's entry on proof that it was valuable for mineral purposes. Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95. But until some such action by the United States, Messenger's entry segregated the land from the public domain and made it so far private as to withdraw it from the operation of the law permitting other citizens to locate mines or cut timber on public mineral land. Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Shiver v. United States, 159 U. S. 495, 40 L. ed. 231, 16

Sup. Ct. Rep. 54. Until his claim was canceled, Messenger was entitled to exclude others from the quarter section. And as they would have been estopped, as against him, from denying that he was lawfully in possession of it as a homestead, so was he estopped from denying that it was a homestead when sued for cutting timber in violation of the law applicable thereto. He could not claim the rights of a homesteader in land intended for settlement and cultivation (Rev. Stat. § 2290, U. S. Comp. Stat. 1901, p. 1389), and at the same time defend under another statute which related to public land valuable for mineral purposes. The mining company bought with notice that Messenger was a trespasser, and is liable for the timber unlawfully removed by its vendor.

Affirmed.

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551] *JESSIE E. THOMPSON, Appt.,
v.
CHARLES N. THOMPSON.

(See S. C. Reporter's ed. 551–567.)

**Appeal — jurisdictional amount — what deemed matter in dispute.**

1. The matter in dispute essential under the act of February 9, 1893 (27 Stat. at L. 436, chap. 74, U. S. Comp. Stat. 1901, p. 573), § 8, to sustain an appeal from the court of appeals of the District of Columbia to the Federal Supreme Court, need not be of such a nature as to constitute (if the event be favorable) a technical debt of record.

[For other cases, see Appeal and Error, I. f, 4, e, in Digest Sup. Ct. 1908.]

**Appeal — jurisdictional amount — matter in dispute — future payments.**

2. The payments which, considering the expectancy of life of the parties, will accrue in the future, under a decree in favor of the wife in a suit for maintenance, brought by her against her husband, may be added to the instalments already accrued, for the purpose of determining whether the amount necessary under the act of February 9, 1893, § 8, to sustain the appellate jurisdiction of the Federal Supreme Court over the court of appeals of the District of Columbia, is involved, although such future payments may, under D. C. Code, §§ 976–978, 980, be increased, decreased, or cut off entirely in the event of a change in the circumstances of the parties.

[For other cases, see Appeal and Error, I. f, 4, e, in Digest Sup. Ct. 1908.]

**Judgment — full faith and credit — decree of divorce.**

3. The courts of the state which is the domicil of the husband, and the only matrimonial domicil, have jurisdiction to render a decree of divorce in his favor entitled, under U. S. Const. art. 4, § 1, and U. S. Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677, to full faith and credit in the courts of the District of Columbia, although the wife has left the jurisdiction, and can only be served by publication.

[For other cases, see Judgment, 983–987, 1039–1040, in Digest Sup. Ct. 1908.]

**Courts — following state court decisions — local practice.**

4. The use, as the basis of an order for publication, of an affidavit averring the nonresidence of the defendant upon information and belief, must be assumed to be in accord with the local state practice, where a court of that state has adjudged such an affidavit to be sufficient, there being no local law excluding its use for such purpose.

[For other cases, see Courts, VII. c, 19, in Digest Sup. Ct. 1908.]

**Judgment — full faith and credit — collateral attack.**

5. The acceptance by a state court of an affidavit averring the nonresidence of the defendant upon information and belief as legal evidence upon which an order for publication may be based must be deemed sufficient, on collateral attack in the courts of the District of Columbia, to confer jurisdiction over the subject-matter in accordance with local laws, in the absence of any such law excluding the use of such an affidavit for such a purpose.

[For other cases, see Judgment, 1057–1062, in Digest Sup. Ct. 1908.]

**Judgment — res judicata — divorce — maintenance.**

6. A decree of divorce *a mensa et thoro*, rendered in favor of the husband by a state court of competent jurisdiction, forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the local law, where the courts of the state hold, upon general principles, that alimony has its origin in the legal obliga-

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NOTE.—As to appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

As to extraterritorial effect of decree of divorce rendered upon constructive service—see notes to Benton's Succession, 59 L.R.A. 162, and Joyner v. Joyner, 18 L.R.A.(N.S.) 647.

Jurisdiction of court of state of matrimonial domicil to grant a divorce upon constructive service of process against defendant who is out of jurisdiction—see notes to Butler v. Washington, 19 L.R.A. 814, and State ex rel. Aldrach v. Morse, 7 L.R.A. (N.S.) 1127.

As to giving full faith and credit to judgments of courts of other states generally—see note to Huntington v. Attrill, 36 L. ed. U. S. 1123.

As to questions of state law as to which the decisions of the highest state court must be followed in actions originating in, or removed to, the Federal courts—see note to Snare & T. Co. v. Freidman, 40 L.R.A.(N.S.) 380.

tion of the husband to maintain his wife, and that she may, by her conduct, forfeit it, and that where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband.

[For other cases, see Judgment, III. j, 4, in Digest Sup. Ct. 1908.]

[No. 45.]

Argued November 8, 1912. Decided January 6, 1913.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District in favor of the wife in a suit for maintenance in which the husband set up a decree of divorce rendered in his favor in the Virginia courts. Affirmed.

See same case below, 35 App. D. C. 14.

The facts are stated in the opinion.

Mr. William M. Lewin argued the cause and filed a brief for appellant:

A claim of alimony, even *pendente lite*, may afford the basis of this court's jurisdiction on appeal.

De la Rama v. De la Rama, 201 U. S. 303, 318, 50 L. ed. 765, 771, 26 Sup. Ct. Rep. 485.

The mere fact that the decree, following the statute, decrees that payment shall be made periodically, instead of *in solido*, does not affect the question of jurisdiction, as the amount of the possible, indeed reasonably probable, payments under the decree, will exceed $5,000.

Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 106, 55 L. ed. 384, 388, 31 Sup. Ct. Rep. 368.

In determining the amount involved, for the purpose of appeal, the scope of the inquiry may be, and generally is, broader in a suit in equity than in a case at law.

Stinson v. Dousman, 20 How. 461, 466, 467, 15 L. ed. 966, 969; New England Mortg. Secur. Co. v. Gay, 145 U. S. 123, 131, 132, 36 L. ed. 646, 648, 649, 12 Sup. Ct. Rep. 815; Troy v. Evans, 97 U. S. 1, 3, 24 L. ed. 941, 942; Marshall v. Holmes, 141 U. S. 589, 595, 35 L. ed. 870, 872, 12 Sup. Ct. Rep. 62.

The jurisdiction in this case is measured by the value of the right to be protected, and not by the value of some mere isolated element of that right.

Berryman v. Whitman College, 222 U. S. 334, 346–348, 56 L. ed. 225, 228, 229, 32 Sup. Ct. Rep. 147.

Statutes regulating appeals are remedial, and this court has always construed them *liberally*.

*The Habana, 175 U. S. 677, 682, 44 L. ed. 320, 322, 20 Sup. Ct. Rep. 290; Wetmore v. Rymer, 169 U. S. 115, 128, 42 L. ed. 682, 686, 18 Sup. Ct. Rep. 293; Harris v. Barber, 129 U. S. 366, 369, 370, 32 L. ed. 697, 699, 700, 9 Sup. Ct. Rep. 314; Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 603, 6 Sup. Ct. Rep. 576; Audubon v. Shufeldt, 181 U. S. 575, 578, 45 L. ed. 1009, 1011, 21 Sup. Ct. Rep. 735.*

The decree is limited by the pleadings, which adhere to the requirements of the Code. The meaning of the decree, therefore, is that the husband shall pay to the wife at the least the sum of $75 a month as long as the child may be dependent upon her for care and support.

Barnes v. Chicago, M. & St. P. R. Co. 122 U. S. 1, 30 L. ed. 1128, 7 Sup. Ct. Rep. 1043; Pierce v. Tennessee Coal, Iron & R. Co. 173 U. S. 1, 9, 43 L. ed. 591, 594, 19 Sup. Ct. Rep. 335; Ex parte Hart, 94 Cal. 254, 29 Pac. 774; Carnig v. Carr, 167 Mass. 547, 35 L.R.A. 512, 57 Am. St. Rep. 488, 46 N. E. 117; McCaddin v. McCaddin, 116 Md. 574, 82 Atl. 554.

This court will take judicial notice of the usual tables, showing the expectancy of life of the parties and of the child.

Lincoln v. Power, 151 U. S. 436, 441, 38 L. ed. 224, 227, 14 Sup. Ct. Rep. 387.

The appellee's self-confessed conduct towards a frail and invalid wife may not be a bar to his Virginia decree, but it is a fact, nevertheless, which this court will consider upon the merits of the case.

Crosby v. Buchanan, 23 Wall. 420, 454, 23 L. ed. 138, 142.

There was no valid service of process upon defendant.

Raub v. Otterback, 89 Va. 645, 16 S. E. 933.

The Virginia decree was therefore not final within the meaning of the full faith and credit clause of the Constitution.

Cheely v. Clayton, 110 U. S. 701, 708, 28 L. ed. 298, 300, 4 Sup. Ct. Rep. 328; Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; Lynde v. Lynde, 181 U. S. 183, 187, 45 L. ed. 810, 814, 21 Sup. Ct. Rep. 555.

The sufficiency of the jurisdictional affidavit is to be determined by the law of Virginia; and if the publication in the particular case be unauthorized, no principle is perceived upon which it can be regarded as constructive notice.

Hollingsworth v. Barbour, 4 Pet. 466, 474, 8 L. ed. 922, 926.

A statement made upon information and belief cannot be equivalent to a direct statement unless the facts upon which the information and belief are based are set forth, so that the court may determine their reasonableness and sufficiency.

Clowser v. Hall, 80 Va. 864; Rice v.

Ames, 189 U. S. 371, 374, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356; Holmes v. Holmes, 15 Neb. 616, 19 N. W. 600; Fulton v. Levy, 21 Neb. 482, 32 N. W. 307.

Process by means of publication is purely statutory, and not according to the course of the common law, and it can only be instituted in the manner required by the statute.

Cooper v. Newell, 173 U. S. 555, 572, 43 L. ed. 808, 814, 19 Sup. Ct. Rep. 506.

If the affidavit had been as to the defendant's domicil, which may present a mixed question of law and fact, there would be some basis for the contention that an affidavit upon information and belief would be sufficient; but as to the mere fact of residence, the affidavit must be positive.

Jackson v. Webster, 6 Munf. 464; Clowser v. Hall, 80 Va. 864.

Cases when the judgment is to have an effect on personal rights, as in divorce suits, are not to be assimilated too closely to those cases in which the jurisdiction is acquired by seizure of the property involved.

Cooper v. Reynolds, 10 Wall. 308, 319, 19 L. ed. 931, 933; Hamilton v. Brown, 161 U. S. 256, 274, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 584; Haddock v. Haddock, 201 U. S. 562, 576, 50 L. ed. 867, 872, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1.

Land may be drawn within the jurisdiction of the court by merely bringing a suit; but the jurisdictional necessity for the actual custody of chattels has been consistently applied, and for the same reason that a vested remainder in chattels was not subject to sale by common-law execution, as the fieri facias in either case requires actual custody and delivery of the goods.

Dargan v. Richardson, Dud. L. 62; Allen v. Scurry, 1 Yerg. 36, 24 Am. Dec. 436; Lockwood v. Nye, 2 Swan, 515, 58 Am. Dec. 73.

The force of the words "on affidavit," as used in the Virginia statute, cannot be less than that of the word "thereupon," construed as jurisdictional when applied to special statutory powers.

Re Pensacola Lumber Co. 8 Ben. 171, Fed. Cas. No. 10,959.

The courts indulge presumptions when the record is silent which are overcome when different evidence is disclosed or averments made; then why should not a defendant be permitted by the court to assume that there was no other time designated, and to rely upon an "actual notice" in lieu of the constructive (presumed) notice by publication?

Galpin v. Page, 18 Wall. 350, 366, 21 L. ed. 959, 962; Cheely v. Clayton, 110 U. S. 701, 706, 28 L. ed. 298, 301, 4 Sup. Ct. Rep. 228; *Hays v. United States, 175 U. S. 248,*



261, 44 L. ed. 150, 155, 20 Sup. Ct. Rep. 80; Blackburn v. Crawford, 3 Wall. 175, 194, 18 L. ed. 186, 194.

The appellant's domicil was not in Virginia. She was therefore not bound by the Virginia decree.

Haddock v. Haddock, 201 U. S. 562, 583, 589, 599, 606, 50 L. ed. 867, 875, 877, 882, 884, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1.

Mr. Joseph W. Cox argued the cause, and, with Messrs. A. E. L. Leckie and John A. Kratz, Jr., filed a brief for appellee:

The court is without jurisdiction.

Barry v. Mercein, 5 How. 103, 12 L. ed. 70; Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; Durham v. Seymour, 161 U. S. 235, 40 L. ed. 682, 16 Sup. Ct. Rep. 452; Huntington v. Saunders, 163 U. S. 319, 41 L. ed. 174, 16 Sup. Ct. Rep. 1120; 1 Foster, Fed. Pr. 4th ed. p. 87; Miles v. Miles, 200 Ill. 524, 66 N. E. 28.

The decree of the Virginia court, if valid in Virginia, is binding upon the parties in the District of Columbia.

Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544.

The effect of that decree in Virginia is to bar the wife's right to maintenance.

Harris v. Harris, 31 Gratt. 17; Carr v. Carr, 22 Gratt. 168; Latham v. Latham, 30 Gratt. 338.

The Virginia decree is not invalid in that state because of the insufficiency of the affidavit filed as the basis of the order of publication.

Adams v. Hosmer, 98 Mich. 51, 56 N. W. 1051; Pennoyer v. Neff, 95 U. S. 714–721, 24 L. ed. 565, 568; Long v. Fife, 45 Kan. 271, 23 Am. St. Rep. 724, 25 Pac. 594; Belmont v. Cornen, 82 N. Y. 256; Rowe v. Palmer, 29 Kan. 340; Smith v. Smith, 3 Or. 363; Ligare v. California Southern R. Co. 76 Cal. 610, 18 Pac. 777; Lawson v. Moorman, 85 Va. 880, 9 S. E. 150; Harris v. Claflin, 36 Kan. 543, 13 Pac. 830; Britton v. Larson, 23 Neb. 806, 37 N. W. 681; Fulton v. Levy, 21 Neb. 478, 32 N. W. 307.

The giving of personal notice in the District of Columbia did not vitiate the constructive notice by publication, and render the decree void in Virginia.

7 Enc. Pl. & Pr. 109; Burnes v. Burnes, 61 Mo. App. 612; Dresser v. Wood, 15 Kan. 344.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia, reversing a decree of the supreme court of the District in favor of the wife in a suit for maintenance, brought under § 980 of the District Code (act of March 3, 190

31 Stat. at L. 1346, chap. 854). The bill of complaint was filed July 29, 1907, and charged the husband with failing and refusing to maintain the complainant, and with cruel treatment of such character as to compel her to leave him. Upon the filing of the bill a subpœna to answer was issued and returned "not found," whereupon alias and pluries writs were successively issued and returned until November 18, 1907, when the husband was served with process. Meanwhile, and on September 3, 1907, he brought suit against the wife in the circuit court of Loudoun county, Virginia, for divorce *a mensa et thoro*, upon the ground that on June 13, 1907, the wife wilfully abandoned his bed and board and de-[558]serted him *without cause, and that notwithstanding his repeated entreaties and endeavors to induce her to return, she had refused to do so. An order of publication having been made and published, the Virginia court, on October 19, 1907, made a decree granting to the husband a divorce *a mensa et thoro*. He thereafter, on being served as already mentioned with process in the wife's suit, filed a plea setting up the Virginia decree and the proceedings upon which it was rendered, as a bar to her action. This plea was, on hearing, overruled, the husband being allowed time in which to answer the bill. He answered, denying the wife's charges of cruelty, and setting up other matters pertaining to the merits, and also averred that his domicil, as well as the matrimonial domicil of the parties, was in Loudoun county, Virginia, and again pleaded the Virginia proceedings and decree as a bar to the wife's suit. The supreme court of the District, upon final hearing, held the Virginia divorce to be invalid, and made a decree awarding to the wife custody of an infant child born to the parties during the pendency of the proceedings, and requiring the husband to pay to the wife $75 per month for the maintenance of herself and the child, to forthwith pay to her the sum of $500 for counsel fees, and also to pay the costs of suit to be taxed. From this decree the husband appealed to the court of appeals of the District, which court reversed the decree and remanded the cause, with directions to enter an order vacating the decree and dismissing the bill. 35 App. D. C. 14.

The present appeal is based upon § 8 of the act of February 9, 1893, to establish a court of appeals for the District of Columbia, and for other purposes (27 Stat. at L. 436, chap. 74, U. S. Comp. Stat. 1901, p. 573), which section gives a writ of error or appeal to review in this court any final judgment or decree of the court of appeals "in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." Appellee challenges our jurisdiction *on the[559] ground that the matter here in dispute does not exceed the sum mentioned.

Under the decree of the supreme court the payments of $75 per month for support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the court of appeals, the instalments already accrued would amount to considerably more than one half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance.

It is true that the obligation to make such payments for maintenance in the future, even when fixed by judicial decree, is not in the nature of a technical debt.

Section 980 of the District Code (31 Stat. at L. 1346, chap. 854), upon which the present action is based, enacts: "Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able so to do, the court, on application of the wife, may decree that he shall pay her periodically such sums as would be allowed to her as permanent alimony in case of divorce for the maintenance of herself and the minor children committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to such permanent alimony." The matter of permanent allmony is dealt with in §§ 976, 977, and 978, the latter of which provides: "After a decree of divorce in any case granting alimony and providing for the care and custody of children, the case shall still be considered open for any future orders in those respects."

The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband. See Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; Audubon v. Shufeldt, 181 U. S. 575, 578, 45 L. ed. 1009, 1010, 21 Sup. Ct. Rep. 735; Lynde v. Lynde, 64 N. J. Eq. 736, 751, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694.

*Nevertheless, such a decree clearly[560] and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfil that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be in-

creased, decreased, or even cut off, as just indicated.

The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed $5,000, does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record. In Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602, 6 Sup. Ct. Rep. 570, the matter in dispute was stated to be "whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary as paymaster general during the residue of his term as such, and as pay inspector afterwards, which, in less than two years, would exceed the sum of $5,000." This court sustained the appellate jurisdiction. That case has been repeatedly cited upon the present point (Smith v. Adams, 130 U. S. 167, 175, 32 L. ed. 895, 898, 9 Sup. Ct. Rep. 566; South Carolina v. Seymour, 153 U. S. 353, 358, 38 L. ed. 742, 744, 14 Sup. Ct. Rep. 871; Simon v. House, 46 Fed. 317, 318; Chesapeake & D. Canal Co. v. Gring, 86 C. C. A. 530, 159 Fed. 662, 664); and its authority upholds our jurisdiction in the case before us.

The next question is whether the court of appeals was right in holding that the supreme court of the District erred in refusing to give credit to the Virginia decree.

Art. 4, § 1, of the Constitution, declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." By § 905, Rev. Stat. (U. S. Comp. Stat. 1901, p. 677), the mode in which such acts, records, and proceedings are to be proved was 561]prescribed; and it was enacted *that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." This latter clause finds its origin in the first act passed by Congress to carry into effect the constitutional mandate (act of May 26, 1790, chap. 11, 1 Stat. at L. 122, U. S. Comp. Stat. 1901, p. 677); and, in an early case, it was held that the words "every court within the United States" include the courts of the District of Columbia, and require those courts to give full faith and credit to the judicial proceedings of the several states when properly authenticated. Mills v. Duryee, 7 Cranch, 484, 485, 3 L. ed. 412.

But it is established that the full faith and credit clause, and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the *res* in proceedings *in rem*. D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Bigelow v. Old Dominion Copper Min. & S. Co. 225 U. S. 111, 134, 56 L. ed. 1009, 1024, 32 Sup. Ct. Rep. 641.

This subject, in its relation to actions for divorce, has been most exhaustively considered by this court in two recent cases: Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544; Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. In the Atherton Case the matrimonial domicil was in Kentucky, which was also the domicil of the husband. The wife left him there and returned to the home of her mother in the state of New York. He began suit in Kentucky for a divorce *a vinculo matrimonii* because of her abandonment, which was a cause of divorce by the laws of Kentucky, and took such proceedings to give her notice as the laws of that state required, which included mailing of notice to the postoffice nearest her residence in New York. No response or appearance having been made by her, the Kentucky court proceeded to take evidence and grant to the husband *an absolute decree of divorce.[562 It was held that this decree was entitled to full faith and credit in the courts of New York. In the Haddock Case, the husband and wife were domiciled in New York, and the husband left her there, and, after some years, acquired a domicil in Connecticut, and obtained in that state, and in accordance with its laws, a judgment of divorce, based upon constructive, and not actual, service of process on the wife, she having meanwhile retained her domicil in New York, and having made no appearance in the action. The wife afterwards sued for divorce in New York, and obtained personal service in that state upon the husband. The New York court refused to give credit to the Connecticut judgment, and this court held that there was no violation of the full faith and credit clause in the refusal, and this because there was not at any time a matrimonial domicil in the state of Connecticut, and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that state.

In the present case it appears that the parties were married in the state of Virginia, and had a matrimonial domicil there, and not in the District of Columbia or

elsewhere. The husband had his actual domicil in that state at all times until and after the conclusion of the litigation. It is clear, therefore, under the decision in the Atherton Case and the principles upon which it rests, that the state of Virginia had jurisdiction over the marriage relation, and the proper courts of that state could proceed to adjudicate respecting it upon grounds recognized by the laws of that state, although the wife had left the jurisdiction and could not be reached by formal process.

But in order to make a divorce valid, even when granted by the courts of the state of the matrimonial domicil, there must be notice to the defendant, either by service of process, or (if the defendant be a nonresident) by such publication or other con-[563 structive notice as is required by *the law of the state. Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; Atherton v. Atherton, 181 U. S. 155, 171, 172, 45 L. ed. 794, 803, 21 Sup. Ct. Rep. 544. In Cheely v. Clayton, because the notice was published against the defendant without making such effort as the local law required to serve process upon her within the state, this court held, following repeated decisions of the state court, that the decree of divorce was wholly void for want of jurisdiction in the court that granted it; and that the liberty conferred by the local statute upon a defendant on whom constructive service only had been made, to apply within three years to set the decree aside, did not make it valid when the constructive service was so defective.

The Virginia decree now in question is attacked for want of jurisdiction on the ground that the affidavit used as a basis for the order of publication was made upon information and belief, and not upon personal knowledge. It is insisted that the order was therefore unauthorized and all proceedings based upon it null and void.

By § 3230 of the Virginia Code it is provided that "on affidavit that a defendant is not a resident of this state . . . an order of publication may be entered against such defendant." Succeeding sections prescribe the form of the order, the mode of publication, and the proceedings to be taken when the order has been thus executed.

The record of the Virginia proceedings shows that on September 3, 1907, in the clerk's office of the circuit court of Loudoun county, "the said Charles N. Thompson filed an affidavit setting forth that the said Jessie E. Thompson was not a resident of the state of Virginia, said affidavit to be used as basis for an order of publication against the said Jessie E. Thompson, . . . in the words and figures following, to wit: 'Charles N. Thompson, plaintiff, this day made oath before me in said office that Jessie E. Thompson, defendant in the suit aforesaid, is not a resident of the said state, as he is informed and verily believes.'" *This was certified by the[564 clerk of the court, as permitted by the state practice. The order of publication follows, which, after setting forth the title of the court, the names of the parties, and the object of the suit, proceeds thus: "It appearing from legal evidence that the said defendant is not a resident of this state, it is ordered that she do appear within fifteen days after due publication hereof, in the clerk's office of our said court, and do what is necessary to protect her interests." There follow certificates of the publication and public posting of the required notice, and subsequent proceedings resulting in th· final decree, which is to the following effect: "It appearing that the complainant hath proceeded regularly at rules to mature this suit against defendant, who is a nonresident of Virginia, both by personal service of process and by publication, in the mode prescribed by statute, this case was set down for hearing and came on this day to be heard on said proceedings at rules, the bill of complaint, and the depositions of witnesses regularly taken and returned to the court; on consideration whereof, the court, being of the opinion that complainant hath made out his case by legal evidence, doth adjudge, order, and decree that the prayer of the bill be and the same is hereby granted; that the complainant, Charles N. Thompson, be and hereby is granted a divorce *a mensa et thoro* from said defendant, Jessie E. Thompson; and that each of them be, and he and she are, devested of all marital rights in the other's property. And it is further ordered that this cause be placed upon the suspended docket, with leave to the complainant to apply for further relief whenever he may be advised that he is entitled thereto." (Note: We disregard the recital of "personal service of process," because the service referred to appears to have been made in the District of Columbia, and whether it was in season to serve any useful purpose under the Virginia practice is questionable.)

*The record clearly imports a deter-[565 mination by the Virginia court that the affidavit of nonresidence, although based upon information and belief, amounted to "legal evidence," and was in conformity with "the mode prescribed by statute." We are not

referred to any provision of the Virginia Code, nor to any decision of the courts of that state, that excludes the use of such evidence for such a purpose. Sec. 3282 of the Code provides that "where an affidavit is required in support of any pleading, it shall be sufficient if the affiant swear that he believes it to be true." Under the Code of 1873, chap. 148, § 1, which provided for the issuance of a writ of attachment against nonresident debtors, and required an "affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant or one of the defendants is not a resident of this state, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is," it was held that so much of the affidavit as set forth the amount and justice of the claim, that there was present cause of action therefor, and that the defendant was nonresident in the state, must be absolute, and not made upon information and belief. Clowser v. Hall, 80 Va. 864. This decision was in 1885, and thereafter the section relating to foreign attachments was amended by permitting all of the averments of the affidavit to be based upon the belief of the plaintiff, his agent or attorney. Va. Code, § 2959.

We are not able to discover here or elsewhere any general law or policy of the state of Virginia excluding the use of affidavits based upon information and belief as the foundation of an order of publication. In the very decree before us the Virginia court has adjudged such an affidavit to be sufficient. We are therefore bound to assume that the use of such an affidavit is in accord with proper practice in that state.

566] *But, were it otherwise, it seems well settled that where the affidavit used as the basis for an order of publication is defective, not in omitting to state a material fact, but in the mode of stating it or in the degree of proof, the resulting judgment, even though erroneous and therefore voidable by direct attack, cannot be said to be *coram non judice* and therefore void on its face. Atkins v. Atkins, 9 Neb. 191, 200, 2 N. W. 466; Pettiford v. Zoellner, 45 Mich. 358, 362, 8 N. W. 57; Adams v. Hosmer, 98 Mich. 51, 56 N. W. 1051; Long v. Fife, 45 Kan. 271, 23 Am. St. Rep. 724, 25 Pac. 594; Belmont v. Cornen, 82 N. Y. 256; 7 Enc. Pl. & Pr. 110; 17 Enc. Pl. & Pr. 60, 61.

The material fact upon which, according to the laws of that state, the jurisdiction of the Virginia court depended, was the nonresidence of the defendant. The Code required (§ 3230) that this fact should appear by affidavit. The affidavit in question set *forth the fact; the circumstance* that it was averred on information and belief affected merely the degree of proof. In the absence of any local law excluding the use of such an affidavit, the decision of the state court accepting it as legal evidence must be deemed sufficient, on collateral attack, to confer jurisdiction in that court over the subject-matter, in accordance with local laws.

This being so, it is clear that the resulting decree is entitled, under the act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia. As the laws of that state provide for a divorce from bed and board for the cause of desertion, and confer jurisdiction of suits for divorce upon the circuit courts (Va. Code, §§ 2257-2260, 2264, 2266; Bailey v. Bailey, 21 Gratt. 43; Carr v. Carr, 2 Gratt. 168; Latham v. Latham, 30 Gratt. 307); and since the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right, she may by her conduct forfeit it, and where she is the offender, she cannot *have alimony on[567 a divorce decreed in favor of the husband (Harris v. Harris, 31 Gratt. 13), it is plain that such a decree forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the law of Virginia.

From this it results that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife's action for maintenance in the courts of this District.

Decree affirmed.

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GEORGE W. EVANS, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 567-570.)

**Officers — compensation — extra services.**

Compensation for the special services of a disbursing clerk of the Interior Department, rendered by him under an appointment by the Secretary of the Interior as "special disbursing agent" of appropriations for the Government Hospital, is prohibited by the express terms of U. S. Rev. Stat. § 1765, U. S. Comp. Stat. 1901, p. 1207, where the appropriation acts did not specially provide for such compensation, although it was understood that he should have additional pay, since the case is one of the performance of additional service in

NOTE.—As to extra compensation to officers—see note to United States v. Macdaniel, 8 L. ed. U. S. 587.

the way of disbursing public moneys, and not of an appointment to a separate and distinct office.

[For other cases, see Officers, 28–32, in Digest Sup. Ct. 1908.]

[No. 65.]

Argued December 5, 1912. Decided January 6, 1913.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a government official for extra compensation. Affirmed.

See same case below, 44 Ct. Cl. 549, 45 Ct. Cl. 169.

The facts are stated in the opinion.

Messrs. **Jackson H. Ralston** and **William E. Richardson** argued the cause, and, with Mr. Frederick L. Siddons, filed a brief for appellant:

A special appointment, such as the present, to do certain specified work, which is terminated *ipso facto* by the completion of the work, lacks the essential characteristics of an "office."

21 Ops. Atty. Gen. 507; Flemming's Case, 2 Compt. Dec. 467.

The congressional enactments, as construed by this court, relate only to the prohibition of compensation for extra work pertaining to the regular duties of an officer or employee,—*i. e.*, that which may be required of him as such officer or employee. They also include work which should properly be discharged by some other officer or employee.

Converse v. United States, 21 How. 463, 16 L. ed. 192; United States v. Saunders, 120 U. S. 126, 30 L. ed. 594, 7 Sup. Ct. Rep. 467; United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439.

They do not forbid the employment of an officer in a special capacity to perform services not required of him as such officer. Nor is it necessary that such special employment constitute an "office," as is illustrated by the following citations:

Meigs v. United States, 19 Ct. Cl. 497; 8 Ops. Atty. Gen. 325; Garter v. United States, 31 Ct. Cl. 344, 170 U. S. 527, 42 L. ed. 1133, 18 Sup. Ct. Rep. 703; Converse v. United States, 21 How. 463, 16 L. ed. 192; United States v. Saunders, 120 U. S. 126, 30 L. ed. 594, 7 Sup. Ct. Rep. 467.

The executive department of the government, to which is intrusted the control of the subject-matter, must necessarily determine all questions appertaining to the employment and payment of such temporary agents, and the exigency which demands their employment.

*United States v. Jones, 18 How. 92, 15* L. ed. 274; United States v. Johnston, 124 U. S. 252, 31 L. ed. 395, 8 Sup. Ct. Rep. 446.

Assistant Attorney General **Thompson** argued the cause, and, with Mr. P. M. Ashford, filed a brief for appellee.

*Mr. Justice **Pitney** delivered the [568] opinion of the court:

This case comes here on appeal from a judgment of the court of claims, dismissing appellant's petition after hearing the merits, and denying a motion for a new trial. 44 Ct. Cl. 549, 45 Ct. Cl. 169. Briefly, the facts are that the appellant, who was chief of division and disbursing clerk of the Interior Department, receiving a salary of $2,000 per year, and was also disbursing clerk of the architect of the Capitol, for which he received annual compensation of $1,000, was appointed by the Secretary of the Interior on August 10, 1901, to act as a special disbursing agent to disburse an appropriation of $925,000 provided by the acts of June 6, 1900, and March 3, 1901 (31 Stat. at L. 619, 1163, chaps. 791, 853, U. S. Comp. Stat. 1901, p. 3357), for the construction of additional buildings in the extension of the Government Hospital for the Insane in the District of Columbia. Further appropriations having been made by Congress, *viz.*, for an office and administration building, $145,000, and for a central heating and lighting plant for the entire hospital, $260,000, appellant was directed by the Secretary, under date January 5, 1903, to disburse these appropriations under his original appointment; and similar action was taken May 16, 1904, directing him to disburse an appropriation for painting the new buildings. Appellant accepted the appointment and gave bonds, first in the sum of $25,000, and afterwards in the additional sum of $75,000; he entered upon his duties and faithfully discharged them, and disbursed between August, 1901, and June, 1905, the sum of $1,410,761.87. In the order appointing him it was stated that, for the service of disbursing the appropriation, he would be allowed the maximum compensation permitted by law, not exceeding ⅞ of 1 per cent. The appointment of a special agent to make the disbursements was, in the judgment of the Secretary of the Interior, a necessity. *During the time appellant [569] acted as such special disbursing agent he continued to hold the office of disbursing clerk of the Interior Department, and to act as disbursing clerk of the architect of the Capitol, and for the performance of these duties received the salary and compensation first mentioned. For the special service

of disbursing the appropriations for the Government Hospital he presented a claim for $5,290.36, payment of which was refused by the accounting officers of the Treasury Department, on the ground that at the time the special service was rendered he was holding two offices under the United States, the emoluments of which exceeded $2,500 a year, and that the charge for such special service was in violation of §§ 1763 and 1765, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1205, 1207), inasmuch as the act under which the appropriation was made did not provide for a special allowance to an agent for disbursing it.

Three sections that stand side by side in the Revised Statutes should be quoted:

"Sec. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

"Sec. 1764. No allowance or compensation shall be made to any officer or clerk by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever which any officer or clerk may be required to perform, unless expressly authorized by law.

"Sec. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the 570]same is *authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

It seems to us that the appointment of the appellant as "special disbursing agent" was not an appointment to a separate and distinct office from those already held by him, but was merely an order requiring him to perform additional services in the way of disbursing public moneys. This being so, payment for the extra services is prohibited by the terms of § 1765, Rev. Stat., without reference to the fact that the appellant already held offices whose salary or annual compensation amounted to more than $2,500. The case is within the authority of Woodwell v. United States, 214 U. S. 82, 53 L. ed. 919, 29 Sup. Ct. Rep. 576. The fact that in the present case it was understood that the appellant should have additional pay makes this case different in its *circumstances, but does not* render inapplicable the statutory prohibition.

Judgment affirmed.

Mr. Justice McKenna and Mr. Justice Hughes dissent.

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MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plff. in Err.,
v.
SALLIE C. WULF.

(See S. C. Reporter's ed. 570–578.)

**Error to circuit court of appeals — Federal question.**

1. A writ of error lies from the Federal

NOTE.—As to appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Amendment of pleading after limitation period by changing capacity in which plaintiff sues.

As in the principal case, the court, in Bixler v. Pennsylvania R. Co. 201 Fed. 553, a suit under the Federal employers' liability act, begun in their individual capacities by the parents, who were the sole beneficiaries of the deceased employee, permitted an amendment to the petition after the running of the two years' limitation, so that the parents should appear to be suing as the personal representatives of the decedent.

Had the father of the deceased employee procured himself to be appointed the administrator of his deceased son's estate, as was his legal right, there could be no question, said the court in Reardon v. Balaklala Consol. Copper Co. 193 Fed. 189, of his right under U. S. Rev. Stat. § 954, U. S. Comp. Stat. 1901, p. 696, so far as the statute of limitations is concerned, to have himself in his representative capacity substituted as plaintiff in place of himself as an individual in an action against the employer to recover for his son's death, no new facts being alleged as a ground of recovery, and the father still remaining the beneficiary of the recovery sought.

An amendment in an action by a widow for the death of her husband, striking the descriptive word "administratrix" from the declaration, and leaving the suit to proceed in the individual name of the widow, does not admit the bar of the statute, though made after the limitation period. Atlanta, K. & N. R. Co. v. Smith, 1 Ga. App. 162, 50 S. E. 106.

But where an action for wrongful death was brought by deceased's widow as such, under a state statute giving her alone the right of action, for her sole benefit, an amendment of the declaration, changing the relation in which she sues from that of widow to that of administratrix, for the benefit of herself as widow and her children, and changing her cause of action to one

Holston v. Coal & I. Co. 95 Tenn. 521, 32 S. W. 486; Collins Coal Co. v. Hadley, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353; Boyd v. Brazil Block Coal Co. 25 Ind. App. 157, 57 N. E. 732; Lower v. Segal, 59 N. J. L. 66, 34 Atl. 945; Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Duval v. Hunt, 34 Fla. 85, 15 So. 876, 13 Am. Neg. Cas. 848; Barker v. Hannibal & St. J. R. Co. 91 Mo. 91, 14 S. W. 280; Major v. Burlington, C. R. & N. R. Co. 115 Iowa, 309, 88 N. W. 816; Fithian v. St. Louis & S. F. R. Co. 188 Fed. 842; Usher v. West Jersey R. Co. 126 Pa. 206, 4 L.R.A. 261, 12 Am. St. Rep. 863, 17 Atl. 597; Hagen v. Kean, 3 Dill. 124, Fed. Cas. No. 5,899; Illinois C. R. Co. v. Hunter, 70 Miss. 471, 12 So. 482; Killian v. Southern R. Co. 128 N. C. 261, 38 S. E. 873; Hunt v. Monroe, 32 Utah, 428, 11 L.R.A.(N.S.) 249, 91 Pac. 270; McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489; Ward v. Pertie, 157 N. Y. 301, 68 Am. St. Rep. 790, 51 N. E. 1002; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118; State ex rel. Broatch v. Moores, 58 Neb. 285, 78 N. W. 529.

It is only necessary that the Federal question appear somewhere in the record by some proper pleading of the plaintiff. It makes no difference whether it is in the original petition, an amended petition, or a supplemental petition.

Bankers Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 380, 48 L. ed. 488, 24 Sup. Ct. Rep. 325; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 341, 51 L. ed. 213, 27 Sup. Ct. Rep. 90; Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; American Sugar Ref. Co. v. New Orleans, 181 U. S. 281, 45 L. ed. 861, 21 Sup. Ct. Rep. 646; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843.

In determining whether there has been a departure in pleading, or whether an amendment sets up a new cause of action, the court will look alone to the pleadings.

Metropolitan L. Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643; Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938; Haley v. Hobson, 88 Me. 167; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; United States v. Dalcour, 203 U. S. 423, 51 L. ed. 251, 27 Sup. Ct. Rep. 58; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Boston & M. R. Co. v. Hurd, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 124; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 308.

The amendment sets up a different law, and for that reason sets up a new cause of action.

Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44; Walker v. Hester, 9 Kan. App. 201, 59 Pac. 662; Atchison, T. & S. F. R. Co. v. Schroeder, 56 Kan. 731, 44 Pac 1093; Wingert v. Carpenter, 101 Mich. 395, 59 N. W. 662; Parmelee v. Savannah, F. & W. R. Co. 78 Ga. 239, 2 S. E. 686; Despeaux v. Pennsylvania R. Co. 133 Fed. 1009; Wiley v. Yale, 1 Met. 553; Melvin v. Smith, 12 N. H. 462; Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938; Hansberger v. Pacific R. Co. 43 Mo. 196; Exposition Cotton Mills v. Western & A. R. Co. 83 Ga. 441, 10 S. E. 113; Holiday v. Jackson, 21 Mo. App. 660; Gillam v. Life Ins. Co. 121 N. C. 369, 28 S. E. 470; Fairchild v. Dunbar Furnace Co. 128 Pa. 485, 18 Atl. 443; Newton v. Allis, 12 Wis. 378; Phœnix Lumber Co. v. Houston Water Co. 94 Tex. 462, 61 S. W. 707.

The fact that defendant in error could have recovered more under the amendment would constitute a new cause of action.

Atlanta, K. & N. R. Co. v. Hooper, 35 C. C. A. 24, 92 Fed. 820.

If the amended petition sets up a cause of action new, different, and distinct from that originally set up, there is no relation back, and the statute of limitation runs against the new cause of action until it is introduced.

Sicard v. Davis, 6 Pet. 124, 8 L. ed. 342; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Union P. R. Co. v. Wyler, 158 U S. 289, 39 L. ed. 987, 15 Sup. Ct. Rep. 877; United States v. Dalcour, 203 U. S. 423, 51 L. ed. 251, 27 Sup. Ct. Rep. 58; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Boston & M. R. Co. v. Hurd, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 124; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 308; Nelson v. First Nat. Bank, 139 Ala. 578, 101 Am. St. Rep. 52, 36 So. 707; Shepherd v. Southern Pine Co. 118 Ga. 292 45 S. E. 220; Davis v. New York, L. E. & W. R. Co. 110 N. Y. 646, 17 N. E. 733; People ex rel. Gorman v. Newaygo Circuit Judge, 27 Mich. 138; Grier v. Northern Assur. Co. 183 Pa. 334, 39 Atl. 10; Scovill v. Glasner, 79 Mo. 449; Atchison, T. & S. F. R. Co. v. Schroeder, 56 Kan. 731, 44 Pac. 1093; Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938; Phœnix Lumber Co. v. Houston Water Co. 94 Tex.

463, 61 S. W. 707; McLane v. Belvin, 47 Tex. 493; Bigham v. Talbot, 63 Tex. 271; International & G. N. R. Co. v. Pape, 73 Tex. 502, 11 S. W. 526; East Line & R. River R. Co. v. Scott, 75 Tex. 84, 12 S. W. 995; Cotton v. Rand, 93 Tex. 24, 51 S. W. 838, 53 S. W. 343; Buswell, Limitations, p. 515.

Statutes of limitation are statutes of repose; and in view of the policy that inspired them, the courts look with favor on rights arising under them.

Nelson v. First Nat. Bank, 139 Ala. 578, 101 Am. St. Rep. 52, 36 So. 707; People ex rel. Gorman v. Newaygo Circuit Judge, 27 Mich. 138.

An action for damages for injuries resulting in death under the Federal employers' liability act can only be maintained by the administrator or the executor of the estate of the deceased person.

Thompson v. Wabash R. Co. 184 Fed. 554; Troxell v. Delaware, L. & W. R Co. 180 Fed. 874; Adams v. Northern P. R. Co. 95 Fed. 938; McCarty v. New York, L. E. & W. R. Co. 62 Fed. 437; Briggs v. Walker, 171 U. S. 466, 43 L. ed. 243, 19 Sup. Ct. Rep. 1; O'Neill v. Douthitt, 40 Kan. 689, 20 Pac. 495; Oates v. Union P. R. Co. 104 Mo. 514, 24 Am. St. Rep. 348, 16 S. W. 487; Walker v. O'Connell, 59 Kan. 306, 52 Pac. 894; Cleveland, C. C. & St. L. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285; Yelton v. Evansville & I. R. Co. 134 Ind. 414, 21 L.R.A. 158, 33 N. E. 629; Lovell v. De Bardelaben Coal & I. Co. 90 Ala. 13, 7 So. 756, 13 Am. Neg. Cas. 174; Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451, 14 So. 287, 13 Am. Neg. Cas. 180; Thornton, Employers' Liability, § 73; Reno, Employers' Liability Acts, chap. 8.

There being no action at common law for damages for injuries resulting in death, such cause of action is covered by the provisions of the statute from which it arises, as to the right of recovery, as to the time within which the suit may be brought, and as to the parties that can maintain the suit.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; Davidow v. Pennsylvania R. Co. 85 Fed. 943; Walker v. O'Connell, 59 Kan. 306, 52 Pac. 894; Boston & M R. Co. v. Hurd, 56 L.R.A. 193. 47 C. C. A. 615, 108 Fed. 125; Lake Erie & W. R. Co. v. Charmar, 161 Ind. 95, 67 N. E. 923.

The substitution by an amended petition of a personal representative as plaintiff in lieu of the beneficiary named as plaintiff in the original petition, in a cause of action arising *under the Federal employers' liability act*, is, as regards limitation, the commencement of a new suit, the statement of a new cause of action, and limitation runs against such cause of action until the amended petition is filed.

Armstrong v. Bean, 59 Tex. 492; International & G. N. R. Co. v. Howell, 101 Tex. 603, 111 S. W. 142; Flatley v. Memphis & C. R. Co. 9 Heisk. 230.

Under Lord Campbell's act every action thereunder was required to be commenced within twelve calendar months, and a similar provision is contained in nearly all of the state statutes, some limiting the time to one year and some to two years. These limitations differ in all respects from ordinary statutes of limitations, inasmuch as the act which creates the limitation also creates the action to which it applies, and the limitation is not merely of the remedy, but of the right of action itself. So strictly are these limitations in such statutes enforced that the right is given subject to the limitation, and even a subsequent change in the period of limitation will not extend the period so as to affect an existing right of action.

The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; Pittsburg, C. & St. L. R. Co. v. Hine, 25 Ohio St. 629; Benjamin v. Eldridge, 50 Cal. 612; Com. v. Boston & W. R. Corp. 11 Cush. 512; Com. v. East Boston Ferry Co. 13 Allen, 589.

Furthermore, the statute of limitations in these cases need not be pleaded, but it is incumbent upon the plaintiff to show by her own statement of facts that the suit was filed within the period fixed, and otherwise the petition is demurrable.

Hanna v. Jeffersonville R. Co. 32 Ind. 113; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48, 3 Am. Neg. Cas. 106; George v. Chicago, M. St. &. R. Co. 51 Wis. 603, 8 N. W. 374.

Messrs. Joseph M. Bryson, Alexander S. Coke, and A. H. McKnight also filed a brief for plaintiff in error.

Mr. **Judson H. Wood** argued the cause and filed a brief for defendant in error:

The jurisdiction of the United States circuit court in which this case was tried depended upon diverse citizenship of the parties, and the judgment of the United States circuit court of appeals, affirming the judgment of the trial court, is final.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 177.

The pleadings of the plaintiff alone are looked to to determine the jurisdiction. If the original petition disclosed the fact that jurisdiction of the circuit court w

invoked solely upon diverse citizenship of the parties to the suit, the judgment of the United States circuit court of appeals is final, notwithstanding the defendant by its answer may invoke the construction of a Federal statute.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 142, 37 L. ed. 1031, 14 Sup. Ct. Rep. 35; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Ayers v. Polsdorfer, 187 U. S. 588, 47 L. ed. 315, 23 Sup. Ct. Rep. 196; Arbuckle v. Blackburn, 191 U. S. 413, 48 L. ed. 241, 24 Sup. Ct. Rep. 148.

The fact that the suit is founded upon a Federal statute does not raise a Federal question such as would give the circuit court of the United States jurisdiction; but it must be shown by the pleadings of the plaintiff that there is a controversy over the construction of such statute, the determination of which would give or defeat the right of action.

Spencer v. Duplan Silk Co. 191 U. S. 530, 48 L. ed. 290, 24 Sup. Ct. Rep. 174; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 380, 48 L. ed. 488, 24 Sup. Ct. Rep. 325; Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 610, note.

This statute was enacted for the benefit of employees, and should be construed liberally in order to give it effect.

United States v. Kansas City Southern R. Co. 189 Fed. 471; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Caspar v. Lewin, 82 Kan. 604, — L.R.A.(N.S.) —, 109 Pac. 667; Walsh v. Whiteley, L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38; Stewart v. Baltimore & O. R. Co. 168 U. S. 447, 42 L. ed. 538, 18 Sup. Ct. Rep. 105.

The United States courts look to the real rather than the nominal party.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Van Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 261; McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171; Viscount De Valle Da Costa v. Southern P. Co. 100 C. C. A. 313, 176 Fed. 843; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 431, 30 L. ed. 982, 7 Sup. Ct. Rep. 958.

The trial court was authorized to permit the defendant in error to make herself party plaintiff as administratrix; and the same was not the beginning of a new cause of action, but related back to the beginning of the suit; therefore the court properly overruled the demurrer setting up limitation.

McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171; Murphy v. Stewart, 2 How. 263–281, 11 L. ed. 261–268; The Caroline v. United States, 7 Cranch, 496, 3 L. ed. 417; Jackson v. Ashton, 8 Pet. 148, 8 L. ed. 898; Jackson v. Ashton, 10 Pet. 480, 9 L. ed. 502; Garland v. Davis, 4 How. 131, 11 L. ed. 907; Stockton v. Bishop, 4 How. 155, 11 L. ed. 918; Conrad v. Griffey, 11 How. 480, 13 L. ed. 779; Conrad v. Griffey, 16 How. 38, 14 L. ed. 835; Parks v. Turner, 12 How. 39, 13 L. ed. 883; Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Bamberger v. Terry, 103 U. S. 40, 26 L. ed. 317; Dow v. Humbert, 91 U. S. 294–297, 23 L. ed. 368–370; Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646–655, 23 L. ed. 341–344; Hardin v. Boyd, 113 U. S. 765, 28 L. ed. 1144, 5 Sup. Ct. Rep. 771; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Erstein v. Rothchild, 22 Fed. 61; Bowden v. Burnham, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752; Smith v. Missouri P. R. Co. 5 C. C. A. 557, 12 U. S. App. 426, 56 Fed. 458; Carnegie v. Hulbert, 16 C. C. A. 498, 36 U. S. App. 81, 97, 70 Fed. 209; People's Sav. Bank & T. Co. v. Batchelder Egg Case Co. 2 C. C. A. 126, 4 U. S. App. 603, 51 Fed. 130; Tiernan v. Woodruff, 5 McLean, 135, Fed. Cas. No. 14,027; Swatzel v. Arnold, 1 Woolw. 383, Fed. Cas. No. 13,682; Dixon v. Dixon, 19 Iowa, 512; Hodges v. Kimball, 49 Iowa, 577, 31 Am. Rep. 158; Lake Erie & W. R. Co. v. Boswell, 137 Ind. 336, 36 N. E. 1103; Wood v. Lane, 84 Mich. 521, 47 N. W. 1103; McLewis v. Furgerson, 59 Ga. 644; Wilson v. First Presby. Church, 56 Ga. 554; Childers v. Adams, 42 Ga. 352; Miller v. Pollock, 99 Pa. 202; Com. v. Dillon, 61 Pa. 488; Whitaker v. Pope, 2 Woods, 463, Fed. Cas. No. 17,528; Buckland v. Green, 133 Mass. 421; McCall v. Lee, 120 Ill. 261, 11 N. E. 522; Costello v. Crowell, 134 Mass. 280; Pierce v. Charter Oak L. Ins. Co. 138 Mass. 151; Merchants' Bank v. Stevenson, 7 Allen, 489; Byers v. Franklin Coal Co. 106 Mass. 131, 12 Mor. Min. Rep. 27; Wilson v. Welch, 157 Mass. 77, 31 N. E. 712; Morford v. Dieffenbacker, 54 Mich. 593, 20 N. W. 600; Lottman v. Barnett, 62 Mo. 159; George v. Reed, 101 Mass. 378; Sanger v. Newton, 134 Mass. 308; Van Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 260; Price v. Wiley, 19 Tex. 143, 70 Am. Dec. 323; Martel v. Somers, 26 Tex. 551; Hudson v. Morriss, 55 Tex. 604; Rabb v. Rogers, 67 Tex. 339, 3 S. W. 303; Connolly v. Hammond, 51 Tex. 647; Killebrew v. Stockdale, 51 Tex. 531; Tarkinton v. Broussard, 51 Tex. 554; Scoby v. Sweatt, 28 Tex. 713; Becton v.

Alexander, 27 Tex. 659; Thouvenin v. Lea, 26 Tex. 614; Texas P. R. Co. v. Davidson, 68 Tex. 370, 4 S. W. 636, 6 Am. Neg. Cas. 542; Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551; Frank v. Kaigler, 36 Tex. 305; Heard v. Lockett, 20 Tex. 163; Dowell v. Mills, 32 Tex. 440; Schneider-Davis Co. v. Brown, — Tex. —, 46 S. W. 109; Massey v. Blake, 3 Tex. Civ. App. 57, 21 S. W. 782; Jones v. Blake, — Tex. Civ. App. —, 21 S. W. 783; Hinchman v. Marshall, — Tex. Civ. App. —, 22 S. W. 926; Tousey v. Butler, 9 Tex. 525; Mayer v. Walker, 82 Tex. 222, 17 S. W. 505; Tolbert v. McBride, 75 Tex. 95, 12 S. W. 752; Tackett v. Mutual Realty Co. — Tex. Civ. App. —, 143 S. W. 347.

The filing of the first original answer waived defects of parties.

Carey v. Brown, 92 U. S. 171, 23 L. ed. 469; Greenleaf v. Queen, 1 Pet. 138, 7 L. ed. 85; Connor v. Hawkins, 64 Tex. 545; State v. Goodnight, 70 Tex. 688, 11 S. W. 119; Tryon v. Butler, 9 Tex. 553; Blum v. Strong, 71 Tex. 329, 6 S. W. 167; 31 Cyc. 172.

Messrs. Judson H. Wood and James P. Haven also filed a brief for defendant in error:

The discretion of the trial court in allowing such amendments as granted by § 954 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 696) is plenary and cannot be reviewed.

Eberly v. Moore, 24 How. 147, 16 L. ed. 612; Spencer v. Lapsley, 20 How. 264, 15 L. ed. 902; Re Glass, 119 Fed. 509; Union Cent. L. Ins. Co. v. Phillips, 41 C. C. A. 263, 102 Fed. 23.

The right of the circuit courts of the United States to allow such amendments without review by the appellate courts, independent of any state statute where such court is sitting, is fully established.

Mexican C. R. Co. v. Duthie, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; Bamberger v. Terry, 103 U. S. 43, 26 L. ed. 317; Erstein v. Rothschild, 22 Fed. 61; Bowden v. Burnham, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752; Oliver v. Raymond, 108 Fed. 927; United States Bank v. Lyon County, 48 Fed. 632.

The United States Supreme Court will not review the action of a state court on construing questions of pleading and practice in that court.

Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412.

A substitution of a new party plaintiff is not the beginning of a new cause of action, but takes effect as of the date of the filing of the original suit.

Pennsylvania Co. v. Sloan, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37; Sublett v. Hodges, 88 Ala. 491, 7 So. 296; Bray v. Creekmore, 109 N. C. 49, 13 S. E. 723; Hines v. Rutherford, 67 Ga. 606; Tighe v. Pope, 16 Hun, 180.

The allegations in the petition that a right of action accrued under the Federal employers' liability act, and that it accrued under the statute of Kansas, were conclusions of the pleader and were surplusage. Under the system of pleading in Texas, the facts, and not the conclusions, must be set out in the petition.

Connor v. Hawkins, 64 Tex. 545; State v. Goodnight, 70 Tex. 688, 11 S. W. 119; Tryon v. Butler, 9 Tex. 553.

The defendant in error was authorized in its original petition to present as many causes of action as it deemed necessary to meet the facts that might be introduced on the trial, as the suit was based only upon one transaction.

Dobbin v. Bryan, 5 Tex. 276; Mateer v. Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751; Craddock v. Goodwin, 54 Tex. 582.

The conclusions of the pleader as to what law prevailed might be disregarded as surplusage under the Texas practice without affecting the substance of the pleading.

Nash v. George, 6 Tex. 234; Turner v. Brooks, 6 Tex. 205; Maddox v. Craig, 80 Tex. 600, 16 S. W. 328; Kottwitz v. Bagby, 16 Tex. 656; Burns v. Goff, 79 Tex. 236, 14 S. W. 1009.

There is nothing better established in Texas practice than that, unless denied under oath, the plaintiff is presumed to have the right to sue in the capacity in which he does sue.

Cheatham v. Riddle, 12 Tex. 112; Clifton v. Lilley, 12 Tex. 130; Trammell v. Swan, 25 Tex. 474; Bauman v. Chambers, 91 Tex. 108, 41 S. W. 471; Manning v. Hunt, 36 Tex. 118.

Mr. Justice Pitney delivered the opinion of the court:

The defendant in error, Sallie C. Wulf, in her individual capacity, commenced this action January 23, 1909, in the circuit court of the United States for the eastern district of Texas, to recover damages by reason of the death of her son, Fred S. Wulf, which occurred November 27, 1908, while he was in the employ of the defendant (now plaintiff in error) as a locomotive fireman, and in the performance of his duties as such upon a train bound *from[572 Parsons, in the state of Kansas to Osage, in the state of Oklahoma. The original petition set up diversity of citizenship, plain-

tiff being alleged to be a bona fide inhabitant, resident, and citizen of Texas, and the defendant a corporation organized under the laws of the state of Kansas. For cause of action it was averred that the decedent's death was the result of a bursting of the locomotive boiler, due to defects therein attributable to the negligence of the employer. It was further averred that "plaintiff is the mother of the said Fred S. Wulf, and is a *feme sole*, and the said Fred S. Wulf was an unmarried man, leaving no wife or children surviving. That his father died prior to the time that he died, and plaintiff is the sole heir, next of kin, and beneficiary of the estate of the said Fred S. Wulf, deceased. That there is no administration pending on the said estate of the said Fred S. Wulf within this state (Texas) or elsewhere, and that none is necessary. That said decedent was a resident citizen of the state of Texas when he was killed, but was temporarily working in Kansas. That by virtue of the laws of the state of Kansas, where the said Fred S. Wulf was killed, a right of action is provided by statute for injuries resulting in death." The plaintiff demanded $40,000 damages. On May 19, 1909, defendant filed its original answer, consisting of a general demurrer, a general denial of the allegations of the petition, and averments that the injuries complained of were proximately caused and contributed to by deceased's own negligence and want of ordinary care and by that of his fellow servants. No action appears to have been taken upon this pleading; but on January 6, 1911, defendant filed its first amended answer, consisting of a general demurrer; a special demurrer to the claim of $40,000 damages, on the ground that under the laws of Kansas the damages were limited to $10,000; and averments that at the time of the injury and death of deceased, defendant was 573]engaged in interstate commerce, *and deceased was in its employ and was himself engaged in interstate commerce. and that the cause of action is not governed by the laws of Kansas, but arises out of the Federal employers' liability act of 1908 [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322]. There were also a general denial of the allegations of the petition, and an averment of contributory negligence on the part of the deceased and of his fellow servants. Upon the same day (January 6, 1911), the plaintiff filed her first amended original petition, averring that she was the sole heir and next of kin of Fred S. Wulf, deceased; that at the time of the filing of the original petition *there was no administration* upon his estate *and no necessity for any; that on* January 4, 1911, she was duly appointed temporary administratrix of his estate by the county court of Grayson county, Texas, a court of competent jurisdiction, and qualified as such, with full power and authority to prosecute this suit as party plaintiff, and had made application to be appointed permanent administratrix. "That there now exists no necessity for an administration upon the estate of the said Fred S. Wulf, unless the same should be necessary for the sole purpose of prosecuting this suit as administratrix of said decedent for the benefit of herself as the surviving parent and next of kin of the said decedent; said plaintiff being the next of kin and sole beneficiary of whatever may be recovered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin; but in the event it shall be determined that she is not entitled to recover in said capacity, then she asks that she be allowed to recover as administratrix for her benefit, as aforesaid. Therefore she sues both in her individual capacity and as administratrix, as aforesaid." The averment of diversity of citizenship was repeated, as were those averments of the original petition that set forth the cause of action. The amended petition further averred "that by virtue of both the laws of the state of Kansas, where the said Fred S. Wulf *was killed, and the acts of[574 Congress, a right of action is provided for injuries resulting in death in the manner and form and in the occupation that deceased was engaged in at the time of his death." This amendment was allowed by the court, and an order was made permitting the plaintiff to prosecute as the personal representative of the deceased for her individual benefit, as well as in her individual capacity. Thereafter the defendant filed its second amended answer, by which it excepted to that portion of the amended petition making Sallie C. Wulf a party plaintiff, because, "under the act of Congress known as the employers' liability act, she is not a proper party to said suit;" excepted to that portion making her a party as temporary administratrix, "because she was not made a party as such administratrix at the time of the filing of the original petition;" and excepted to that portion seeking to make her a party as administratrix, because the amendment making her a party in that capacity was made more than two years from the time the alleged cause of action accrued; and for that the cause of action, if any, was barred by the limitation of two years. There was also a general denial of the allegations of fact in plaintiff's petition contained, "except that this defendant says that, at the time the

said deceased was killed, he was engaged in interstate commerce."

The exceptions being overruled, a trial was had upon the issues of fact, and resulted in a verdict and judgment in favor of the plaintiff (now defendant in error) for $7,000, which was affirmed by the circuit court of appeals for the fifth circuit (113 C. C. A. 665, 192 Fed. 919), and the case comes here by writ of error.

The judgment of the circuit court being founded upon the Federal employers' liability act, so that the jurisdiction of that court was not dependent entirely upon the diversity of citizenship of the parties, the 575]judgment of the *circuit court of appeals was not made final by § 6 of the Evarts act, and thus (the matter in controversy exceeding $1,000) there is a right to a writ of error from this court. Act of March 3, 1891, 26 Stat. at L. 828, chap. 517, § 6, U. S. Comp. Stat. 1901, p. 549; Judicial Code of March 3, 1911, 36 Stat. at L. chap. 231, pp. 1133, 1157, §§ 128, 241, U. S. Comp. Stat. Supp. 1911, pp. 193, 229.

The argument for reversal rests wholly upon the mode of procedure followed in the circuit court. It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her individual capacity, and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal employers' liability act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action, and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines, due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the *laws of Kansas, without making* reference to the act of *Congress. But[576 the court was presumed to be cognizant of the enactment of the employers' liability act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us,—an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within § 954, Rev. Stat. U. S. Comp. Stat. 1901, p. 696.

Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by § 6 of the employers' liability act. The change was in form rather than in substance (Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit. Texas & P. R. Co. v. Cox, 145 U. S. 593, 603, 36 L. ed. 829, 832, 12 Sup. Ct. Rep. 905; Atlantic & P. R. Co. v. Laird, 164 *U. S.[577 393, 395, 41 L. ed. 485, 486, 17 Sup. Ct. Rep. 120. See also McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171, 177, 178; Putillo v. Allen-West Commission Co. 65 C. C. A. 508, 131 Fed. 680; Reardon v. Balaklala Consol. Copper Co. 193 Fed. 189. Reliance is placed by plaintiff in error upon Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877. There

the action was commenced in a state court of Missouri and afterwards removed to the United States circuit court. The original petition was based upon the common law of master and servant, and set up an injury to the plaintiff occurring in the state of Kansas while he was in the employ of the defendant, averring that the injury was due to the negligence of the defendant in employing and retaining in its employ as fellow servant of the plaintiff one Kline, an incompetent person, with knowledge of his incompetency; afterwards plaintiff filed an amended petition, eliminating the charge of incompetency on the part of Kline, and the averment of defendant's knowledge of such incompetency, and resting the cause of action exclusively upon the negligence of Kline as a fellow servant of plaintiff, averring that the employer was liable to the plaintiff for the injury suffered by him through such negligence because a right of action was given in such case by the law of Kansas, where the accident occurred. This court held that the amendment introduced a substantially new cause of action, to which the bar of the statute of limitations applied. But in that case, as is made plain in the opinion delivered by Mr. Justice White (now Chief Justice), the amended petition set up not only a different state of facts, but a different rule of law as the ground of the action; the original petition proceeding exclusively on the common-law rule which held a master liable who, with knowledge, employs or retains an incompetent servant, and making no reference to the Kansas statute, nor averring negligence on the part of the fellow servant, excepting so far as this might be inferred from the averment of his incompetency; while 578] the amendment *relied upon the fellow servant's mere negligence, together with a statute of Kansas which made the master responsible for the consequences of the negligence of a fellow servant. The action having been commenced in a Missouri court which would not take notice of the Kansas statute unless it were pleaded (Babcock v. Babcock, 46 Mo. 243), this court held that the rule that the Federal courts take judicial notice of the laws of the several states did not apply. Since, in the present case, the Federal statute did not need to be pleaded, and the amended petition set up no new facts as the ground of action, the decision in the Wyler Case is not controlling.

**Judgment affirmed.**

*Mr.* **Justice Lurton** entertains doubts as *to whether the two years' limitation does not apply.*

MATHIAS SCHMIDINGER, Plff. in Err.,
v.
CITY OF CHICAGO, Illinois.

(See S. C. Reporter's ed. 578–590.)

**Error to state court — scope of review — construction of municipal ordinance.**

1. The construction given by the highest state court to a municipal ordinance prescribing standard sizes of loaves of bread, and prohibiting the sale of other sizes, as not intended to limit the weight of a loaf to a pound, or the fractional part or multiple of a pound, but only to prevent the sale of loaves of bread which are short in weight, is binding on the Federal Supreme Court when determining, on writ of error to a state court, the validity of the ordinance under the due process of law clause of the Federal Constitution.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

**Constitutional law — police power — due process of law — regulating size of loaves of bread.**

2. Fixing by municipal ordinance the weight of the standard loaf of bread to be sold in the city of Chicago at one pound, and prohibiting the making or selling of loaves which are not up to the weight of the standard loaf, or of a specified fractional part or multiple of such loaf, though it may produce some inconvenience, is not such an unreasonable and arbitrary exercise of the police power as to render the ordinance void under U. S. Const. 14th Amend., prohibiting the taking of property without due process of law.

[For other cases, see Constitutional Law, 846–853, 895–903, in Digest Sup. Ct. 1908.]

**Constitutional law — freedom to contract — regulating size of loaves of bread.**

3. The existence of a considerable demand in the city of Chicago for loaves of bread of sizes other than those fixed by an ordinance of that city prohibiting the sale of other than the standard sizes does not render the ordinance invalid as interfering with the freedom of contract protected by U. S. Const. 14th Amend., against infringement without due process of law.

[For other cases, see Constitutional Law, 591–604, in Digest Sup. Ct. 1908.]

[No. 115.]

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Note.—On what questions the Federal Supreme Court will consider when reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On writs of error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

On the validity of police regulations as to branding or labeling articles of commerce—see note to Alcorn Cotton Oil Co. v. State, 40 L.R.A.(N.S.) 875.

Argued and submitted December 20, 1912.
Decided January 13, 1913.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which, on a second appeal, affirmed a judgment of the Circuit Court of Cook County in that state, enforcing a municipal ordinance fixing standard sizes for loaves of bread. Affirmed.

See same case below, first appeal, 243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614; on second appeal, 245 Ill. 317, 92 N. E. 244.

The facts are stated in the opinion.

Mr. Harry Rubens argued the cause, and, with Mr. Benjamin F. Ninde, filed a brief for plaintiff in error:

The prohibition of the making of loaf bread in weights such as were in large demand at the time of the passage of the ordinance in question in the ordinary and customary course of business, and in weights which are necessary to satisfy reasonable and legitimate business requirements, although the loaves are labeled in accordance with their exact weight, and therefore no fraud is attempted, unreasonably, arbitrarily, and unnecessarily interferes with the legitimate pursuit of an ordinary, private, and useful business and with the right of contracting in relation thereto. It thus deprives the plaintiff in error of liberty and property without due process of law, and violates the 14th Amendment of the Constitution of the United States.

Buffalo v. Collins Baking Co. 39 App. Div. 432, 57 N. Y. Supp. 347; Lochner v. New York, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

In whatever language a law may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States. The police power cannot be put forward as an excuse for oppressive and unjust legislation.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Lochner v. New York, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Messrs. Joseph F. Grossman and William H. Sexton submitted the cause for defendant in error:

The power of the city of Chicago to prescribe the weight of bread in the loaf is expressly conferred by statute, and the decision of the supreme court of the state of Illinois in the case at bar precludes this court from questioning the right to exercise that power by the city of Chicago.

Chicago v. Schmidinger, 243 Ill. 171, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614; Fischer v. St. Louis, 194 U. S. 362, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Peoples Gaslight & Coke Co v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520, affirming 114 Fed. 388; Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. Rep. 650.

The regulation of the weight of bread in the loaf has been recognized by all courts as a legitimate exercise of the police power of the state.

People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; Paige v. Fazackerly, 36 Barb. 392; Com. v. McArthur, 152 Mass. 522, 25 N. E. 836; Chicago v. Schmidinger, 243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614; State v. McCool, 83 Kan. 428, 111 Pac. 477; Re Nasmith, 2 Ont. Rep. 192; Guillotte v. New Orleans, 12 La. Ann. 432; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Laws providing for the prevention and detection of imposition and fraud are generally held to be free from constitutional objection, on the ground that they are a proper exercise of the police power of the state.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Chicago v. Bowman Dairy Co. 234 Ill. 294, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700; State, Waterbury, Prosecutor, v. Newton, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; People v. Arensberg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; State v. Rogers, 95 Me. 94, 85 Am. St. Rep. 395, 49 Atl. 564; Com. v. Waite, 11 Allen, 264, 87 Am. Dec. 711; People v. Cipperly, 101 N. Y. 634, 4 N. E. 107, reversing 37 Hun, 319; State v. Campbell, 64 N. H. 402, 10 Am. St. Rep. 419

13 Atl. 585; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344; State v. Schlenker, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; State v. Crescent Creamery Co. 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; State v. Williams, 93 Minn. 155, 100 N. W. 641; State v. Holton, 148 Iowa, 724, 126 N. W. 1125; American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 41 L.R.A.(N.S.) 149, 125 N. W. 127.

The ordinance is not so arbitrary and unreasonable in its terms as to amount to a confiscation of the property rights of plaintiff in error, or to a deprivation of his freedom of contract in the sale of bread, in violation of the 14th Amendment.

(a) Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of its police powers, and no person has such absolute and unqualified right of control over his liberty or property that it cannot be curtailed by the sovereign power of the state for the general welfare of the people.

Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 409, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419; Holden v. Hardy, 169 U. S. 366, 391, 392, 42 L. ed. 780, 790, 791, 18 Sup. Ct. Rep. 383; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499.

(b) A very wide discretion must be given to the legislative department of government in determining the manner and extent of the exercise of the police powers of the state. Exact wisdom and nice adaptation of remedies are not required by the 14th Amendment, nor the crudeness, nor the impolicy, nor even the injustice of state laws redressed by it.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 354, 355, 52 L. ed. 236, 243, 244, 28 Sup. Ct. Rep. 114; Jacobson v. Massachusetts, 197 U. S. 11, 25, 31, 49 L. ed. 643, 649, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Otis v. Parker, 187 U. S. 606, 608, 609, 47 L. ed. 323, 327, 328, 23 Sup. Ct. Rep. 168; Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Crowley v. Christensen, 137 U. S. 86, 91, 92, 34 L. ed. 620, 623, 624, 11 Sup. Ct. Rep. 13; Powell v. Pennsylvania, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257.

(c) The impossibility of baking a loaf of bread so that it will be of the weight prescribed in the ordinance at all times after it leaves the oven does not render it unreasonable, in view of the construction of the ordinance by the supreme court of the state of Illinois, that it prohibits the sale of loaves of bread which are short in weight only.

In cases involving police power, the interpretation placed by the highest court of the state upon its statutes and the ordinances of its municipalities is conclusive on the Federal court.

Smiley v. Kansas, 196 U. S. 447, 455, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 408, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 353, 44 L. ed. 192, 195, 20 Sup. Ct. Rep. 136.

The ordinance does not by its terms nor in effect regulate the price of bread.

Chicago v. Schmidinger, 243 Ill. 173, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614.

Mr. Justice Day delivered the opinion of the court:

The city of Chicago instituted suit against the plaintiff in error in the circuit court of Cook county, Illinois, to recover penalties for certain violations of an ordinance of that city. The violations alleged in the declaration which are material here consisted in the making and selling of loaves of bread differing in weight from the weights prescribed by the ordinance. Upon the first trial in the circuit *court[584 judgment was rendered in favor of the plaintiff in error, then defendant. The judgment was reversed upon appeal to the supreme court of Illinois, and the case remanded to the circuit court (243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614). That court, following the decision of the supreme court of Illinois, rendered judgment for certain penalties against the plaintiff in error. The case was again appealed to the supreme court of Illinois, and the judgment affirmed in a *per curiam* opinion, following 243 Ill. supra (245 Ill. 317, 92 N. E. 244). The case was then brought here on writ of error.

The ordinance in question, passed January 6, 1908, undertakes to regulate the sale of bread in the loaf within the city of Chicago, and the parts pertinent to the present case provide:

"Section 2. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale, in the city of Chicago, shall weigh a pound avoirdupois (except as hereinafter provided), and such loaf shall be considered to be the standard loaf of the city of Chicago. Bread may also

be made or procured for the purpose of sale, sold, offered or exposed for sale, in half, three-quarter, double, triple, quadruple, quintuple, or sextuple loaves, and in no other way. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale, in the city, shall have affixed thereon in a conspicuous place a label at least 1 inch square, or, if round, at least 1 inch in diameter, upon which label there shall be printed in plain type . . . the weight of the loaf in pound, pounds, or fraction of a pound avoirdupois, whether the loaf be a standard loaf or not. The business name and address of the maker, baker, or manufacturer of the loaf shall also be printed plainly on each label.

"Section 3 Every maker, baker, or manufacturer of bread, every proprietor of a bakery or bakeshop, and every seller of bread in the city of Chicago, shall keep 585]scales and *weights, suitable for the weighing of bread, in a conspicuous place in his bakery, bakeshop, or store, and shall, whenever requested by the buyer, and in the buyer's presence, weigh the loaf or loaves of bread sold or offered for sale.

"Section 4. If any person, firm, or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale, within the city of Chicago . . . any bread the loaf or loaves of which are not standard, half, three-quarter, double, triple, quadruple, quintuple, or sextuple loaves, as defined in § 2 of this ordinance, . . . or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the city of Chicago, any standard loaf or loaves of bread which do not weigh 1 pound each, or any bread the loaf or loaves of which do not weigh as much as the weight marked thereon, or any bread the loaf or loaves of which do not have affixed thereon the label marked as hereinbefore provided, contrary to the provisions of this ordinance, such person, firm, or corporation shall be fined not less than $10 nor more than $100 for each offense.

"Section 5. The provisions of this ordinance . . . shall not apply to . . . what is commonly known as 'stale bread,' sold as such, provided the seller shall, at the time of sale, expressly state to the buyer that the bread so sold is stale bread."

The objections of a Federal character arise from alleged violations of the 14th Amendment to the Constitution of the United States. The plaintiff in error avers that the due process clause of that Amendment is violated in that the ordinance is an unreasonable and arbitrary exercise of the police power, and constitutes an unlawful interference with the freedom of contract included *in the protection secured to* the individual under that Amendment. In the supreme court of Illinois error was also assigned because of the violation of the clause of the 14th *Amendment guar-[586 antying equal protection of the laws. That insistence does not appear to be made here, and the right of the legislature or municipal corporation, under legislative authority, to regulate one trade, and not another, is too well settled to require further consideration.

At the hearing the plaintiff in error introduced testimony which tended to establish the following facts: There are between 800 and 1,000 bakers in the city of Chicago, together making about 50 per cent of the bread consumed in that city. Bread is sold in Chicago in large quantities at certain prices per loaf, 95 per cent of the bread made by the bakers, outside of the restaurant business, consisting of loaves sold for 5 cents or multiples thereof, and 85 per cent of such bread being sold for 5 cents a loaf. The 5-cent loaf weighs about 14 ounces when baked, and the weight of the bread in the loaf varies and is adjusted in accordance with the fluctuations in the price of raw material, labor, and other elements of expense of production, and the different qualities of bread, and as a result of competition. There is a considerable demand in Chicago, especially in the restaurant trade, for bread in weights differing from those fixed by the ordinance. In some parts of the city bread weighing 7 pounds is commonly sold. The moisture in the bread after it leaves the oven causes very appreciable shrinkage in weight, the extent of which depends upon the quality and size of the loaf, the atmospheric condition, and the dryness and temperature of the place where kept. It appears that, in order to insure bread of the standard weight of 16 ounces, it is necessary to scale the dough before baking at about 20 ounces.

The record also shows that although the price of bread sold by the loaf in Chicago has generally been 5 cents or some multiple thereof, loaves of bread weighing approximately 1 pound have been sold for 5, 6, and 7 cents at different times.

*The right of state legislatures or[587 municipalities acting under state authority to regulate trades and callings in the exercise of the police power is too well settled to require any extended discussion. In Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, the doctrine was stated by this court as follows:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade,

business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

See also, in this connection, Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, and other cases in this court, reviewed and commented upon in those cases.

The making and selling of bread, particularly in a large city, where thousands of people depend upon their supply of this necessary of life by purchase from bakers, is obviously one of the trades and callings which may be the subject of police regulation. This general proposition is conceded by counsel for plaintiff in error, but it is contended that the limitation of the right to sell bread which this ordinance undertakes to make in fixing a standard loaf of 16 ounces and other half, three-quarter, double, triple, quadruple, quintuple, or sextuple loaves, is such an unreasonable and arbitrary exercise of legislative power as to render it unconstitutional and void. This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, 588]are *primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred. Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

Furthermore, laws and ordinances of the character of the one here under consideration, and tending to prevent frauds, and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exertions of the police power. McLean v. Arkansas, 211 U. S. 560, 53 L. ed. 320, 29 Sup. Ct. Rep. 206; Freund, Pol. Power, §§ 274, 275. Laws prescribing standard sizes of loaves of bread, and prohibiting, with minor exceptions, the sale of other sizes, have been sustained in the courts of Massachusetts and Michigan. Com. v. McArthur, 152 Mass. 522, 25 N. E. 836; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609.

It is contended, however, that there are special circumstances in this case that take it out of this rule. The record shows, as we have already said, that the loaf of bread most largely sold in Chicago costs 5 cents, and when it reaches the consumer is generally 14 ounces in weight; and it is urged that to make a loaf of the standard size of 1 pound, as required by the ordinance, would be extremely inconvenient at least, owing to changes and evaporation after the loaf is baked, and that to insure a loaf of full standard size it would be necessary to use 20 ounces of dough. But inconveniences of this kind do not vitiate the exercise of legislative power. The local legislature is presumed to know what will be of the most benefit to the whole body of citizens. Evidently, the council of the city of Chicago has acted with the belief that a full pound loaf, with the variations provided, would *furnish the best standard. It has[589 not fixed the price at which bread may be sold. It has only prescribed that the standard weight must be found in the loaves of the sizes authorized. To the argument that to make exactly 1 pound loaves is extremely difficult, if not impracticable, the supreme court of Illinois has answered, and this construction is binding upon us, that the ordinance is not intended to limit the weight of a loaf to a pound or the fractional part or multiple of a pound, but that the ordinance was passed with a view only to prevent the sale of loaves of bread which are short in weight. Thousands of transactions in bread in the city of Chicago are with people who buy in small quantities, perhaps a loaf at a time, and, exercising the judgment which the law imposed in it, the council has passed an ordinance to require such people to be sold loaves of bread of full weight. We cannot say that the fixing of these standards in the exercise of the legislative discretion of the council is such an unreasonable and arbitrary exercise of the police power as to bring the case within the rare class in which this court may declare such legislation void because of the provisions of the 14th Amendment to the Constitution of the United States, securing due process of law from deprivation by state enactments.

It is further urged that this ordinance interferes with the freedom of contract

guaranteed by the 14th Amendment, for it is said that there is a demand for loaves of bread of sizes other than those fixed in the ordinance, which demand exists among many people and also among contractors whose business requires special sizes to be made for them. This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to 590 ]contract freely, *because of restrictions upon that right deemed necessary in the interest of the general welfare. So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body, and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense. See, in this connection, Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, and the previous cases in this court reviewed in the course of the opinion in that case.

We are unable to find that the decision of the supreme court of Illinois, affirming the judgment against the plaintiff in error, deprived him of the constitutional rights secured by the 14th Amendment to the Federal Constitution.

Judgment affirmed.

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EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plff. in Err.,
v.
EICHEL & WEIKEL, a Firm Composed of William Eichel and Adam Weikel.

(See S. C. Reporter's ed. 590–598.)

**Error to state court — Federal question — how raised.**

1. A Federal right, privilege, or immunity was not "specially set up or claimed" within the meaning of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), governing writs of error from the Federal Supreme Court to a state court, by the repeated insistence, in an action for a breach of contract, that the rights of the parties should be determined according to the law of the territory of New Mexico, where the contract was made and was to be performed, that such law was to be ascertained from the reported decisions of the Federal Supreme Court, and that under those decisions certain clauses that gave finality to the decision of the defendant's engineer were valid and binding, and that plaintiff's action was foreclosed thereby, where it was not suggested that in so insisting defendant was asserting or relying upon any right, privilege, or immunity derived from the Federal Constitution or laws, and the state courts do not appear to have passed upon any such question.

[For other cases, see Appeal and Error, 1168–1248, 2278–2297, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — where raised.**

2. The assertion of Federal rights in an unsuccessful application to the highest court of a state for a writ of error directed to an intermediate appellate court raises no question which will sustain a writ of error from the Federal Supreme Court to the intermediate state court.

[For other cases, see Appeal and Error, 1249–1318, in Digest Sup. Ct. 1908.]

[No. 252.]

Argued December 3, 1912. Decided January 13, 1913.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of El Paso County in that state in favor of plaintiff in an action for a breach of contract. Dismissed for want of jurisdiction.

See same case below, — Tex. Civ. App. —, 130 S. W. 922.

The facts are stated in the opinion.

Mr. Aldis B. Browne argued the cause, and, with Mr. W. C. Keegin, filed a brief for plaintiff in error:

The courts below cannot be charged with failure to apprehend the meaning of defendant's contention that the Federal law and rule distinctly applicable in the territory of New Mexico could not be set up

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

without thereby invoking the protection of the Federal Constitution. The right was so claimed "by clear and necessary intendment," and was as clearly ignored. It was hence denied.

Murray v. Charleston, 96 U. S. 432, 441, 442, 24 L. ed. 760, 761, 762; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 67, 68, 43 L. ed. 364, 368, 369, 19 Sup. Ct. Rep. 97; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 579, 28 L. ed. 1084, 1086, 5 Sup. Ct. Rep. 681; Chapman v. Goodnow, (Chapman v. Crane) 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211; Sayward v. Denny, 158 U. S. 180, 184, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; Lycoming F. Ins. Co. v. Wright, 60 Vt. 515, 12 Atl. 103; State v. Dyer, 67 Vt. 690, 32 Atl. 814, 10 Am. Crim. Rep. 227.

Messrs. Aldis B. Browne, Alexander Britton, and Evans Browne also filed a brief for plaintiff in error.

Mr. Philip W. Frey argued the cause, and, with Messrs. Waters Davis, James M. Goggin, and Richard F. Burges, filed a brief for defendants in error:

That the decision of a state court of last resort places a different construction upon a contract than that placed upon a similar contract by the supreme court of the state where the contract was made and to be executed does not present a Federal question as a denial of full faith and credit to the laws of such other state.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

It is clearly apparent from the record that there is no question in this case involving a decision against the validity of an authority exercised under the United States, it being nowhere shown that any authority exercised by the United States or by any officer thereof was set up or in any way involved in the decision of the case, or such authority in any way called into question.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 645, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829.

Decisions of the state courts in respect to matters of general law cannot be reviewed by the Supreme Court of the United States on the theory that the law of the land is violated, because the state court's conclusions are not absolutely free from error.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The question of the true construction to be placed upon the contract involved in this suit depended wholly upon general rules of law, and in no degree upon the Constitution, laws, or treaties of the United States, and a disregard by the courts of the state of Texas of the opinions of the Supreme Court of the United States rendered in other, though similar, cases, would not give the Supreme Court of the United States jurisdiction to review the judgment of the state court.

Giles v. Little, 134 U. S. 650, 33 L. ed. 1063, 10 Sup. Ct. Rep. 623; Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530; DeSaussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

The Supreme Court of the United States cannot entertain jurisdiction of a case from a state court because the judgment of that court impairs or fails to give effect to a contract. The judgment must give effect to some state statute or state Constitution, which impairs the obligation of contract.

Knox v. Exchange Bank, 12 Wall. 379, 20 L. ed. 414; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; McManus v. O'Sullivan, 91 U. S. 578, 23 L. ed. 390; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Brown v. Atwell, 92 U. S. 329, 23 L. ed. 512; New York L. Ins. Co. v. Hendren, 92 U. S. 286, 23 L. ed. 709; Crossley v. New Orleans, 108 U. S. 105, 27 L. ed. 667.

The court below did not refuse to give full faith and credit to the laws of New Mexico or to the decisions of the United States Supreme Court, offered in evidence.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

In order that the Supreme Court can take jurisdiction because of a Federal question, the Federal question must necessarily be involved in the decision so that the state court could not have given the judgment or decree which it passed without deciding it.

Crowell v. Randell, 10 Pet. 391, 9 L. ed. 467; Armstrong v. Athens County, 16 Pet. 285, 10 L. ed. 966; Hoyt v. Sheldon (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; Snell v. Chicago, 152 U. S. 191, 38 L. ed. 406, 14 Sup. Ct. Rep. 489.

The Supreme Court of the United States has no jurisdiction to revise the views or principles held by the state court where there is nothing in the record to show that

the court supposed that protection under the United States Constitution from its rulings was claimed, or that such ruling as made involved a decision against a right specially set up under that instrument.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Hoyt v. Sheldon (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65.

To give the Supreme Court of the United States jurisdiction under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, because of a denial by the state court of some right, title, privilege, or immunity claimed under the Constitution, or some law or treaty of the United States, it must appear on the record that such title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States was specially and distinctly set up at the proper time and in the proper way.

Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Chicago, R. I. & P. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Maxwell v. Newbold, 18 How. 515, 15 L. ed. 508.

Where the Federal question has been raised in neither the trial court, nor in the state court of appeals, when the latter court is called upon to pass upon the case on review and reverse or affirm the judgment of the trial court, but the question is raised for the first time in a petition for a writ of error to the supreme court of the state, it comes too late where the petition is denied by the supreme court without a written opinion.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Huber v. Jennings-Haywood Oil Syndicate, 201 U. S. 641, 50 L. ed. 901, 26 Sup. Ct. Rep. 759; Herold v. Frank, 191 U. S. 558, 48 L. ed. 302, 24 Sup. Ct. Rep. 844; Hughes v. Kepley, 191 U. S. 557, 48 L. ed. 301, 24 Sup. Ct. Rep. 842; Wakefield v. Van Tassell, 192 U. S. 601, 48 L. ed. 583, 24 Sup. Ct. Rep. 850; Bank of Commerce v. Wiltsie, 189 U. S. 505, 47 L. ed. 921, 23 Sup. Ct. Rep. 851.

Under the laws and rules of practice governing the supreme court of the state of Texas, that court has no right to, and will not, consider errors assigned or rights set up for the first time in the application for a writ of error addressed to it, such errors so claimed not having been called to the attention of the court of civil appeals by appropriate assignments of error by a motion *for a rehearing in the court of* civil appeals, distinctly pointing out the error complained of, unless the error complained of is fundamental.

Southern P. Co. v. Haas, 85 Tex. 401, 20 S. W. 586.

Mr. Justice Pitney delivered the opinion of the court:

Writ of error sued out under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), to review a judgment of the court of civil appeals, that being the highest court of the state in which a decision in the suit could be had, because the supreme court of Texas denied a petition for writ of error to review the judgment in that court.

The action was brought by defendants in error in the district court of El Paso county, Texas, to recover damages for certain alleged breaches of contract committed by the railroad company, now plaintiff in error. Damages were recovered accordingly, and the judgment awarding them was affirmed by the court of civil appeals. 130 S. W. 922. Whether the jurisdiction of this court is *properly invoked de-[592 pends upon whether any Federal right or immunity was duly set up or claimed by the plaintiff in error in the state court, and there overruled.

The controversy in suit arose out of a written contract between the parties, whereby the railroad company, owner of a railroad located in the then territory of New Mexico, for the purpose of procuring crushed stone ballast from a quarry owned by it and situate in the territory, agreed to provide a crushing and quarry plant capable of producing 1,000 cubic yards of ballast in ten hours, with the necessary appurtenances and equipment, including coal, water, and railroad cars, and the defendants in error agreed that with and from said plant they would quarry, crush, prepare, and deliver ballast at the rate of 750 cubic yards for each day's work, at prices fixed by the contract. The contract contained a clause providing that monthly payments to the extent of 90 per centum of the engineer's estimates should be made to the defendants in error during the progress of the work, with a final payment at the completion of the whole work contemplated, "upon the certificate of the company's engineer of maintenance of way that the contractor has acceptably discharged all of his obligations under this agreement, in conformity to the following specifications." Also the following, appended to the specifications: "The decision of the company's engineer of maintenance of way shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and

each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said engineer of maintenance of way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

The plaintiffs, in their petition, set up numerous grounds of action. So far as they [593] were submitted to the jury they *were summarized by the trial judge as follows: Plaintiffs alleged that the defendant failed to furnish a crusher plant of the capacity agreed to be furnished, that the plant actually furnished was of much less capacity, and that instead of furnishing coal and water of a quality reasonably sufficient and suitable for the purpose of operating the plant and quarry, the defendant furnished coal and water entirely unsuitable for that purpose; that by reason of the incapacity of the plant and the unsuitability of the coal and water, plaintiffs were prevented from producing the quantity of ballast required by the contract, and which they had a right to produce and would have produced but for the defendant's alleged defaults; that the cost of the ballast actually produced was greatly enhanced by reason of said defaults, and plaintiffs were finally compelled to shut down and abandon their contract; wherefore they sought to recover the retained 10 per cent, certain penalties that had been exacted under the terms of the contract for failure to produce ballast, and certain freight charges against them, deducted by defendant for goods transported over its own line; and also to recover for the enhanced cost of production of the ballast actually produced, and for the profits which they alleged they would have made under the contract if it had been fairly performed by the defendant.

The defense, so far as now pertinent, was, that the contract was made and intended to be performed in the then territory of New Mexico, and was made with reference to the laws in force therein, and that there was in that territory, at the time of the making of the contract and at the time of the suit, "a certain nonstatutory and unwritten law, to the effect that agreements such as those herein specially referred to (meaning the agreement respecting the arbitrament of the engineer) are valid and binding, and that neither of the parties to such contract and agreement has any right of action in a [594] cause based *thereon, but must rely for a decision of such rights and claims on the determination thereof by such engineer."

*This defense was set up by exceptions to the plaintiff's petition, and by* special pleas thereto. The cause proceeded to trial, whereupon the defendant introduced, for the purpose of showing the laws of New Mexico at the time the contract was made, certain decisions of this court, to wit: Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; Sweeney v. United States, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; Chicago, S. F. & C. R. Co. v. Price, 138 U. S 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; United States v. Robeson, 9 Pet. 319, 327, 9 L. ed. 142, 145; United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; Mercantile Trust Co. v. Hensey, 205 U. S. 298, 51 L. ed. 811, 27 Sup. Ct. Rep. 535. At the conclusion of the evidence the defendant, among other special charges, requested the court to instruct the jury that the contract sued on provided that the decision of the company's engineer of maintenance of way should be final and conclusive in any dispute between the parties relative to the agreement, and that each of the parties thereby waived any right of action or other remedy at law, or otherwise, by virtue of the covenants of the agreement, and expressly agreed that the decision of the engineer should, in the nature of an award, be final and conclusive on the rights of the parties; that the contract was intended to be performed in the territory of New Mexico, and that under the laws of that territory the agreement referred to was a valid agreement, binding upon both parties; that under the laws of the territory and the provisions of the contract made in pursuance thereof, the matters and things in dispute in this action should have been submitted to the decision of the engineer; and because they had not been so submitted and acted upon by him, no judgment could be rendered against the defendant, arising out of the matters in dispute; and also, that if the jury believed from the evidence that the engineer had theretofore decided and determined that the plant *in question was of the capacity war- [595] ranted, and the coal and water were serviceable for the purpose for which they were intended, and that all allowances which plaintiffs could be entitled to by reason of delay on account of the lack of coal and water, or the bad character of coal and water, had been in fact allowed by the engineer, and the plaintiffs had been paid therefor by the defendant, then the plaintiffs would not be entitled to recover in this action by reason of the incapacity of the plant or the character and quality of the coal and water furnished, unless the jury should further believe that in making such decisions and

awards the engineer acted in fraud of the plaintiff's rights, or in such ignorance thereof as to amount in law to a fraud.

The trial court refused to give these instructions, and, on the contrary, charged the jury that if the crusher plant installed by the defendant company did not have the stipulated maximum capacity, or if the water or coal was of a quality not reasonably suitable for the operation of the plant, and, if, by reason of either of these causes, the production of ballast by the plaintiffs was reduced beneath 750 cubic yards per day, and beneath that which the plaintiffs would otherwise have actually produced with reasonable care, management, and diligence, and if plaintiffs suffered loss and damage by reason thereof, then the defendant would be liable for such loss and damage as was the proximate result of its failure to furnish a crusher plant of the guaranteed capacity, or to furnish reasonably suitable coal or reasonably suitable water.

In the opinion of the court of civil appeals, the action of the trial court was sustained upon the following reasoning: "The question of the capacity of the crushing plant, and the quality and sufficiency of the coal and water to successfully operate the plant to the end it was furnished plaintiffs by defendant, were not by the contract submitted to the engineer for his decision. 596]These matters, *as we have seen, were conditions precedent to the contract, which it was incumbent upon the defendant to perform in order that plaintiffs might carry out their part of the contract; and if defendant failed to perform them, and such failure proximately caused default of plaintiffs for which the penalties were assessed by the engineer, such assessments were wrong, and the amount paid by plaintiffs, if not voluntarily [paid], are recoverable by them." And again: "It was not contemplated by the contract that defendant's engineer, as an arbiter, should determine the question whether a material provision in the contract was breached by either party, and assess the damages occasioned by such breach, nor were such matters submitted to or determined by such engineer. If they had been, neither party would have been bound by his award; for they were such as could only be determined by a court of competent jurisdiction. Therefore there was no error in the court's refusing special charges Nos. 43, 45 and 47 [being those to which reference has been made] nor do we think that either of said special charges suggested any law upon the subject to which they pertain, which required the court to prepare another charge thereon and submit it to the jury."

We have sufficiently indicated the general character of the controversy, the issues of fact and of law that were raised therein, and the disposition that was made of them. Whether this court has jurisdiction to review the resulting judgment depends, of course, upon whether, in the course of the proceedings, the plaintiff in error "specially set up or claimed" any "right, privilege, or immunity" under the Constitution or any statute of the United States, within the meaning of § 709, Rev. Stat.

It is contended that the decisions of this court that were introduced as evidence of the law of New Mexico in effect conferred upon the plaintiff in error the privilege and immunity of being protected against any action to recover *damages, except such[597 as the engineer had decided were due to defendants in error; and that the failure of the state court to give effect to those decisions, or to properly construe and apply the unwritten law of the territory, as established thereby, presents a Federal question as much as if an act of Congress had been disregarded.

But assuming (without, however, conceding) that the plaintiff in error was entitled to a "right, privilege, or immunity" in the premises, derived from the Federal Constitution or laws, the question remains whether such right, privilege, or immunity was "specially set up or claimed." An examination of the record discloses that while it was repeatedly insisted that the rights of the parties under the contract should be determined according to the law of the territory of New Mexico, that such law was to be ascertained from the reported decisions of this court, and that under those decisions the clauses that gave finality to the decision of the company's engineer were valid and binding, and that the plaintiff's action was foreclosed thereby, it was not suggested that in so insisting the plaintiff in error was asserting or relying upon any right, privilege, or immunity derived from the Constitution or laws of the United States.

Questions of the *lex loci contractus* and of the *lex loci solutionis* are questions of general law that frequently arise in actions respecting written agreements. Von Hoffman v. Quincy, 4 Wall. 535, 550, 18 L. ed. 403, 408; 9 Cyc, title, "Contracts," 664–674; 2 Parsons, Contr. **567, 582–585; Story, Confl. L. §§ 231, 232, 241, 242, 270, 272, 280, etc. To insist, in such a litigation, that the matter ought to be controlled by the law of the place where the contract was made and to be performed, rather than by the law of the forum, is no more than to insist that the controversy

shall be determined according to the rules of law properly applicable thereto.

The points raised by plaintiff in error 598]that are now relied *upon as an assertion of Federal rights were brought to the attention of the trial court and of the court of civil appeals like any other of the multitude of questions that were raised in those courts; and, so far as appears, the decision in both courts proceeded not in disregard of any Federal right asserted or suggested, nor even in disregard of the decisions of this court or the authority of those decisions, as laying down the law of the territory of New Mexico, but rather upon the ground that, upon the proper interpretation of the contract, the clause that was cited as giving finality to the decision of the company's engineer was not applicable to the questions in controversy.

We therefore deem it clear that plaintiff in error did not lay the foundation for a review under § 709, Rev. Stat. either in the trial court or in the court of civil appeals.

After the denial by the latter court of a motion for rehearing, application was made to the supreme court of Texas for a writ of error, to the end that that court might review the judgment. In this application alleged Federal rights were for the first time asserted, it being assigned for error that the trial court and the court of civil appeals had "refused to give full faith and credit to the public acts and laws of the territory of New Mexico," etc., etc. The application was considered and refused, and a motion for a rehearing thereon was overruled. But since the court of civil appeals is the highest court of the state that rendered a judgment reviewable here (Stanley v. Schwalby, 162 U. S. 255, 269, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754; Bacon v. Texas, 163 U. S. 207, 215, 41 L. ed. 132, 135, 16 Sup. Ct. Rep. 1023), the assertion of Federal rights in an unsuccessful application to the supreme court of the state for a writ of error raises no question that is reviewable in this court.

Writ of error dismissed.

# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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599]*KANSAS CITY, MISSOURI, Plaintiff in Error, v. STATE OF KANSAS EX REL. JOSEPH TAGGART, County Attorney, et al. [No. 396.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Kansas to review a judgment awarding a peremptory writ of mandamus requiring the county clerk of Wyandotte county, in that state, to extend upon the tax rolls of that county for taxation a waterworks plant owned by a Missouri municipality, but situated in such county.

See same case below, 85 Kan. 178, — L.R.A.(N.S.) —, 116 Pac. 251, Ann. Cas. 1912D, 800.

Mr. John G. Park for plaintiff in error.

Mr. L. W. Keplinger for defendants in error.

October 28, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Billings v. Illinois, 188 U. S. 97, 101, 47 L. ed. 400, 402, 23 Sup. Ct. Rep. 272; Cook v. Marshall County, 196 U. S. 261, 273, 274, 49 L. ed. 471, 475, 476, 25 Sup. Ct. Rep. 233; Michigan C. R. Co. v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227.

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JACOB GLOS et al., Plaintiffs in Error, v. CITY OF CHICAGO, in Trust for the Use of the Schools, et al. [No. 519.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cook County, *in that state,* awarding compensation in condemnation proceedings.

See same case below, 251 Ill. 594, 96 N. E. 539.

The plaintiffs in error *in propriis personis.*

Messrs. Angus Roy Shannon and George Gillette for defendants in error.

October 28, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; Howard v. Kentucky, 200 U. S. 164, 172, 50 L. ed. 421, 425, 26 Sup. Ct. Rep. 189; Tracy v. Ginzberg, 205 U. S. 170, 177, 178, 51 L. ed. 755, 760, 27 Sup. Ct. Rep. 461; King v. West Virginia, 216 U. S. 92, 101, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580.

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*EX PARTE: IN THE MATTER OF WALTER COOK, Petitioner. [No. —, Original.] [600

Motion for leave to file petition for a writ of habeas corpus and for a rule to show cause.

Mr. Milton Strasburger for petitioner.

November 4, 1912. Denied.

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SOCIÉTÉ ANONYME DES SUCRERIES DE ST. JEAN, Plaintiff in Error, v. UNITED STATES. [No. 8.]

In Error to the District Court of the United States for Porto Rico.

Messrs. Colley W. Bell, Hugh B. Rowland, and Benjamin S. Minor for plaintiff in error.

The Attorney General and Assistant Attorney General Denison for defendant in error.

November 4, 1912. *Per Curiam:* Judgment affirmed. Gonzales v. Buist, 224 U. S. 126, 130, 56 L. ed. 693, 695, 32 Sup. Ct. Rep. 463; Humes v. United States, 170 U. S. 210, 212, 42 L. ed. 1011, 1012, 18 Sup.

Ct. Rep. 602; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 10, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; Schuylkill Improv. Co. v. Munson, 14 Wall. 442, 448, 20 L. ed. 867, 872.

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JOHN F. HANSON, Plaintiff in Error, v EMIL GUSTAFSON. [No. 24.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Kansas.

Mr. John F. Hanson *pro se* for plaintiff in error.

Mr. Emil Gustafson *pro se* for defendant in error.

November 11, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Kimball v. Kimball, 174 U. S. 158 161-163, 43 L. ed. 932-934, 19 Sup. Ct. Rep. 639, and cases cited.

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NATIONAL TELEPHONE MFG. COMPANY, Plaintiff in Error, v. AMERICAN BELL TELEPHONE COMPANY. [No. 312.]

Error to circuit court — Federal question.

In Error to the Circuit Court of the United States for the District of Massachusetts to review a judgment for defendant in an action for malicious prosecution, in which plaintiff unsuccessfully urged the right to jury trial under the Federal Constitution to prevent sending the cause to an auditor.

Messrs. Louis T. Michener and Samuel W. Emery for plaintiff in error.

Messrs. Robert M. Morse and Chas. H. Swan for defendant in error.

601] *November 11, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. Carey v. Houston & T. C. R. Co. 150 U. S. 170, 181, 37 L. ed. 1041, 1044, 14 Sup. Ct. Rep. 63; American Sugar Ref. Co. v. United States, 211 U. S. 155, 161, 162, 53 L. ed. 129-131, 29 Sup. Ct. Rep. 89, and cases cited. Cause remanded to the District Court of the United States for the District of Massachusetts.

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CHICAGO & ERIE R. R. COMPANY, Plaintiff in Error, v. JOSEPH A. EBERSOLE. [No 37.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Hamilton County, in that state, which enforced as against an interstate carrier a state statute prohibiting the assignment of future wages.

*See same case* below, — Ind. — 87 N. E. 1090.

Mr. D. C. Harrington for plaintiff in error.

No appearance for defendant in error.

November 11, 1912. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 576, 40 L. ed. 536, 540, 16 Sup. Ct. Rep. 389; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 471, 43 L. ed. 519, 19 Sup. Ct. Rep. 265.

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EMMA R. MCCABE, Administratrix of Peter McCabe, Deceased, Plaintiff in Error, v. MAYSVILLE & BIG SANDY RAILROAD COMPANY et al. [No. 138.]

Error to state court — Federal question.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which, on a fourth appeal, affirmed a judgment of the Mason County Circuit Court in that state, sustaining the demurrer to a reply in an action for death.

See same case below, 136 Ky. 674, 124 S. W. 892.

Mr. Allan D. Cole for plaintiff in error.

Mr. E. L. Worthington for defendants in error.

November 18, 1912. *Per Curiam:* Dismissed for want of jurisdiction on the authority of Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430.

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*ELIZA B. CLINGER, Administratrix, [602 etc., Plaintiff in Error, v. CHESAPEAKE & OHIO RAILWAY OF KENTUCKY et al. [No. 236.]

Error to state court — Federal question.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which, on a second appeal, affirmed a judgment of the Mason County Circuit Court in that state, sustaining a demurrer to the reply in an action for death.

See same case below on first appeal, 128 Ky. 736, 15 L.R.A.(N.S.) 998, 109 S. W. 315; on second appeal, 138 Ky. 615, 128 S. W. 1055.

Mr. Allan D. Cole for plaintiff in error.

Mr. E. L. Worthington for defendants in error.

November 18, 1912. *Per Curiam:* Dismissed for the want of jurisdiction, on the authority of Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430.

POST PRINTING & PUBLISHING COMPANY et al., Plaintiffs in Error, v. JOHN F. SHAFROTH, as Governor, etc., et al. [No. 812.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the District Court of the City and County of Denver, in that state, upholding the validity of an amendment to the state Constitution.

See same case below, 53 Colo. 129, 124 Pac. 176.

Mr. Booth M. Malone for plaintiffs in error.

Messrs. Benjamin Griffith, Henry J. Hersey, F. A. Williams, and Horace N. Hawkins for defendants in error.

November 18, 1912. *Per Curiam:* Dismissed for the want of jurisdiction, on the authority of Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 465, 471, 43 L. ed. 517, 519, 19 Sup. Ct. Rep. 265.

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M. M. BRIGHT, Administrator of Robert Larck, Deceased, v. CHESAPEAKE & OHIO RAILWAY COMPANY. [No. —.]

Mr. Herbert Fitzpatrick for the Railway Company, petitioner for the writ.

No opposition.

November 18, 1912. *Per Curiam:* The Writ of Error applied for in this case is denied. Wilkinson v. Nebraska, 123 U. S. 286, 31 L. ed. 152, 8 Sup. Ct. Rep. 120; Re Pennsylvania Co. 137 U. S. 451, 454, 34 L. ed. 738, 740, 11 Sup. Ct. Rep. 141.

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CHAN KAM, Appellant, v. LUTHER C. STEWARD and H. Edsell. [No. 374.]

Aliens — deportation.

Appeal from the Circuit Court of the 603]*United States for the Northern District of California to review a decree refusing relief by habeas corpus to an alien immigrant detained for deportation by the immigration authorities.

Messrs. Carroll Cook and Corry M. Stadden for appellant.

The Attorney General, the Solicitor General, and Mr. Assistant Attorney General Harr for appellees.

December 2, 1912. *Per Curiam:* Judgment affirmed on the authority of Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734, and cause remanded to the District Court of the United States for the Northern District of California.

YUK PING, Alias LEE SO MUI Appellant, v. LUTHER C. STEWARD and H. Edsell. [No. 375.]

Aliens — deportation.

Appeal from the Circuit Court of the United States for the Northern District of California to review a decree refusing relief by habeas corpus to an alien immigrant detained for deportation by the immigration authorities.

Messrs. Carroll Cook and Corry M. Stadden for appellant.

The Attorney General, the Solicitor General, and Mr. Assistant Attorney General Harr for appellees.

December 2, 1912. *Per Curiam:* Judgment affirmed on the authority of Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734, and cause remanded to the District Court of the United States for the Northern District of California.

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F. B. WILLIAMS CYPRESS COMPANY, LIMITED, Plaintiff in Error, v. STATE OF LOUISIANA. [No. 760.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the District Court for the Parish of Assumption, in that state, awarding damages for the conversion of timber on certain school sections.

See same case below, 131 La. 62, 58 So. 1033; on rehearing, — La. —, 61 So. 988.

Mr. Charlton R. Beattie for plaintiff in error.

Mr. Charles T. Wortham for defendant in error.

December 9, 1912. *Per Curiam:* Dismissed for want of jurisdiction, on the authority of Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699, and cases cited.

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TILLIE ANDERSON, Plaintiff in Error, v. STATE OF CONNECTICUT. [No. 62.]

Error to state court — Federal question.

In Error to the Supreme *Court of[604 Errors of the State of Connecticut to review a judgment which, on a second appeal, affirmed a conviction in the New Haven Court of Common Pleas under an information charging the keeping of a house of ill fame.

See same case below, on first appeal, 82 Conn. 111, 72 Atl. 648; on second appeal, 83 Conn. 55, 75 Atl. 81.

Mr. Ernest L. Averill for plaintiff in error.

Mr. E. P. Arvine for defendant in error.

December 16, 1912. *Per Curiam:* Dismissed for want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727.

ADDISON SHIP-Y-TUCK, Plaintiff in Error. v. UNITED STATES. [No. 70.]

Indians — Federal regulation — intoxicating liquors.

In Error to the District Court of the United States for the District of Kansas to review a conviction for introducing intoxicating liquors into the Indian country.

Messrs. F. T. Woodburn and A. E. Crane for plaintiff in error.

The Attorney General and Mr. Assistant Attorney General Harr for defendant in error.

December 2, 1912. *Per Curiam:* Judgment affirmed upon the authority of Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587.

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ISAAC A. MANSOUR, Appellant, v. UNITED STATES. [No. 73.]

Aliens — naturalization — canceling certificate.

Appeal from the District Court of the United States for the Southern District of New York to review a decree canceling a naturalization certificate.

See same case below, 170 Fed. 671.

Messrs. Paul Armitage, Walter S. Penfield, and William L. Penfield for appellant.

The Attorney General and Mr. Assistant Attorney General Harr for appellee.

December 16, 1912. *Per Curiam:* Judgment affirmed.

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GEORGE FRED WILLIAMS, Executor of the Estate of Amey M. Starkweather, Plaintiff in Error, v. JOSEPH U. STARKWEATHER, Administrator, etc. [No. 199.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Rhode Island to review an order adjudging plaintiff in error in contempt.

See same case below, 31 R. I. 134, 76 Atl. 662.

Mr. James A. Halloran for plaintiff in error.

Mr. Edward D. Bassett for defendant in error.

605] *December 16, 1912. *Per Curiam:* Dismissed for want of jurisdiction. Loeber v. Schroeder, 149 U. S. 580, 585, 37 L. ed. 856, 859, 13 Sup. Ct. Rep. 934; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Fayerweather v. Ritch, 195 U. S. 299, 49 L. ed. 210, 25 Sup. Ct. Rep. 58; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727.

B. ZAVELO, Plaintiff in Error, v. LEICHTMAN, GOODMAN, & COMPANY. [No. 300.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Birmingham City Court, in favor of plaintiff in an action for conversion.

See same case below, 171 Ala. 65, 54 Sc. 537.

Mr. Oscar R. Hundley for plaintiff in error.

Mr. Samuel A. Putman for defendant in error.

December 23, 1912. *Per Curiam:* Dismissed for want of jurisdiction. Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265, and cases cited.

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JOHN MEDLEY, Plaintiff in Error, v. STATE OF WEST VIRGINIA. [No. 98.]

Error to state court — Federal question.

In Error to the Supreme Court of Appeals of the State of West Virginia to review a judgment which affirmed a conviction for murder in the Criminal Court of Mercer County, in that state.

See same case below, 66 W. Va. 216, 66 S. E. 358, 18 Ann. Cas. 761.

Mr. Joseph M. Sanders for plaintiff in error.

Mr. William G. Conley for defendant in error.

January 6, 1913. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of Spies v. Illinois, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22, and Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 485, 486, 56 L. ed. 1171, 1175, 32 Sup. Ct. Rep. 790, and cases cited.

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PARK RAPIDS LUMBER COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 100.]

Indians — restrictions on alienation — sale of timber.

In Error to the Circuit Court of the United States for the District of Minnesota to review a judgment in favor of the United States in an action to recover the value of timber cut from allotted land within the limits of an Indian reservation.

Messrs. Ransom J. Powell and George T. Simpson for plaintiff in error.

The Attorney General and Assistant Attorney General Knaebel for defendant in error.

January 6, 1913. *Per Curiam:* Judgment affirmed on the authority *of[606 United States v. Rickert, 188 U. S. 432, 436, 47 L. ed. 532, 535, 23 Sup. Ct. Rep. 478; act of Congress of April 21, 1904 (33 Stat. at

L. 189, 209, chap. 1402); Heckman v. United States, 224 U. S. 413, 436, 56 L. ed. 820, 829, 32 Sup. Ct. Rep. 424; and cause remanded to the District Court of the United States for the District of Minnesota.

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EX PARTE: IN THE MATTER OF JEWELL KING, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Habeas Corpus.

Mr. Burton Smith for petitioner.

January 6, 1913. Denied.

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JOHN T. COOPER, Petitioner, v. C. M. PRATT et al., Partners, etc. [No. 790.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 113 C. C. A. 666, 193 Fed. 1020.

Messrs. R. G. Linn, Aldis B. Browne, and Alex. Britton for petitioner.

No appearance for respondents.

October 21, 1912. Denied.

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JAMES D. HARDIN, Petitioner, v. UNION TRUST COMPANY OF THE CITY OF PHILADELPHIA et al. [No. 799.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 111 C. C. A. 632, 191 Fed. 152.

Messrs. Chambers Kellar and Ernest Wilkinson for petitioner.

No appearance for respondents.

October 21, 1912. Denied.

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607]*UNITED STATES, Petitioner, v. A. GERO MARSHALL. [No. 805.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 117 C. C. A. 65, 197 Fed. 511.

The Attorney General, The Solicitor General, and Assistant Attorney General Harr for petitioner.

Mr. John M. Coleman for respondent.

October 21, 1912. Denied.

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DUNLEVY & BROTHER COMPANY, Petitioner, v. ELIZABETH FORREST. [No. 808.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 116 C. C. A. 582, 197 Fed. 34.

Mr. Henry J. Nesbit for petitioner.

Mr. H. Fred Mercer for respondent.

October 21, 1912. Denied.

I. D. BLOCK et al., Petitioners, v. CITY OF MERIDIAN. [No. 716.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 169 Fed. 516.

Messrs. G. Q. Hall and Joseph Hirsh for petitioners.

Mr. Wm. H. Ambrecht for respondent.

October 28, 1912. Denied.

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MAHONING VALLEY RAILWAY COMPANY, Petitioner, v. BELINDA O'HARA. [No. 768.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 116 C. C. A. 495, 196 Fed. 945.

Mr. George F. Arrel for petitioner.

Mr. Charles Koonce, Jr., for respondent.

October 28, 1912. Denied.

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AMERICAN FIDELITY COMPANY, Petitioner, v. S. H. VELIE, Doing Business as Velie Motor Company. [No. 813.]

*Petition for a Writ of Certiorari to[608 the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 116 C. C. A. 22, 196 Fed. 190.

Messrs. Joseph S. Brooks and Louis C. Boyle for petitioner.

Mr. Henry De L. Ashley for respondent.

October 28, 1912. Denied.

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DETROIT STEEL COOPERAGE COMPANY, Petitioner, v. SISTERSVILLE BREWING COMPANY et al. [No. 825.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Geo. M. Hoffheimer, O. B. Taylor, and Chas. M. Kimball for petitioner.

No appearance for respondents.

November 4, 1912. Granted.

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REPUBLIC RUBBER COMPANY, Petitioner, v. MORGAN & WRIGHT. [No. 814.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 117 C. C. A. 45, 197 Fed. 549.

Mr. Marshall A. Christy for petitioner.

Mr. Antonio Knauth for respondent.

November 4, 1912. Denied.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY et al., Petitioners, v. MRS. BESSIE SCHINNERRER. [No. 832]; and MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY et al., Petitioners, v. MRS. EMMA HURST. [No. 833.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 117 C. C. A. 193, 196 Fed. 375.

Messrs. Frank S. Masten, Chas. M. Johnson, R. P. Cary, and Chas. H. Stephens for petitioners.

Mr. F. Zimmerman for respondents.

November 4, 1912. Denied.

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609]*NEW YORK, NEW HAVEN, & HARTFORD R. R. COMPANY, Owner, etc., Petitioner, v. RIVER & HARBOR TRANSPORTATION COMPANY. [No. 835.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 114 C. C. A. 155, 194 Fed. 77.

Mr. Edward B. Robbins for petitioner.

Mr. Chas. C. Burlingham for respondent.

November 4, 1912. Denied.

---

JOHN L. HART, Administrator, etc., Petitioner, v. NORTHERN PACIFIC RAILWAY COMPANY. [No. 822.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 116 C. C. A. 12, 196 Fed. 180.

Mr. Francis B. Hart for petitioner.

No appearance for respondent.

November 11, 1912. Denied.

---

JOHN W. PATTERSON, Petitioner, v. UNITED STATES. [No. 830.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 39 App. D. C. 84.

Mr. Matthew E. O'Brien for petitioner.

The Attorney General and Mr. Assistant *Attorney General* Harr for respondent.

*November 18, 1912. Denied.*

E. A. BLOUNT et al, Petitioners, v. GEORGE E. DOWNS et al. [No. 809.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, on first writ of error, 31 L.R.A.(N.S.) 1076, 95 C. C. A. 289, 170 Fed. 15; on second writ of error, 114 C. C. A. 664, 194 Fed. 1020.

Messrs. J. C. McReynolds and George C. Greer for petitioners.

Messrs. Hiram Garwood and Maxwell Evarts for respondents.

December 2, 1912. Denied.

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DAN KOVOLOFF, Petitioner, v. UNITED STATES. [No. 841.]

Petition for a Writ of Certiorari *to[610 the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 202 Fed. 475.

Messrs. Benjamin C. Bachrach and John F. Geeting for petitioner.

The Attorney General and the Solicitor General for respondent.

December 9, 1912. Denied.

---

FARMERS & MECHANICS BANK OF VANDALIA, ILLINOIS, Petitioner, v. HARRISON W. MAINES. [No. 850.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, on first writ of error, 105 C. C. A. 329, 183 Fed. 37; on second writ of error, 115 C. C. A. 64, 195 Fed. 62.

Mr. Bernard B. Selling for petitioner.

Mr. John C. Donnelly for respondent.

December 9, 1912. Denied.

---

WORK MINING & MILLING COMPANY, Petitioner, v. DR. JACK POT MINING COMPANY. [No. 855.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 114 C. C. A. 392, 194 Fed. 620.

Messrs. Charles S. Thomas, Henry C. Hall, William H. Bryant, and George L. Nye for petitioner.

Mr. William V. Hodges for respondent.

December 9, 1912. Denied.

BYRON E. VAN AUKEN et al., Petitioners, v. MONASH-YOUNKER COMPANY. [Nos. 860 and 861.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 117 C. C. A. 605, 199 Fed. 123.

Mr. C. Clarence Poole for petitioners.

Mr. Thomas A. Banning for respondent.

December 9, 1912. Denied.

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LUTCHER & MOORE LUMBER COMPANY et al.,† Petitioners, v. WILLIAM H. KNIGHT et al. [No. 810.]

611] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 114 C. C. A. 665, 194 Fed. 1022.

Mr. A. P. Pujo for petitioners.

No appearance for respondents.

December 16, 1912. Denied.

---

CHARLOTTE CASSIDY, Petitioner, v. SILVER KING COALITION MINES COMPANY. [No. 839.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 640, 199 Fed. 100.

Mr. John A. Shelton for petitioner.

No appearance for respondent.

December 16, 1912. Denied.

---

FLORENCE A. HARPER, Petitioner, v. LOUIS L. TAYLOR. [No. 856.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 113 C. C. A. 572, 193 Fed. 944.

Mr. James H. Vahey for petitioner.

Mr. Lewis Miles for respondent.

December 16, 1912. Denied.

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†Death of Henry J. Lutcher, one of the petitioners, suggested December 9, 1912, and appearance of Frances A. Lutcher, widow, and Miria M. Stark and Carrie L. Brown, children of Henry J. Lutcher, deceased, as *parties petitioners herein.*

*57 L. ed.*

WILLIAM W. WISHART, etc., Petitioners v. SUPREME COUNCIL OF THE ROYAL ARCANUM. [No. 872.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 112 C. C. A. 591, 192 Fed. 453.

Messrs. A. S. Worthington and J. Roy Dickie for petitioners.

Mr. Joseph A. Langfitt for respondent.

December 16, 1912. Denied.

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C. E. MITCHELL, Petitioner, v. UNITED STATES. [No. 845.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for *the Ninth Circuit. [612

See same case below, 116 C. C. A. 436, 196 Fed. 874.

Mr. Hosea B. Moulton for petitioner.

The Attorney General and Mr. Assistant Attorney General Harr for respondent.

December 23, 1912. Denied.

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SKEELE COAL COMPANY, Petitioner, v. GOHEN C. ARNOLD, Trustee in Bankruptcy, etc. [No. 866.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 118 C. C. A. 545, 200 Fed. 393.

Mr. Nicholas W. Hacker for petitioner.

Mr. C. Andrade, Jr, for respondent.

December 23, 1912. Denied.

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MRS. BESSIE SCHINNERRER et al., Petitioners, v. MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY et al. [No. 874.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 119 C. C. A. 127, 200 Fed. 711.

Mr. F. Zimmerman for petitioners.

Mr. Frank S. Masten for respondents.

December 23, 1912. Denied.

---

JOHN M. CONROY et al., Petitioners, v. PENN ELECTRICAL MANUFACTURING COMPANY. [No. 879.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 118 C. C. A. 101, 199 Fed. 427.

Mr. Paul Synnestvedt for petitioners.

Messrs. Edward Rector and J. M. Nesbit for respondent.

December 23, 1912. Denied.

CHARLES F. ALLEN, Executor, etc., Petitioner, v. SEABOARD AIR LINE RAILWAY et al. [No. 881.]

Petition for a Writ of Certiorari to the [613]United *States Circuit Court of Appeals for the Second Circuit.

See same case below, 112 C. C. A. 642, 192 Fed. 480.

Mr. Ferdinand E. M. Bullowa for petitioner.

Mr. James Byrne for respondents.

January 6, 1913. Denied.

---

HOWARD H. SYPHER et al., Petitioners, v. BOUVIER-IAEGER COAL LAND COMPANY. [No. 883.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 111 C. C. A. 673, 191 Fed. 1006.

Mr. John H. Holt for petitioners.

Mr. George E. Price for respondent.

January 6, 1913. Denied.

---

KEYSTONE TYPE FOUNDRY, Petitioner, v. NATIONAL COMPOSITYPE COMPANY. [No. 892.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 113 C. C. A. 667, 193 Fed. 1021.

Mr. E. W. Bradford for petitioner.

No appearance for respondent.

January 6, 1913. Denied.

---

WALTER MURPHY, Petitioner, v. ASHLEY M. GOULD, Associate Justice, etc. [No. 895.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 39 App. D. C. 363.

Mr. John Altheus Johnson for petitioner.

No appearance for respondent.

January 6, 1913. Denied.

---

J. L. SHINE, Petitioner, v. UNITED STATES. [No. 887.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. W. S. Welch for petitioner.

The Attorney General and Assistant Attorney General Harr for respondent.

January 13, 1913. Denied.

*HARTFORD RUBBER WORKS COMPANY, [614 Petitioner, v. METALLIC RUBBER TIRE COMPANY. [No. 906.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 200 Fed. 743.

Mr. Livingston Gifford for petitioner.

Mr. Norman Johnson for respondent.

January 13, 1913. Denied.

---

CHARLES GRING, Owner, etc., Petitioner, v. ROSA LEE CHERRY, Administratrix, et al. [No. 908.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Howard M. Long, J. Parker Kirlin, and Edward R. Baird, Jr., for petitioner.

Mr. Henry Bowden for respondents.

January 13, 1913. Denied.

---

ROYAL BOSWORTH YOUNG et al., Petitioners, v. UNITED ZINC COMPANIES et al. [No. 909.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below 117 C. C. A. 301, 198 Fed. 593.

Mr. Robert O. Harris for petitioners.

Messrs. Samuel Williston and Hollis R. Bailey for respondents.

January 13, 1913. Denied.

---

J. G. BRILL COMPANY, Petitioner, v. BEMIS CAR BOX COMPANY. [No. 910.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 200 Fed. 749.

Messrs. J. Edgar Bull, Alexander Simpson, Jr., and Francis Rawle, for petitioner.

Messrs. John G. Johnson, Henry P. Brown, and Antonio Knauth, for respondent.

January 13, 1913. Denied.

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*NORTHERN INDIANA GAS & ELECTRIC [615 Co., Appellant, v. MAYOR AND BOARD OF PUBLIC WORKS OF THE CITY OF HAMMOND, INDIANA, et al. [No. 26.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. Max Pam for appellant.

Mr. Edward F. Colladay for appellee.

October 14, 1912. Dismissed per stipulation, and cause remanded to the District Court of the United States for the District of Indiana.

ST. LOUIS & SAN FRANCISCO R. R. CO., Plaintiff in Error, v. WILLIAM HEYSER. [No. 133.]

In Error to the Supreme Court of the State of Arkansas.

Mr. W. F. Evans for plaintiff in error.

No appearance for defendant in error.

October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

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ATCHISON, TOPEKA, & SANTA FE RY. CO., Plaintiff in Error, v. I. A. TACK. [No. 183.]

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

Messrs. Gardiner Lathrop, J. W. Terry, and A. H. Culwell for plaintiff in error.

Mr. George E. Wallace for defendant in error.

October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

---

NORTH RIVER INSURANCE COMPANY, Plaintiff in Error, v. W. B. HIGSON. [No. 227.]

616] In Error to the Supreme Court *of the State of North Carolina.

Mr. Charles W. Tillett for plaintiff in error.

No appearance for defendant in error.

October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

---

FIDELITY TRUST COMPANY, Appellant, v. LON H. GASKELL, Receiver. [No. 228.]

In Error to the District Court of the United States for the Western District of Missouri.

Messrs. Frank Hagerman and Justin D. Bowersock for appellant.

Mr. John M. Cleary for appellee.

October 14, 1912. Dismissed with costs, per stipulation.

---

UNITED STATES EXPRESS COMPANY, Plaintiff in Error, v. STATE OF NEBRASKA. [No. 233.]

In Error to the Supreme Court of the State of Nebraska.

See same case below, 85 Neb. 42, 122 N. W. 697.

Messrs. Charles J. Greene and Ralph W. Breckenridge for plaintiff in error.

Messrs. W. T. Thompson and Grant G. Martin for defendant in error.

October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

ST. LOUIS & SAN FRANCISCO R. R. COMPANY, Plaintiff in Error, v. CASSIE KITCHEN. [No. 317.]

In Error to the Supreme Court of the State of Arkansas.

Messrs. W. F. Evans and E. T. Miller for plaintiff in error.

No appearance for defendant in error.

October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

---

*CENTRAL R. R. COMPANY OF NEW JER-[617
SEY, Plaintiff in Error, v. MICHAEL CO
LASURDO. [No. 569.]

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Robert Thorne for plaintiff in error

No appearance for defendant in error.

October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

---

BERNARD HAAS by Sadie Haas, his Guardian *ad litem*, et al., Appellants, v. GREYSTOKE CASTLE S. S. COMPANY (Ltd.), etc. [No 599.]

Appeal from the District Court of the United States for the Northern District of California.

Messrs. E. B. McClanahan and Charles T Tittman for appellants.

Mr. J. Parker Kirlin for appellees.

October 14, 1912. Dismissed with costs, on motion of counsel for the appellants.

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GREAT NORTHERN RAILWAY COMPANY, Petitioner, v. WAYLAND SLOAN et al., Minors, etc. [No. 712.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 116 C. C. A. 90, 196 Fed. 270.

Messrs. E. C. Lindley and Charles S. Albert for petitioner.

No appearance for respondents.

October 14, 1912. Dismissed on motion of counsel for the petitioner.

---

ANTONIO JOAQUIN LUIS SANCHEZ DE LARRAGOITI et al., Plaintiffs in Error, v. SALVADOR CASTELLO et al. [No. 6.]

In Error to the District Court of the United States for Porto Rico.

Messrs. James Byrne, Francis H. Dexter, and Hugo Kohlmann for *plaintiffs in[618
error.

No appearance for defendants in error.

October 24, 1912. Dismissed with costs, pursuant to the Nineteenth Rule.

Samuel Loeb, Plaintiff in Error, v. State of Georgia. [No. 21.]

In Error to the Court of Appeals of the State of Georgia.

No appearance for plaintiff in error.

Mr. Thomas S. Felder for defendant in error.

October 30, 1912. Dismissed with costs, pursuant to the Sixteenth Rule, on motion of Mr. Thomas S. Felder for the defendant in error.

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Atchison, Topeka, & Santa Fe Railway Company et al., Plaintiffs in Error, v. Valentina Chaves de Padilla. [No. 547.]

In Error to the Supreme Court of the Territory of New Mexico.

Mr. Robert Dunlap for plaintiffs in error.

No appearance for defendant in error.

November 4, 1912. Dismissed with costs, per stipulation, and cause remanded to the Supreme Court of the state of New Mexico.

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M. Kahn & Brother, Plaintiff in Error, v. J. F. Bledsoe, Trustee, etc. [No. 4.]

In Error to the Supreme Court of the state of Oklahoma.

See same case below, 22 Okla. 666, 132 Am. St. Rep. 665, 98 Pac. 921.

Mr. Wm. F. Bowman for plaintiff in error.

Mr. S. T. Bledsoe for defendant in error.

November 4, 1912. Dismissed with costs, pursuant to the Sixteenth Rule, on motion of Mr. Evans Browne in behalf of counsel for the defendant in error.

---

Minneapolis & St. Louis Railroad Company, Plaintiff in Error, v. Clarence C. Gray. [No. 125.]

619] *In Error to the Supreme Court of the State of Minnesota.

See same case below, 110 Minn. 527, 124 N. W. 1100.

Mr. Wm. H. Bremner for plaintiff in error.

No appearance for defendant in error.

November 11, 1912. Dismissed with costs on authority of counsel for the plaintiff in error.

---

A. W. Morse, Plaintiff in Error, v. Baltimore & Ohio Southwestern Railway Company. [No. 747.]

In Error to the District Court of the United States for the Northern District of Texas.

Mr. Wm. H. Atwell for plaintiff in error.

No appearance for defendant in error.

*November 13, 1912.* Dismissed with costs *on motion of counsel for plaintiff in error.*

G. L. Crenshaw, Appellant, v. Carroll Allen, as Trustee in Bankruptcy of the Estate of Fred Dorr, Bankrupt. [No. 780.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Wm. B. Mathews for appellant.

Mr. Jas. H. Shankland for respondent.

November 15, 1912. Dismissed, each party paying his own costs, per stipulation.

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United States of America, Complainant, v. People of the State of New York et al. [No. 5, original.]

The Attorney General for complainant.

Mr. James M. Hunt for respondents

December 2, 1912. Dismissed without prejudice, on motion of Mr. Solicitor General Bullitt for the complainant.

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Marius Calmels, Appellant, v. Samuel W. Backus, Commissioner of Immigration, etc. [No. 793]; *Victor Vinol, Ap-[620 pellant, v. Samuel W. Backus, Commissioner of Immigration, etc. [No. 794]; Leopold Calmels, Appellant, v. Samuel W. Backus, Commissioner of Immigration, etc. [No. 795]; Maria Louise Calmels, Appellant, v. Samuel W. Backus, Commissioner of Immigration, etc. [No. 796]; and Valerie Calmels, Appellant, v. Samuel W. Backus, Commissioner of Immigration, etc. [No. 797].

Appeal from the District Court of the United States for the Northern District of California.

Mr. Corry M. Stadden for appellants.

The Attorney General for appellee.

December 2, 1912. Dismissed with costs, on motion of Mr. Corry M. Stadden for the appellants.

---

Gaspar Cue et al., Appellants, v. William C. Cotton et al., Executors, etc., et al. [No. 88.]

Appeal from the Circuit Court of the United States for the Western District of Texas.

Mr. A. Seymour Thurmond for appellants.

No appearance for appellees.

December 10, 1912. Dismissed with costs, pursuant to the Tenth Rule, and cause remanded to the District Court of the United States for the Western District of Texas.

ED. BROWN et al., Plaintiffs in Error, v. FRANK M. POWERS, Judge, et al. [No. 94.]

In Error to the Supreme Court of the State of Iowa.

Mr. Benjamin I. Salinger for plaintiffs in error.

No appearance for defendants in error.

December 13, 1912. Dismissed with costs, pursuant to the Tenth Rule.

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621]*ED. BROWN et al., Plaintiffs in Error, v. FRANK M. POWERS, Judge, et al. [No. 95.]

In Error to the Supreme Court of the State of Iowa.

Mr. Benjamin I. Salinger for plaintiffs in error.

No appearance for defendants in error.

December 13, 1912. Dismissed with costs, pursuant to the Tenth Rule.

---

FRANK F. LAMB, Plaintiff in Error, v. SAMUEL B. BAKER. [No. 267.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. George S. Ramsey for plaintiff in error.

No appearance for defendant in error.

December 18, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error.

---

SEABOARD FIRE & MARINE INSURANCE COMPANY, Plaintiff in Error, v. GUSTAVE MONTELEONE. [No. 110.]

In Error to the Supreme Court of the State of Louisiana.

See same case below, 126 La. 807, 52 So. 1032.

Mr. Edgar H. Farrar for plaintiff in error.

Messrs. Benjamin Rice Foreman and Anthony J. Rossi for defendant in error.

December 19, 1912. Dismissed with costs, per stipulation.

---

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, v. MICHAEL KILEY. [No. 114.]

In Error to the Supreme Court of the State of Wisconsin.

Messrs. Burton Hanson and C. H. Van Alstine for plaintiff in error.

No appearance for defendant in error.

December 19, 1912. Dismissed with costs, pursuant to the *Tenth Rule.*

*JOHN H. HALL, Plaintiff in Error, [622 v. UNITED STATES. [No. 117.]

In Error to the Circuit Court of the United States for the District of Oregon.

Mr. John H. Hall, *pro se*, for plaintiff in error.

The Attorney General for defendant in error.

January 6, 1913. Dismissed, on motion of Mr. Solicitor General Bullitt for the defendant in error, and cause remanded to the District Court of the United States for the District of Oregon.

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UNITED STATES, Plaintiff in Error, v. NORTHERN COMMERCIAL COMPANY. [No. 548.]

In Error to the District Court of the United States for the Fourth Division, Territory of Alaska.

The Attorney General for plaintiff in error.

Messrs. John Sidney Webb and Edward M. Cleary for defendant in error.

January 6, 1913. Dismissed, on motion of Mr. Solicitor General Bullitt for the plaintiff in error.

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AUGUSTUS BURGDORF, Surviving Trustee, et al., Appellants, v. LEMUEL E. MAYHEW. [No. 182.]

Appeal from the Court of Appeals of the District of Columbia.

Mr. John Ridout for appellants.

No appearance for appellee.

January 6, 1913. Dismissed with costs, on motion of counsel for the appellants.

---

GERMAN INSURANCE COMPANY, Plaintiff in Error, v. COMMONWEALTH OF KENTUCKY, FOR THE USE, ETC., OF THE LOUISVILLE SCHOOL BOARD et al. [No. 315.]

In Error to the Court of Appeals of the State of Kentucky.

Messrs. Louis B. Wehle and O. *A.[622 Wehle for plaintiff in error.

No appearance for defendants in error.

January 6, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

---

ST. LOUIS FAIR ASSOCIATION, Plaintiff in Error, v. GILSONITE ROOFING & PAVING COMPANY. [No. 210.]

In Error to the Supreme Court of the State of Missouri.

See same case below, 231 Mo. 589, 132 S. W. 657.

Messrs. Henry W. Bond and Thomas Bond for plaintiff in error.

No appearance for defendant in error.

January 13, 1913. Dismissed with costs on motion of counsel for the plaintiff in error.

LOUIS F. BRAUN, Appellant, v. LINDSAY RUSSELL, Trustee, et al. [No. 329.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Mr. Dix W. Noel for the appellant.

Mr. Daniel P. Hays for the appellees.

July 12, 1912. Dismissed pursuant to the Twenty-eighth Rule.

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WALTER BAMFORD, Appellant, v. LINDSAY RUSSELL, Trustee, et al. [No. 330.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Mr. Dix W. Noel for the appellant.

Mr. Daniel P. Hays for the appellees.

July 12, 1912. Dismissed pursuant to the Twenty-eighth Rule.

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LINDSAY RUSSELL, Trustee, Appellant, v. WALTER BAMFORD and Louis F. Braun. [No. 331.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

624] *Mr. Daniel P. Hays for the appellant.

Mr. Dix W. Noel for the appellees.

July 12, 1912. Dismissed pursuant to the Twenty-eighth Rule.

---

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, v. NANCY E. GILKINSON. [No. 96.]

In Error to the Appellate Court of the State of Indiana.

See same case below, 46 Ind. App. 29, 90 N. E. 650.

Mr. Samuel O. Pickens, Mr. Robert Franklin Davidson, Mr. George H. Fearons, Mr. Rush Taggart, and Mr. Francis Raymond Stark for the plaintiff in error.

Mr. Charles W. Hiller for the defendant in error.

July 31, 1912. Dismissed pursuant to the Twenty-eighth Rule.

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AMERICAN REALTY COMPANY, Plaintiff in Error, v. LEAH A. THOMPKINS. [No. 328.]

In Error to the Court of Appeals of the District of Columbia.

Mr. Milton Strasburger for the plaintiff in error.

Mr. Alexander Wolf and Mr. J. J. Darlington for the defendant in error.

September 17, 1912. Dismissed pursuant to the Twenty-eighth Rule.

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MONETT ELECTRIC LIGHT, POWER, & ICE COMPANY, Appellant, v. CITY OF MONETT, MISSOURI. [No. 235.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

See same case below, 186 Fed. 360.

Mr. Joseph M. Hill, Mr. James Brizzolara, and Mr. H. L. Fitzhugh for the appellant.

Mr. John M. Wood for the appellee.

October 10, 1912. Dismissed pursuant to the Twenty-eighth Rule.

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ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1912.

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# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1912.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plff. in Err.,
v.
GREENWOOD GROCERY COMPANY.

(See S. C. Reporter's ed. 1-3.)

**Commerce — state regulations — delivering cars to consignee.**

The rule of a state railroad commission under which a *per diem* penalty may be exacted from a carrier for delay in delivering cars to the consignee at the termination of interstate transportation amounts to an unreasonable burden upon interstate commerce, where the requirement of such rule as to the delivery of the cars "within twenty-four hours after arrival, computing from 7 A. M. the day following the arrival," is absolute, and makes no allowance whatever for any justifiable and unavoidable cause for failure to deliver.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

[No. 54.]

Argued November 14, 1912. Decided January 20, 1913.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Leflore County, in that state, enforcing a rule of the state railroad commission under which a *per diem* penalty may be exacted from a carrier for delays in delivering cars at the termination of interstate transportation. Reversed and remanded for further proceedings.

See same case below, 96 Miss. 450, 51 So. 450.

The facts are stated in the opinion.

Messrs. Charles N. Burch and Edward Mayes argued the cause, and, with Mr. Blewett Lee, filed a brief for plaintiff in error:

By the Hepburn act Congress has acted; and therefore the states are without any further power in the premises.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; State ex rel. Railroad Commission v. Adams Exp. Co. 171 Ind. 138, 19 L.R.A.(N.S.) 93, 85 N. E. 337, 966.

State legislation may be in aid of commerce, but still be constitutionally objectionable.

Southwestern R. Co. v. Com. 107 Va. L.R.A.(N.S.) 364, 60 S. E. 70; Southern R. Co. v. King, 217 U. S. 524, 531, 532, 54 L. ed. 868, 870, 871, 30 Sup. Ct. Rep. 594.

By the rules complained of the state commission laid an unreasonable burden on commerce.

Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Southern R. Co. v. Com. 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S.

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NOTE.—On state regulations requiring carrier to furnish cars to shipper as interference with interstate commerce—see notes to St. Louis Southwestern R. Co. v. Arkansas, 54 L. ed. U. S. 699; Southern R. Co. v. Com. 17 L.R.A.(N.S.) 364, and Chicago, R. I. & P. R. Co. v. Beatty, 42 L.R.A.(N.S.) 984.

As to duty of railroad company to furnish cars to shippers—see note to Houston, E. & W. T. R. Co. v. Campbell, 43 L.R.A. 225.

136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476.

The constitutional validity of a law or administrative rule is to be tested not by what has been done under it, but by what may be done.

Southwestern R. Co. v. Com. 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289; St. Louis & S. F. R. Co. v. State, 26 Okla. 62, 30 L.R.A.(N.S.) 137, 107 Pac. 929.

Messrs. Charles N. Burch, Edward Mayes, H. D. Minor, and Blewett Lee also filed a brief for plaintiff in error.

Mr. Harry Peyton argued the cause and filed a brief for defendant in error:

Until Congress acts, the states have the right to pass laws governing interstate commerce so long as they do not impede, obstruct, hinder, or interfere with such commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 214, 29 L. ed. 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Smith v. Alabama, 124 U. S. 465, 476, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678–685, 27 L. ed. 442–446, 2 Sup. Ct. Rep. 185; Western U. Teleg. Co. v. James, 162 U. S. 650–661, 40 L. ed. 1105–1109, 16 Sup. Ct. Rep. 934; Western U. Teleg. Co. v. Tyler, 90 Va. 297, 44 Am. St. Rep. 914, 4 Inters. Com. Rep. 481, 18 S. E. 280; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Sherlock v. Alling, 93 U. S. 101, 23 L. ed. 820; Hall v. DeCuir, 95 U. S. 487, 24 L. ed. 548; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; State Tax on Gross Receipts, 15 Wall. 284, 21 L. ed. 164; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 711; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Burgess v. Western U. Teleg. Co. 92 Tex. 125, 71 Am. St. Rep. 833, 46 S. W. 794.

A number of cases are cited in the books, holding various legislative acts invalid and contrary to the commerce clause of the Constitution because the legislation attempted is national in its scope, or of such a nature as to admit of uniformity of regulation, affecting all of the states alike; in such cases, the power is exclusive of all state authority, and is vested in Congress alone, and all state laws contrary thereto are invalid.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Cardwell v. American River Bridge Co. 113 U. S. 209, 28 L. ed. 961, 5 Sup. Ct. Rep. 423.

There is a further line of cases wherein impositions are placed by the laws of the state on interstate commerce, the result of which legislation would be the creation of monopolies or restraining of trade by the protection of local industries at the expense of foreign industries. These laws are very clearly contrary to the commerce clause of the Constitution, for it was to prevent exactly this result that this clause was introduced. A violation of it in this particular would operate to the decided advantage of one state over another,—would create a discrimination such as is abhorrent to the law.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Bagg v. Wilmington, C. & A. R. Co. 109 N. C. 279, 14 L.R.A. 596, 26 Am. St. Rep. 573, 3 Inters. Com. Rep. 803, 14 S. E. 79.

The Hepburn act is not exclusive of all power of the state to control interstate commerce.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 620, 53 L. ed. 359, 29 Sup. Ct. Rep. 214; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 123, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140.

The rule of the state railroad commission is not unreasonable.

Patterson v. Missouri P. R. Co. 77 Kan. 236, 15 L.R.A.(N.S.) 733, 94 Pac. 138; Southern R. Co. v. Atlanta Sand & Supply Co. 135 Ga. 35, 68 S. E. 807; Hardwick Farmers Elevator Co. v. Chicago, R. I. & P. R. Co. 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088.

Mr. Chief Justice White delivered the opinion of the court:

The grocery company was permitted in the state courts to offset against a claim for demurrage, its claim against the railroad company for penalties aggregating $58 for delays in delivering cars to the grocery company, the consignee thereof, at the completion of interstate transportation, the right to which penalties arose from certain rules of the Railroad Commission of Mississippi, copied in the margin.†

†Rule I. Railroad companies shall, within twenty-four hours after the arrival of shipments, give notice by mail or other-

Eighteen dollars of the penalties accrued after June 29, 1906, the date of the passage of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288].

3] *If the case at bar, concerning, as it does, the delivery of cars at the termination of interstate commerce transportation, be considered as governed by the rule which controls the furnishing of cars for the making of such shipments, the decision recently announced in Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co. No. 25 of the present term [226 U. S. 426, ante, 284, 33 Sup. Ct. Rep. 174] would be controlling as to the penalties allowed as an offset which accrued after June 29, 1906. As, however, the prior penalties allowed as an offset would in any event be not controlled by the case referred to, we come to consider the validity of the allowance of all of the offset, independent of the principle applied in that case. Approaching the subject from this point of view, we think the rule of the State Commission upon which the right to all the so-called "delayage penalties" was based constituted an unreasonable burden upon interstate commerce within the decision in Houston & T. C. R. Co. v. Mayes, 201 U. S. 329, 50 L. ed. 775, 26 Sup. Ct. Rep. 491, since the requirement as to the delivery of cars within the short period fixed in the rule is absolute, and makes no allowance whatever for any justifiable and unavoidable cause for the failure to deliver. In saying this we do not give controlling effect to the observation contained in the opinion of the court below, that no question was made as to the reasonableness of the regulation, since the opinion itself states that the ruling in the Mayes Case was the main reliance of the railroad company, and in the argument at bar both sides have discussed the case on the theory that the substantial question to be decided was whether the rule of the commission which the court below upheld was an unreasonable regulation, in view of the decision in the Mayes Case.

The judgment of the Supreme Court of Mississippi is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

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wise, to consignee, of arrival of goods, together with weight and amount of freight charges due thereon, and on goods in carload quantities, said notices must contain letters or initials of the car, number of the car, and if transferred in transit, the number and initial of the original car, net weight, and the amount of freight charges due on same. No demurrage charge shall be made unless legal notice of arrival is given to consignee.

Any railroad company failing to give such notice, *and to deliver such freight at its depots or warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading, within twenty-four hours after arrival, computing from 7 a. m., the day following the arrival, shall forfeit and pay* the consignee, or other party whose interest is affected, the sum of $1 per car per day or fraction of a day, on all carload shipments, and 1 cent per one hundred (100) pounds per day or fraction thereof, on less than carload lots, with a minimum charge of 5 cents for any one package, after the expiration of said twenty-four hours.

Rule XI. No other charge shall be made for storage or demurrage except as provided in the foregoing rules, and if a railroad company is indebted to a shipper or consignee for delayage, then a claim for demurrage shall be offset by a claim for delayage.

*57 L. ed.*

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*WYNKOOP, HALLENBECK, CRAWFORD COMPANY, Appt., [4

v.

THOMAS J. GAINES, JR.

(See S. C. Reporter's ed. 4-8.)

**Appeal — from circuit court of appeals — bankruptcy case.**

The question whether an order of the bankruptcy court from which no appeal was taken, postponing a part of the claim of an officer of a bankrupt corporation to the claim of an intervener, was correctly interpreted by the referee and court in the distribution directed by a subsequent administrative order, is not one concerning the allowance or rejection of a claim within the meaning of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 25b, governing appeals from the circuit courts of appeals to the Federal Supreme Court, but is a matter arising in the administration of the bankrupt estate, which the Supreme Court is not empowered to review.

[For other cases, see Appeal and Error, III. d, 2, in Digest Sup. Ct. 1908.]

[No. 689.]

Submitted January 6, 1913. Decided January 20, 1913.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed an order of distribution of a bankrupt estate, ordered by the referee and approved by the

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NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 606.

District Court for the Southern District of New York. Dismissed for want of jurisdiction.

See same case below, 116 C. C. A. 177, 196 Fed. 357.

Mr. William Otis Badger, Jr., submitted the cause for appellant. Messrs. William H. Hotchkiss and Louis J. Wolff were on the brief.

Mr. John J. Crawford submitted the cause for appellee.

6] *Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

A corporation known as the Paris Modes Company was adjudicated a bankrupt on March 28, 1910. Gaines, the appellee, owned half of the stock of the company and was its president. His relatives, during the active life of the corporation, made large loans to the company. The claims for these advances were assigned to Gaines shortly before the bankruptcy, and he made proof of the same in the bankruptcy proceeding. Subsequently the Wynkoop, Hallenbeck, Crawford Company, the appellant, a creditor of the bankrupt estate which had proved its claim, filed an intervening petition asking for the re-examination and disallowance as against it of the Gaines claim. The ground for the relief prayed was that Gaines was equitably estopped from collecting his claim against the bankrupt estate to the prejudice of the petitioner, because of misrepresentations and concealment of material facts as to the financial condition of the bankrupt, made by him as an officer of the company, upon which the intervening company relied to its injury. The referee found that Gaines had made the representations complained of, and that although intentional fraud on his part was not shown, yet, if he had been the owner and holder of the notes upon which he had proved at the time of the making of the statements, they were of such a character as to cause him to be equitably estopped from asserting the claims to the prejudice of the intervener. As, however, it was found that Gaines had no interest in the claims embraced in his proof of debt at the time the representations were made by him, because he had acquired the claims by assignments subsequent thereto, the referee concluded that Gaines was entitled to assert the rights of his assignors, and was not 7] *estopped as against the Wynkoop, Hallenbeck, Crawford Company. In reviewing the action of the referee, the district court disapproved the same, and, on June 22, 1911, directed that the claim of Gaines, in so far as it represented demands against the bankrupt which were in existence at the time the representations were made by Gaines, should be postponed to the claim of the intervener. Neither party appealed from this order.

Thereafter, on August 3, 1911, the referee made an order that the dividend on the sum of $199,000 of the claim of Gaines, being the portion representing the indebtedness at the time of the misrepresentations, should be paid to the intervener. On petition to review, this order was affirmed by the district court. Gaines then carried the matter, by both appeal and petition for review, to the circuit court of appeals, complaining of the mode of distribution which had been adopted to execute the decree of June 22, 1911. That the controversy was thus limited and that no issue was raised or contention made concerning the decree of June 22, 1911, itself, which had become final, is certain. Thus, in August, 1912, in announcing its decision, the circuit court of appeals thus stated the controversy before it: "There is no occasion to go back of the order of June 22, 1911, or to inquire into its propriety. No appeal was taken or petition to review filed, and appellant here concedes that it lays down the rule for distribution in this case, and announces that he has no criticism to make as to the propriety of that rule. That is to say, although in his opinion the facts did not warrant the adoption of such a rule, he is willing to accept it and let the case be disposed of in conformity to its terms."

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That the motion to dismiss must be granted is manifest from the statement we have made. Whatever may have been the nature of the original controversy presented by the intervention of the Wynkoop Company, the acquiescence of both parties in the order of June 22, 1911, settled that controversy, and the questions remaining were purely administrative, concerning as they did merely the carrying out of the order according to its true intent and purpose. This being the case, the question whether the order of June 22, 1911, was correctly interpreted by the referee and the district court in the distribu-

tion directed by the subsequent administrative order is not one concerning an allowance or rejection of a claim within § 25b of the bankrupt act, but is a matter arising in the administration of the bankrupt estate, which we are not empowered to review.

Appeal dismissed.

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D. E. VIRTUE and the Owatonna Fanning Mill Company, Plffs. in Err.,
v.
CREAMERY PACKAGE MANUFACTURING COMPANY, the Owatonna Manufacturing Company, and Frank LaBare.

(See S. C. Reporter's ed. 8–39.)

**Monopoly — combination in restraint of trade — patented articles.**

1. A contract by which a corporation, manufacturing dairy supplies under various patents owned by it, and selling them throughout the United States, constituted another corporation its exclusive sales agent, and fixed the list price of its products, does not violate the prohibition of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations in restraint of commerce.

[For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.]

**Monopoly — combination in restraint of trade — treble damages.**

2. A corporation manufacturing dairy products under patents owned by it is not chargeable with participation in a combination formed contrary to the act of July 2, 1890, by its exclusive sales agent and other manufacturers and dealers, so as to render the corporation and its agent liable under the treble damage clause of § 7 of that act to persons joined as defendants in simultaneous patent infringement suits separately brought by such principal and agent, either because the sales agency contract, which antedated the illegal combination, provided that the manufacturer should protect the agent from all suits for infringement, should defend the validity of the patents, and promptly attack infringers, or because of a supplementary contract for the settlement of claims growing out of reciprocal charges of infringement which has no other connection with the unlawful combination than that some of the claims were against corporations which were parties to that unlawful agreement, or because of any negotiations preceding the execution of the sales agency contract which have for their inducement and object the settlement of controversies and rights growing out of earlier contracts, or because of the simultaneous bringing of the infringement suits.

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Argued December 9 and 10, 1912. Decided January 20, 1913.

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Mr. William Otis Badger, Jr., submitted the cause for appellant. Messrs. William H. Hotchkiss and Louis J. Wolff were on the brief.

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the defendant Creamery Package Manufacturing Company against these plaintiffs was only interlocutory. Further, the questions of monopoly, restraint of trade, and lack of title are new in this action, and were not litigated or at issue in the patent infringement suit, as shown by the pleadings in the patent infringement suit set forth in full in the complaint in this action.

Harmon v. Struthers, 48 Fed. 260; Ex parte National Enameling & Stamping Co. 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; Humiston v. Stainthorp, 2 Wall. 106, 17 L. ed. 905; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; Water, Light & Gas Co. v. Hutchinson, 19 L.R.A.(N.S.) 219, 90 C. C. A. 547, 160 Fed. 41; Brush Electric Co. v. Western Electric Co. 22 C. C. A. 543, 46 U. S. App. 355, 76 Fed. 761; Australian Knitting Co. v. Gormly, 138 Fed. 92; B. Roth Tool Co. v. New Amsterdam Casualty Co. 88 C. C. A. 569, 161 Fed. 709.

This conspiracy was a continuing offense; every overt act committed in furtherance thereof was a renewal of the same as to all of the parties. The statute of limitations does not begin to run until the commission of the last overt act; neither can the parties claim a vested right to violate the law.

19 Am. & Eng. Enc. Law 2d ed. 136, "Limitations of Actions;" United States v. Greene, 115 Fed. 343; Ochs v. People, 124 Ill. 399, 16 N. E. 662; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; 8 Cyc. 678.

It is an elementary principle of evidence that where two or more persons are associated together for some illegal purpose, the acts or declarations of one of them in reference to the common object are admissible against them all.

1 Greenl. Ev. § 111; 2 Wigmore, Ev. § 1079; American Fur Co. v. United States, 2 Pet. 358, 7 L. ed. 450; Clune v. United States, 159 U. S. 593, 40 L. ed. 270, 16 Sup. Ct. Rep. 125; Wiborg v. United States, 163 U. S. 656, 41 L. ed. 298, 16 Sup. Ct. Rep. 1127, 1197.

A combination between two or more independent and competing corporations engaged in manufacturing and selling under letters patent, and having an interstate trade and commerce, to eliminate the competition between them and create a monopoly, is in violation of the Sherman anti-trust act.

Bloant Mfg. Co. v. Yale & T. Mfg. Co. 166 Fed. 555; National Harrow Co. v. Hench, 76 Fed. 667, 39 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36, 84 Fed. 226; Bobbs-Merrill Co. v. Straus, 139 Fed. 155; Strait v. National Harrow Co. 18 N. Y. Supp. 224; National Harrow Co. v. E. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462; Mines v. Scribner, 147 Fed. 927; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Pope Mfg. Co. v. Gormully, 144 U. S. 238, 36 L. ed. 419, 12 Sup. Ct. Rep. 632; State v. Creamery Package Mfg. Co. 110 Minn. 437, 136 Am. St. Rep. 514, 126 N. W. 126, 623, 115 Minn. 207, — L.R.A.(N.S.) —, 132 N. W. 268, Ann. Cas. 1912 D, 820.

A court will not lend its aid to the accomplishment of an unlawful object.

Peck v. Heurich, 167 U. S. 624, 42 L. ed. 302, 17 Sup. Ct. Rep. 927; Graham v. La Crosse & M. R. Co. 102 U. S. 148, 26 L. ed. 106; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Hoffman v. Bullock, 34 Fed. 248; Forker v. Brown, 10 Misc. 161, 30 N. Y. Supp. 827; Gruber v. Baker, 20 Nev. 472, 9 L.R.A. 308, 23 Pac. 858, 28 Am. & Eng. Enc. Law, 2d ed. 866, 867; 10 Cyc. 161; National Harrow Co. v. Hench, 84 Fed. 226; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Levy v. Kansas City, 22 L.R.A.(N.S.) 862, 93 C. C. A. 523, 168 Fed. 524; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; McMullen v. Hoffman, 174 U. S. 639, 48 L. ed. 1117, 19 Sup. Ct. Rep. 839; Thomson v. Thomson, 7 Ves. Jr. 470, 6 Revised Rep. 151.

Every combination resulting directly or necessarily in restraint of interstate trade is prohibited. It is immaterial what kind of a combination it is; none is exempt.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

To wrongfully charge infringement, or to say that a person has no patent, or has not a valid patent, is an actionable wrong. This is true apart from any violation of Sherman anti-trust act.

Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 195; 25 Cyc. 263, 559; Bowsky v. Cimiotti Unhairing Co. 72 App. Div. 172, 76 N. Y. Supp. 465; Watson v. Trask, 6

Ohio, 531, 27 Am. Dec. 271; Cousins v. Merrill, 8 U. C. C. P. 114; Meyrose v. Adams, 12 Mo. App. 329; Flint v. Hutchinson Smoke Burner Co. 110 Mo. 492, 16 L.R.A. 243, 33 Am. St. Rep. 476, 19 S. W. 804; Germ Proof Filter Co. v. Pasteur Chamberland Filter Co. 81 Hun, 49, 30 N. Y. Supp. 584; Wren v. Weild, L. R. 4 Q. B. 731, 10 Best & S. 51, 38 L. J. Q. B. N. S. 327, 20 L. T. N. S. 1007; Swan v. Tappan, 5 Cush. 104; McElwee v. Blackwell, 94 N. C. 261; Snow v. Judson, 38 Barb. 210; Dicks v. Brooks, L. R. 15 Ch. Div. 22, 49 L. J. Ch. N. S. 812, 43 L. T. N. S. 71, 29 Week. Rep. 87; Barley v. Walford, 9 Q. B. 197, 15 L. J. Q. B. N. S. 369, 10 Jur. 917.

To take away plaintiff's customers by intimidation and threats renders defendants liable to damages under the Sherman anti-trust act.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; People's Tobacco Co. v. American Tobacco Co. 95 C. C. A. 566, 170 Fed. 396.

Plaintiffs have a cause of action at common law.

38 Cyc. 517; Bond v. Chapin, 8 Met. 33; Moulton v. Lowe, 32 Me. 466; Foster v. Dow, 29 Me. 442; Smith v. Hyndman, 10 Cush. 554; Streeper v. Ferris, 64 Tex. 12; Hackett v. McMillan, 112 N. C. 513, 21 L.R.A. 862, 17 S. E. 433; Metcalf v. Alley, 24 N. C. (2 Ired. L.) 38; Ertz v. Produce Exchange Co. 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; Albro J. Newton Co. v. Erickson, 144 App. Div. 939, 129 N. Y. Supp. 1111; Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 7 L.R.A.(N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 Ann. Cas. 1184; Randall v. Lonstorf, 126 Wis. 147, 3 L.R.A.(N.S.) 470, 105 N. W. 663, 5 Ann. Cas. 371; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Employing Printers' Club v. Doctor Blosser Co. 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 Ann. Cas. 694; Baldwin v. Escanaba Liquor Dealers' Asso. 165 Mich. 98, 130 N. W. 214; Standard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Dunshee v. Standard Oil Co. *152 Iowa, 618, 36 L.R.A.*

*57 L. ed.*

(N.S.) 263, 132 N. W. 371; VanHorn v. VanHorn, 56 N. J. L. 318, 28 Atl. 669; Severns v. Brainard, 61 Minn. 265, 63 N. W. 477; Antcliff v. June, 81 Mich. 477, 10 L.R.A. 621, 21 Am. St. Rep. 533, 45 N. W. 1019; Milling v. Sulphur, Timber & Lumber Co. 119 La. 585, 44 So. 307; Atlanta Ice & Coal Co. v. Reeves, 136 Ga. 294, 36 L.R.A. (N.S.) 1112, 71 S. E. 421; Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207; Bradshaw v. Frazier, 113 Iowa, 579, 55 L.R.A. 258, 86 Am. St. Rep. 394, 85 N. W. 752; Grimestad v. Lofgren, 105 Minn. 286, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; Smith v. Nippert, 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846; 32 Cyc. 541–543; Rossiter v. Minnesota Bradner-Smith Paper Co. 37 Minn. 296, 33 N. W. 855; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

All the defendants in this case assume that the 1893 agreement authorized the Owatonna Company to put the Disbrow Company absolutely out of business, forever, both at Mankato and everywhere else. If that 1893 contract purported to give any such power to the Owatonna Company, it was illegal and void.

Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 238, 36 L. ed. 419, 12 Sup. Ct. Rep. 637.

Patentees may compose their differences as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage.

National Harrow Co. v. Hench, 39 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36.

It cannot be material just how much competition was suppressed by any one contract.

W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

Combinations otherwise in violation of the anti-trust law are not valid because based on a few patents.

United Shoe Machinery Co. v. LaChapelle, 212 Mass. 467, 99 N. E. 289; State v. Creamery Package Mfg. Co. 110 Minn. 415, 136 Am. St. Rep. 514, 126 N. W. 126, 623.

An innocent act becomes unlawful if made part of a criminal scheme.

Garland v. State, 112 Md. 83, 75 Atl. 631, 21 Ann. Cas. 28; State v. Stewart, 59 Vt. 286, 59 Am. Rep. 710, 9 Atl. 559; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Klingel's Pharmacy v. Sharp &

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Dohme, 104 Md. 218, 7 L.R.A.(N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 Ann. Cas. 1184; Gatzow v. Buening, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289.

A patent infringement suit is much like an ejectment action; it is to eject defendant from the domain claimed by plaintiff. A plaintiff in ejectment must recover on the strength of his own title.

King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925.

An illegal deed, or one based on an illegal consideration, or a deed absolutely void because in fraud of creditors, is not sufficient.

15 Cyc. 17, 44, note; Kirkpatrick v. Clark, 132 Ill. 342, 8 L.R.A. 511, 22 Am. St. Rep. 531, 24 N. E. 71; Watkins v. Nugen, 118 Ga. 372, 375, 45 S. E. 260, 262.

**Mr. Emanuel Cohen** argued the cause, and, with Messrs. John B. Atwater, Frank W. Shaw, and George C. Fry, filed a brief for defendant in error the Creamery Package Manufacturing Company:

In order to condemn an agreement as void under the act of July 2, 1890, its dominant purpose must be an interference with interstate or international commerce.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208, 179 Fed. 118; Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Anderson v. United States, 171 U. S. 604, 615, 43 L. ed. 300, 305, 19 Sup. Ct. Rep. 50; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 229, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 331, 48 L. ed. 679, 697, 24 Sup. Ct. Rep. 436; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 623, 48 L. ed. 1142, 1154, 24 Sup. Ct. Rep. 784; Standard Oil Co. v. United States, 221 U. S. 1, 66, 55 L. ed. 619, 647, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737.

Even if the Creamery Company were assumed to be a party to an unlawful combination in restraint of trade, this would not deprive it of its right to sue for infringement of its patents.

Strait v. National Harrow Co. 51 Fed. 819; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; Dickerman v. Northern Trust Co. 176 U. S. 181, 190, 192, 44 L. ed. 423, 430, 431, 20 Sup. Ct. Rep. 311; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 295, 298, 299, 49 L. ed. 739, 761, 763, 764, 765, 25 Sup. Ct. Rep. 493; Re Metropolitan R. Receivership, 208 U. S. 90, 111, 52 L. ed. 403, 413, 28 Sup. Ct. Rep. 219; International Harvester Co. v. Smith, 30 L.R.A.(N.S.) 580, note.

The owner of a patent may notify infringers of his claims and warn them that unless they desist, suits will be brought to protect him in his legal rights. The only limitation on the right to issue such warnings is the requirement of good faith.

Kelley v. Ypsilanti Dress Stay Mfg. Co. 10 L.R.A. 686, 44 Fed. 19; Computing Scale Co. v. National Computing Scale Co. 79 Fed. 962; A. B. Farquhar Co. v. National Harrow Co. 49 L.R.A. 755, 42 C. C. A. 600, 102 Fed. 714; Adriance, P. & Co. v. National Harrow Co. 58 C. C. A. 163, 121 Fed. 827; Warren Featherbone Co. v. Landauer, 151 Fed. 130, Mitchell v. International Tailoring Co. 169 Fed. 145; 30 Cyc. 1054.

The agreement made on the part of the Disbrows not to engage in the churn or butter-worker business, either manufacturing or selling, during the life of said patents or this contract, did not make the transaction unlawful. The restraint of trade was not greater than the circumstances of the transaction required, particularly in view of the breach of the 1893 agreement by the Disbrows.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572.

Owners of property have the right to select their customers, to sell and to refuse to sell to whomsoever they choose, and to fix different prices for sales of the same commodities to different persons.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 461.

The stipulation by the Disbrows, assigning to the Owatonna Manufacturing Company all modifications or improvements upon any of said inventions or patents, or in and to any other inventions that have heretofore or may hereafter be made or invented by them, relating or applicable to any kind of combined churns and butter-workers, was valid.

Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Westinghouse Air Brake Co. v. Chicago Brake & Mfg. Co. 85 Fed. 786, Reece Folding Mach. Co. v. Fenwick, 2

L.R.A.(N.S.) 1094, and note, 72 C. C. A. 39, 140 Fed. 288.

The stipulations in the Owatonna Manufacturing Company agreements as to prosecuting infringers were usual covenants, not warranting the inference of a purpose to drive competitors out of business by groundless suits.

Foster v. Goldschmidt, 22 Blatchf. 287, 21 Fed. 70; Macon Knitting Co. v. Leicester & C. Mills Co. 113 Fed. 844; Wilfley v. New Standard Concentrator Co. 90 C. C. A. 543, 164 Fed. 421; Critcher v. Linker, 169 Fed. 653; Jackson v. Allen, 120 Mass. 64; Forncrook Mfg. Co. v. Barnum Wire & Iron Works, 63 Mich. 195, 29 N. W. 537; Croninger v. Paige, 48 Wis. 229, 4 N. W. 106; Washburn & M. Mfg. Co. v. Southern Wire Co. 37 Fed. 428.

The Owatonna agreements had to do wholly with manufacture, and were thus beyond the purview of the Sherman law.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; United States v. Northern Securities Co. 120 Fed. 728; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206; Cornell v. Coyne, 192 U. S. 418, 428, 48 L. ed. 504, 508, 24 Sup. Ct. Rep. 383; Loewe v. Lawlor, 208 U. S. 274, 297, 52 L. ed. 488, 497, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

The Owatonna agreements had to do wholly with patented articles, and were thus beyond the purview of the Sherman law.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 91, 46 L. ed. 1058, 1068, 22 Sup. Ct. Rep. 747; Henry v. A. B. Dick Co. 224 U. S. 1, 28, 30, 56 L. ed. 645, 656, 657, 32 Sup. Ct. Rep. 364.

The prohibitions of the Sherman law extend only to undue restraint.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

There is nothing in the 1898 general agreement to show a design to drive competitors out of business by groundless suits.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; United States v. Standard Oil Co. 173 Fed. 177; Cincinnati, B. P. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208.

The Creamery Company has never monopolized or attempted to monopolize any part of interstate commerce within the meaning of the Sherman law.

Noyes, Corporate Relations, § 389, p. 711; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379.

Even if the Creamery Company had monopolized a substantial part of interstate commerce, no causal connection is shown between its acts and the damages claimed by plaintiffs.

21 Am. & Eng. Enc. Law, 2d ed. 480; 29 Cyc. 439.

An executed illegal contract carries title to its subject-matter in the same way as if the contract were legal, unless the law violated declares to the contrary.

15 Am. & Eng. Enc. Law, 932; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93.

The Sherman law does not forbid the passage of title, but, on the contrary, impliedly sanctions it.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493.

A patent owner, if a party to an illegal combination, is not by that fact debarred from equitable remedies against an infringer.

Strait v. National Harrow Co. 51 Fed. 819; Edison Electric Light Co. v. Sawyer-Man Electric Co. 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. 592; American Soda-Fountain Co. v. Green, 69 Fed. 333; Bonsack Mach. Co. v. Smith, 70 Fed. 383; Brown Saddle Co. v. Troxel, 98 Fed. 620; National Folding-Box & Paper Co. v. Robertson, 99 Fed. 985; Otis Elevator Co. v. Geiger, 107 Fed. 131; General Electric Co. v. Wise, 119 Fed. 922; Fuller v. Berger, 65 L.R.A. 381, 56 C. C. A. 588, 120 Fed. 274; Motion Picture Patents Co. v. Laemmle, 178 Fed. 104; Motion Picture Patent Co. v. Ullman, 186 Fed. 174.

The plaintiffs suffered no damage by the successful prosecution of the suit against them.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Strait v. National Harrow Co. 51 Fed. 819.

The plaintiffs are in fact prosecuting a suit for malicious prosecution in defiance of the rule that such a suit is not maintainable unless the primary suit has terminated in their favor.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 461; Pennsylvania R. Co. v. Marchant, 119 Pa. 561, 4 Am. St. Rep. 659, 13 Atl. 690; Smith v. Wilcox, 47 Vt. 545; Hortenstine v. Virginia-Carolina R. Co. 102 Va. 914, 47 S. E. 996; Connolly v. Western U. Teleg. Co. 1

Va. 51, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618; Tyler v. Western U. Teleg. Co. 54 Fed. 634; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 147, 148, 30 L. ed. 614, 617, 7 Sup. Ct. Rep. 472; 26 Cyc. 55.

According to the weight of authority and reason a suit for the malicious prosecution of a civil action is not maintainable unless there be an interference with person or property.

21 Am. L. Reg. 281, 353; McCormick Harvesting Mach. Co. v. Willan, 93 Am. St. Rep. 466, note; 4 Current Law, pp. 472, 474; 19 Am. & Eng. Enc. Law, 652, 653; 26 Cyc. 14–16; Wetmore v. Mellinger, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870; Smith v. Michigan Buggy Co. 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569; Potts v. Imlay, 4 N. J. L. 330; Luby v. Bennett, 111 Wis. 613, 56 L.R.A. 261, 87 Am. St. Rep. 897, 87 N. W. 804; Burnap v. Albert, Taney, 244, Fed. Cas. No. 2,170; Cooper v. Armour, 8 L.R.A. 47, 42 Fed. 215; Bishop v. American Preservers' Co. 51 Fed. 272; Wade v. National Bank, 114 Fed. 377; Tamblyn v. Johnson, 62 C. C. A. 601, 126 Fed. 270; Wilkinson v. Goodfellow-Brooks Shoe Co. 141 Fed. 218.

Even in jurisdictions where a suit may be maintained without interference with persons or property, the want of probable cause must be very clearly proven. There is in this case no evidence at all of want of probable cause.

Eickhoff v. Fidelity & C. Co. 74 Minn. 139, 76 N. W. 1030; Ferguson v. Arnow, 142 N. Y. 583, 37 N. E. 626.

The same or an even greater intensity of proof is required when a patent is challenged. The patent is of itself prima facie proof that the patentee was the original and first inventor, and the one attacking it has a much greater burden than merely producing a preponderance of evidence against it.

Seymour v. Osborne, 11 Wall. 516, 538, 20 L. ed. 33, 37; Coffin v. Ogden, 18 Wall. 120, 124, 21 L. ed. 821, 823; Cantrell v. Wallick, 117 U. S. 689, 695, 29 L. ed. 1017, 1019, 6 Sup. Ct. Rep. 970; Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.) 143 U. S. 275, 284, 36 L. ed. 154, 158, 12 Sup. Ct. Rep. 443, 450; Deering v. Winona Harvester Works, 155 U. S. 286, 300, 39 L. ed. 153, 158, 15 Sup. Ct. Rep. 118.

The complainants have waived their right to the penalty under the Sherman law by bringing suit in the state court for malicious prosecution.

7 Enc. Pl. & Pr. 364; 15 Cyc. 260; Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; William W. Bierce v. Hutchins, 205 U. S. 340, 346, 51 L. ed. 828, 833, 27 Sup. Ct. Rep. 524; A. Klipstein & Co. v. Grant, 72 C. C. A. 511, 141 Fed. 72; Water, Light & Gas Co. v. Hutchinson, 19 L.R.A. (N.S.) 219, 90 C. C. A. 547, 160 Fed. 41; Thompson v. Howard, 31 Mich. 312.

A patent owner may notify infringers of his claims and threaten them with a suit unless they desist. If he does this in good faith, believing his claims to be valid, and brings his suit with reasonable diligence, he is acting within his rights and incurs no liability.

Kelley v. Ypsilanti Dress-Stay Mfg. Co. 10 L.R.A. 686, 44 Fed. 19; Computing Scale Co. v. National Computing Scale Co. 79 Fed. 962; A. B. Farquhar Co. v. National Harrow Co. 49 L.R.A. 755, 42 C. C. A. 600, 102 Fed. 714; Adriance, P. & Co. v. National Harrow Co. 58 C. C. A. 163, 121 Fed. 827; Warren Featherbone Co. v. Landauer, 151 Fed. 130; Dittgen v. Racine Paper Goods Co. 164 Fed. 84; Mitchell v. International Tailoring Co. 169 Fed. 145; 30 Cyc. 1054.

The patent owner has the right to appeal to the court for the protection of his patent. Sometimes the exercise of this right carries with it a damage in lessening the sales of the challenged device made or used by the defendants. Such damage is an incident of the suit and cannot be made the ground of a recovery.

Kelley v. Ypsilanti Dress-Stay Mfg. Co. 10 L.R.A. 686, 44 Fed. 19.

The warnings, considered as a separate cause of action, were barred by the statute of limitations.

State v. Bonness, 99 Minn. 392, 109 N. W. 703.

The construction given by the highest tribunal in the state to the state statute of limitations is adopted in this court.

Balkam v. Woodstock Iron Co. 154 U. S. 177, 38 L. ed. 953, 14 Sup. Ct. Rep. 1010; Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261, 262.

The Sherman law operates only on restraint of trade. There is no violation of the law unless free competition is directly and substantially restricted.

Northern Securities Co. v. United States, 193 U. S. 197, 331, 48 L. ed. 679, 697, 24 Sup. Ct. Rep. 436.

The fundamental thing is free competition where the public is entitled to it. When the particular thing is not within the field of competition, it is not within the Sherman law, and restraints of trade in it are not punishable under that law, because they invade no right of the public. Examples of noncompetitive things are contracts or combinations relating to trade secrets (Board of Trade v. Christey Grain & Stock

Co. 198 U. S. 236, 252, 49 L. ed. 1031, 1039, 25 Sup. Ct. Rep. 637), and those relating to personal service (State v. Duluth Bd. of Trade, 107 Minn. 506, 23 L.R.A.(N.S.) 1260, 121 N. W. 395).

The monopoly of the United States patent is merely the exclusion of the public for a definite term from something new and useful not theretofore known or used by it; and this new and useful thing becomes public property, barring only the limited but exclusive term given to the inventor. The inventor takes nothing from the public, but, on the contrary, gives the public something that it did not have, and presumably, but for his talent and industry, would never have had.

Grant v. Raymond, 6 Pet. 218, 8 L. ed. 376; Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532; United States v. American Bell Teleph. Co. 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; Continental Paper Bag Co. v. Eastern Paper Bag Co. 210 U. S. 405, 52 L. ed. 1122, 28 Sup. Ct. Rep. 748; Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364.

The Sherman law, if extended to patents and combinations in patents, would not prevent the granting of any number of patents in the same art to the same inventor. In fact, unless prohibited by that law, an inventor can buy later inventions made by others and unite them with his own for his own advantage. This is shown by the opinion in United States v. American Bell Teleph. Co. 167 U. S. 224, 249, 42 L. ed. 144, 157, 17 Sup. Ct. Rep. 809; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365.

Patent owners may lawfully secure for themselves, through a combination of their patents, a traffic, however extensive, in unpatented articles.

Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364.

**Mr. Amasa C. Paul** also argued the cause, and, with Mr. W. A. Speery, filed a brief for defendants in error, the Owatonna Manufacturing Company and Frank LaBare.

24] *Mr. Justice McKenna delivered the opinion of the court:

Action for the recovery of damages in the sum of $406,881.60, being the total of certain specific items mentioned in the complaint, and for all other damages sustained by plaintiffs (so designated throughout this opinion) by virtue of the facts stated, including all sums that they are entitled to under the provisions of the anti-trust act of 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], together with an attorneys' fee. The grounds of recovery are set forth in the complaint, which, inclusive of exhibits, occupies 150 pages of the record, and seems to make impossible any attempt at brevity or condensation. The case, however, is not in wide compass, and attention may be concentrated upon certain considerations. The contention of plaintiffs in its most general form is that the defendants entered into a conspiracy or combination in restraint of interstate trade, and in execution of it plaintiffs' interstate business was destroyed by defendants wrongfully prosecuting two suits against them for the infringement of patents under which the articles of their trade were manufactured, and by circulating slanders and libels to the effect that such articles were infringements of defendants' patents. A cause of action is hence asserted under § 7 of the anti-trust act. The section is as follows: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorneys' fee."

To justify recovery, therefore, injury must result from something forbidden or made unlawful by the act, and *what is[25 forbidden or made unlawful is expressed in §§ 1 and 2. Section 1 is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. . . ."

The acts forbidden are made a misdemeanor. And by § 2 it is also made a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations."

The question occurs, Do the facts of the case show a breach of the law by defendants and injury resulting from it to plaintiffs? The following facts are alleged: On the 24th of February, 1898, or just prior thereto, certain corporations and one partnership were engaged in making or selling creamery supplies, including combined churns and butter workers, and transporting them in state and interstate commerce. All of the corporations and the partnership were in direct competition in their lines of business, and as the result

of it all of the articles manufactured and sold by them were sold at no more than a fair price and legitimate profit. The corporations controlled over 90 per cent of the business of manufacturing and selling creamery and dairy supplies in the states of Michigan and Indiana and in all the states west and in some of the states east thereof, manufacturing the articles in one or more of the states, and shipping by the same common carriers from the states where manufactured to other states, and distributing and selling such articles there.

On the 24th of February, 1898, the Creamery Package Manufacturing Company, one of the corporations, and its stockholders, then engaged in the manufacture and sale of dairy and creamery supplies, but not 26]of *combined churns and butter workers, it being as to the latter only the agent for their sale, entered into a contract with the other corporations and the partnership, by which it was agreed to increase the capital stock of the Creamery Package Manufacturing Company to enable it to purchase the property and business of the other corporations, parties to the contract, including in the property all patents and applications for patents.

The contract is very elaborate and verbose, but we need not give its particular covenants, as no point is made upon them; it being only alleged and contended that its purpose and effect were that the Creamery Package Manufacturing Company should acquire the property and business of the other corporations, and that while the latter should cease to exist, they should be represented as continuing as separate and independent concerns and competitors in the market with the Creamery Package Manufacturing Company, and with one another, while in truth and fact there would be no competition between them.

It is alleged that, in execution of the purpose of the contract, traveling men from the different houses, under instructions from the Creamery Package Manufacturing Company, met and secretly arranged the bid each should interpose, determining by by lot and other ways who should interpose the lowest bid and who the highest.

The Owatonna Company was not a party to that contract, but it is contended that it participated in or is brought into the scheme and purpose of the contract by certain agreements entered into by it with the Creamery Package Manufacturing Company. They are all attached to the complaint as exhibits, and may be described as transferring certain patents or the right *to use* certain patents to the Creamery 27]*Package Manufacturing* *Company. A 402

brief summary of them is given in the margin.†

*It is alleged that on July 8, 1904, the[28 Creamery Package Manufacturing Company and the Owatonna Company brought suit separately in the circuit court of the United States for the first division of the state of Minnesota, at Winona, against the plaintiffs, charging infringement of patents for churns and butter workers. The bills in the suits are attached to the complaint in this action and are in the usual form. Process was issued and the plaintiffs here answered. Upon proofs taken a decree was entered in favor of plaintiffs and against the Owatonna Company in the suit brought by it. It is not alleged in the complaint, but it is in the answer of the Creamery *Package Manufacturing Company, and[29 not denied, that it obtained a decree adjudging plaintiffs here infringers of the patents which were the subject of the suit.

It is alleged that the defendants here conspired with one another to commence and

†The first of the agreements between the companies was made April 19, 1897 (that was before the contract of February 24, 1898) and recited that the Owatonna Company was the owner of certain patents covering combined churns and butter workers, and was manufacturing the same, and that, as the Creamery Package Manufacturing Company was desirous of handling the same as sole agents, the agreement was made. It conveyed five patents issued between January, 1893, and August, 1896, and applications for another. There were provisions as to the size, material, and other details; also as to royalties to be paid to the Disbrow Manufacturing Company. And the Owatonna Company agreed to protect the Creamery Package Manufacturing Company from all suits for infringement of the patents, or claims for damages arising out of the sales of the churns, and promptly and vigorously to attack infringers, and to procure patents on all improvements made by it or by any person in its behalf.

There was an addition to the contract, made June 4, 1897, in regard to the repair parts of the "Winner" churns and the repair and perfection of the same, and the rebate from the billing price.

On January 12, 1898, a supplemental contract was made by the same parties as to the disposition of the royalties received under a license contract made September 30, 1897, with the Cornish, Curtis, & Greene Manufacturing Company, of Fort Atkinson, Wisconsin.

On June 4, 1898, another agreement was made between the parties which referred to the agreement of April, 1897, and to the pendency of litigation based on the infringement or charges of infringement of the patents with which that contract was concerned. For the purpose of adjusting all claims growing out of such infringe-

prosecute the suits, and that they were commenced and prosecuted maliciously and without probable cause, whereby plaintiffs were caused certain items of damages.

The other allegations of the complaint need not be repeated in detail. They are to the effect that the contract of February 24, 1898, was made in violation of law, to restrain state and interstate trade and commerce, and that all that was done under it was in pursuance and execution of that purpose, including the suits brought against plaintiffs by the Owatonna Company and the Creamery Package Manufacturing Company for the infringement of patents. That prior to the bringing of those suits, plaintiffs had a good and established trade and market for their churns, and were manufacturing and shipping them in the states of Wisconsin, Iowa, and South Dakota; and knowing this, and fearing that such trade would be continued in those states, and be extended to other states, defendants commenced the suits for infringement, and prior thereto and since have written letters and talked to purchasers and prospective purchasers of plaintiffs' churns, threatening lawsuits and actions for damages for infringement of the patents described in the bills, and also threatened suits for injunction, and by this means destroyed plaintiffs' state and interstate trade.

That plaintiff D. E. Virtue and one Martin Deeg were the first joint inventors of a churn and butter worker, and that a patent was issued therefor, No. 634,074, under which they manufactured those articles and sold them in state and interstate commerce except as they had been prevented by the suits brought against them as hereinbefore stated. And by elaborate allegations the patents upon *which[30 those suits were brought are attacked for want of invention and novelty.

That the Creamery Package Manufacturing Company has purchased the property and business of other competitive concerns, and that it has had during the last several years contracts with many and numerous dealers in the articles sold by which it required them to purchase such goods exclusively of it at certain fixed and maintained prices, and to sell only in certain designated territory, the object of which is to secure a monopoly to the Creamery Package Manufacturing Company, and to restrain interstate commerce. That all of the acts detailed were done in pursuance of a common scheme and conspiracy on the part of all of the defendants during the years 1897 and 1898, and ever since maintained and carried out, limiting the production of creamery supplies, fixing and determining their prices, restraining trade in them, and monopolizing over 90 per cent of their production and sale, of which, prior to one year before the bringing of this action, plaintiff had no knowledge or notice except the two suits in equity and the contract by which Virtue and Deeg

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ment, and settling the litigation between the Owatonna Company and F. B. Fargo & Company, whose rights the Creamery Package Manufacturing Company had acquired, it was agreed that one of the suits which was named, and in which proofs had been taken, should be brought to a speedy hearing and all other suits dismissed.

The Creamery Package Manufacturing Company agreed not to manufacture the machine known as the "Winner" or the "Disbrow," both referred to in the contract of April, 1897, called the "sales contract," or any other of a described kind made by the Owatonna Company, but was at liberty to manufacture and sell churns and butter workers of any other construction. Satisfaction of all royalties, damages, and costs was agreed on.

The sales contract was continued in force, and there was added to it a provision entitling the Owatonna Company to furnish 55 per cent in value at list price of the churns and butter workers sold by the Creamery Package Manufacturing Company in each year after the date of the contract. If less than that per cent should be made and furnished by the Owatonna Company, certain sums were provided to be paid by the other company. And the latter company agreed not to *discriminate* against the machines manufactured by the Owatonna company in favor of machines of its own manufacture or of other manufacturers, and that it would give to the machines of the Owatonna Company the same effort and energy to effect their sale. The Owatonna Company agreed to protect the patents and prosecute infringers and give assistance to the Creamery Package Manufacturing Company in the prosecution of infringers. Permission was given to the Owatonna Company to use the "Disbrow" and "Winner" churns owned by the Creamery Package Manufacturing Company or to be acquired by it. There was also an agreement made on the 4th of June, 1898, between the parties in settlement of claims on account of the use of patents with certain other parties besides F. B. Fargo & Company, whose business the Creamery Package Manufacturing Company had acquired. There was a provision for paying royalties to the Disbrow Company, with other details not necessary to mention.

On January 1, 1903, another agreement was entered into between the parties which disposed of and adjusted rights and contentions as to patents for a machine called a pasteurizer and cream ripener. By an agreement made January 1, 1903, the prices provided for in the sales contract were changed in certain particulars.

transferred to the Creamery Package Manufacturing Company the exclusive right to manufacture the churn and butter worker under patent No. 634,074 for the period of three years. That they did not know that that contract was procured as part of the schemes of defendants. That they were at no time parties to acts of defendants, and did not know of the wrongful contracts and combinations until after the time limited to take the testimony in the two equity suits.

The defendants answered the complaint, admitting some of its allegations and denying others. They alleged performance of the contract between the Creamery Package Manufacturing Company and the plaintiff Virtue and said Deeg, and opposed to the charges of the complaint certain affirmative matters, including two actions brought in the state court.

31] *A jury was impaneled to try the issues, which under the instructions of the court, found a verdict for defendants upon which a judgment was duly entered. It was affirmed by the circuit court of appeals. 102 C. C. A. 413, 179 Fed. 115.

The circuit court and the circuit court of appeals both decided that the damages which plaintiffs alleged they sustained were not a consequence of a violation by defendants of the provisions of the Sherman anti-trust law. Both courts assumed, for the purpose of their decision, that the contract of February 24, 1898, between the Creamery Package Manufacturing Company and the other manufacturers and sellers of churns and butter workers was a combination in restraint of trade; but both courts held that the Owatonna Company was not a party to it, nor became associated subsequently in its scheme.

Of the infringement suits the court of appeals said they exhibited "a case where two suits were brought, one by a party to a lawful agreement, the other by a party to an unlawful agreement, for the infringement of patents owned by them respectively, and where both parties were doing no more then exercising their legal rights." And the court declared in effect that it could see no sinister significance in the suits being simultaneous, and said, further, that after a thorough examination of the record, it agreed with the circuit court that there was no evidence offered at the trial "'which would warrant the jury in finding that any agreement of that kind existed.'"

The plaintiffs attack this conclusion in twenty-one propositions, some of which are of very broad generality, and all, counsel contend, are supported by the decisions of this and other courts. It is quite impossible to consider them in detail without a review and repetition of the cases. The view we take of the case makes this unnecessary. The case is, as we have said, in narrow compass. The complaint charges a violation of the Sherman law, and, as a means of accomplishing its purpose, the destruction of *plaintiffs' interstate trade[32 by a malicious litigation of their rights. A necessary element of the charge is the co-operation of at least the corporate defendants in the purpose, and this determines our inquiry. In answering it we shall assume, as the lower courts assumed, that by the contract of February, 1898, the Creamery Package Manufacturing Company and the corporations competing with it entered into a combination offensive to the law. Did the Owatonna Company participate in it, or subsequently join it or co-operate to execute its purposes? The question must be answered in the negative, as we shall proceed to show.

The Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, which articles it sold throughout the United States, and by the contract of April 19, 1897, it constituted the Creamery Package Manufacturing Company its sales agent of them, the latter company not making churns and butter workers. The contract was a perfectly legal one, and preceded by some time the agreement of the 24th of February, 1898, entered into between the latter company and other corporations. There were contracts between the Creamery Package Manufacturing Company and the Owatonna Company subsequent to the latter date, but all of them were supplemental to the first one and had no illegal taint, nor did they affect it with illegal taint. It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights, but this was no violation of law. The owner of a patent has exclusive rights,—rights of making, using, and selling. He may keep them or transfer them to another,—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, ante, 107, 33 Sup. Ct. Rep. 9. But *patents are not so used[33 when the rights conferred upon them by law are only exercised. The agreement of the 19th of April, 1897, constituted, as we said, the Creamery Package Manufacturing Company a sales agent of the churns and butter workers made by the Owatonna Company

and fixed their list price. The patents under which the articles were manufactured were stated, and it was provided that the Owatonna Company should protect the Creamery Package Manufacturing Company from all suits for infringement, defend the validity of the patents, and promptly attack infringers. This provision is especially urged by plaintiffs as showing a common and illegal purpose between the companies. It has not that quality. It is but an assurance of title to the rights conveyed.

But it is said that the contract between the companies dated June 4, 1898, exhibits knowledge by the Owatonna Company of the Creamery Package Manufacturing Company's purpose, and "fitted into the scheme of the two defendant corporations to get a monopoly in the United States;" and this, it is said further, "can only be when all of the doings . . . are looked at as a whole from beginning to end." We cannot concur. We have seen that the contract of June 4, 1898 (inserted above in the margin), was but a settlement of claims growing out of reciprocal charges of infringement, and it has no other connection with the agreement of February, 1898, than that some of the claims were against corporations which were parties to that agreement. It would be far-fetched to say that the Owatonna Company could not assert rights or protect rights because they were asserted or sought to be protected against corporations which had become members of an illegal combination, without participating in the guilt of such combination and becoming a joint conspirator in its purposes. But it may be said that we are considering the tran-[34]actions isolatedly and ignoring *their combined effect. That indeed would be a fault, but in order to compute their combined effect we must estimate what strength they have separately, and so far, on the face of the contracts, there is nothing to inculpate the Owatonna Company.

But a united purpose is sought to be established between it and the Creamery Package Manufacturing Company by the testimony of witnesses to the effect that the contract of April 19, 1897, between the Disbrow Manufacturing Company and the Owatonna Company, was urged by the president of the Creamery Package Manufacturing Company, who represented that the acceptance of royalties by the Disbrow Company was better than a continuance of competition. It is not practicable to give all the testimony of what preceded and induced that contract. The part most relevant to our inquiry is that which related to the competition which existed between the companies. A witness, who was president of the Owatonna Company at the time, testified that it was suggested to him and other officers of the company by Mr. Gates, president of the Creamery Package Manufacturing Company, that a settlement ought to be brought about by letter or otherwise with the Disbrow Manufacturing Company "so as to get the two churns which were then being manufactured together," and stated that he (Gates) had had some conferences with the Disbrow Company, and he thought that if the officers of the Owatonna Company would go to Mankato "there might be an arrangement made whereby that business could be brought in connection with ours, and in that way eliminate the competition that at that time existed between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company." This object was expressed by the witnesses in different ways.

The president of the Disbrow Manufacturing Company testified that Gates urged that the Disbrow Company should "stop manufacturing and make a contract with *the Owatonna Manufacturing Com-[35]pany, and let them have all our patents on combined churns and butter workers and other things, and combine the whole business under one head, and let them do all of the manufacturing." The witness testified that he at first rejected the proposition and resented the manner in which the proposal was made, Gates going so far as to declare, with a profane accompaniment, "You will do it or we will put you out of business." But subsequently negotiations were resumed and the president of the Creamery Package Manufacturing Company explained that he wanted matters settled, litigation stopped, "and a new arrangement made so that the whole thing should be run under one head and one control," and in that way "control the whole churn business." The witness formulated the terms, which resulted, after some days of negotiation, in the contract of April 19, 1897. But during the negotiations the witness did not see the Owatonna Company's representatives until they reached the point of signing the contract.

These declarations seem to be very arbitrary and unjustifiable when standing alone, and to have had no other purpose than the ruthless crushing of a competitor in the same line of business. They take on another character, or rather the object of the negotiations and the contracts which resulted from them take on another character, when all the testimony is considered. It will be observed from the date of those negotiations and of the contracts that they preceded by nearly a year the contract between the Creamery Package Manufacturing

Company and its competitors, and could have had no relation to it. And, besides, they had a natural and adequate inducement. They were an adjustment of disputes and litigation growing out of a contract between the Disbrow Company and the Owatonna Company concerning the very same patents. In one suit the Owatonna Company was plaintiff against the Disbrow Company; in 36]another suit the latter *company was plaintiff against the Owatonna Company, and both suits were based on disputes as to rights or obligations arising from the contract of October 2, 1893. The testimony also shows some controversy between the Creamery Package Manufacturing Company and the Disbrow Company in regard to other patents, but the effect of it is not easy to estimate. There was also a contract entered into between the Disbrow Company and the Creamery Package Manufacturing Company on the 19th of April, 1897, settling matters growing out of a contract between those companies, made on the 12th of October, 1896, by which the Disbrow Company made the Creamery Package Manufacturing Company its exclusive sales agent for churns and butter workers, and mortgaged to the latter company its plant. The other provisions of the contract concern the adjustment of the relations between all of the companies under the contemporaneous contracts, and need not be stated in detail. It is clear, then, as we have already said, that what transpired on the 19th of April, 1897,—negotiations and contracts,—had no relation to the contract of February, 1898, and had for their inducement and object the settlement of controversies and rights growing out of the contract of October 2, 1893, between the Disbrow Company and the Owatonna Company, and that of October 12, 1896, between the Disbrow Company and the Creamery Package Manufacturing Company, and the proposition of the latter company to become the sales agent of the churns made by the Owatonna Company. All of this is very complicated in the statement, but is simple enough in the results, and can be definitely estimated as to actual and legal effect. We may therefore sum up by saying that the Disbrow Company, by its contract with the Owatonna Company, did nothing more than confirm or enlarge the rights which the Owatonna Company had obtained, by the contract of 1893, and conveyed to it 37]the exclusive right *in the patents for certain named royalties. This was no violation of law. The Owatonna Company did nothing more in its contract with the Creamery Package Manufacturing Company than to make that company its exclusive sales agent, and this was no violation of law. Both contracts had natural and adequate legal inducements and conveyed rights that could, under the law, be conveyed, and, as a necessary incident to the conveyance, one only of the parties could thereafter exercise them. It may be that the Disbrow Company was to an extent in competition with the Owatonna Company, but it was a competition in part, at least, which, it was contended, was illegally conducted against rights which had been transferred in 1893. But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture, or of sale, is not one condemned by law.

It is, however, urged that the infringement suits brought by the Creamery Package Manufacturing Company and the Owatonna Company against plaintiffs were provided for by the contracts between the Owatonna Company and the Disbrow Company, and their coincidence in time is urged as proof of concerted action on the part of defendants and of a conspiracy to destroy plaintiffs' business. The contention is that the bringing of those suits was not a single and isolated act, but was a part of the more comprehensive plan and scheme to secure a monopoly in the United States of the business of making and selling creamery supplies, or, more accurately, counsel, say, to continue and maintain the monopoly already acquired. And it is contended that the attempt was successful in that it destroyed plaintiffs' business. That these contentions are untenable we have demonstrated. The contracts, we have shown, were legal conveyances of rights, and the provision for the prosecution of infringement suits was but an assurance of those rights. Patents would be of little *value[38 if infringers of them could not be notified of the consequences of infringement, or proceeded against in the courts. Such action, considered by itself, cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights, or asserted rights, may be. But this is not an action for malicious prosecution. It is an action under the Sherman anti-trust act for the violation of the provisions of that act, seeking treble damages. This, indeed, plaintiffs take special pains to allege, that there may be no confusion about the right or grounds or extent of recovery. The testimony shows that no wrong whatever was committed by the Owatonna Company, and the fact that it failed in its suit against plaintiffs does not convict it of any.

This is enough to dispose of the case, for the foundation of the complaint is that the defendants entered into a contract or com-

bination in restraint of trade which caused damage to plaintiffs; and the guilt of the individual defendants and of the two corporations and of all of their officers, servants, and stockholders, is very carefully alleged. It was in this aspect that the case was tried.

But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute, and that they were entitled to go to the jury as to that company. But the contention was not made in the circuit court nor was it made in the circuit court of appeals. The case was tried and ruled upon, as we have seen, on the ground of the co-operation of the defendants in a scheme of monopoly and restraint of trade. There was no liability asserted in the circuit court or in the circuit court of appeals against one of the defendants separately from the others. Concert and co-operation was asserted against all, and a ruling was not invoked as to the separate liability of either. One Frank LaBare was a party defendant, and as to him plaintiffs made a motion that "the case be dismissed and 39]dropped." The court denied the *motion for some reason, and then plaintiffs' counsel said: "We desire to proceed with the case as against the defendants, the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company." The plaintiffs then offered to prove that they had not infringed the patents sued on by the defendants. It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time.

There are twenty-seven errors assigned upon offers of testimony excluded or upon other rulings of the circuit court. These we have examined and find that, in the view taken by the courts below of the case and that which we take, there was no error of substance committed.

Judgment affirmed.

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CAMERON SEPTIC TANK COMPANY, Appt.,
v.
CITY OF KNOXVILLE, in the County of Marion and State of Iowa.

(See S. C. Reporter's ed. 39–50.)

**Patents — term — expiration of foreign patent — effect of treaty.**

1. The term of a United States patent which, under U. S. Rev. Stat, § 4887, U. S. Comp. Stat. 1901, p. 3382, would expire with the expiration of the term of a British patent previously granted for the same invention, was not extended by the provisions of the treaty of Brussels of December 14, 1900 (32 Stat. at L. 1936), art. 4 *bis*, that patents applied for in the different contracting states by persons admitted to the benefit of the convention shall be independent of the patent obtained for the same invention in other states, and that this provision shall apply to existing patents, but such provisions, if construed as they must be, in accordance with the declaration of the Brussels Convention at the instance of the American delegates, affect only those existing patents whose terms might otherwise be shortened by the lapsing of foreign patents.

[For other cases, see Patents, IV. a; Treaties, II., in Digest Sup. Ct. 1908.]

**Patents — term — effect of treaty.**

2. The omission from the act of March 3, 1903 (32 Stat. at L. 1225, chap. 1019, U. S. Comp. Stat. Supp. 1911, p. 1453), enacted to make effective the Brussels treaty of December 14, 1900, for the protection of industrial property, of any provision to carry out art. 4 *bis*, which declares that patents applied for in the different contracting states by persons admitted to the benefit of the convention shall be independent of the patent obtained for the same invention in other states, and that this provision shall apply to existing patents, which article, in the light of subsequent congressional action and of legislative action of some of the other contracting nations, cannot well be deemed self-executing, leaves in force as to existing United States patents the provisions of U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, under which such patents will expire with the expiration of the term of a foreign patent previously granted for the same invention.

[For other cases, see Patents, IV. a; Treaties, II., in Digest Sup. Ct. 1908.]

[No. 82.]

Argued December 11 and 12, 1912. Decided January 20, 1913.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa to review a decree which dismissed the bill in a suit founded upon the infringement of a patent. Affirmed.

The facts are stated in the opinion.

Mr. **Henry Love Clarke** argued the cause and filed a brief for appellant:

The language of article 4 *bis* of the treaty —"shall be independent," and "this provision shall apply to patents existing"—is the language of self-executing law, and not of a mere contract to legislate. It exactly corresponds to the language "shall be valid," which Chief Justice Marshall, in considering

NOTE.—On the effect of foreign patents—see note to Grant v. Walter, 37 L. ed. U. S. 553.

ing a treaty relating to grants of lands, declared would be self-executing, and "would have repealed those acts of Congress which were repugnant to it."

Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435; United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 84 C. C. A. 76, 155 Fed. 844; Hennebique Constr. Co. v. Myers, 97 C. C. A. 289, 172 Fed. 887; Chew Heong v. United States, 112 U. S. 536, 539, 540, 542, 543, 28 L. ed. 770–773, 5 Sup. Ct. Rep. 255; Orr v. Hodgson, 4 Wheat. 453, 463, 464, 4 L. ed. 613, 616; Chirac v. Chirac, 2 Wheat, 259, 270, 271, 277, 278, 4 L. ed. 234, 237–239; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427, 439, 48 L. ed. 247, 253, 24 Sup. Ct. Rep. 145; Jones v. Meehan, 175 U. S. 1, 19, 20, 44 L. ed. 49, 57, 20 Sup. Ct. Rep. 1.

A self-executing clause in a treaty, plainly securing a private right, is as much the law of the land as an act of Congress, and repeals any prior act of Congress repugnant to it.

J. Ribas y Hijo v. United States, 194 U. S. 315, 324, 48 L. ed. 994, 996, 24 Sup. Ct. Rep. 727.

There is notning ambiguous in the body of the act of March 3, 1903, and the mere title cannot import into it a thing upon which it is entirely silent.

United States v. Oregon & C. R. Co. 164 U. S. 526, 541, 41 L. ed. 541, 545, 17 Sup. Ct. Rep. 165.

After the treaty, in the plain words of self-executing law, had confirmed to and already vested in the patentees the title to the rest of the "seventeen years" named (in accordance with the still effective U. S. Rev. Stat. § 4884, U. S. Comp. Stat. 1901, p. 3381) in the grant on the sealed face of the existing patents, no subsequent act of Congress could devest that title.

Society for Propagation of Gospel v. New Haven, 8 Wheat. 464, 493, 5 L. ed. 662, 669; Walker, Patents, 4th ed. 139; McClurg v. Kingsland, 1 How. 202, 206, 11 L. ed. 102, 103.

A patent right is as much a "property right" as is the title to land, and may be secured by treaty as well as by statute.

Jones v. Meehan, 175 U. S. 1, 19, 20, 32, 44 L. ed. 49, 57, 61, 20 Sup. Ct. Rep. 1; Rhode Island v. Massachusetts, 12 Pet. 657, 747, 9 L. ed. 1233, 1269; Orr v. Hodgson, 4 Wheat. 453, 463, 464, 4 L. ed. 613, 616; Society for Propagation of Gospel v. New Haven, 8 Wheat. 464, 489, 490, 5 L. ed. 662, 668.

Prior negotiations cannot modify the words of the treaty.

Little v. Watson, 32 Me. 223; New York Rep. 531; The Amiable Isabella, 6 Wheat. 1, 71, 72, 5 L. ed. 191, 208.

Mr. Wallace R. Lane argued the cause, and, with Messrs. R. L. Welch and Samuel H. Crosby, filed a brief for appellee:

The treaty of 1902 does not extend the life of the Cameron et als. patent in suit.

Thomson-Houston Electric Co. v. McLean, 82 C. C. A. 629, 153 Fed. 883; United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 84 C. C. A. 76, 155 Fed. 842; Malignani v. Hill-Wright Electric Co. 177 Fed. 430; Malignani v. Jasper Marsh Consol. Electric Lamp Co. 180 Fed. 442; Commercial Acetylene Co. v. Searchlight Gas Co. 188 Fed. 85; Highland Glass Co. v. Schmertz Wire Glass Co. 102 C. C. A. 316, 178 Fed. 951; Westinghouse Electric & Mfg. Co. v. Bullock Electric & Mfg. Co. (unreported); Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495; Rousseau v. Brown, 21 App. D. C. 73, 104 Off. Gaz. 1120; Butterworth v. Boral, 97 Off. Gaz. 1596; Ex parte Zwack, 76 Off. Gaz. 1855.

The treaty-making representatives of the government are controlled by and cannot go beyond the Constitution of the United States.

De Geofroy v. Riggs, 133 U. S. 258, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Jones v. Walker, 2 Paine, 688, Fed. Cas. No. 7,507.

The treaty-making department of the government can only bind the United States in relation to patents to such extent as Congress later ratifies, as Congress has the power to grant patents for limited times, under the Constitution, and this power cannot be devested by the treaty-making power.

Evans v. Robinson, Brunner, Col. Cas. 400, Fed. Cas. No. 4,571.

Treaties relative to patents to become binding on citizens of United States must be enacted by Congress.

Foster v. Neilson, 2 Pet. 253, 313, 314, 7 L. ed. 415, 435, 436; 47 Off. Gaz. 397.

To the extent that Congress did not adopt the provisions of the treaty of 1902, it repealed and modified this treaty in conformance with the intention expressed in the minutes of the convention, to the effect that it should not apply to patents in existence at the time of the ratification of the treaty.

Dallemagne v. Moisan, 197 U. S. 169, 175, 49 L. ed. 709, 711, 25 Sup. Ct. Rep. 422; United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 84 C. C. A. 76, 155 Fed. 848; Commercial Acetylene Co. v. Searchlight Gas Co. 197 Fed. 919; Taylor

*Indians v. United States, 170 U. S. 1, 22, 23, 42 L. ed. 927, 934, 935, 18 Sup. Ct. 468*

v. Morton, 2 Curt. C. C. 457, Fed. Cas. No. 13,999; Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Re Ah Lung, 18 Fed. 28; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; La Republique Francaise v. Schultz, 57 Fed. 37.

Mr. Justice McKenna delivered the opinion of the court:

A bill in equity was brought by appellant as successor to the rights of an invention patented under United States letters patent to Edwin Cameron et al. for a process and an apparatus for treating sewage, No. 634,423, dated October 3, 1899. The bill contained the usual allegations and prayed for an injunction to restrain appellee from the use of the invention. Appellee filed a plea to the bill, in which it alleged that the invention had been previously patented in Great Britain by letters patent dated November 8, 1895, and that that patent had expired on or before the 8th day of Novem-41]ber, 1909, being the expiration of *the term for which it was granted, and that therefore the United States patent expired and became terminated by law, and it being stipulated that the bill should be considered as filed as of that date, and as the bill was not filed with the purpose or intention of applying for or obtaining an injunction before the expiration of the British patent, no injunctive or equitable relief could be had. A dismissal of the bill was therefore prayed. The decree of the court recited the facts of the plea and adjudged that the patent had expired as therein alleged, and that its expiration was not prevented "by any effect of the treaty of Brussels of December 14, 1900 [32 Stat. at L. 1936], which treaty and the construction thereof was drawn in question on the plea in this cause;" and that therefore the court was without jurisdiction, the complainant having a plain and adequate remedy at law. This appeal was then prosecuted under § 5 of the circuit court of appeals act (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488).

The single question here is whether the United States patent expired with the British patent according to the laws which existed when it was issued, or whether its existence was preserved by the treaty of Brussels.

At the time the patent was issued, § 4884, Revised Statutes (U. S. Comp. Stat. 1901, p. 3381), made the term of a patent seventeen years; and by § 4887 it was provided that the receiving of a foreign patent did not prevent the *granting of a United States* patent. It was, however, provided that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent; or, if there be more than one, at the same time with the one having the shortest term; and in no case shall it be in force more than seventeen years."

The section coming up for judicial consideration, it was decided that it assumed that the foreign patent previously granted was one granted for a definite term, that the United States patent should expire with that *term, and that it was not to be[42 limited by any lapsing or forfeiture of any portion of the term of the foreign patent, by means of the operation of a condition subsequent, according to the foreign statute. Pohl v. Anchor Brewing Co. 134 U. S. 381, 386, 33 L. ed. 953, 955, 10 Sup. Ct. Rep. 577. And it was held that the American patent is limited by law, whether it is so expressed or not in the patent itself, to expire with the foreign patent having the shortest term. Bate Refrigerator Co. v. George H. Hammond & Co. 129 U. S. 151, 167, 32 L. ed. 645, 650, 9 Sup. Ct. Rep. 225; Bate Refrigerator Co. v. Sulzberger, 157 U. S. 43, 39 L. ed. 613, 15 Sup. Ct. Rep. 508; Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 325, 53 L. ed. 805, 815, 29 Sup. Ct. Rep. 495.

Appellee contends that these decisions and the cited sections of the Revised Statutes constituted the law of the United States patent to Cameron, and caused it to terminate with the expiration of the term of the British patent. The argument is that it was granted not for seventeen years, but for a term to be measured by that of the foreign patent, enduring the full term for which the latter was granted, but no longer, though on its face it was to run seventeen years. The appellant, opposing the contention, insists that the treaty of Brussels has superseded § 4887, and has freed the Cameron patent from subjection to the provisions of that section. It is the effect of the contention that, though the patent was issued for a definite term, as decided by the cited cases, the term was enlarged by the treaty.

Appellant candidly admits that there are cases adverse to its contention, but seeks to limit their strength of persuasion or authority to one only, and to that one opposes the reasoning and precedent of another. The cases so put in opposition are United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 84 C. C. A. 76, 155 Fed. 842, decided by the circuit court of appeals of the first circuit against the effect of the treaty contended for, and Hem

bique Constr. Co. v. Myers, 97 C. C. A. 289, 172 Fed. 869, decided by the circuit court 43]of appeals of the third circuit, *which is asserted to be the other way. But the cases do not present the antagonistic authority of two courts. Judge Archbald, whose views in the latter case are relied on by appellant, stated in a subsequent one (Union Typewriter Co. v. Smith, 173 Fed. 288, 299) that this opinion was not that of the court.

The other cases in which the Brussels treaty was considered, and in which it was decided that it did not enlarge the term of an American patent beyond the term of a foreign patent for the same invention, are the following: Malignani v. Hill-Wright Electric Co. 177 Fed. 430; Malignani v. Jasper Marsh Consol. Electric Lamp Co. 180 Fed. 442; Commercial Acetylene Co. v. Searchlight Gas Co. 197 Fed. 918. Appellant contends, as we have seen, that these cases do not express independent views, but follow United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. as authority. This is not true to the extent contended. In the first two cases an independent judgment was expressed. In the third case (197 Fed. 918) it was said of United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. that it was "well considered and very persuasive," and was "deemed to be the correct expression of the law for the purpose" of the hearing. Judicial opinion must therefore be ranged against appellant's contention, and is persuasive, at least, of its unsoundness.

Appellant, however, relies on the words of the treaty, which, it is insisted, have no ambiguity whatever, and which, it is contended, by the proclamation of the President of September 14, 1902, because the " 'supreme law of the land.' " The provision relied on reads as follows:

"Art. 4 *bis*. Patents applied for in the different contracting states, by persons admitted to the benefit of the convention under the terms of articles 2 and 3, shall be independent of the patent obtained for the same invention in the other states, adherents or nonadherents to the Union.

44] *"This provision shall apply to patents existing at the time of its going into effect.

"The same rule applies, in the case of adhesion of new states, to patents already existing on both sides at the time of the adhesion." 32 Stat. at L. 1940.

The Cameron patent existed at the time the treaty went into effect, and the British patent by which it was limited was a patent obtained in one of the states adhering to the treaty; namely, Great Britain. It is hence contended that all of the conditions necessary to the application of the treaty to the Cameron patent existed, and the limitation of its term to that of the British patent, as provided by law at the time it was issued, was removed, that law being repealed by the treaty, which, it is contended further, was self-executing, and the patent became a grant for seventeen years. Two propositions are involved in the contentions: (1) that the treaty applies to the Cameron patent; (2) that the treaty is self-executing. If either proposition be erroneous, appellant's contentions are untenable.

To say that the text of the treaty is without ambiguity does not carry us far. All of the conditions of a patent are not expressed in it, and when these are considered, construction is demanded and must be exercised. What is meant by the independence of a patent for the same invention in different states? It certainly was not intended to break down all of the provisions of law applicable to a patent; in other words, to interfere with the manner of its grant, and, it would seem by necessary implication, the extent of its grant as provided by the local law. A most essential attribute of a patent is the term of its duration, which is necessarily fixed and determined by the local law. And what difference in principle or effect is there if the term be expressed directly by a number of years or by something else, as a foreign patent which has a certain duration? The patent is no *more contingent in one[45 case than in the other. It is complete in both cases at the moment it is issued. In both cases its term has certain definition given by the local law. And this is the declaration of the cases, and that the integrity of its term and its independence were not affected by subsequent conditions which might terminate the foreign patent.

But it is contended that so to confine the treaty is to deprive it of significance and force because the decisions of this court had given to patents such independence. Pohl v. Anchor Brewing Co. 134 U. S. 381, 33 L. ed. 953, 10 Sup. Ct. Rep. 577. The answer is not sufficient. It might have been thought worth while to give conventional sanction to the judicial construction, and make it applicable to the adhering states whose laws were not uniform; and it is certain that there was an immediate demand of the American delegates so to qualify the provision that it should not extend the term of the monopoly of the patent beyond that which was given by the law under which the patent had been issued.

The details of the Conference are set out in Hennebique Constr. Co. v. Myers, supra. It appears that Mr. Forbes, one of the American delegates, pointed out that if

article 4 *bis* could be interpreted as applying to patents already issued, which he said it might be, it would encounter opposition in the United States; and he inquired whether it could not be made the subject of a special protocol. A view was expressed that the article would not produce the apprehended effect, but Mr. Forbes insisted on the necessity of stating the point precisely in order to avoid error of interpretation. After debate, in which different views were expressed, the director of the International Bureau suggested the following amendment: "This provision shall apply to patents in existence at the time of its being put into force. Its effects are, however, limited to nullities and lapses which 46] *would affect anterior patents." The amendment was not adopted, but, following the suggestion of Mr. Bellamy Storer, one of the delegates from the United States, the president "put to vote the adoption of the text previously adopted for article 4 *bis*, with the interpretation which the American delegation desired to specifically point out, by proposing to complete the second paragraph by supplementing this explanatory clause: 'However, the term fixed by the initial law of each country remains intact.' Article 4 *bis* is definitely adopted with this condition."

It is, however, urged that the delegate from Great Britain said that he "could only take the indicated act of interpretation as a declaration of the American delegation, and not as a decision of the Conference." The proceedings, however, show that the Conference adopted the whole of the first final protocol prepared by the committee on reports.

Certain subjects were not disposed of by the Conference, but postponed with the comment that "after the exchange of views through diplomatic channels," the Conference would "reassemble anew in the Belgian Capital in order to finish its work."

The American delegates reported to the Secretary of State their understanding of the meaning of article 4 *bis* and interpretation which had been given it by the Conference. The unanimous sanction of the Conference, they said, was that the second paragraph of article 4 *bis*, which reads: "This provision shall apply to all patents existing at the time of its entering into force," was not applicable to existing United States patents, but only to those patents whose terms might be shortened by the laws of those states of the Union [for the Protection of Industrial Property] in which provision was made for the shortening of the term on the lapsing of patents for the same invention in other states. Existing *United States patents, they* further reported, could not be affected by what might take place *in regard to a foreign[47 patent, their terms having been determined by § 4887 at the moment they were issued, and that therefore their duration was unaffected by the subsequent expiration of a foreign patent for the same invention by reason of nonpayment of taxes or nonworking.

There was a second session of the Conference in December, 1900. Article 4 *bis* was not further debated. There was some reference to it as one of three arrangements "concerning retroactivity." Appellant hence insists that, having that quality, the article necessarily applied to existing patents, and was a "plain and simple retroactive ending of the former dependence of existing patents upon the running of the terms allowed to foreign patents." To confine the provision, it is contended further, to "mere future contingencies that might befall patents, would be prospective, and not 'retroactive.'" In aid of these contentions it is urged that the American delegates, two of whom were new, made no objection to the declaration of the retroactivity of article 4 *bis*, and that no limiting protocol was annexed to the treaty when it was finally adopted at Brussels in 1900, and that the article was ratified by the Senate and proclaimed by the President without qualifying it. The considerations have strength, but there are opposing ones. The second session of the Conference was a continuation of the first. The American delegates had secured an interpretation of article 4 *bis*. It could be accepted by them as final and definite. There was no challenge of it by ascribing retroactivity to article 4 *bis*, for that article was recognized to have such effect, but not to extend the term of a patent fixed by the initial law. Future contingencies, as said by appellant, would, of course, be prospective, but whether patents existing at the time of the treaty should be subject to them or independent of them was retroactive.

The action of Congress must be taken into account in estimating appellant's contentions. In United Shoe *Machinery Co.[48 v. Duplessis Shoe Machinery Co. 84 C. C. A. 76, 155 Fed. 842, it was made determinative, and the court decided that what construction should be put on article 4 *bis*, and what rule should apply as to its becoming effective, became academic questions in view of the provisions of the act of Congress of 1903 [32 Stat. at L. 1225, chap. 1019, U. S. Comp. Stat. Supp. 1911, p. 1453], entitled, "An Act to Effectuate the Provisions of the Additional Act of the International Convention for the Protection of Industrial Property." The act of 1903 was preceded by—and probably induced by—a letter

which the Chargé d'Affaires of Switzerland addressed to the Secretary of State. The letter was prompted, according to its representations, by the embarrassment to which the International Bureau was subjected on account of the uncertainty of the action of the United States in regard to the additional act of Brussels of December 14, 1900, the treaty being so designated. It referred to the Convention of March 20, 1883 [25 Stat. at L. 1372], and the approval by the Senate of that Convention in 1887, but it stated "that Congress had not brought into the Federal law the changes required to make it consonant with the Convention," and that, "according to the opinion rendered by Attorney General Miller in 1889, American courts have consistently decided that the Convention of 1883 could not be enforced in the United States except so far as it accorded with the law of the country." The opinion was expressed that the difficulties attending this condition of things were not so great as they would have been in some other country, but it was said, however, that the circumstances had changed since the additional act of Brussels went into effect. One of the most important of its provisions, it was said, was that which amends article 4 of the Convention of 1883, extending to one year the priority of six months during which the original applicant for a patent in one of the states of the Union may validly file an application for the same invention in the other contracting states. After some comment on the priority 49] *period, the letter proceeded as follows: "The Bureau is placed in an awkward situation. On the one hand, it cannot say that the United States will not enforce the additional act it has ratified and has asked should go into effect. On the other hand, it is without information that the bills relative to industrial property that have been framed in the committee organized under the act of June 4, 1898 [30 Stat. at L. 431, chap. 379], have been passed by Congress; and it is constrained to admit that, according to judicial precedents, the new treaty provisions could not be enforced until the corresponding legislation shall have been revised." The required legislation was urged.

The Secretary of State replied to the letter, describing it as "in regard to the provisions of the Industrial Property Convention of March 20, 1883, and the Brussels act of December 14, 1900, modifying it," and said that he was advised by the Secretary of the Interior that he had prepared a bill "to make effective in this country the *Convention* and modifying act in question." *The act of 1903 was then enacted*, and if *there could be any doubt that it* expressed the sense of Congress and those concerned with the treaty that it required legislation to become effective, such doubt would be entirely removed by the legislative action of other states. It appears from the report of the committee on patents of the Senate and of the House of Representatives on the proposed legislation that thirteen countries had adopted legislation giving full force and effect to the provisions of the additional act, either in the form of a general law or by specific amendment to other laws providing for carrying into force the provisions of the additional act as regards the extension of the "delay and priority" to twelve months. Other countries were mentioned as being expected to do so. In explaining the object of the bill, the member in charge of it in the House of Representatives said that it was to carry into effect the additional act of the Convention held at *Brussels in December, 1900; and, fur-[50 ther, that the additional act agreed upon simply extended the period of priority in applications for patents, and that it did not "extend by a single instant the life of any patent now in existence, or any patent that may be granted hereafter." He further said that nearly all of the nations which were represented at Brussels had already passed legislation to give force to the act, and that it was but fair that this country should take similar action.

An attempt is made by appellant to distinguish between article 4 *bis* and the provisions of the treaty expressly dealt with by Congress, and to assign to that article a more distinct and definite power of execution than the other provisions possess. To account thereby for its omission from the act of 1903, it is urged that those provisions concern matters of admistrative law which might be or thought to be in conflict with statutory provisions, whereas article 4 *bis* accomplished all that it could accomplish the instant the treaty went into effect, and there was nothing further to be done as a matter of administrative law. We are unable to accept the distinction, and appellant is therefore brought to this alternative. If the treaty be construed as we think it must be construed, in accordance with the declaration of the Conference at the instance of the American delegates, it has no application to the Cameron patent. If it be not self-executing, as it is certainly the sense of Congress that it was not, and seems also to be the sense of some of the other contracting nations, and as the act of 1903 did not make effective article 4 *bis*, the provisions of § 4887 apply to the Cameron patent, and caused it to expire with the British patent for the same invention.

Decree affirmed.

51] *S. T. GRAY and Robert Brady, Appts.,
v.
ROBERT H. TAYLOR, Charles W. Wingfield, and Romualdo Duran, the Board of County Commissioners of Lincoln County, Territory of New Mexico. (No. 322.)

TERRITORY OF NEW MEXICO, By its Attorney General, Frank W. Clancy, on the Relation of JACOBO J. ARAGON, Appt.,
v.
BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, NEW MEXICO. (No. 483.)

(See S. C. Reporter's ed. 51–58.)

**Statutes — local or special legislation — changing county seat.**

1. Including in N. M. Laws 1909, chap. 80, relating to the changing of county seats, provisions that the place to which it it proposed to remove the county seat shall be at least 20 miles distant from the then county seat, and that no proposition to remove a county seat from a place situated on a railroad to one not so situated shall be entertained, does not make the law a local or special one within the prohibition contained in the act of Congress of July 30, 1886 (24 Stat. at L. 170, chap. 818), § 1, against the enactment by the territorial legislature of local or special laws changing county seats, although it is obvious that at any given time the law in question does not operate in the same way in every part of the territory.

[For other cases, see Statutes, I. f, in Digest Sup. Ct. 1908.]

**Appeal — review of territorial decision — validity of statute.**

2. A decision of the New Mexico supreme court sustaining a territorial statute over the objections that it was not approved by the governor and does not appear to have reached him more than three days before the adjournment of the legislature, so as to have become a law by N. M. Rev. Stat. § 1842, and that the bill was not signed by the president of the council or the speaker of the house of representatives, as required by the respective rules of those bodies, will not be disturbed by the Federal Supreme Court on appeal, where the statute appears in the official copy of the laws of the year, and passed the two houses in fact, and in ample time to be submitted to the governor, who returned the bill to the council with the statement that he had allowed it to become a law by limitation.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. d, in Digest Sup. Ct. 1908.]

**Appeal — review of territorial decision — sufficiency of petition.**

3. The objection that the petition asking a board of county commissioners to call an election and submit to a vote the proposition to remove the county seat did not ask for the removal, as required by N. M. Laws 1909, chap. 80, will not prevail in the Federal Supreme Court on appeal from a decree of the territorial supreme court, holding such petition to be sufficient, since it might well be implied that the proposition to remove emanated from those who signed the petition.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. d, in Digest Sup. Ct. 1908.]

**Appeal — review of territorial decision — special election — ballots.**

4. A ruling of a territorial supreme court adverse to objections based upon the unintelligible and misleading form of the ballots used in voting on a proposition to change the county seat will not be revised in the Federal Supreme Court, where the ballots conformed to the governing provisions of N. M. Comp. Laws 1897, § 631, and there is no evidence that the voters were deceived.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. d, in Digest Sup. Ct. 1908.]

**Appeal — review of territorial decision — statutory construction.**

5. The Federal Supreme Court will not reverse the ruling of the territorial supreme court, that the general provisions of N. M. Comp. Laws 1897, § 1709, for the registration of voters before a board appointed sixty days before election, had no application to a special election upon the proposition to change a county seat, held conformably to N. M. Laws 1909, chap. 80, which required such election to be called at any time within two months of the date of presenting the petition.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. d, in Digest Sup. Ct. 1908.]

**Appeal — from territorial supreme court — scope of review.**

6. An objection that various allegations of the bill in a taxpayer's suit to restrain the erection of a county building were admitted because not denied is not open on an appeal to the Federal Supreme Court from a decree of a territorial supreme court, which affirmed a judgment below, dismissing the bill.

[For other cases, see Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

[Nos. 322 and 483.]

Submitted January 6, 1913. Decided January 20, 1913.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for the County of Lincoln, dismissing the bill in a taxpayer's suit to restrain the County Commissioners from erecting a county building on the assumption that the county seat had been changed. Affirmed. Also an

NOTE.—as to review by United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

APPEAL from the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of Lincoln County, dismissing the petition for a writ of quo warranto against the same board to stop the same and other proceedings taken by it on the same ground. Affirmed.

See same cases below, No. 322, 15 N. M. 742, 113 Pac. 588; No. 483, 16 N. M. 467, 117 Pac. 1127.

The facts are stated in the opinion.

Mr. T. B. Catron submitted the cause for appellants. Mr. George B. Barber was on the brief:

The act in question, if valid at all for any purpose, or if properly enacted for any purpose, is a local and special act, and void under the Springer act.

People ex rel. Lee v. Chautauqua County, 43 N. Y. 16; Re Henneberger, 155 N. Y. 424, 42 L.R.A. 132, 50 N. E. 61; People v. O'Brien, 38 N. Y. 193; Ferguson v. Ross, 126 N. Y. 464, 27 N. E. 954; State, Closson, Prosecutor, v. Trenton, 48 N. J. L. 439, 5 Atl. 323; Com. ex rel. Fertig v. Patton, 88 Pa. 260; Davis v. Clark, 106 Pa. 377; McCarthy v. Com. 110 Pa. 246, 2 Atl. 423; Montgomery v. Com. 91 Pa. 125; Devine v. Cook County, 84 Ill. 591; State ex rel. Harris v. Herrmann, 75 Mo. 346; Scowden's Appeal, 96 Pa. 424; Klokke v. Dodge, 103 Ill. 125; State ex rel. Columbus v. Mitchell, 31 Ohio St. 592; State ex rel. Atty. Gen. v. First Judicial Judges, 21 Ohio St. 11; Stange v. Dubuque, 62 Iowa, 303, 17 N. W. 518; Sutherland, Stat. Constr. §§ 127–129; Smith, Com. §§ 595, 596; Sedgw. Stat. & Const. Law, 32; Potter's Dwarr. Stat. 355; Ex parte Westerfield, 55 Cal. 552, 36 Am. Rep. 47; Desmond v. Dunn, 55 Cal. 251; State ex rel. Van Riper v. Parsons, 40 N. J. L. 123, 29 Am. Rep. 210; State, Zeigler, Prosecutor, v. Gadis, 44 N. J. L. 363; Hammer v. State, 44 N. J. L. 669; State, Van Giesen, Prosecutor, v. Bloomfield, 47 N. J. L. 442, 2 Atl. 249.

Even if the statute was not a local or special law, it never was legally enacted. It was not approved by the governor, nor was it ever signed by the president of the council or speaker of the house of representatives, and there is no evidence that it ever reached the governor more than three days before the adjournment of the legislature.

Marshall Field & Co. v. Clark, 143 U. S. 671, 36 L. ed. 303, 12 Sup. Ct. Rep. 495; State ex rel. Panghorn v. Young, 32 N. J. L. 30; State ex rel. Coffin v. Howell, 26 *Nev. 98, 64 Pac. 466; State* ex rel. George *v. Swift, 10 Nev. 182, 21 Am. Rep.* 721; Sherman v. Story, 30 Cal. 257, 89 Am. Dec. 93.

The election was void because no petition asking for the removal of the county seat of said county to some other designated place, or to Carrizozo, was ever presented to or acted on by the board of county commissioners of Lincoln county when they called the election.

Lilly v. Lakin, 66 Ala. 122; Tally v. Grider, 66 Ala. 119; Lanier v. Padgett, 18 Fla. 844; McKinney v. Bradford County, 26 Fla. 267, 4 So. 855; Zeiler v. Chapman, 54 Mo. 502; State ex rel. Lexington & St. L. R. Co. v. Saline County Ct. 45 Mo. 242; State ex rel. Woodson v. Brassfield, 67 Mo. 336; State use of Neal v. Saline County Ct. 48 Mo. 390, 8 Am. Rep. 108; State ex rel. Ensworth v. Albin, 44 Mo. 348; Detroit River & I. R. Co. v. Bearss, 39 Ind. 598; People's Nat. Bank v. Pomona, 48 Kan. 55, 28 Pac. 1089; Culver v. Hayden, 1 Vt. 359; Blackwell, Tax Titles, 213; Pitkin v. McNair, 56 Barb. 77; Wheeler v. Mills, 40 Barb. 644; Bunner v. Eastman, 50 Barb. 639; People ex rel. Foley v. Kopplekom, 16 Mich. 342; Nefzger v. Detroit & St. P. R. Co. 36 Iowa, 644; State ex rel. Harvey v. Piper, 17 Neb. 618, 24 N. W. 204; Adriance v. McCafferty, 2 Robt. 353; Sutherland, Stat. Constr. 2d ed. §§ 565, 566; Lanier v. Padgett, 18 Fla. 842.

Unless the legislature provides for the special election to be held in such limited time only as will not admit of a registration, and it will not be within the power of the board to give time enough to make the registration, the registration law must be complied with; if it is possible to comply with it, it must be done.

State ex rel. Harris v. Scarborough, 110 N. C. 232, 14 S. E. 737; Smith v. Skagit County, 45 Fed. 725; McCrary, Elections, 2d ed. § 193, p. 145.

Mr. John Y. Hewitt submitted the cause for appellees. Mr. Andrew H. Hudspeth was on the brief:

No court has ever declared an act of the legislature void for noncompliance with the rules of procedure made by itself, or the respective branches thereof, and which it or they may change or suspend at will.

McDonald v. State, 80 Wis. 407, 50 N. W. 185.

The signature of a presiding officer to a bill is a mere certificate to the governor that it has passed the requisite number of readings and been adopted by the constitutional majority of the house over which he presides.

Cottrell v. State, 9 Neb. 128, 1 N. W. 1008.

Does the failure of the presiding officer

of the senate to sign a bill invalidate everything connected therewith? If it does, then the presiding officer of the senate has more power to veto bills than the governor, or than any other person or officer of the state.

Leavenworth County v. Higginbotham, 17 Kan. 74.

This court will presume that an act found among the published laws, bearing the approval of the governor, was constitutionally passed.

Illinois C. R. Co. v. Wren, 43 Ill. 77; Bedard v. Hall, 44 Ill. 91.

Upon demurrer to an indictment on the ground that the statute on which it is based was not passed in a constitutional manner, the presumption of the validity of the law must prevail, since, until the journal entries are brought before the court, they will not be considered in passing upon the validity of the law.

State v. Wray, 109 Mo. 594, 19 S. W. 86.

That the number of municipalities affected by a law is limited or restricted does not make the bill a private or local one.

People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820.

A law is not necessarily a local law because the practical effect and operation of the law is and must be in every instance local, special, and private. It is sufficient that the law offers like privileges to all who may comply with its terms or come within its provisions.

18 Am. & Eng. Enc. Law, 984.

An act in general terms is valid.

Ritchie v. Franklin County, 22 Wall. 67, 22 L. ed. 825.

The construction by the supreme court of the territory which enacted the law is conclusive in this court, as well as everywhere, as to its character.

George H. Hammond & Co. v. Hastings, 134 U. S. 401, 33 L. ed. 960, 10 Sup. Ct. Rep. 727.

Section 1702, Compiled Laws 1897, provides for a registration only before a general election. This section, enacted in 1889, clearly repeals, by implication, § 1709, passed in 1869, as it covers the whole subject of the older law, and was intended as a substitute therefor.

United States v. Tynen, 11 Wall. 88, 89, 20 L. ed. 153; Bartlet v. King, 12 Mass. 545, 7 Am. Dec. 99; Com. v. Cooley, 10 Pick. 37; Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. Rep. 527; United States v. Barr, 4 Sawy. 254, Fed. Cas. No. 14,527; Swann v. Buck, 30 Miss. 308; Industrial School Dist. v. Whitehead, 13 N. J. Eq. 291; State, Roche, Prosecutor, v. Jersey City, 40 N. J. L. 262.

Mr. Justice Holmes delivered the opinion of the court:

The first of these suits is a bill in equity brought by taxpayers to restrain the county commissioners of Lincoln county from erecting a courthouse and jail in the town of Carrizozo, the board assuming that the county seat has been changed from Lincoln to that town. The second is a quo warranto at the relation of a taxpayer against the same board to stop the same and other proceedings taken by the board on the same ground. The supreme court of the territory affirmed a decree dismissing the bill, and also a judgment denying the quo warranto. 15 N. M. 742, 113 Pac. 588, 16 N. M. 467, 117 Pac. 1127. Both cases raised the question whether the attempted change of the county seat was void, and turn on the same facts, which may be stated in connection with the several objections that the appellants take.

In the first place it is said that the statute under which the attempted change took place is void because it is a local law, and the act of Congress of July 30, 1886, chap. 818, § 1, 24 Stat. at L. 170, provides that the legislature of the territory shall not pass local or special laws in the matter, among others, of changing county seats. The statute, being chap. 80 of the Laws of New Mexico of 1909, is thought to be local because by § 2 it enacts that the place to which it is proposed to remove the county seat "shall be at least 20 miles distant from the then county seat of said county," and that no proposition to remove a county seat from a place situated on a railroad to one not so situated shall be entertained. It is argued at great length and is obvious that at any given time this enactment does not bear in the same way on every part of the territory. *In its present form the stat-[56 ute may be specially favorable to the change from Lincoln to Carrizozo, if, as is said, the latter town is on a railroad and Lincoln is not. It may be admitted that a local act could be disguised in general terms, if a legislature would condescend to evading its duties under a constitution or organic act. It may be assumed that general words are not necessarily enough to disguise such an intent. But it is not lightly to be supposed that a legislature is less faithful to its obligations than a court. General words indicate and affirm a general intent, and if the fact that different sections are differently affected is enough to make a law local, the field of legislation would be narrowed beyond anything that Congress could have dreamed. It cannot have been intended, for instance, that no laws should be passed concerning cities or towns, yet such laws would be local in their

application. The phrase "local law" means, primarily, at least, a law that in fact, if not in form, is directed only to a specific spot. If it has a wider meaning it involves questions of degree that cannot be decided by putting cases other than the one before us. We know nothing that would warrant us in declaring that this law was not intended, according to its purport, to regulate generally the change of county seats. Ritchie v. Franklin County, 22 Wall. 67, 22 L. ed. 825.

The full discussion in Codlin v. Kohlhausen, 9 N. M. 565, 58 Pac. 499, has lost but little of its force and applicability, notwithstanding the later amendment of the statute. The law is shown not to be a local law, and with regard to the 20-mile limit, it is said to be only reasonable to believe that the legislature intended, in fixing it, "to prevent cities and towns situated within a few miles of each other from engaging in those injurious contests for the supremacy for the location of the county seat, based upon population only. The wisdom of these conditions is apparent, and it is within the power of the legislature to make them."

However it may be as to the foregoing 57]question, which *arises under an act of Congress, the other objections are of a kind as to which we often have intimated our strong leaning toward following the local courts, and therefore will not be discussed at length. Fox v. Haarstick, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457; Treat v. Grand Canyon R. Co. 222 U. S. 448, 452, 56 L. ed. 265, 266, 32 Sup. Ct. Rep. 125. In the first place it is said that the statute was not approved by the governor, and does not appear to have reached him more than three days before the adjournment of the legislature, so as to have become a law by Rev. Stat. § 1842. Also it is said that the bill was not signed by the president of the council or the speaker of the house of representatives, as required by the respective rules of those bodies. But the act appears in the official copy of the Laws of 1909, it passed the two houses in fact, and in ample time to be submitted to the governor. The governor returned the bill to the council with the statement that he had allowed it to become a law by limitation. We agree with the court below that the governor's message is as good evidence as a note of the date on the bill that the bill had been received long enough before the return to make his statement correct. Gardner v. Collector (Gardner v. Barney) 6 Wall. 499, 508, 509, 18 L. ed. 890, 892, 893. The journals of the two houses showed the passage of the bill, and we certainly should not reverse the local decision that the evidence, if necessary, was admissible and sufficient in aid of the act.

The next objection is to the form of the petition by which the proceedings for the change were begun. The statute provides that the board of county commissioners shall order a vote whenever citizens of a county equal in number to at least one half of the legal votes cast at the last preceding general election in the county shall present a petition asking for the removal of the county seat to some other designated place. The petition asked the board "to call an election and submit to a vote . . . the proposition to remove the county seat of said Lincoln county to Carrizozo," etc. It is said that this did not ask *for the re-[58 moval, and if read with extreme technicality, it did not, in so many words. But the petition very well might be held to imply that the proposition to remove emanated from those who signed,—the only persons from whom it could emanate under the law that the petitioners had in mind.

Again, it is said that the ballot was in an unintelligible and misleading form. The board, following the statute, Compiled Laws 1897, § 631, ordered that "the tickets voted shall contain 'For County Seat,' with the name of the place for which the voter desires to cast his ballot, either written or printed thereon." If the court was of opinion that the voters would understand that those in favor of Carrizozo would write that word on the ticket, and those opposed to a change would write "Lincoln," we could not say that they overrated the intelligence of their fellow citizens. There was no evidence that the voters were deceived. But it is enough that the statute was followed. There is no ground on which the law could be declared void.

It is objected that there was no registration of voters, as required in general terms by § 1709 of the Compiled Laws. But that section required the county commissioners to appoint a board of registration sixty days before any election, and as the statute concerning the change of county seats in case of a special election required it to be called "at any time within two months of the date of presenting said petition," it naturally was held that the case was taken out of § 1709 by the latter act.

It is objected that various allegations of the bill were admitted because not denied. If any such matter is open, the allegations not denied were mainly, if not wholly, erroneous conclusions of law from the facts proved at the trial. Equitable Life Assur Soc. v. Brown, 213 U. S. 25, 43, 53 L. ed. 682, 689, 29 Sup. Ct. Rep. 404. But it is

not open. The argument seems to us to need no further or more elaborate reply.

Decree affirmed.

Judgment affirmed.

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59] *MICHIGAN CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

DANIEL B. VREELAND, Administrator, etc.

(See S. C. Reporter's ed. 59–74.)

**Error to circuit court — dismissal — grounds.**

1. A writ of error from the Federal Supreme Court will not be dismissed because the constitutional questions which furnished the ground for bringing the case directly to the Supreme Court have, since the allowance of the writ of error, been decided by that court in another case adversely to the plaintiff in error.

[For other cases, see Appeal and Error, VII. 1, in Digest Sup. Ct. 1908.]

**Abatement — death — action for personal injuries.**

2. The right of action created by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), in behalf of an injured interstate railway employee, is extinguished by his death, because of the failure of that statute to provide for any survival of such right of action, and it cannot be helped out by any state legislation on the subject.

[For other cases, see Abatement and Revival, II. c, in Digest Sup. Ct. 1908.]

**Death — right of action for causing — effect of temporarily surviving injury.**

3. The liability to certain relatives dependent upon the decedent, which is imposed by the employers' liability act of April 22, 1908, on an interstate railway carrier negligently causing the death of an employee while engaged in interstate commerce, is not limited to cases where death was instantaneous, the right of action thus created being independent of any cause of action which the decedent had, and including no damages which he might have recovered for his injury if he had survived.

[For other cases, see Death, II. a, in Digest Sup. Ct. 1908.]

**Damages — for death — pecuniary benefit.**

4. The financial benefit which might reasonably be expected from her husband in a pecuniary way is the measure of damages in an action brought against an interstate railroad carrier under the employers' liability act of April 22, 1908, for the benefit of the widow of an employee killed while engaged in interstate commerce.

[For other cases, see Damages, VI. 1, in Digest Sup. Ct. 1908.]

**Appeal — reversible error in instructions — damages.**

5. Instructing the jury to estimate from their own experience as men the financial value of a widow's loss of her husband's "care and advice" requires the reversal of a judgment against a carrier in an action brought under the employers' liability act of April 22, 1908, for the death of her husband while in the carrier's employ, as opening the door to conjecture and speculation.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

[No. 242.]

Argued December 4, 1912. Decided January 20, 1913.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment against a carrier in an action brought under the employers' liability act for the benefit of the widow of an employee who was killed while engaged in interstate commerce. Reversed and a new trial ordered.

See same case below, 189 Fed. 495.

The facts are stated in the opinion.

Mr. Emery D. Potter argued the cause and, with Messrs. Frank E. Robson, Henry Russel, and Charles P. Carroll, filed a brief for plaintiff in error:

The employers' liability act in force at the time of this accident made no provision whatever for a survivor in cases where the injured party survived the injury, but thereafter died as the result of the injury.

Fulgham v. Midland Valley R. Co. 167 Fed. 660; Walsh v. New York, N. H. & H. R. Co. 173 Fed. 494.

There cannot be two independent and separate rights of action vesting at the same time, one in Wisemiller, the party injured, and in his personal representative for the benefit of the widow and next of kin.

Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; State v. Grand Trunk R. Co. 61 Me. 114

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NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; Paducah v. East Tennessee Teleph. Co. 106 C. C. A. 333, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On the right to recover in one action for the death of a *person and for his suffering* before death—see notes to Louisville & N. R. Co. v. McElwain, 34 L.R.A. 788; Stewart v. United Electric Light & P. Co. 8 L.R.A. (N.S.) 384, and Mahoning Valley R. Co. v. Van Alstine, 14 L.R.A.(N.S.) 893.

On the measure of recovery for death caused by negligence—see note to Morgan v. Southern P. Co. 17 L.R.A. 71.

14 Am. Rep. 552; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291; West v. Detroit United R. Co. 159 Mich. 269, 123 N. W. 1101; Olivier v. Houghton County Street R. Co. 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53; Dolson v. Lake Shore & M. S. R. Co. 128 Mich. 444, 87 N. W. 629; Kellow v. Central Iowa R. Co. 68 Iowa, 470, 56 Am. Rep. 858, 23 N. W. 740, 27 N. W. 466; Sweetland v. Chicago & G. T. R. Co. 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066; Jones v. McMillan, 129 Mich. 86, 88 N. W. 206; Storrie v. Grand Trunk Elevator Co. 134 Mich. 297, 96 N. W. 569; Ely v. Detroit United R. Co. 162 Mich. 287, 127 N. W. 259; St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Nourse v. Packard, 138 Mass. 307; Mulchahey v. Washburn Car Wheel Co. 145 Mass. 281, 1 Am. St. Rep. 458, 14 N. E. 106; Holton v. Daly, 106 Ill. 131; Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113.

The court erred in its charge to the jury on the measure of damages.

Davis v. Guarnieri, 45 Ohio St. 471, 4 Am. St. Rep. 548, 15 N. E. 350; Steel v. Kurtz, 28 Ohio St. 191; Cincinnati Street R. Co. v. Altemeier, 60 Ohio St. 10, 53 N. E. 300; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; St. Louis & S. F. R. Co. v. Townsend, 69 Ark. 380, 63 S. W. 994; May v. West Jersey & S. R. Co. 62 N. J. L. 63, 42 Atl. 163; Nelson v. Lake Shore & M. S. R. Co. 104 Mich. 582, 62 N. W. 993; Swift & Co. v. Johnson, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867; McHugh v. Schlosser, 159 Pa. 480, 23 L.R.A. 574, 39 Am. St. Rep. 699, 28 Atl. 291; Holton v. Daly, 106 Ill. 132; Baltimore & P. R. Co. v. Golway, 6 App. D. C. 144; St. Louis, A. & T. R. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104; Illinois C. R. Co. v. Bentz, 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763, 69 S. W. 317; Sternfels v. Metropolitan Street R. Co. 73 App. Div. 494, 77 N. Y. Supp. 309; Helena Gas Co. v. Rogers, 98 Ark. 413, 135 S. W. 904; Texas & N. O. R. Co. v. Walker, — Tex. Civ. App. —, 125 S. W. 99; Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57.

Mr. John B. Daish argued the cause, and, with Mr. Joseph D. Sullivan, filed a brief for defendant in error:

Unless the provisions of the particular statutes are distinctly and clearly to the contrary, it is the rule of the Federal and many state courts that so long as the death of the injured party is occasioned by acts within the statute, it is immaterial whether or not the death and injury are simultaneous.

Roach v. Consolidated Imperial Min. Co. 7 Sawy. 224, 7 Fed. 698; Matz v. Chicago & A. R. Co. 85 Fed. 180; Sternenberg v. Mailhos, 39 C. C. A. 408, 99 Fed. 43; St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Murphy v. New York & N. H. R. Co. 30 Conn. 184; Malott v. Shimer, 153 Ind. 35, 74 Am. St. Rep. 278; 54 N. E. 101, 6 Am. Neg. Rep. 263; Conners v. Burlington, C. R. & N. R. Co. 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465; Worden v. Humeston & S. R. Co. 72 Iowa, 201, 33 N. W. 629; Brown v. Buffalo & S. Line R. Co. 22 N. Y. 191; Perham v. Portland General Electric Co. 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; Missouri P. R. Co. v. Kindred, 57 Tex. 491; Boyden v. Fitchbury R. Co. 70 Vt. 125, 39 Atl. 771; Van Amberg v. Vicksburg, S. & P. R. Co. 37 La. Ann. 651, 55 Am. Rep. 517; Hamilton v. Morgan's L. & T. R. & S. S. Co. 42 La. Ann. 824, 8 So. 586; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Hulbert v. Topeka, 34 Fed. 510.

Of course, where states have so-called "survival acts" and a statute creating a new cause of action (as in Michigan), it would appear to be a salutary rule that an administrator can recover damages under the latter statute only if death is instantaneous; and if the death is not instantaneous, he can recover under the former statute.

Sweetland v. Chicago & G. T. R. Co. 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066; Dolson v. Lake Shore & M. S. R. Co. 128 Mich. 444, 87 N. W. 629; Kyes v. Valley Teleph. Co. 132 Mich. 281, 93 N. W. 623, 13 Am. Neg. Rep. 340; Olivier v. Houghton County Street R. Co. 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53.

Such statutes are clearly distinguishable from the one under consideration; also such statutes as exist in Maine (Sawyer v. Perry, 88 Me. 42, 33 Atl. 660, 15 Am. Neg. Cas. 291).

With respect to the instruction as to damages, it is proper to consider the entire charge.

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; Rogers v. The Marshal (United States use of Rogers v. Conklin) 1 Wall. 644, 654, 17 L. ed. 714, 717; Evanston v. Gunn, 99 U. S. 660, 25 L. ed. 306.

The charge of the trial court is clearly within the well-recognized rule.

Tilley v. Hudson River R. Co. 29 N. Y. 252, 86 Am. Dec. 297; Baltimore & O. R. Co. v. Wightman, 29 Gratt. 436, 26 Am. Rep. 384; Searle v. Kanawha & O. R. Co. 32 W. Va. 370, 9 S. E. 248; Howard County v. Legg, 93 Ind. 523, 47 Am. Rep. 390; Northern P. R. Co. v. Freeman, 27 C. C. A.

457, 48 U. S. App. 757, 83 Fed. 82; Felt v. Puget Sound Electric R. Co. 175 Fed. 477; Bolinger v. St. Paul & D. R. Co. 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; Chattanooga R. & C. R. Co. v. Clowdis, 90 Ga. 258, 17 S. E. 88; Missouri P. R. Co. v. Bond, 2 Tex. Civ. App. 104, 20 S. W. 930; St. Louis, I. M. & S. R. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472, 11 Am. Neg. Cas. 133; Stoher v. St. Louis, I. M. & S. R. Co. 91 Mo. 509, 4 S. W. 389; Walker v. McNeill, 17 Wash. 582, 50 Pac. 582.

Mr. Justice **Lurton** delivered the opinion of the court:

This was an action under the employers' liability act of April 22, 1908 [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322], to recover damages for the wrongful death of the intestate, an employee in the service of the railroad company. The constitutionality of the act was drawn in question by the plaintiff in error in the court below, and this afforded ground for bringing the case directly to this court. Since the allowance of the writ of error all of the constitutional questions have been decided adversely to the plaintiff in error. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169.

64] But this does not justify *our dismissing the case, since the constitutional questions which gave the right to bring it here were not foreclosed when the writ was allowed, and we therefore have jurisdiction to consider other assignments of error.

These relate to the construction of the act and the measure of damages thereunder. Sections 1 and 2 of the act of 1908, and § 2 of the amendatory act of April 5, 1910 [36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1325], are set out in the margin.†

65] *This case, however, involves only a construction of the act prior to the amendment referred to.

The decedent survived his injuries for several hours. His personal representative has brought this action, not for the injury suffered by his intestate, but for the loss suffered by his widow as a consequence of his wrongful death.

For the railroad company it has been argued that the fact that the injured employee survived his injuries for several hours operates to extinguish its liability for both the wrongful injury and the death which ensued. The view of counsel seems to be that the act declared a single liability and constituted a cause of action in behalf of the injured person if he survived, or, in case his death was instantaneous, a cause of action for the benefit of the specified dependent relatives surviving. This is a narrow interpretation of the act, and would operate to defeat all liability unless the injured person should survive long enough to conduct his action to a recovery.

We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representative? This is a question which depends upon the statute.

*We may not piece out this act of [66 Congress by resorting to the local statutes of the state of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states.

Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. "The

†Sec. 1. That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier

subject," as observed by this court in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 54, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, "is one which falls within the police power of the state in the absence of legislation by Congress." Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28. By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. Thus, in Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802, it was said, in reference to state legislation touching freight rates upon interstate freight which conflicted with the legislation of Congress upon the same subject, that:

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 271, 23 L. ed. 543, 548. 'Definitions of the police power must, however, be taken, subject to the condition that the state cannot, 67]in its exercise, *for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114."

It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states. Reid v. Colorado, 187 U. S. 137, 146, 47 L. ed. 108, 113, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

The statutes of many of the states expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employee, it does not pass to his representative, notwithstanding state legislation. The question of survival is not one of procedure, "but one which depends on the substance of the cause of action." Schreiber v. Sharpless, 110 U. S. 76, 80, 28 L. ed. 65, 66, 3 Sup. Ct. Rep. 423; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533.

Nothing is better settled than that, at common law, the right of action for an injury to the person is extinguished by the death of the party injured. The rule, "*Actio personalis moritur cum persona*" applies, whether the death from the injury be instantaneous or not. The act of 1908 does not provide for any survival of the right of action created in *behalf of an [68 injured employee. That right of action was therefore extinguished. The act has been many times so construed by the circuit

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in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2 of the act of April 5, 1910:

That said act be further amended by adding the following section as section nine of said act:

Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

courts. We cite a few of the cases: Fulgham v. Midland Valley R. Co. 167 Fed. 660; Walsh v. New York, N. H. & H. R. Co. 173 Fed. 495.

At common law loss and damage may, in some cases, accrue to persons dependent upon one wrongfully injured, and a right of action in some cases arises in their behalf. But this cause of action, except for loss of personal services before the death, abates at the death.

In Baker v. Bolton, 1 Campb. 493, Lord Ellenborough ruled that "in a civil court, the death of a human being could not be complained of as an injury." Mobile L. Ins. Co. v. Brame, 95 U. S. 756, 24 L. ed. 580; The Harrisburg, 119 U. S. 199, 204, 30 L. ed. 358, 359, 7 Sup. Ct. Rep. 140.

The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds—"or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death," etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.

69] *The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being,—that of 9 and 10 Vict. chap. 93, known as Lord Campbell's act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the states and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the *deprivation, pecuniarily,* resulting to them from his wrongful death. For convenience in comparing Lord Campbell's act with the act of Congress of 1908, the 1st and 2d sections of the former are set out in the margin.†

In one of the earliest cases which arose under the act, Coleridge, J., said:

"It will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles." Blake v. Midland R. Co. 18 Q. B. 93.

In Seward v. The Vera Cruz, L. R. 10 App. Cas. 59, Lord Blackburn said:

*"A totally new action is given against[70 the person who would have been responsible to the deceased if the deceased had lived,—an action which . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who, under such circumstances, suffers pecuniary loss."

But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, § 124; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 231, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; Read v. Great Eastern R. Co. L. R. 3 Q. B. 555, 9 Best. & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; Hecht v. Ohio & M. R. Co. 132 Ind. 507, 32 N. E. 302; Fowlkes v. Nashville & D. R. Co. 9 Heisk. 829; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881.

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†Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death, etc.

The 2d section provides that,—

Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.

The distinguishing features of that act are identical with the act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. Tiffany, Death by Wrongful Act, §§ 153, 154; Illinois C. R. Co. v. Barron, 5 Wall. 90, 105, 106, 18 L. ed. 591, 594, 595; Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350; Blake v. Midland R. Co. 18 Q. B. 93, 21 L. J. Q. B. N. S. 233, 71]16 Jur. 562; Hurst v. *Detroit City R. Co. 84 Mich. 539, 545, 48 N. W. 44; Munro v. Pacific Coast Dredging & Reclamation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

The word "pecuniary" did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Patterson, Railway Acci. Law, § 401.

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

In Tilley v. Hudson River R. Co. 24 N. Y. 471, and 29 N. Y. 252, 86 Am. Dec. 297, the court stated that "the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value."

To the same effect are the cases of Schaub v. Hannibal & St. J. R. Co. 106 Mo. 74, 16 *S. W. 924, which was followed by the [72 circuit court of appeals for the eighth circuit in Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57; Lett v. St. Lawrence & O. R Co. 11 Ont. App. Rep. 1; Pennsylvania R. Co. v. Goodman, 62 Pa. 329, 339; Louisville, N. A. & C. R. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010; Tiffany, Death by Wrongful Act, §§ 154 to 162, inclusive; Patterson, Railway Acci. Law, §§ 401 to 406.

No hard and fast rule by which pecuniary damages may in all cases be measured is possible. In Lett v. St. Lawrence & O. R Co. cited above, it was said in the opinion of Patterson, J. A., after a review of all the English cases construing the act of Lord Campbell—

"That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute cannot be claimed."

The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, "according as the action is brought for the benefit of husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled." Tiffany, Death by Wrongful Act, §§ 158, 160-162.

The court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings." They were directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have *been derived by [73 her from the decedent's earnings. The court did not stop there, but further instructed

the jury that, "in addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." [189 Fed. 496.] This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

A minor child sustains a loss from the death of a parent, and particularly of a mother, altogether different from that of a wife or husband from the death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages. Tilley v. Hudson River R. Co. and Lett v. St. Lawrence & O. R. Co. both cited above. If the case at bar had been of such a character, the loss of "care and advice" might have been a proper matter for compensation.

Neither "care" nor "advice," as used by the court below, can be regarded as synonymous with "support" and "maintenance," for 74]the court said it was a deprivation *to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice from their own experiences as men." These experiences, which were to be the standard, would, of course, be as various as their tastes, *habits, and opinions.* It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband.

In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed and a new trial ordered.

Mr. Justice Holmes concurs in the result.

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WALTER B. GRANT and R. E. Burlingame, Appts. and Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 74–80.)

**Appeal — mode of review — criminal contempt.**

1. A judgment fining a person for contempt in disobeying a subpœna duces tecum directing the production before the grand jury of certain books and papers in his possession is reviewable only by writ of error, the case being one of criminal contempt.

[For other cases, see Appeal and Error, I. d, 21, in Digest Sup. Ct. 1908.]

**Appeal — who may bring error — party.**

2. Neither the appearance before the grand jury of the alleged owner of certain books and papers called for in a subpœna duces tecum directed to his attorney, nor an order appointing a referee to take testimony as to the rights and privileges claimed by the attorney, and as to the ownership of such books and papers, makes the former a party to the proceedings to punish the attorney for contempt in disobeying the subpœna, and he therefore has no standing to sue out or join in a writ

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NOTE.—Distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On refusal to produce books or papers in response to subpœna, upon ground that they contain private matter—see note to Re Bolster, 29 L.R.A.(N.S.) 716.

On compulsory production of books and papers as unreasonable search or seizure—see note to Consolidated Rendering Co. v. Vermont, 52 L. ed. U. S. 327.

As to particularity required in description of documents in subpœna duces tecum—see note to Ex parte Gould, 31 L.R.A. (N.S.) 835.

As to constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Court, 29 L.R.A. 811.

On the right of officer of a corporation to refuse to turn over its books to a receiver, upon the ground that they have a tendency to incriminate him—see note to Manning v. Mercantile Securities Co. 30 L.R.A.(N.S.) 725.

of error to review the final judgment in such proceedings.

[For other cases, see Appeal and Error, IV. a, 2, in Digest Sup. Ct. 1908.]

**Witnesses — privileged communications — production of client's documents — self-crimination.**

3. Whether or not an attorney may refuse to obey a subpœna duces tecum calling for the production of his client's books and papers before a grand jury because they may tend to incriminate the client depends upon the client's constitutional rights, irrespective of any question of professional privilege.

[For other cases, see Witnesses, V. c; Evidence, X. e, in Digest Sup. Ct. 1908.]

**Witnesses — self-crimination — production of corporate books.**

4. A stockholder in a defunct corporation cannot invoke his constitutional privilege against self-crimination to justify his refusal to produce before the grand jury, under a subpœna duces tecum, the corporate books and papers in his possession, although the legal title to such books and papers may be in him.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

**Searches and seizures — production of corporate books.**

5. The enforced production before the grand jury under a subpœna duces tecum of the books and papers of a defunct corporation covering a period of three years, which are in the possession of a former stockholder who claims title, does not violate any constitutional protection against unreasonable searches and seizures.

[For other cases, see Search and Seizure, in Digest Sup. Ct. 1908.]

[No. 831.]

Argued and submitted January 6, 1913. Decided January 20, 1913.

APPEAL from and IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment fining an attorney for contempt in disobeying a subpœna duces tecum calling for the production of the books and papers to which his client asserts title. Appeal dismissed. Judgment affirmed on writ of error.

See same case below, 198 Fed. 708.

The facts are stated in the opinion.

Mr. William A. Keener submitted the cause for appellants and plaintiffs in error. Mr. Dallas Flannagan was on the brief:

The title to the books and letters called for by the subpœna, being in Burlingame personally, the case of Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558, *has no* application to the case at bar.

*The same protection which* the Constitution *extends to Burlingame* against the forced production of his books and letters which would tend to incriminate him also extends to his attorney when such books and letters are in his attorney's possession as attorney.

Boyd v. United States, 116 U. S. 616, 630, 29 L. ed. 746, 751, 6 Sup. Ct. Rep. 524.

Solicitor General Bullitt argued the cause, and, with Mr. Loring C. Christie, filed a brief for the United States:

The appeal here should be dismissed because a contempt proceeding such as this is *sui generis*, is in its nature criminal, and a person adjudged in contempt must review the order by writ of error, and not by appeal.

Bessette v. W. B. Conkey Co. 194 U. S. 324, 338, 48 L. ed. 997, 1006, 24 Sup. Ct. Rep. 665; Alexander v. United States, 201 U. S. 117, 122, 50 L. ed. 686, 688, 26 Sup. Ct. Rep. 356; Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Sessions v. Gould, 11 C. C. A. 550, 26 U. S. App. 368, 63 Fed. 1001.

Burlingame has no standing in this court and his writ of error must be dismissed.

Ex parte Cockcroft, 104 U. S. 578, 26 L. ed. 856; Bayard v. Lombard, 9 How. 530, 551, 13 L. ed. 245, 254; Payne v. Niles, 20 How. 219, 221, 15 L. ed. 895, 896.

This is a noncapital criminal case. There can be no review of it here unless a constitutional question is involved.

Rakes v. United States, 212 U. S. 55, 53 L. ed. 401, 29 Sup. Ct. Rep. 244; Nelson v. United States, 201 U. S. 92, 98, 50 L. ed. 673, 674, 26 Sup. Ct. Rep. 358.

The court held as a fact that Grant had the books solely for safe-keeping, and not as attorney. This finding will not be reviewed on writ of error.

Behn v. Campbell, 205 U. S. 403, 407, 51 L. ed. 857, 858, 27 Sup. Ct. Rep. 502; Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665.

If the constitutional question considered below is involved, it is covered by Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558.

Since Burlingame would have been bound to produce the books, Grant, even assuming that he holds them as Burlingame's attorney, is likewise bound to produce them, since they are documents independently pre-existing, and their production, therefore, is not a disclosure of the attorney's knowledge at all.

4 Wigmore, Ev. § 2307.

The subpœna is suitably specific, and, in

any event, such an objection does not affect the validity of the order below.

Wilson v. United States, 221 U. S. 375, 376, 55 L. ed. 777, 778, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 554, 52 L. ed. 327, 335, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658.

Mr. Justice Hughes delivered the opinion of the court:

Walter B. Grant and E. E. Burlingame seek, both by appeal and by writ of error, a review of a judgment of the district court by which Grant was adjudged to be guilty of contempt.

Burlingame was indicted by a Federal grand jury in the southern district of New York on August 30, 1911, and again on March 15, 1912, the latter indictment being found against him in connection with the Ellsworth Company, a corporation, J. D. Smith, and others. Walter B. Grant was one of Burlingame's attorneys. On March 13, 1912, a subpœna duces tecum was served upon Grant, directing him to appear before the grand jury to testify in regard to an alleged violation of the statutes of the 77] *United States by J. D. Smith, and to produce certain books and papers of the Ellsworth Company for the years 1907, 1908, 1909. In response to the subpœna, Grant appeared before the grand jury but did not produce the documents demanded. On being asked whether he had received from Burlingame any box of books or papers, he declined to answer further than to say that he had received nothing from Burlingame save in his capacity as attorney for the purpose of professional consultation and of preparing for the defense of his client. He said that he had not opened any box received from Burlingame, and he refused to open any such box in order to ascertain whether or not it contained the books or papers called for, upon the ground that to do so for the purpose of disclosing the result of his examination would violate his duty and his client's privilege.

The grand jury thereupon presented Grant for contempt. Burlingame appeared in court, set up that the books and papers required to be produced were his individual property, and that to produce them or to disclose their contents or whereabouts would tend to incriminate him. The court appointed a referee to take evidence as to the rights and privileges claimed by Grant, and as to the ownership of the books and papers, together with such other evidence as might be relevant to the questions raised, and to make report to the court, with his conclusions. Much testi-



mony was taken before the referee, wh submitted an elaborate report upon th facts and the law, embracing the followin conclusions: That Burlingame had at s times been the sole stockholder of the Ell worth Company which, on December 3 1909, had ceased to do business; that th legal title to the books and papers was the corporation, and not in Burlingam that if the title had passed to Burlingam prior to the service of the subpœna, neve theless they would not be privileged, f the reason that they were corporate character; *that in August or Septem-[7 ber, 1911, Burlingame had delivered tw packages and a box to Grant, which the la ter had in his possession; that the packag and box were delivered to Grant for saf keeping in his office, and were not deliver to him in his professional capacity as a torney, or for the purpose of consultati with him in such capacity; that their co tents were not privileged, and that Gra should have searched therein for the bool and papers, should have produced them found, and should have answered the que tions put to him before the grand jur and, finally, that by reason of his refusa he was in contempt.

Exceptions were filed to the report, whi was confirmed by the court save as to th finding that the legal title to the bool and papers was in the corporation. Gra was thereupon adjudged to be in contem for failing to examine the contents of th box and packages for the purpose of a certaining whether they contained the p pers specified in the subpœna, and for fa ing to answer the questions put to him co cerning them by the grand jury. It w provided that he might purge himself the contempt by making the examinati and by answering such questions and pr ducing the papers, if found, in response a fresh subpœna. In punishment, he w fined a sum equal to the expenses of th reference.

The appeals, both of Grant and Burli game, from this judgment must be di missed. The case was one of crimin contempt reviewable only by writ of erro Bessette v. W. B. Conkey Co. 194 U. 324, 336–338, 48 L. ed. 997, 1005, 1006, Sup. Ct. Rep. 665; Bucklin v. United Stat 159 U. S. 681, 40 L. ed. 304, 16 Sup. C Rep. 182; Gompers v. Bucks Stove & Ran Co. 221 U. S. 418, 444, 55 L. ed. 797, 80 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 49 Re Merchants' Stock & Grain Co. 223 U. 639, 56 L. ed. 584, 32 Sup. Ct. Rep. 33

In the writ of error, Burlingame has a tempted to join. The subpœna was not d rected to him, and he was not charged w contempt. It is true that he appe

before the court when Grant was presented 79]by the grand jury, *and stated his claim to the books and papers. In the subsequent inquiry, the purpose of the court manifestly was to ascertain all the facts in order that it might properly decide the question with respect to the alleged contumacy of Grant. Neither Burlingame's appearance before the court, nor the order of reference, made Burlingame a party to the proceeding, which was in its nature criminal, and was instituted and conducted to the final judgment against Grant alone. Burlingame had no standing to sue out a writ of error. Bayard v. Lombard, 9 How. 530, 551, 13 L. ed. 245, 254; Payne v. Niles, 20 How. 219, 221, 15 L. ed. 895, 896; Ex parte Cockcroft, 104 U. S. 578, 26 L. ed. 856. And the writ must be dismissed as to him.

The judgment is attacked by Grant upon the ground that there has been a denial of constitutional right. It is contended by the government that the writ should also be dismissed as to Grant because the facts are not open to review, and it was found by the court below that he had not received the box and packages in his professional capacity as attorney or for purposes of consultation. While this suffices to show that the questions put to the witness did not invade the professional privilege, the finding does not control the decision of the case with respect to the requirement of the production of the books and papers if in Grant's possession. See 4 Wigmore, Ev. § 2307. These were independent documents. Even if they had been received by Grant as attorney for purposes of consultation, they could not be regarded as privileged communications. And, assuming that they were left with him merely for safe-keeping, they would still be held by Grant as Burlingame's agent. The inquiry thus remains whether in these circumstances Grant could refuse their production if they would tend to incriminate his principal.

Although the merits of the constitutional question are thus before us, it does not require extended discussion in view of the recent decisions of this court. The books 80] *and papers called for by the subpœna were corporate records and documents. Whether or not the title to them had passed to Burlingame when the Ellsworth Company ceased to do business, their essential character was not changed. They remained subject to inspection and examination when required by competent authority, and they could not have been withheld by Burlingame himself upon the ground that they would tend to incriminate him. Nor was there any unreasonable search or seizure. Wheeler v. United States, decided January 6, 1913 [226 U. S. 478, ante, 309, 33 Sup. Ct. Rep. 158]; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558.

It follows that Grant, from any point of view, was not justified in his refusals, and the judgment is affirmed.

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NORMAN H. DAVIS and Charles H. Phillips, Appts.,

v.

LAS OVAS COMPANY, Incorporated.

(See S. C. Reporter's ed. 80–87.)

**Corporations — promoters — secret profits.**

1. A corporation may recover the secret profits made by some of its promoters without the knowledge of their associates in the purchase of a tract of land for the proposed corporation, and may require them to surrender for cancelation the shares of stock issued to them for their services as promoters, although such recovery may inure to the benefit of the guilty as well as to the innocent.

[For other cases, see Corporations, VIII., in Digest Sup. Ct. 1908.]

**Parties — necessary defendants — suit against promoters of corporation.**

2. All the promoters who may have shared in the secret profits made in the purchase of a tract of land for the proposed corporation are not necessary parties defendant to a suit by a corporation to recover such profits, together with the shares of stock issued to them for their services as promoters, but the corporation may sue any or all of those who received such profits.

[For other cases, see Parties, II. a, 2, in Digest Sup. Ct. 1908.]

[No. 87.]

Argued December 16, 1912. Decided January 20, 1913.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which, reversing in part a decree of the Supreme Court of the District, ordered the entry of a decree for the recovery by a corporation of secret profits made by its

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NOTE.—Liability of promoter for secret profits on sale to corporation of property on which he holds option.

The confidential or fiduciary relation to the corporation and its members, in which the promoter is universally regarded as standing, is enough to require him to disgorge any secret profits of the character under consideration.

promoters, and the surrender for cancelation of the shares of stock issued to them for their services as promoters. Affirmed.

See same case below, 35 App. D. C. 372.

Messrs. J. K. M. Norton and Samuel A. Putman argued the cause and filed a brief for appellants:

Can the company in such a case as this, where the syndicate put the property in its name and took it back in the form of all its stock, bring suit for a deception upon some members by other members of the syndicate when the public was not only not brought in, but could not be brought in, as the company had no stock to sell the public?

Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634; Morawetz, Priv. Corp 2d ed. § 292.

When directors issue the whole stock o the company for property worth less tha the par amount, no one is injured in th least.

Blum v. Whitney, 185 N. Y. 232, 77 N E. 1159; Cook, Corp. 6th ed. § 651.

When all the stock of the company i turned into another company in exchang for the stock of the latter, and the pro moters are the only ones interested, thoug the stock is afterwards sold, the promoter cannot be held.

Cook, Corp. § 651, p. 1888; Stratton' Independence v. Dines, 126 Fed. 968, a firmed in 68 C. C. A. 161, 135 Fed. 449.

When all the stock of a corporation i

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Promoters will not, said the court in Mangold v. Adrian Irrig. Co. 60 Wash. 286, 111 Pac. 173, be permitted to profit secretly at the expense of investing stockholders in the sale of property to the corporation on which such promoters held merely an option.

One who, while acting as promoter of a corporation, obtains an option on lands which he sells to the corporation when formed, at an advance, concealing from the company the fact that he is making a profit, will not be allowed to derive any advantage from such sale. Johnson v. Sheridan Lumber Co. 51 Or. 35, 93 Pac. 470.

Where persons who had an option to purchase property for $20,000 represented to the subscribers that the option would cost $90,000, and after securing the subscription and the money thereon, paid the $20,000, and converted $70,000 to their own use, it was held that an action on behalf of the corporation to recover the $70,000 was maintainable. Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226.

Where a promoter of a corporation for the purchase of certain real estate is not the owner thereof at the time he begins to organize such corporation, but has only an option thereon, but subsequently obtains a deed and then sells at a profit to the company without making known to it fully his interest therein, he is liable in damages to the company for the amount of his secret profit. Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951.

Promoters cannot close an option and sell at an advance in price the land covered by it to a corporation organized by them while the option was unexercised, unless the corporation has the fullest and most complete knowledge of the transaction and consents thereto; and, if they do, they may be required to account for the secret profits. Caffee v. Berkely, 141 Iowa, 344, 118 N. W. 267.

Promoters of a corporation are bound to the exercise of good faith toward all the stockholders; and when they have secured options on *property which they* intend to sell to the corporation, it is their duty t disclose all the facts relating to the prop erty; and they are precluded from takin a secret advantage. See v. Heppenheime 69 N. J. Eq. 36, 61 Atl. 843.

A corporation may secure the cancelatio of stock which was paid for out of the secre profits made by the subscribers in the sal to the corporation of property on whic they had secured an option, and to purchas which they had organized the corporatio the management of which, at the consum mation of the transaction, was completel under their control. Yeiser v. United State Board & Paper Co. 52 L.R.A. 724, 46 C. C A. 567, 107 Fed. 340.

In Wills v. Nehalem Coal Co. 52 Or. 7 96 Pac. 528, a promoter obtained an optio on land for $12,000, paying thereon $40 obtained from a subscriber in payment o his shares; she paid her subscription fo 750 shares, of the par value of $75,00 which was half the stock of the compan by selling the land to the company, whos board of directors she controlled, for $87,00 receiving the note of the company, whic was subsequently paid, for the balanc $12,000. It was held that the promoter di not merely sell the corporation at an un fair price property that lawfully belonge to her, but that the corporation had through a colorable and circuitous transfe of the title, been compelled to pay $87,00 for land that it was legally and equitabl entitled to purchase for $12,000; and tha her stock would be regarded as unpaid o partly unpaid, and she would be compelle to pay the difference to the corporation, o her stock would be canceled, as should ap pear to the court most equitable.

A trust mortgage which represents th secret profits of the promoters on the sal through a third person to the corporation o real property on which such promoters hel an option is void and invalid as against th corporation, although the property actuall may have been worth the increase in pric Midwood Park Co. v. Baker, 128 N. Y. Supp 954, affirmed without opinion in 144 A Div. 939, 129 N. Y. Supp. 1135.

issued in payment for property, the vendor cannot be held liable for misrepresentations as to the value of the property.

Foster v. Seymour, 23 Fed. 65; McCracken v. Robison, 6 C. C. A. 400, 13 U. S. App. 547, 57 Fed. 375; Du Pont v. Tilden, 42 Fed. 87; Wood v. Corry Water Works, 12 L.R.A. 168, 44 Fed. 146; Bank of Fort Madison v. Alden, 129 U. S. 373, 32 L. ed. 725, 9 Sup. Ct. Rep. 332; Barr v. New York, L. E. & W. R. Co. 125 N. Y. 273, 26 N. E. 145; Seymour v. Spring Forrest Cemetery Asso. 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365; Thornton v. Wabash R. Co. 81 N. Y. 467; Parsons v. Hayes, 14 Abb. N. C. 434; King v. Barnes, 109 N. Y. 268, 16 N. E. 332; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 472, 93 N. Y. Supp. 134; Higgins v. Lansing, 154 Ill. 301, 40 N. E. 362; Spaulding v. North Milwaukee Town Site Co. 106 Wis. 488, 81 N. W. 1064; Garretson v. Pacific Crude Oil Co. 146 Cal. 184, 79 Pac. 838; St. Louis, Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 633, 15 Pac. 544; Walburn v. Chenault, 43 Kan. 356, 23 Pac. 657; Arkansas River Land Town & Canal Co. v. Farmers' Loan & T. Co. 13 Colo. 587, 22 Pac. 954; Tompkins v. Sperry, 96 Md. 583, 54 Atl. 254; Swift v. Smith, 65 Md. 435, 57 Am. Rep. 336, 5 Atl. 534; Merchants & M. Sav. Bank v. Burlington Coal & Coke Co. 51 W. Va. 60, 41 S. E. 390; Clark v. American Coal Co. 86 Iowa, 436, 17 L.R.A. 561, 53 N. W. 291; Divine v. Universal Sewing Mach. Motor Attachment Co. — Tenn. —, 38 S. W. 93; Re Ambrose Lake Tin & C.

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Where a realty company had contracted to buy for $350,000 property which it the next day sold for $640,000 to the trustees of a syndicate formed by it to purchase the property, and which was later incorporated, the realty company representing that the purchase price was $550,000, and taking a mortgage for the remaining $90,000 for its services in procuring the property and its expenses in forming the syndicate, such mortgage will be canceled, the realty company being called upon to act in good faith, and being prohibited from making a secret profit out of the transaction. Crowe v. Malba Land Co. 76 Misc. 676, 135 N. Y. Supp. 454.

Bonds issued to promoters in payment for options on the property of competing companies of small and uncertain prospective value are void under a Constitution which provides that no corporation shall issue stock or bonds except for money, labor done, or money or property actually received, and that all fictitious increase of stock or indebtedness shall be void. Wiegand v. Albert Lewis Lumber & Mfg. Co. 85 C. C. A. 430, 158 Fed. 608, affirming Re Wyoming Valley Ice Co. 153 Fed. 787.

The law will not approve a transaction by which property is purchased by a promoter of a corporation with money solicited in substantial part from associates by representations that he intends to form a corporation with a specified capitalization, and sell the property to it for a certain amount of stock, followed by its actual sale to the corporation for a much larger sum, the settlement with the associates at the price agreed upon, and the retention by the promoter of the difference as a secret profit, taking cash subscriptions from the general public, who understand that the corporation is organized under a statute which requires property to be taken for stock only at its true value. Old Dominion Copper Min. & Smelting Co. v. Bigelow, 203 Mass. 159, 40 L.R.A.(N.S.) 314, 89 N. E. 193, affirmed in 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641.

*In Walker v. Pike* County Land Co. 71 C. C. A. 593, 139 Fed. 609, defendant, who held an option to purchase certain land for $67,500, represented to certain prospective buyers that the lowest sum for which it could be obtained was $80,000, and joined with them in forming a corporation to hold the title to the same, and himself became a subscriber. It was held that "as a joint purchaser he stood in a fiduciary relationship to his associates, and was bound to the utmost good faith in his dealings with them. The law demanded of him not only that he should not be guilty of positive fraud, but that he should not conceal from them any fact material to the transaction. Any profit which he secured by violating this legal duty he was bound to account for to them." Hence a judgment for the amount of the secret profits, in favor of the corporation, was sustained.

Even though a promoter of a corporation to purchase certain land obtained an option thereon and paid part of the purchase price before beginning to organize the corporation, yet he has no right to conceal or misrepresent his connection with and interest in the thing about which he is proposing to deal with the corporation; and if he does, he may be compelled to account to it for his secret profit in the sale. Wiano Land & Improv. Co. v. Webster, 75 Mo. App. 457.

It was held in Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92, that, where the holder of an option on oil lands for $6,000 organizes a corporation to purchase and develop the same, and on each subscription paper states that he holds an option on said lands and will sell them for $8,500 to the company when organized, but says nothing about what they cost him, and the company, when organized, votes to buy the same, such holder is guilty of no deceit, and may retain his profit, since he is the owner of the lands, and may sell them for what he can get for them.

And on the general subject of the duty and liability of promoters to the corporation and its members, see notes to Lomita Land & Water Co. v. Robinson, 18 L.R.A.(N.S.) 1106, and Yale Gas Stove Co. v. Wilcox, 25 L.R.A. 90.

Min. Co. L. R. 14 Ch. Div. 395, 49 L. J. Ch. N. S. 457, 42 L. T. N. S. 604, 28 Week. Rep. 783; Salomen v. Salomen & Co. L. R. [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193.

There is no legal difference between the holder of an option and a full owner of land.

Densmore Oil Co. v. Densmore, 64 Pa. 49, 3 Mor. Min. Rep. 569; Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891, 1 Ann. Cas. 986.

The syndicate agreement was wholly between the parties thereto.

Hutchinson v. Simpson, 92 App. Div. 382, 87 N. Y. Supp. 369; Blum v. Whitney, 185 N. Y. 241, 77 N. E. 1159.

Equity looks at the substance, and not at the form of things. There is nothing here for the company to sue for.

Thomp. Corp. 3d ed. § 3997.

Herbert and Micou should have been made parties.

Thomp. Corp. § 473; Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Jessup v. Illinois C. R. Co. 36 Fed. 738.

Equity will surely not allow the plaintiff purposely to leave out some and make victims of a part without good reason.

Thomp. Corp. §§ 465, 473; Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Jessup v. Illinois C. R. Co. 36 Fed. 738.

The measure of the recovery in equity is only the net secret profits.

McElhenny's Appeal, 61 Pa. 188.

In estimating secret profits allowance must be made for all expenses incurred.

Emma Silver Min. Co. v. Grant, L. R. 11 Ch. Div. 918, 40 L. T. N. S. 804.

The company must be consistent. It cannot leave out Herbert and Micou, thus treating them as innocent, and at the same time hold Davis and Phillips for all the secret profits, some of which was certainly received by Herbert and Micou, through Micou.

7 Am. & Eng. Enc. Law, 22; Littell v. Julius Lansburgh Furniture Co. 96 Va. 540, 32 S. E. 63.

All the cases negative the idea that a court of equity can penalize and fine in such cases by taking away what was openly agreed to be given.

Thomp. Corp. §§ 459, 463, 8287; McElhenny's Appeal, 61 Pa. 188; Emma Silver Min. Co. v. Grant, L. R. 11 Ch. Div. 918, 40 L. T. N. S. 804.

Parties are not allowed to take inconsistent positions in legal proceedings.

7 Am. & Eng. Enc. Law, 22; Littell v. Julius Lansburgh Furniture Co. 96 Va. 540, 32 S. E. 63.

Mr. J. J. Darlington argued the caus and filed a brief for appellee.

*Memorandum opinion by direction of[8 the court, by Mr. Justice Lurton:

This is a bill by the appellee to recove from appellants secret profits made by them as promoters of the Las Ovas Company i the purchase of a part of a tract of lan known as Las Ovas, in the Republic o Cuba, and also for the cancelation of cer tain shares of stock issued to them as pro moters.

The facts essential to judgment are no in serious dispute. They are found clearl and fully stated in the opinion of Mr Justice Gould for the supreme court of th District of Columbia, and again in th opinion of the court of appeals of the Dis trict by Mr. Justice Robb.

From the facts found by both courts i appears:—

a. That the appellants and certain othe persons, not parties to this suit, signe an agreement on March 19, 1904, by whic they agreed to purchase for a corporatio which they were to organize a specified par of a tract of land in Cuba called the La Ovas plantation, for the price of $34,000 to which it was later agreed to add anothe small parcel at an additional price o $1,000.

b. It was further agreed that they shoul organize a corporation, of which they shoul be the incorporators, with a capital stoc of $150,000, and that 40 per cent of th shares should be issued to them for servic as promoters and that the remaining stoc should be subscribed for by them. For thi subscribed stock they were to pay a amount sufficient to cover the purchas money of $35,000 and to create an expens fund of $5,000.

c. It was agreed that the property should when acquired, be placed in the hands o one of the group of promoters until th formation of the company, and then con veyed to it.

d. The scheme was one originated an engineered by the appellants, who, at[8 the time of this agreement, had already se cretly secured an option for themselves fo the purchase of this property at the price o $20,000. To conceal the true consideratio from their associates they caused the prop erty to be conveyed by the vendor to on Escalante, a stranger selected by them. Th deed to Escalante recited the true consid eration. Later, in pursuance of the pro moters' agreement, they caused Escalant to convey to the member of the syndicat selected to hold the title until organizatio reciting a consideration of $35,000.

The corporation was organized as planned. The promoters' shares were duly issued and the remaining shares taken by the promoters upon the agreed terms, its officers and directors being composed exclusively of the members of the syndicate. Thereupon the property was transferred to the company and paid for, through appellants, out of the proceeds of the subscribed stock.

The result of the transaction was that the corporation was required to pay to those who had assumed to act for and represent it, a secret profit of $15,000 and also to compensate them for their services in buying the land and organizing the company by issuing to each of them $15,000 in nonassessable shares of its stock.

The decree below required the appellants to account for the profits realized by them, in part traced to certain shares in their hands, and to surrender for cancelation the shares issued to them as promoters.

It is now said that the corporation was "a mere convenient receptacle for the property, erected for the convenience of the syndicate." That the property was bought by the syndicate for their own advantage, and that the corporation included only the members of the syndicate. That the stock of the company was all taken by the syndicate, who, for property which was their own, agreed *to pay enough to cover the purchase price and create a small expense fund. [86]

Upon this contention it is urged that the corporation has no right to the relief sought, as the whole transaction was a mere form adopted by the parties for their own convenience as owners of the property and owners of the corporation. It is then said: "If we admit, for the purposes of this point, that appellants did deceive some of the syndicate, what has the company to do with it? For this they cite Old Dominion Copper Min. & Smelting Co. v. Lewisohn, 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634, where it was held that a subordinate fraud practised by some of the promoters of a corporation upon some of their associates was a matter wholly between them and the syndicate, which gave rise to no corporate right of action in the absence of innocent incorporators or stockholders.

But that is not this case. Some of those, if not all, interested by appellants in the property and in its purchase for a proposed consideration were ignorant of the real price which they were to pay for it, and were not, therefore, in complicity with their scheme to make a secret profit. Their innocent members of the syndicate became stock subscribers and directors of the company, as did appellants. The buyers and sellers were not the same. Those of the syndicate assuming to act for the corporation in acquiring the property were under obligation to disclose the truth and deal openly. In the absence of such disclosure the corporate assent was obtained on false grounds. The wrong was done when those members of the syndicate not in complicity with appellants subscribed to the stock of the company and aided their guilty associate managers in the corporate action necessary to the corporate acquisition of the property at the exaggerated price placed upon it by those who were to realize a secret profit. Thus, the original fraud practised upon some of those associated with them in the promoters' arrangement became operative against the corporation itself. The standing of the *corporation [87] results from the fact that there were innocent and deceived members of the corporation when the property was taken over by it.

Neither is the corporate right of action defeated by the fact that the recovery will inure to the guilty as well as to the innocent, nor is the fact that all of the parties who may have shared in the secret profits are not sued fatal to the case. The corporation may well sue either one or all of those who received secret profits. There is no want of necessary parties because all are not here sued.

The distinction between a case in which all of the owners of the property and all of the members of the buying corporation are the same persons, and participate in the profit realized, and the case here presented, is fully recognized in Old Dominion Copper Min. & Smelting Co. v. Lewisohn, as well as in New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436, and in the well-considered opinion of Judge Severens in Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340.

There was no error in canceling the shares issued to the plaintiffs in error for promotion of the corporation. They and the other members of the syndicate received these shares upon the assumption that they had in good faith served the corporation in the procurement of the property. Obviously appellants were serving themselves to the detriment of the corporation and innocent subscribers to its stock. In such a situation the corporation may recover the shares.

The decree will be affirmed.

88] *INTERSTATE COMMERCE COMMISSION and the United States, Appts.,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(See S. C. Reporter's ed. 88–100.)

**Interstate Commerce Commission — review of order fixing rates — commerce court.**

1. An order of the Interstate Commerce Commission reducing railway rates, made in the exercise of its power under the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), § 4, to set aside rates if, after a hearing, the "Commission shall be of the opinion that the charge was unreasonable," may be reversed by the commerce court if there was no substantial evidence to sustain the order, in view of the provisions of the act of March 2, 1889 (25 Stat. at L. 861, chap. 382, U. S. Comp. Stat. 1901, p. 3168), § 6, for methods of procedure before the Commission that "conduce to justice," and of the express declaration in the act of June 18, 1910 (36 Stat. at L. 551, chap. 309), § 12, that such orders "may be suspended or set aside by a court of competent jurisdiction."

[For other cases, see Interstate Commerce Commission, 8–14, in Digest Sup. Ct. 1908.]

**Interstate Commerce Commission — review of order fixing rates — commerce court.**

2. The lack of formal proof at the hearing essential to sustain an order of the Interstate Commerce Commission reducing rates cannot be supplied by indulging a presumption that its findings were supported by the information which the Commission is required by the act of February 10, 1891 (26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3163), § 12, to obtain in order to enable it to perform the duties and carry out the objects for which it was created.

[For other cases, see Interstate Commerce Commission, 8–14, in Digest Sup. Ct. 1908.]

**Interstate commerce commission — review of order fixing rates — facts.**

3. An order of the Interstate Commerce Commission restoring an old local rate which had been raised by the carrier in order to make the sum of the locals equal the through rate, and making a corresponding reduction in such through rate, cannot be said to have been made without any substantial evidence to support it, where there was conflicting evidence as to the justice of the new rates in themselves and by comparison with others, and as to the reasonableness of the old rates, which had remained in force for some years after the water competition originally compelling them had disappeared.

[For other cases, see Interstate Commerce Commission, 8–14, in Digest Sup. Ct. 1908.]

[No. 600.]

Argued October 17 and 18, 1912. Decided *January 20, 1913.*

APPEAL from the United States Commerce Court to review a decree which annulled an order of the Interstate Commerce Commission reducing rates. Reversed.

See same case below, 195 Fed. 541.

The facts are stated in the opinion.

Assistant to the Attorney General Fowler argued the cause, and, with Mr. Blackburn Esterline, Special Assistant to the Attorney General, filed a brief for the United States:

The decisions of this court prior to the case of Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541–546, 56 L. ed. 308–310, 32 Sup. Ct. Rep. 108, sustain the view that the evidence before the Commission cannot be reviewed by the courts.

Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 108, 110, 111, 54 L. ed. 946, 957, 958, 30 Sup. Ct. Rep. 651; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 251, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392.

If the action of the Commission in determining whether or not a rate is reasonable is judicial in its nature, the evidence upon which it acts is not reviewable.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 499, 501, 42 L. ed. 243, 253, 254, 17 Sup. Ct. Rep. 896, 998; Harlan v. McGourin, 218 U. S. 442, 444. 447, 54 L. ed. 1101, 1103, 1105, 31 Sup. Ct. Rep. 44, 2 Ann. Cas. 849; Hilton v. Merritt, 110 U. S. 97, 107, 28 L. ed. 83, 86, 3 Sup. Ct. Rep. 548; Muser v. Magone, 155 U. S. 240, 247, 39 L. ed. 135, 137, 15 Sup. Ct. Rep. 77.

When an act is partly judicial and partly administrative, as numerous acts performed by the heads of departments, the evidence upon which the action is had is not subject to consideration.

American School v. McAnnulty, 187 U. S. 94, 107, 109, 47 L. ed. 90, 95, 96, 23 Sup. Ct. Rep. 33; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; Bates

& G. Co. v. Payne, 194 U. S. 106, 110, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324, 47 L. ed. 1074, 1078, 23 Sup. Ct. Rep. 698.

The action of the Commission in determining that the existing rates were unreasonable, and in fixing maximum reasonable rates, was legislative, and therefore the commerce court has no control whatever over the same if regularly passed and within the power of the Commission.

Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 227, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598, 51 L. ed. 636, 27 Sup. Ct. Rep. 326.

The reasonableness of a rate is a question of fact for the Commission.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288.

The determination by the Commission whether a rate is reasonable, and the determination by the courts whether a rate when fixed is unconstitutional, because confiscatory, are governed by entirely different principles.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 267, 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804. See also San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

Mr. P. J. Farrell argued the cause and filed a brief for the Interstate Commerce Commission:

The commerce court erred in substituting its own judgment for the judgment of the Commission concerning the reasonableness of the rates involved.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Procter & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761.

Mr. Helm Bruce argued the cause, and, with Messrs. Henry L. Stone and Albert S. Brandeis, filed a brief for appellee:

An order of the Interstate Commerce Commission lowering rates, entered without substantial evidence to support it, is void.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108.

In a suit to enforce or enjoin an order of the Interstate Commerce Commission there is jurisdiction to take evidence upon the merits of the original controversy.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 174, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108.

There is no presumption of wrong arising from a change of rate by a carrier.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493.

The Interstate Commerce Commission has no power to fix rates for the future until the existing rates have been shown to be unreasonable.

Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 544, 54 L. ed. 608, 609, 30 Sup. Ct. Rep. 417.

Mr. Justice Lamar delivered the opinion of the court:

The New Orleans Board of Trade, in October and November, 1907, brought three separate proceedings against *the Louis-[90 ville & Nashville Railroad, asking the Commerce Commission to set aside as unfair, unreasonable, and discriminatory certain class and commodity rates (local) from New Orleans to (1) Mobile, to (2) Pensacola, and (3) through rates, *via* those cities, to Montgomery, Selma, and Prattville. The railroad answered. A hearing was had, the issue as to commodity rates was adjusted by agreement, and on December 31, 1909, the Commission made a single order in which it found the class rates complained of to be unreasonable, directed the old locals to be restored, and a corresponding reduction made in the through rates. The railroad thereupon, on January 26, 1910, filed a bill in the United States circuit court for the western district of Kentucky, praying that the Commission be enjoined from enforcing this order, which it alleged was arbitrary, op-

pressive, and confiscatory, and deprived the company of its property and right to make rates, without due process of law.

After a hearing before three circuit court judges, the carrier's application for a temporary injunction was denied. 184 Fed. 118. Testimony was then taken before an examiner. Later the suit was transferred to the newly organized commerce court,—the United States being made a party. There, in addition to the evidence in the circuit court, the railroad exhibited all that had been introduced before the Commission, as a basis for the contention that this evidence utterly failed to show that the rates attacked were unreasonable. This view was sustained by the commerce court, which in a lengthy opinion held (one judge dissenting) that the order was void because there was no material evidence to support it.

On the appeal here, the government insisted that while the act of 1887 to regulate commerce (24 Stat. at L. 379, §§ 14-16, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284) made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn act of 1906 (34 Stat. at L. 584, § 4, chap. 3591, U. S. Comp. Stat. 91]Sup. 1911, p. 1297), *that rates should be set aside if after a hearing the "Commission shall be of the opinion that the charge was unreasonable." In such case it insisted that the order based on such opinion is conclusive, and (though Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 547, 56 L. ed. 311, 32 Sup. Ct. Rep. 108, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence" (Tang Tun v. Edsell, 223 U. S. 681, 56 L. ed. 610, 32 Sup. Ct. Rep. 359; Chin Yow v. United States, 208 U. S. 13, 52 L. ed. 370, 28 Sup. Ct. Rep. 201; Low Wah Suey v. Backus, 225 U. S. 468, 56 L. ed. 1167, 32 Sup. Ct. Rep. 734; Zakonaite v. Wolf, 226 U. S. 272, ante, 218, 33 Sup. Ct. Rep. 31), or if the facts found do not, as a matter of law, support the order made (United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, ante, 104, 33 Sup. Ct. Rep. 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 301, 45 L. ed. 201, 21 Sup. Ct. Rep. 115; Washington ex rel. *Oregon R.[92 & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Muser v. Magone, 155 U. S. 247, 39 L. ed. 137, 15 Sup. Ct. Rep. 77).

2. The government's claim is not only opposed to the ruling in Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 547, 56 L. ed. 311, 32 Sup. Ct. Rep. 108, and the cases there cited, but is contrary to the terms of the act to regulate commerce, which in its present form provides (25 Stat. at L. 861, § 6, chap. 382, U. S. Comp. Stat. 1901, p. 3168), for methods of procedure before the Commission that "conduce to justice." The statute, instead of making its orders conclusive against a direct attack, expressly declares that they may "be suspended or set aside by a court of competent jurisdiction." 36 Stat. at L. 551, § 12, chap. 309. Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power.

3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to

show that the rates were unreasonable there was no jurisdiction to make the order. Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 544, 54 L. ed. 609, 30 Sup. Ct. Rep. 417. In a case like the present the courts will not review the Commission's conclusions of fact (Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 251, 55 L. ed. 456, 31 Sup. Ct. Rep. 392) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be "set aside by a court of competent jurisdiction." 36 Stat. at L. 551, chap. 309.

93] *4. The government further insists that the commerce act (26 Stat. at L. 743, chap. 128, U. S. Comp. Sat. 1901, p. 3163) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but *pre-[94 sumptively sufficient information to support the finding. United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, ante, 104, 33 Sup. Ct. Rep. 5.

As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order.

5. The Louisville & Nashville railroad ran from New Orleans to Mobile and to Pensacola. From both of these cities it also had lines extending to Montgomery. When the road from Mobile to New Orleans was completed, about 1871, there was in operation a boat line carrying freight from the latter city to Mobile and Pensacola. In order to meet this water competition a low rail rate was compelled, and was put in force by the rail carrier.

In 1887 the through rate from New Orleans to Montgomery was adjusted so as to conform to an award by Judge Cooley, under which rates from certain Ohio river points to Montgomery were to be the same, irrespective of any difference in distance. Rates to Montgomery from Kentucky points on the Mississippi were to be 2 cents lower, and rates to Montgomery from Memphis, Vicksburg, and New Orleans were to be 2 cents lower still. With the exception of a change made necessary by the construction of a short line from Memphis to Birmingham, the class rates in that territory were, as a rule, maintained in conformity with the Cooley award, though, from time to time, commodity rates were made to meet special conditions.

Changes in rates from New Orleans to Mobile, to Pensacola, and from those cities to Montgomery, were made in 1907. The carrier insists that the situation at Pensacola was not the same as at Mobile. But the controlling principle is applicable to the rates at all the points involved. And in order to prevent a treble discussion of the three cases the rates from New Orleans to Mobile to Montgomery *may be[95 regarded as typical. The increase in class rates varied from 1 to 13 cents per 100 pounds. The increase in class 3 was greatest, and it will therefore be taken as affording the best concrete example of the situation before and after the change of 1907.

Under the Cooley award the tariff on class 3 had been fixed as follows:

New Orleans to Mobile (local.....25
Mobile to Montgomery (local).....30
—
Combination of locals .....55

But while these locals aggregated only 55 cents, there was, at the same time, a through rate:

New Orleans to Montgomery .....68

The carrier's filed tariffs contained a provision that wherever the rate between two points on its line was greater than the sum of the locals between the same places, the combination of the two locals should be collected. There was nothing to indicate that shipments from New Orleans to Montgomery were not entitled to this combination rate; but it seems that the privilege was rarely, if ever, granted to New Orleans merchants, who, in order to get the advantage of the low locals (25), were obliged to ship to Mobile, there unload, reload, and rebill to Montgomery at the 30 cent rate. By this inconvenient method they could secure the 55-cent rate to Montgomery. Otherwise, they paid the rate of 68 cents on the same goods, over the same line, between the same points.

The carrier was notified that this practice was in violation of the Commission's ruling that, except in special cases, the through rate must not exceed to the sum of the locals. An enforcement of this rule would have compelled the carrier to reduce the through rate (68) to the sum of the locals (55), and so, in less proportion, as to all other class rates involved in this case.

96] *The company, however, met the situation by increasing the local, instead of reducing the through rate. For example, the rate on class 3 from New Orleans to Mobile was raised from 25 to 38, so that, when added to the 30-cent rate from Mobile to Montgomery the combination 68 equaled the existing through rate of 68 cents from New Orleans to Montgomery. Similar action was taken as to all other rates between New Orleans and Mobile and New Orleans and Pensacola and thence to Montgomery.

At the hearing the facts thus recited were established. The reports of the carrier, showing its earnings and expenses in detail, were in evidence. Its tariffs and those of other railroads were offered, as a basis for comparing the rates under attack with those charged by this and other companies for similar and longer distances. Numerous merchants from New Orleans testified that since the increase of August 13, 1907, they had been unable to sell in Mobile and Pensacola *and that the through* rate to Montgomery made it impossible to deal in that city. In its report the Commission found that the rates to Mobile, Pensacola, and Montgomery from other and more distant points were actually or relatively lower than those for the shorter distance from New Orleans; that the ton-mile rate on the average of the first six classes was greater from New Orleans to Montgomery than from Memphis; that many departures had been made from the Cooley award; that the company's tariff contained a provision that the through rates should not exceed the sum of the locals; that while increasing the local on eastbound freight from New Orleans to Mobile and Pensacola no corresponding increase had been made on the westbound freight from those points to New Orleans; that the old low local out of New Orleans had been so long in force as to create a presumption that it was reasonable and compensatory. It concluded by entering an order adjudging that the rates in the tariff filed August 13, 1907, were unreasonable, and *directing the carrier to[97 restore the old class rates (local) from New Orleans to Mobile and to Pensacola, and to make a corresponding reduction in the through rates from New Orleans to Montgomery, Selma, and Prattville.

This order was attacked generally and specially by a bill which, at length and in minute detail, assailed each specific fact stated in the report on the ground, either that the fact found was without evidence to support it, or that it was irrelevant to the issue involved, and furnished no basis whatever for the order which followed.

The commerce court rendered a lengthy and elaborate opinion in which it reviewed all of the matters referred to in the Commission's report, and held that the findings were irrelevant, or without evidence to support them, or contrary to the uncontradicted testimony; that the fact that rates from more distant points to Montgomery, Pensacola, and Mobile were actually or relatively lower than from New Orleans to the same points, furnished no basis for the order, unless it was shown that the conditions were similar, while it affirmatively appeared that these lower rates were compelled by water competition; that no conclusion could be drawn from the fact that such rates to Montgomery from other points were lower on the ton-mile basis, in view of the universal rule that the longer the haul the lower the rate. That the departures from the Cooley award related only to commodity rates, which were not involved in this hearing, and that the complaints of the merchants as to inability to sell in Mobile, Pensa-

cola, and Montgomery were referable only to commodity rates, and not to class rates. It found that no legal inference could be drawn from the fact tnat the low locals had been maintained on westbound shipments after the carrier, on August 13, 1907, raised the locals on eastbound shipments from New Orleans to Mobile and Pensacola, inasmuch as there is no legal objection to having lower rates in one direction than in another. It found that the 98]sole ground *for making the order was the fact that the carrier had raised rates after they had been in force for more than twenty years; although the presumption of reasonableness disappeared in view of the uncontradicted testimony that the old rates had been compelled by water competition.

6. It is unnecessary in this case to review each of the matters discussed, ruled, and found by the Commission in its report, and only the more salient facts will be mentioned. For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended. These findings are collateral, and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order.

7. The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies, and history of rate making in each section of the country. So, too, the fact that a commodity rate is low may cast some light on the reasonableness of the higher rate on the class from which that commodity was taken or to which it might legally be restored.

It is true that the old low locals from Mobile (west) to New Orleans were maintained, while those from New Orleans (east) to Mobile were raised is not conclusive against the reasonableness of new 99]tariff put in force in 1907. But it *was a fact tending to support the conclusion, unless the difference was shown to have been warranted by proper rate-making rules. Of the sufficiency of the explanation, including the extent of the difference in empty-car movement, the Commission was authorized to judge. It also had before it the company's financial statement and general tariff sheets,—against which was the testimony for the carrier, tending to prove that the rate to New Orleans was low in fact, and by comparison with those in force over other parts of the carrier's system, and on other lines in the same territory, even though this particular part of the road ran through a sparsely settled country, with expensive trestles and bridges, frequently damaged by storms from the Gulf, and expensive to maintain.

8. But these facts did not stand alone. It appeared that for many years prior to 1907 the carrier had maintained low locals from New Orleans to Mobile and Pensacola. When first put in force they were abnormally low because compelled by water competition, and therefore furnish no just standard of reasonableness. And if when that competition disappeared the rates had been advanced, no inference adverse to the railroad could have been drawn from the increase. Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493. The answer of the railroad company admits that this water competition had ceased to exist. The date is not definitely stated, but it is fairly inferable that the water competition was not potential for some years before the increase in rates in 1907. When made, the increase was not because of the absence of water competition, but to make the sum of the locals correspond with the through rates. Under the circumstances the maintenance of these low rates after the water competition disappeared tends to support the theory that by an increase of business or other cause they had become reasonable and compensatory.

9. From the appellee's standpoint, probably a principal *objection to the or-[100 der complained of is that it will upset the Cooley award, under which rates have been adjusted throughout a large section. But that, too, was a matter for consideration by the Commission, which by this order has not lost power to restore the old rates, or to make changes in the new if it shall be found that those put in force unjustly discriminate in favor of New Orleans against other cities.

The order of the Commission restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary, but sustained by substantial, though conflicting, evidence. The courts cannot settle the conflict, nor put their

judgments against that of the rate-making body, and the decree is reversed.

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GUARDIAN ASSURANCE COMPANY OF LONDON, Limited, Plff. in Err.,
v.
DOMINGO QUINTANA.

(See S. C. Reporter's ed. 100–108.)

**Appeal — affirmance on motion — frivolous question — discretionary matters.**

1. The sole asserted error raised on a writ of error from the Federal Supreme Court to the district court of the United States for Porto Rico cannot be said to be so wholly frivolous and unsubstantial as to require an affirmance of the judgment below on motion, where it is grounded upon the refusal of defendant's request to continue a cause set for trial on the fourth day after a mistrial, he basing such request upon the physical impossibility of bringing back in time to be heard the witnesses who, in reliance upon what is claimed to be a long-established practice to put such cases over the term, have been discharged and permitted to depart for their homes, since such assertion presents a substantial question of the abuse of the trial court's discretion.

[For other cases, see Appeal and Error, VII. g; VIII. 1, 2, in Digest Sup. Ct. 1908.]

**Appeal — bill of exceptions — settlement — death of trial judge.**

2. A controversy over the settlement of a bill of exceptions in a case tried before a judge of the district court of the United States for Porto Rico, the hearing of which was continued because of his illness, and which remained unacted upon at his death, is governed by the provisions of U. S. Rev. Stat. § 953, U. S. Comp. Stat. 1901, p. 696, conferring authority upon and making it the duty, if possible, of any judge of a court in which a case was tried, or the successor in office of the trial judge, to allow and sign a bill of exceptions, where the trial judge was, by reason of death, sickness, or other disability, unable to allow and sign such bill.

[For other cases, see Appeal and Error, V. a, 5, in Digest Sup. Ct. 1908.]

**Appeal — dismissal — delay in settling bill of exceptions.**

3. A motion to dismiss a writ of error to the district court of the United States for the district of Porto Rico for the want of a bill of exceptions was denied without prejudice to a renewal of the motion in case of further unreasonable delay, where the trial judge, after continuing the hearing of a controversy over the settlement of the bill because of his illness, died without further acting, and where neither party thereafter, and after an order of the Federal Supreme Court overruling a prior motion to dismiss, took any steps to have the bill settled by the trial judge's successor in office, and where the dismissal might occasion injustice.

[For other cases, see Appeal and Error, VII. 1, 6, in Digest Sup. Ct. 1908.]

[No. 280.]

Argued January 6 and 7, 1913. Decided January 27, 1913.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment entered upon a verdict in favor of plaintiff in an action on a policy of fire insurance. Motion to dismiss or affirm denied without prejudice.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. J. Spalding Flannery and William Hitz, filed a brief for plaintiff in error:

Where a party without laches on his part loses the benefit of his exceptions through the death or illness of the (trial) judge, a new trial will be granted.

Hume v. Bowie, 148 U. S. 245, 253, 37 L. ed. 438, 440, 13 Sup. Ct. Rep. 582.

With respect to errors apparent on the record, no formal or technical bill of exceptions is necessary to enable the appellate court to exercise its powers.

Moline Plow Co. v. Webb, 141 U. S. 616, 622, 623, 35 L. ed. 879, 881, 12 Sup. Ct. Rep. 100; Baltimore & P. R. Co. v. Sixth Presby. Church, 91 U. S. 127, 23 L. ed. 260; Bennett v. Butterworth, 11 How. 669, 675, 13 L. ed. 859, 862; Young v. Martin, 8 Wall. 354, 357, 19 L. ed. 418, 419; Clinton v. Missouri P. R. Co. 122 U. S. 469, 474, 30 L. ed. 1214, 1215, 7 Sup. Ct. Rep. 1268.

To mulct a person, natural or artificial, by the judgment or decree of a court without having first afforded such person opportunity to be heard in defense is contrary to fundamental principles for the administration of justice, and constitutes a denial of due process of law as understood and practised in civilized and enlightened communities.

Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct.

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NOTE.—On the disposition of appeal where, without fault of appellant, the record is lost or incomplete—see note to Bailey v. United States, 25 L.R.A.(N.S.) 860.

On the appellate jurisdiction of Federal Supreme Court over Porto Rico courts—see *id. & L. ed.*

note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A.

Rep. 841; McVeigh v. United States, 11 Wall. 259, 20 L. ed. 80.

Mr. Clement L. Bouvé argued the cause, and, with Mr. Hector H. Scoville, filed a brief for defendant in error:

The presence or absence of rules in the supreme court of Porto Rico governing the settlement of bills of exceptions in no way affected the situation which confronted the plaintiff in error when Judge Jenkins died leaving the bill unsettled. Such proceedings are to be regulated by acts of Congress, or, when they are silent, by methods derived from the common law, or from the rules and practice of the courts of the United States.

Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 553, 555, 32 L. ed. 508, 511, 512, 9 Sup. Ct. Rep. 150; Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.

Defendant's right to settle being extended until the following term, it is idle to contend that the death of the judge who ordered the continuance could leave the defendant in the position of having no remedy except a new trial, as is argued here. Another judge was appointed before whom the matter should in due course have been taken up, who, as the successor of his predecessor, could exercise the same powers and had the right to act upon every case that remained undecided upon the docket as fully as his predecessor could have done (Life & F. Ins. Co. v. Wilson, 8 Pet. 292, 300, 8 L. ed. 949, 953); and for cases holding that a succeeding judge can settle and sign a bill of exceptions left unsettled by his predecessor, see Bowden v. Wilson, 21 Fla. 168; Ketcham v. Hill, 42 Ind. 70.

An affidavit offered in a case is not part of the record unless brought up by an agreed statement of facts, special verdict, or bill of exceptions.

Clune v. United States, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; Nelson v. Flint, 166 U. S. 276, 41 L. ed. 1002, 17 Sup. Ct. Rep. 576; Evans v. Stettnisch, 149 U. S. 605, 37 L. ed. 866, 13 Sup. Ct. Rep. 931.

All that is before the court is that the defendant below moved for a continuance, which was denied by the trial court. This is but the exercise of the ordinary discretionary powers of a trial court, and therefore does not *per se* constitute error on the face of the record. Abuse of these powers is not to be presumed; the only way to show such abuse is to incorporate the facts substantiating it in the record in the *methods provided* by law. As this was not *done, the question is not presented* here.

Pickett v. United States, 216 U. S. 456, 460, 54 L. ed. 566, 569, 30 Sup. Ct. Rep. 265.

The writ of error was taken for purposes of delay only.

West Wisconsin R. Co. v. Foley, 94 U. S. 100, 24 L. ed. 71; Hennessy v. Sheldon, 12 Wall. 440, 20 L. ed. 446; Nelson v. Flint, 166 U. S. 276, 41 L. ed. 1002, 17 Sup. Ct. Rep. 576.

Mr. Chief Justice White delivered the opinion of the court:

In 1911 defendant in error moved under rule 9 to docket and dismiss the writ of error for failure to file the record. Plaintiff in error opposed because a bill of exceptions was yet unsettled in the hands of the court below, and the motion was, on April 3, 1911, denied "without prejudice to a renewal of same if case is not docketed within a reasonable time after the bill of exceptions is settled." Shortly thereafter, on May 3, 1911, there was filed as a transcript a paper containing the pleadings and certain journal entries and other documents purporting "to relate to[102] proceedings had in the cause in the court below, and to certain steps stated to have been taken concerning a bill of exceptions, there being, however, no such bill in the record. Putting out of view the statements made exhibiting the facts and circumstances which gave rise to the reserving of an exception, and the preparation of a bill of exceptions, and the effort to settle the same, and looking only at the pleadings and journal entries properly embraced in the record, the following is shown:

The suit, on November 29, 1910, was tried, resulting in a failure of the jury to agree. On December 2, 1910, the case was set for retrial at 10 A. M. on the following day. When the case was called for trial, defendant asked a postponement "on account of the short time at his disposal to prepare the defense in the case." On this request being denied an exception was taken and the counsel for the defendant withdrew. After the introduction of evidence for the plaintiff, the jury, as instructed by the court, returned a verdict for the plaintiff, upon which judgment was entered. It is to this judgment that the writ of error is directed, it having been allowed by the trial judge shortly after the trial, a supersedeas bond having been also approved about the same time. The assignment of errors was based solely on error asserted to have been committed in refusing the request to continue the case. It appears also from the record that a bill of exceptions was tendered to the court for approval, which bill presumably contained

a statement of facts connected with the refusal of the continuance which were relied upon to sustain the assignment of error made on that subject.

The matter is again before us on a motion to dismiss because there is nothing within our jurisdiction to review, as there is no bill of exceptions, or to affirm, because of the wholly frivolous and unsubstantial character of the ground of error relied upon; that is, the failure of the court below to grant a continuance.

103] *It is obvious that these propositions, inherently considered, rest upon an identical foundation (Deming v. Carlisle Packing Co. decided December 2, 1912 [226 U. S. 102, ante, 140, 33 Sup. Ct. Rep. 80); and we come to dispose of them in that aspect, considering first the more far-reaching of the two; that is, the asserted frivolous character of the error relied upon. We must, of course, approach the subject upon the assumption that it is urged upon the hypothesis that the record is in such a state as to justify us in disposing of the matter. This assumption must be indulged, because if it is not, there would be no way of testing the merits of the contention, and it would consequently resolve itself into a mere change in the form of stating the proposition that because there was no bill of exceptions, there was nothing for consideration. Coming to test the question of the frivolity of the error relied upon in the light of the assumption just stated, we deem it necessary merely to outline the facts which it is insisted would have been disclosed had a bill of exceptions been settled, as follows: After the failure of the jury to agree, in reliance upon what was asserted to be a practice which had prevailed from the organization of the court, where there had been a disagreement of the jury, to carry a case over for trial before another venire at the following term, the witnesses for the defendant were discharged and allowed to depart for their homes; and on the assigning of the case for a retrial, the request for continuance was based on the physical impossibility of bringing the witnesses back in time to be heard, and to enable that purpose to be accomplished a continuance of five days was prayed and refused. Under this assumed state of facts we content ourselves with saying that there is no room for holding that the assertion of error based upon the refusal to continue was so devoid of foundation as to be merely frivolous in character. We say this because, while the elementary rule is that the granting or refusing of a continuance is within the discretion of a 104]trial court,—a discretion *which will not be lightly interfered with,—it is equally elementary that where it is manifest that there has been a plain abuse of discretion the duty to correct arises.

This brings us to the motion to dismiss; and its determination depends on the facts concerning the alleged bill of exceptions, and whether there has been such laches on that subject as to require a dismissal.

The mistrial, the assignment for a retrial, the application for a continuance, and its refusal and the reserving of an exception, the verdict and judgment and the allowance of the writ of error and the tendering of a bill of exceptions on the subject for settlement, as shown by the record, have already been stated in detail and we need not repeat those statements. Certain is it that the bill remained unsettled in the hands of the court when the previous order of this court, declining to dismiss for want of filing of the record, was entered. Indeed, it is shown by the record that on the 4th of April, 1911, the day after the previous application to dismiss because of the want of a bill of exceptions was by this court denied, the court below entered the following order:

"In view of the illness of the judge of this court it is hereby ordered that the allowance and approval of the bill of exceptions in the above-entitled cause, heretofore under consideration, is hereby continued over to the approaching April term of this court."

It is conceded by counsel for both parties that Judge Jenkins, who thus continued the hearing of the controversy, never further acted upon the matter, because shortly after he left Porto Rico for the United States, where he remained until his death in the following June. It is likewise conceded that the successor in office to Judge Jenkins—Judge Charlton—was appointed and held the court from August 14, 1911, until October 7, 1911, and a further term from October 9, 1911, until April 13, 1912. There is also a certificate of the clerk contained *in the motion papers to the[105 effect that no steps were taken by anyone to procure action by Judge Charlton looking to the settlement of the bill of exceptions. And it is the neglect during the time stated to press for a settlement of the bill of exceptions by Judge Charlton which forms the basis of the laches which it is insisted requires a dismissal of the writ of error. While insisting on laches, it is admitted (citing Hume v. Bowie, 148 U. S. 245, 253, 37 L. ed. 438, 440, 13 Sup. Ct. Rep. 582) that if there was no legal possibility of having the bill of exceptions settled, and the right thereto was lost without any fault on the part of the plaintiff in error, the duty would obtain to grant a new trial.

Passing the consideration of whether the provisions of § 219 of the Code of Civil Procedure of Porto Rico, copied in the margin,† are applicable to the district court of the United States for Porto Rico (see Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150), and whether, if applicable, the adoption of rules on the subject was essential to give it full efficacy, we are of opinion that § 953 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 696), also copied in the margin,† 106]conferred authority *and made it the duty, if possible, of any judge of the court below, successor in office to Judge Jenkins, to consider and settle the controversy concerning the bill of exceptions. Although of this opinion, we do not think our duty exacts under the circumstances of this case that we dismiss for the want of a bill of exceptions. On the contrary, we are of opinion that our duty is to afford an opportunity to the parties to avail of the provisions of Rev. Stat. § 953, so that the record may be completed, to the end that the merits of the writ of error may be disposed of. Briefly stated, we reach this conclusion for the following reasons: (1) because we think there is no just ground for treating our previous order as an affirmative direction to seek the settlement of the bill of exceptions from the successor in office of Judge Jenkins, because at the time that order was entered Judge Jenkins was discharging his duties, and in fact the order, continuing over the term the settlement of the bill of exceptions, was made by him while the previous motion to dismiss was here under consideration; (2) because there was some reason for considering that the provision of the Porto Rican Code to which we have referred did not apply to proceedings in the court below, and there was also some *room for reasonable[107 doubt as to whether the provisions of Rev. Stat. § 953, governed the matter in hand, thereby rebutting the inference that the mere failure to apply to the successor of Judge Jenkins for a settlement of the bill of exceptions was either a waiver of the writ of error or an election to stand upon the imperfect record as filed in this court, without reference to the settlement of the bill of exceptions; (3) because the delay in the settling of the bill of exceptions obviously, in part, at least, arose from the objection of defendant in error, plaintiff below, who, equally with plaintiff in error, took no steps after the order of this court overruling the prior motion to dismiss and the death of Judge Jenkins, to have the bill settled by his successor; (4) because the failure of the court to instruct a verdict on the first trial and this disagreement of the jury all serve to indicate that the defense may not have been wholly devoid of merit; and (5) because if the facts stated extraneous to the record concerning the bill of exceptions, which we have noticed for the purpose of the motion to affirm, be taken as true, it might result that a dismissal for want of a settlement of the bill of exceptions would occasion injustice, amounting to a possible condemnation without a reasonable opportunity to be heard. Indeed, the admonition which arises from this last consideration is cogently re-enforced when the subject-matter to which the bill of exceptions related, the mere refusal to grant a continuance, is

†A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from said island, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its orders or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions.

‡That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial, and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that, owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor

taken into view, and the long delay and presumed hesitancy which followed in settling the bill of exceptions are borne in mind.

We shall therefore refuse the motion both to dismiss and affirm, without prejudice, however, to the right to renew the same unless plaintiff in error within a reasonable time applies to and diligently seeks the settlement of the bill of exceptions at the hands of the successor in office of Judge Jenkins, or any judge empowered by as-108]signment *or otherwise to discharge the duties of a judge of the court below.† And we further direct that the bill of exceptions when settled shall be promptly included in a supplementary transcript of record, or the reasons for a failure to settle the bill, if the judge below finds it impossible to do so, be certified to this court.

Motion to dismiss or affirm denied without prejudice.

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FREDERICK DEBARY & COMPANY,
Plffs. in Err.,
v.
STATE OF LOUISIANA.

(See S. C. Reporter's ed. 108–111.)

**Commerce — in intoxicating liquors — sales in original packages — Wilson act.**

Sales within a state in the original packages of intoxicating liquors imported from foreign countries may be subjected to a state license tax imposed in the exercise of the police power, in view of the provisions of the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), subjecting to laws so enacted "all" intoxicating liquors arriving in the state to the same extent as liquors produced therein.

[For other cases, see Commerce, IV. b, 2, in Digest Sup. Ct. 1908.]

[No. 696.]

Submitted January 10, 1913. Decided January 27, 1913.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, reversing a judgment of the Civil District Court for the Parish of Orleans, enforced a state license tax upon sales in the original packages of intoxicating liquors imported from foreign countries. Affirmed.

See same case below, 130 La. 1090, 58 So. 892.

Messrs. J. D. Rouse, William Grant, and William B. Grant submitted the cause for plaintiffs in error:

The operation of the Wilson act is confined to liquors, the subject of interstate commerce.

Delamater v. South Dakota, 205 U. S. 93–98, 51 L. ed. 724–728, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733.

The words "imported" and "importation" each have a distinct and well-settled meaning in law, "importation" being defined as "the act of bringing goods and merchandise into the United States from a foreign country;" and "an imported article is one brought or carried into the country from abroad."

Bouvier's Law Dict. Rawle's Rev. American Steel & Wire Co. v. Speed, 192 U. S. 500, 520, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

The right to sell the imported article is not limited to the place of importation. The importer may sell the same when and where he pleases without becoming liable to any state or municipal tax.

State ex rel. Gelpi v. Bd. of Assessors, 46 La. Ann. 145, 49 Am. St. Rep. 318, 15

†See the act of Congress approved January 7, 1913, entitled, "An Act to Provide for Holding the District Court of the United States for Porto Rico During the Absence from the Island of the United States District Judge, and for the Trial of Cases in the Event of the Disqualification of or Inability to Act by the Said Judge."

NOTE.—As to the validity generally of state regulation of the sale of intoxicating liquors—see notes to Rhodes v. Iowa, 42 L. ed. U. S. 1089, and Foster v. Kansas, 28 L. ed. U. S. 696.

On the power of the state to prohibit solicitation of orders for intoxicating liquors by mail sent from another state—see note to R. M. Rose Co. v. State, 36 L.R.A.(N.S.) 443.

On shipping liquor C. O. D. from one state into another without previous order as interstate commerce—see note to Adams Exp. Co. v. Com. 5 L.R.A.(N.S.) 630.

As to *what is sufficient to terminate* interstate transportation of intoxicating liquor—see notes to State v. Intoxicating Liquors, 11 L.R.A.(N.S.) 550; State v. Intoxicating Liquors, 23 L.R.A.(N.S.) 1020, and State v. Intoxicating Liquors, 29 L.R.A. (N.S.) 745.

On the right of prohibition as limited by the Federal Constitution—see note to State v. Durein, 15 L.R.A.(N.S.) 923.

On the original-package doctrine—see note to Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

As to what constitutes original or unbroken package—see note to State v. Maire, 39 L.R.A.(N.S.) 1051.

So. 10; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

Mr. R. G. Pleasant, Attorney General of Louisiana, submitted the cause for defendant in error. Messrs. William W. Westerfield and Edward Rightor were on the brief.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

DeBary & Company seek the reversal of a judgment for the amount of a license tax (act No. 176 of 1908, Session Acts of that year, p. 236) for engaging "in the business of disposing of alcoholic liquors in less quantities than 5 gallons." It was conceded below that the business for which the license was exacted consisted only in the sale in the original packages of foreign wine or liquor, some of which was imported through the port of New York and some through the port of New Orleans, a portion of that which was brought into the port of New York having been stored and subsequently shipped to New Orleans. The court below held, first, that imposing the license was an exertion by the state not only of its revenue powers, but of its police authority, brought into play for the purpose of regulating the sale of liquor. In consequence of the provisions of the act of Congress known as the Wilson act (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), and the decisions of this court interpreting and applying the same, it was therefore held that the sale of imported liquor in the original packages was subject to state regulation and hence the license was valid; second, that even if the Wilson act did not concern liquor imported from a foreign country, nevertheless the license was valid because 110] *some of the liquor sold had been shipped to Louisiana from the state of New York after its importation from a foreign country.

Without considering the second proposition, we think the construction given to the Wilson act, upon which the first proposition rests, was so obviously the result of the text of that act as interpreted by the decisions of this court as to leave no room for controversy. Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. It is true that the controversies which were passed upon in the cited cases concerned not liquors imported into the United States from foreign countries, but only liquors which had been brought in from one state to another. But this fact cannot be held to distinguish this case from the previous decisions without giving effect to a distinction without a difference. To hold that liquors brought into a state from a foreign country do not become subject to the state police power until sold in the original packages would certainly conflict with the command of the statute that "all" liquors "transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory . . . as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The word "all" causes a consideration of the point of origin of the liquors transported to be wholly negligible, and this irresistible conclusion as to the meaning of the text is rendered if possible clearer by a consideration of the intent of Congress in enacting the Wilson law. In reason it is certain that the purpose which led to the enactment of the law was to give the several *states power to deal with all liquors[111 coming from outside their limits upon arrival and before sale, thus rendering the state police authority more complete and efficacious on the subject,—a purpose which would be plainly set at naught by exempting liquors brought into a state from a foreign country from the operation of the statute. Indeed, to adopt the construction urged would not only give rise to the contradictions which the analysis of the contentions thus make plain, but would compel us to say that Congress intended by the Wilson law to confer upon foreign producers of liquor a right which was specifically denied to liquor of domestic production.

Affirmed.

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TEXAS & NEW ORLEANS RAILROAD COMPANY, Texarkana & Fort Smith Railway Company, and United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

SABINE TRAM COMPANY.

(See S. C. Reporter's ed. 111-130.)

**Commerce — local or foreign — continuity of transportation — state regulation.**

A shipment of lumber destined by the

purchaser for export, made by the seller under a local bill of lading from an interior point in Texas to a Texas Gulf port, at which the lumber was unloaded without delay by the purchaser's order into slips or docks, in reach of ship's tackle, and was then loaded into chartered ships, by which it was carried to foreign ports,—such shipment not being an isolated one, but typical of many others,—constitutes foreign commerce, and as such is governed by the tariffs on file with the Interstate Commerce Commission to the exclusion of the rates established by the state railroad commission, although the seller had no connection with the lumber after it reached the railway terminus, and had no concern with its destination after it came into the hands of the purchaser, and no knowledge thereof, and although the lumber had no definite foreign destination at the time of the initial shipment.

[For other cases, see Commerce, I. b; III. c, in Digest Sup. Ct. 1908.]

[No. 93.]

Argued December 17 and 18, 1912. Decided January 27, 1913.

IN ERROR to the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas to review a judgment which modified, and, as modified, affirmed, a judgment of the District Court of Jefferson County, in that state, for the recovery from a carrier of excessive freight charges, with statutory penalties for such overcharge. Reversed and remanded for further proceedings.

See same case below, — Tex. Civ. App. —, 121 S. W. 256.

Statement by Mr. Justice McKenna:

The question in the case is whether shipments of lumber on local bills of lading from one point in Texas to another point in Texas, destined for export under the circumstances presently to be detailed, were intrastate or foreign commerce.

The action was brought by defendant in error, here called the Sabine Company, against the railroad companies (we shall so designate them unless it be necessary to distinguish them), to recover the sum of $1,788.33, alleged to be due for overcharges in freight on thirty-three cars of lumber shipped by the Sabine Company from Ruliff, in the state of Texas, to Sabine, in the same state, the shipments moving from the initial point to Beaumont over one of the roads, and from Beaumont to Sabine over the other. It was alleged that the legal rate applicable to the shipments under the orders of the Railroad Commission of Texas was 6½ cents per hundred pounds, and that the railroad companies collected, over the protest of the Sabine Company, 15 cents per hundred pounds under tariffs filed with the Interstate Commerce Commission, amounting to an illegal charge of 8½ cents per hundred *pounds. Recovery was also[113 prayed for penalties for extortion under the laws of the state in the sum of $16,500, the maximum penalty of $500 per carload, upon the assumption that each car was a separate act of extortion, or the sum of $13,000, if shipment on different days should be adjudged to be separate acts.

The railroad companies defended on the ground that the shipments were foreign commerce and subject to a charge of 15 cents per hundred pounds, and that such rate had been established by them and regularly filed with the Interstate Commerce Commission in accordance with the act to regulate commerce.

The trial court charged against the defense, and also that the freight charges collected having been paid in five separate payments, there were five distinct acts of extortion for which the Sabine Company was entitled to recover penalties in the sum of not less than $625 nor more than $2,500; that is, not less than $125 nor more than $500 for each act.

The jury returned a verdict for $1,788.33 as overcharges, with interest at 6 per cent per annum from January 1, 1907, and $1,785 penalties. Judgment was entered on the verdict. A motion for a new trial was denied, and the case was then taken to the court of civil appeals. There was a cross assignment of errors by the Sabine Company, complaining of the ruling of the trial court in finding that the company was only entitled to five penalties. It consented that if the assignment of errors be sustained, the court could render judgment for the lowest penalty, $125. The court sustained the assignment and modified the judgment of the trial court, and rendered judgment for penalties in the sum of $125 for twenty-four shipments, aggregating $3,000. A writ of error to review the judgment of the court of civil

NOTE.—On local transportation of goods as part of interstate or foreign shipment—see notes to Gulf, C. & S. F. R. Co. v. Texas, 51 L. ed. U. S. 540, and Missouri P. R. Co. v. Sherwood, T. & Co. 17 L.R.A. 643.

As to when *the transit of goods* commenced in another state may be deemed to have terminated or to have been definitely interrupted so as to subject the goods to local taxation—see notes to General Oil Co. v. Crain, 52 L. ed. U. S. 755, and Merchants' Transfer Co. v. Board of Review, 2 L.R.A. (N.S.) 662.

appeals was denied, and the judgment thereby becoming final, this writ of error was prosecuted.

114] *The facts were found by the court of civil appeals and are not in dispute:

"At the date of the transaction in question the Sabine Tram Company was engaged in the manufacture of lumber at its mill at Ruliff, a station in Texas on the line of the Texarkana & Fort Smith Railway Company. W. A. Powell Company, Limited, was engaged in buying lumber for export to different points in Europe, through the ports of Sabine and Port Arthur, both in the state of Texas. On August 28, 1906, having made sales to customers for future delivery in Europe of large amounts of heavy pine lumber, for the carriage of which steamships had in part already been chartered, to fill such contracts, W. A. Powell Company bought of the Sabine Tram Company 500,000 feet of heavy pine lumber of certain dimensions, to be delivered during the months of September and October. The contract provided for delivery either in the water at Orange, Texas, or f. o. b. cars at Sabine, Texas, at the option of the seller. The seller exercised the option to deliver at Sabine, a station on the line of the Texas & New Orleans Railway. During the months of September and October the lumber purchased was delivered to the Texarkana & Forth Smith Railroad at Ruliff, to be by it transported to Beaumont, the terminus of its line, and thence by connecting carrier, the Texas & New Orleans Railway, to Sabine, and delivery to the Sabine Tram Company. There were twenty-four several shipments of the lumber on as many different days, the shipments embracing thirty-three cars, for which thirty separate bills of lading were executed by the Texarkana & Fort Smith road, for delivery at Sabine to the Sabine Tram Company, 'Notify W. A. Powell Company, Limited.' No other contract or arrangement was made by the Sabine Tram Company for the carriage of the lumber except that evidenced by the bills of lading aforesaid. Waybills accompanied the shipments, upon which were 115]marked in pencil 'for export,' *but the Sabine Tram Company had no connection with, or knowledge of, the making of these waybills, which was the act of the railway company alone. According to the course of dealing between the parties these bills of lading were indorsed by the Tram Company and sent through [a bank] to W. A. Powell Company, Limited, at New Orleans, Louisiana, attached to a draft for the price of the lumber, which being paid, *the bills were* delivered to Powell Company *and by them transmitted to their* agent, Flanagan, at Sabine. In case of most of the shipments in question the bills of lading reached Flanagan at Sabine before the arrival of the lumber for which they were given. The lumber was carried under the shipping contracts or bills of lading aforesaid, by the Texarkana & Fort Smith road to Beaumont, and there delivered to the Texas & New Orleans road, by which it was carried to Sabine. Upon arrival at the station of Sabine it was, by direction of the agent of Powell Company, carried without delay about a quarter of a mile beyond the station to the dock, where the lumber was to be unloaded. The lumber was unloaded from the cars into water of the slip in reach of ship's tackle, ready for loading onto the ships. The Sabine Tram Company had no connection with this further carriage or switching of the lumber to the docks after its arrival at the station of Sabine, but this was done solely at the instance and under the direction of the agent of Powell Company. The transportation from Ruliff to Sabine was entirely within the state of Texas.

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"When the lumber had been switched to the docks, W. A. Powell Company, through their agent, presented the bills of lading and demanded the lumber, offering to pay the freight charges, which, according to the course of dealing between the parties, they were to pay for the Sabine Tram Company, who owed the same, and which *it was to repay to Powell[116 Company. The Texas & New Orleans Company, acting for itself and the Texarkana & Fort Smith Company, demanded the Interstate Commission rate of 15 cents per hundred pounds, having been previously instructed by the Texarkana & Fort Smith Company that 10 cents per hundred pounds was its rate from Ruliff to Beaumont. This Powell Company, under instructions of the Sabine Tram Company, at first refused to pay, but after communicating with the Tram Company, finally paid the freight at this rate under protest, in order to get possession of the lumber.

"For switching from Sabine to the docks, the rules and orders of the Texas Railroad Commission would allow a switching charge of $1.50 per car on domestic shipments, and if foreign or interstate shipments, the Interstate Commerce Commission tariffs would allow a switching charge of $2.50 per car, had not the charge for this service been absorbed in the 15-cent rate established as aforesaid.

"Upon shipment of freight not for export, only forty-eight hours free time was allowed for unloading cars, after which

demurrage was charged, and if not removed from railroad premises when unloaded, a storage charge was made in addition. No such charge was made upon any of the lumber involved in this suit.

"W. A. Powell Company, Limited, regarded the shipments in controversy as export shipments, and demanded, expected, and received the use of terminal facilities, additional free time, and other privileges accorded to shippers of export freight under export tariffs.

"The railway company knew, when the freight charges were collected, that the lumber was to be placed in its slips and exported to Europe on incoming ships, and the freight was believed by the officers and agents of the railroad company at the time the charges were collected to constitute foreign commerce, and to both permit and require the application of the rate 117]fixed by the tariff on file *with the Interstate Commerce Commission, and this rate was applied.

"All the lumber in question was in fact unloaded from the cars by W. A. Powell Company, Limited, into the Texas & New Orleans Railroad Company's slips, or upon its docks, in reach of ship's tackle, and loaded into the ships previously chartered for the purpose by W. A. Powell Company, Limited, which steamships carried same thence direct to Europe, where this lumber was applied upon contracts for sale in Europe, made before the lumber began to leave Ruliff, and made in fact before the lumber was purchased from the Sabine Tram Company, and before it was sawed, and before the logs from which it was sawed left the state of Louisiana for the Sabine Tram Company's mill at Ruliff, in the state of Texas. One of the ships actually waited at the docks at Sabine for the arrival of part of the lumber, which constituted a portion of its cargo.

"The ship which carried the last of this lumber from Sabine to Europe was chartered by W. A. Powell Company, Limited, for this purpose after these lumber shipments began to arrive at Sabine, but before all of the shipments had left Ruliff.

"None of this lumber remained in the slip at Sabine, or on the docks, except for the time necessary to await the arrival of the particular ship which had previously been chartered for the purpose and designated by W. A. Powell Company as the ship which was to carry that particular lumber from the port of Sabine to Europe.

"Any shipment of lumber intended for export to Europe, and in fact shipped from any point in Texas, to and through Sabine as its port of transhipment, could be contracted for, billed *to and from* Sabine, shipped, transported, and handled in every particular just as was this lumber.

"W. A. Powell Company, Limited, before this lumber began to arrive at Sabine, took out a blanket policy of insurance, *protecting same against loss, from[118 the time this lumber should come into the possession of W. A. Powell Company, Limited, at Sabine, until its final delivery by W. A. Powell Company, Limited, in European ports.

"At the time this lumber was shipped, it was destined by Powell Company for export to some foreign port, but the particular destination of any particular portion of the lumber was not fixed, although the destination of all the lumber to certain foreign ports was known and fixed. The Sabine Tram Company had no concern with the destination of the lumber after it came into the hands of Powell Company, and had no particular knowledge thereof. It supposed from the fact that it was known that Powell Company were exporters of lumber, from the character of lumber, which was such as was intended for export, from the fact that Sabine was an unimportant place at which very little lumber was used, and from other facts and circumstances, known to millmen generally, that the lumber was intended for export, but gave that matter no concern, being only concerned with the delivery of the lumber to Powell Company at Sabine station, and paying the freight thereon. What was done by the Texas & New Orleans Railroad Company after the arrival of the lumber at Sabine, in the way of switching to the docks, allowance of certain privileges allowed only to export freight, was done at the instance and for the benefit of Powell Company, with which the Tram Company had no concern

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"Upon the freight bills was a charge for wharfage against the Tram Company, which was paid by Powell Company as a proper charge against them, and not against the Tram Company. Export freight was entitled to seven days' free time for unloading, and thirty days' free storage on the docks, or in the slips, which privileges were availed of by Powell Company in this lumber.

*"The freight bills were made out[119 against the Sabine Tram Company, and defendants knew that Powell Company were paying the freight for the Tram Company.

"The defendants, in charging the export rate, acted under the advice of their attorneys, that the facts constituted the lumber an export shipment and subjected it to the Interstate Commission Commerce rate."

On motion the court modified its findings as follows:

"Powell & Company purchased lumber from other mills in Texas, with which to supply its said sales in part; it did not know when any particular car or stick of lumber left Ruliff, into which ship or to what particular destination it would ultimately go, or on which sale it would be applied; this not being found out until its agent, Flanagan, inspected the invoice mailed to, and received by, him after shipment. Upon inspection of the invoice, he determined from the character of the lumber described whether it was suited for one cargo or the other. The lumber remained, after arrival, in the slips or on the dock from one to thirty days until a ship chartered by Powell & Company arrived, when that company selected out the lumber suited for that cargo, and shipped it forward to the destination for which Powell & Company intended it.

"We withdraw our finding that rules and orders of the Texas Railroad Commission would allow a switching charge of $1.50 per car on domestic shipments. The only testimony we can find on this point is that of witness Beard, General Freight Agent of the Texas & New Orleans Railroad Company, that 'the Texas rate for switching these cars would have been $1.50 per car, —that is, if Powell Company owned the docks,—if it was shipped to the warehouse owned by consignees or his place of business.' This testimony does not authorize the general finding on this point made by us.

"The freight rate due under the tariff on file with the Interstate Commerce Com-
120]mission and collected on these *shipments was 15 cents per hundred pounds, and under this rate, the services rendered without other charge included switching from Sabine station to the docks, seven days' free time, exclusive of Sundays, within which to unload the lumber from the car, and thirty days free storage of the lumber upon the docks at the wharves or in the slips belonging to the Texas & New Orleans Railroad Company. W. A. Powell & Company, Ltd., availed itself of all these services and privileges which were stipulated for by the Interstate Commerce Commission tariff and included in the 15-cent rate charged on export freight.

"There is not now and was not, at the time these shipments moved, any local market for lumber at Sabine, the population of which place does not exceed fifty in number. Appellees have never done any local business at that point. For the year 1905 there was exported through the port of Sabine 14,667,670 feet of lumber; for the year 1906, 39,554,000. The shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine." [— Tex. Civ. App. —, 121 S. W. 258.]

Messrs. Hiram Glass and H. M. Garwood argued the cause, and, with Mr. Maxwell Evarts, filed a brief for plaintiffs in error:

The shipments in question constituted foreign commerce to which the rates prescribed by the Railroad Commission of Texas did not apply.

Houston Direct Nav. Co. v. Insurance Co. of N. A. 89 Tex. 1, 30 L.R.A. 713, 59 Am. St. Rep. 17, 32 S. W. 889; State v. Gulf, C. & S. F. R. Co. — Tex. —, 44 S. W. 542; Gulf, W. T. & P. R. Co. v. Barry, — Tex. Civ. App. —, 45 S. W. 814; State v. Southern Kansas R. Co. — Tex. Civ. App. —, 49 S. W. 252; State v. International & G. N. R. Co. 31 Tex. Civ. App. 219, 71 S. W. 994; Gulf, C. & S. F. R. Co. v. Fort Grain Co. — Tex. Civ. App. —, 72 S. W. 419; Galveston, H. & S. A. R. Co. v. Wood, Hagenbarth Cattle Co. — Tex. —, 146 S. W. 538; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653, 110 C. C. A. 85, 187 Fed. 965; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission v. Texas & P. R. Co. 75 C. C. A. 226, 144 Fed. 68; Texas & P. R. Co. v. Railroad Commission, 183 Fed. 1005; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Coe v. Errol, 116 U. S. 524, 29 L. ed. 717, 6 Sup. Ct. Rep. 475; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Cutting v. Florida R. & Nav. Co. 3 Inters. Com. Rep. 665, 46 Fed. 641; Re Tariffs on Export & Import Traffic, 10 Inters. Com. Rep. 55; Cosmopolitan Shipping Co. v. Hamburg American Packet Co. 13 Inters. Com. Rep. 266; Baer Bros. Mercantile Co. v. Missouri P. R. Co. 13 Inters. Com. Rep. 329; Re Advances on Cotton & Cotton Linters, 23 Inters. Com. Rep. 404; Denver & R. G. R. Co. v. Interstate Commerce Commission, 195 Fed. 968; Re Transportation of Sugar, 22 Inters. Com. Rep. 558; Shepard v. Northern P. R. Co. 184 Fed. 765; Meredith v. St. Louis Southwestern R. Co. 23 Inters. Com. Rep. 31.

Messrs. S. W. Moore, H. M. Garwood, and Hiram Glass also filed a brief for plaintiffs in error.

Mr. George C. Greer argued the cause and filed a brief for defendant in error:

The shipments were intrastate, and therefore the local state rate applied; and the plaintiffs in error became liable to pay the penalties and suffer the consequences that the Texas laws prescribed for charging a higher rate.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, 97 Tex. 274, 78 S. W. 495; Coe v. Errol, 116 U. S. 524, 29 L. ed. 717, 6 Sup. Ct. Rep. 475; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 27, 48 L. ed. 327, 24 Sup. Ct. Rep. 202; Diamond Match Co. v. Ontonagon, 188 U. S. 94, 47 L. ed. 399, 23 Sup. Ct. Rep. 266; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 572, 30 L. ed. 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Houston Direct Nav. Co. v. Insurance Co. of N. A. 89 Tex. 6, 30 L.R.A. 713, 59 Am. St. Rep. 17, 32 S. W. 889: The Daniel Ball, 10 Wall. 565, 19 L. ed. 1002.

After stating the facts as above, Mr. Justice McKenna delivered the opinion of the court:

If we may regard the essential character of the shipments, we can have no hesitation in pronouncing them to have been in interstate commerce. This conclusion seems indeed to be determined by the last finding of fact. It is there declared that "the shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine."

If the shipments were foreign commerce it is hardly necessary to make explicit the principle that the national dominion over them was supreme; and, conversely, if the shipments were not of that character, they were subject to the regulating power of the state.

123] *The shipments having the character of foreign commerce when they passed "out through the port of Sabine," when did they acquire it? We have had occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce, and decided it to be when the goods have actually started for their destination in another state or to a foreign country, or delivered to a carrier for transportation. Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279.

The Sabine Company, while not denying this general test, urges a more special one as *applicable to the case at bar*. The company contends that the supreme test is, "Was the lumber when it left Ruliff actually launched on its journey to a point in Europe? that is to say, was it committed, by the contract or by any arrangement, between the shipper and the railroad company, or provided for by either, to a common carrier for transportation on its continuous final journey to a destination beyond Sabine, Texas?" Answering this question in the negative, it is contended that the contract of shipment did not contemplate, provide for, or even intend, that the freight should go beyond Sabine "through the agency of that shipment." Nor, it is further contended, were there any means or arrangements for its movement beyond that point, that being left to an intervening third party and a subsequent act after it was delivered to Powell Company, as it was intended to be, at Sabine; and "it took the intervention of a new and independent shipment, arrangement, or contract, to move it beyond that point." Fortifying the contentions, it is said that the existence of the conditions expressed is made the test of foreign commerce by the interstate commerce law, its 1st section reading: "That the provisions of this act shall apply . . . to the transportation. . . of property shipped from any place in the United States to a foreign country, and carried *from[124 such place to a port of transhipment, or shipped . . . from a port of entry either in the United States or an adjacent foreign country." [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284.] Freight is never shipped, in the sense of the law, it is further contended, until it is launched upon its final continuous trip to a foreign country. These contentions would seem to be tantamount to saying that a local bill of lading determined the character of the commerce, but counsel especially exclude this conclusion. They admit "that there may be some additional or outside arrangement for a continuous final movement to a destination beyond that named in the bill of lading, or the bill of lading may itself note a forward continuous movement beyond the destination named." It appears, therefore, that continuity of movement is the chief insistence and test of the Sabine Company; not necessarily, it is explained, in point of time or free of delays, but "an unbroken movement, proceeding under the original arrangement or shipment."

The elements of the contentions are somewhat difficult to estimate. So far as they depend upon the character of a bill of lading, and that it had not provision for carriage beyond the local destination, they

are answered by Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279, and Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653. They are also answered by the following Texas cases: State v. Southern Kansas R. Co. — Tex. Civ. App. —, 49 S. W. 252; State v. International & G. N. R. Co., 31 Tex. Civ. App. 219, 71 S. W. 994; Gulf, C. & S. F. R. Co. v. Fort Grain Co. — Tex. Civ. App. — , 72 S. W. 419; Gulf, C. & S. F. R. Co. v. Fort Grain Co. — Tex. Civ. App. —, 73 S. W. 345.

That there must be continuity of movement we may conceive, and to a foreign destination intended at the time of the shipment. Indeed, all of the elements of the contentions of the Sabine Company are well illustrated by Southern P. Terminal Co. v. Interstate Commerce Commission and Railroad Commission v. Worthington, supra.

125] *In the former case we cited Coe v. Errol, and decided that its principle was not defeated by the fact that the shipments were not made on through bills of lading. The case is instructive as well in its facts as in its principle. The product involved was cotton seed cake and cotton seed meal accumulated at the wharves of the Terminal Company at Galveston, and the cake there manufactured into meal. The cake and meal were purchased in Texas and neighboring states, but chiefly in Texas, and shipped on bills of lading and waybills to the purchaser and manufacturer, showing the point of destination to be Galveston. The purchases were made for export, there being no consumption of the products at Galveston. The sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether the product was on hand at Galveston. At times it was on hand. At other times orders had to be filled from cake purchased in the interior and then in transit, which, upon reaching Galveston, had to be ground into meal and sacked, and for the meal thus ground and sacked or thus bought ships' bills of lading were made. It was contended that the transit of the cake and meal absolutely ended at Galveston, that point being their final point of concentration and manufacture, the cake being there manufactured and sacked for export. The contention was rejected by the application of the principle which we have expressed. The points of resemblance between that case and the one at bar are obvious. Are the points of difference essential? In both cases the article was intended for export, but had no definite foreign destination, nor had it been "committed to a common carrier for its final continuous voyage to a foreign point." In the Terminal Case the manufacturer and exporter of the products purchased them at interior points and had them shipped to himself at Galveston. In the present case the Sabine Company was the manufacturer and shipped them to the Powell Company, *the purchaser, who[126 paid the freight charges for the Sabine Company. Upon the arrival of the lumber at Sabine it was carried without delay beyond and unloaded into the water in reach of ship's tackle. The continuity of the shipment was not as much broken as in the cited case. There there was a delay for manufacturing; here there was only such delay as was incident to transhipment from rail carriage to water carriage, and to the nature of the traffic. It is said, however, that the Sabine Company had no connection with the lumber after its arrival at Sabine, and had no concern with its destination after it came into the hands of Powell Company, and had no particular knowledge thereof. Like circumstances undoubtedly existed in Southern P. Terminal Co. v. Interstate Commerce Commission. It did not prevail there and cannot prevail here. The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured, and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transhipment at the seaboard; and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign.

That it is the nature of the traffic, and not its accidents, which determines its character, is illustrated by Railroad Commission v. Worthington, supra. A rate of 70 cents a ton was imposed by the Commission on what was called "Lake-cargo coal" from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie, *for carriage thence by lake[127 vessels. The shipper transported the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumu-

lated in large quantities at Huron, and only taken out of the accumulated lots from time to time for the purpose of shipment out of the state. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming it for its interstate journey. It was held that its transportation to Huron was an interstate carriage.

Much stress was laid in the argument upon the fact that the coal was billed only to Huron. Replying to the contention the court said that the billing of the coal was not necessarily determinative, citing Southern P. Terminal Co. v. Interstate Commerce Commission, supra.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, is urged as sustaining all of the contentions of the Sabine Company, and the case was considered so apposite and controlling that the supreme court of the state rested its decision entirely upon it. It demands, therefore, a careful review. Its facts were as follows: The Hardin Grain Company, doing business in Kansas City, Missouri, having made a contract with parties at Goldthwaite, Texas, for the delivery of two carloads of corn at that place, in order to comply with their undertaking, contracted to purchase of the Harroun Commission Company, who were also doing business at Kansas City, Missouri, and had an agent at Texarkana, Texas, the same quantity of corn, to be delivered at the latter point. The corn with which the Harroun Commission Company proposed to fulfil their contract was shipped from South Dakota to Texarkana, Texas, through Kansas City, Missouri. It was delivered at Texarkana, Texas, in accordance with the agreement, to the Hardin Grain Company, who thereupon shipped it in the same cars, without 128]breaking bulk, *over the Texas & Pacific Railway and its connecting lines to Goldthwaite, Texas. Commenting on these facts the supreme court of the state, when the case was before it, said: "Since the contract of the Hardin Grain Company with the initial carrier at Texarkana was a contract for transportation wholly within this state, the question resolves itself into the inquiry whether the facts just stated change the character of the transportation and make the carriage from Texarkana to Goldthwaite a part of an interstate shipment." The court decided that the carriage from Texarkana to Goldthwaite "should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City." [97 Tex. 284, 285, 78 S. W. 495.] In other words, the court divided the commerce into two parts: one, the carriage from South Dakota and Kansas City to Texarkana, terminating by the delivery of the corn there to the Hardin Grain Company; and, one, which the court regarded as independent of and disconnected from the other, from Texarkana to Goldthwaite upon a bill of lading by which the railway company acknowledged the receipt from the Hardin Grain Company at Texarkana with orders to deliver to Saylor & Burnett at Galveston, Texas. This carriage, being wholly within the state, was pronounced to be a local shipment.

This court affirmed the judgment, and decided that the contract between the Hardin Grain Company and the Harroun Commission Company was completed in accordance with its terms when the corn was delivered to the Hardin Company at Texarkana. "Then, and not till then," it was said, "did the Hardin Company have full title to and control of the corn, and that was after the first contract of transportation had been completed." Then, and not till then, we may say, did the Hardin Company acquire the means of fulfilling its contract with Saylor & Burnett; and then, and not till then, did it start to fulfil its contract with Saylor & Burnett. *This was the de-[129 termining circumstance both in the supreme court of Texas and in this court. It caused the supreme court of Texas to decide that the carriage of the corn from Texarkana to Goldthwaite should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City. It caused this court, in effect, to adopt that ruling and to consider the corn not at any time to be that of Saylor & Burnett until it was started from Texarkana to Goldthwaite. It appeared that the corn remained five days in Texarkana, and, considering the bearing of this fact and the other facts, it was said: "The Hardin Company was under no obligation to ship it further. It could in any other way it saw fit have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Grain Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Grain Company. Then, and not till then, did the Hardin Grain Company have full title to and control of the corn, and that was after the first contract of transportation had been completed."

It is manifest that these facts were the determining ones, and the history of the corn prior to its arrival at Texarkana was put aside as irrelevant, and the controlling fact decided to be that corn belonging to

the Hardin Grain Company was shipped from Texarkana to Goldthwaite, a strictly local shipment. This was the view taken of the case in Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653. It was there urged to sustain the contention that the manner of billing was controlling of the character of the commerce. The contention was rejected, and, distinguishing the case and speaking of its facts, the court said: "The facts showed that the corn was carried upon a bill of lading from Hudson [South Dakota] to Texarkana, and that after-130]wards, some five days later, *it was shipped from Texarkana to Goldthwaite, both points in the state of Texas. This was held to be an intrastate shipment, unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for, as this court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment." Distinguishing the case, it was said: "It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed."

The facts in the case at bar are different. The lumber was ordered, manufactured, and shipped for export. And we say "shipped," for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipment was a perfectly natural one, and did not change the relation of the Powell Company to it, and make the lumber other than lumber purchased at Ruliff, and started from there in transportation to a foreign destination. The findings are explicit and circumstantial as to this. And the shipment was not an isolated one, but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transhipment at Sabine. Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments.

Judgment reversed and case remanded *for further proceedings* not inconsistent *with this opinion.*

*CHARLES R. HEIKE, Petitioner,[131
v.
UNITED STATES.

(See S. C. Reporter's ed. 131–145.)

**Criminal law — self-crimination — statutory immunity.**

1. An officer of a sugar refining company whose testimony before a Federal grand jury engaged in investigating alleged violations by the corporation of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), consisted chiefly of documentary evidence drawn from the corporation's books and papers, and produced by him in obedience to a subpœna, cannot defeat a prosecution for a conspiracy to commit an offense against the United States by effecting entries of raw sugars at less than their true weights, by a claim of immunity founded on the proviso to the act of February 25, 1903 (32 Stat. at L. 904, chap. 755, U. S. Comp. Stat. Supp. 1911, p. 1314), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under the interstate commerce and anti-trust acts, where the evidence given in the former proceeding does not concern the present one in any substantial way, and has no such tendency to incriminate him as to have afforded a ground for refusing to give it, even apart from the statute and the fact that it came from the corporation's books.

[For other cases, see Criminal Law, III. b, 2; Witnesses, V. c, in Digest Sup. Ct. 1908.]

**Appeal — review — discretion below — separate trial.**

2. The denial of a separate trial to one of several persons jointly indicted will not be revised on appeal by the Federal Supreme Court, unless such denial amounted to an abuse of the trial judge's discretion.

[For other cases, see Appeal and Error, VIII. i. 6, in Digest Sup. Ct. 1908.]

**Conspiracy — against United States — guilt of substantive offense.**

3. A person cannot escape liability for a conspiracy to commit an offense against the United States because he may have committed the substantive offense at which the conspiracy aims.

[For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

**Evidence — documentary — memoranda.**

4. Books in which were entered the weights of importations of sugar by city

Note.—On statutes prohibiting use of self-incriminating testimony against the witness—see notes to Re Buskett, 14 L.R.A. 407; United States v. James, 26 L.R.A. 418, and Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860.

On the constitutional protection against self-crimination—see note to Levy v. Superior Ct. 29 L.R.A. 811.

weighers are admissible in evidence without calling such weighers on a prosecution of the officers of a sugar refining company for conspiracy to commit an offense against the United States by effecting entries of raw sugars at less than their true weights, where the weights shown by such entries, which were the higher ones, and were introduced as evidence of discrepancies, were accepted by the company and were checked by the company's tallymen who did testify.

[For other cases, see Evidence, IV. p; IV. r, in Digest Sup. Ct. 1908.]

**Evidence — relevancy — similar acts.**

5. Testimony that the same course of conduct was going on long before the date in the indictment when it was alleged that the defendants conspired to commit an offense against the United States by effecting entries of raw sugars at less than their true weights is admissible on the trial under such indictment.

[For other cases, see Evidence, XI. k, in Digest Sup. Ct. 1908.]

[No. 520.]

Argued January 9, 1913. Decided January 27, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a conviction in the Circuit Court for the Southern District of New York of conspiring to commit an offense against the United States. Affirmed.

See same case below, 112 C. C. A. 615, 192 Fed. 83.

The facts are stated in the opinion.

Mr. **John B. Stanchfield** argued the cause, and, with Messrs. George S. Graham and Frederick Allis, filed a brief for petitioner:

The immunity statute is an act of general amnesty, and therefore should operate as a pardon from the government.

Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Burrell v. Montana, 194 U. S. 572, 578, 48 L. ed. 1122, 1123, 24 Sup. Ct. Rep. 787; Hale v. Henkel, 201 U. S. 43, 67, 50 L. ed. 652, 662, 26 Sup. Ct. Rep. 370; United States v. Price, 96 Fed. 962; United States v. Armour & Co. 142 Fed. 808; United States v. Swift, 186 Fed. 1002; State v. Murphy, 128 Wis. 201, 107 N. W. 470; American Tobacco Co. v. Werckmeister, 207 U. S. 293, 52 L. ed. 215, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595.

The authorities cited by the government for its contentions, or those of the court below, are not in point, if the immunity statute be treated as a statute of amnesty.

United States v. Burr, Fed. Cas. No. 14,692e; Ex parte Irvine, 74 Fed. 960; United States v. Kimball, 117 Fed. 156; United States v. Price, 96 Fed. 960; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Brown v. Walker, 161 U. S. 610, 40 L. ed. 825, 16 Sup. Ct. Rep. 644; Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787; Jack v. Kansas, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 Ann. Cas. 689; American Lithographic Co. v. Werckmeister, 221 U. S. 603, 611, 55 L. ed. 873, 878, 31 Sup. Ct. Rep. 676; Hale v. Henkel, 201 U. S. 73, 50 L. ed. 665, 26 Sup. Ct. Rep. 370; Foot v. Buchanan, 113 Fed. 156; United States v. Armour & Co. 142 Fed. 808; United States v. Swift, 186 Fed. 1002; State v. Murphy, 128 Wis. 201, 107 N. W. 470.

The word "concerning" should receive the broadest possible construction.

Brown v. Walker, 161 U. S. 623, 40 L. ed. 830, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Counselman v. Hitchcock, 142 U. S. 562, 564, 35 L. ed. 1113, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Hale v. Henkel, 201 U. S. 67, 50 L. ed. 662, 26 Sup. Ct. Rep. 370; Boyd v. United States, 116 U. S. 616, 629, 631, 632, 29 L. ed. 746, 751, 752, 6 Sup. Ct. Rep. 524; American Lithographic Co. v. Werckmeister, 221 U. S. 603, 611, 55 L. ed. 873, 878, 31 Sup. Ct. Rep. 676; People ex rel. Taylor v. Forbes, 143 N. Y. 228, 38 N. E. 303.

Whether or not the immunity statute should receive a broad application is a political question, and the policy adopted by Congress is final and binding on all.

Pennsylvania v. Wheeling, & B. Bridge Co. 18 How. 440, 15 L. ed. 441; Rhode Island v. Massachusetts, 12 Pet. 737, 738, 9 L. ed. 1265, 1266; Luther v. Borden, 7 How. 42, 12 L. ed. 599; William v. Suffolk Ins. Co. 13 Pet. 420, 10 L. ed. 228; Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Head Money Cases (Edye v. Robertson) 112 U. S. 598, 28 L. ed. 803, 5 Sup. Ct. Rep. 247; United States v. Rauscher, 119 U. S. 418, 419, 30 L. ed. 428, 429, 7 Sup. Ct. Rep. 234.

The learned court of appeals erred in holding that petitioner was entitled to no immunity because he was subpœnaed and testified as an officer of the corporation under investigation at the anti-trust proceeding, where he gave the evidence he now relies on.

State v. Nowell, 58 N. H. 314; Brown v. Walker, 161 U. S. 602, 40 L. ed. 823, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Hale v. Henkel, 201 U. S. 69, 70, 50 L. ed. 663, 664, 26 Sup. Ct. Rep. 370; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Baltimore & O. R. Co. v.

Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 21 Sup. Ct. Rep. 621; American Lithographic Co. v. Werckmeister, 221 U. S. 611, 55 L. ed. 878, 31 Sup. Ct. Rep. 676; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

The learned court below erred in denying the motion of the defendant Heike for a separate trial. He was unlawfully prejudiced by being tried together with the other defendants.

White v. People, 81 Ill. 338; State v. Oxendine, 107 N. C. 783, 12 S. E. 573; United States v. Matthews, Fed. Cas. No. 15,741b; Krause v. United States, 78 C. C. A. 642, 147 Fed. 444; O'Connell v. Pennsylvania Co. 55 C. C. A. 483, 118 Fed. 991; Morrow v. State, 14 Lea, 483; Watson v. State, 16 Lea, 604; State v. Desroche, 47 La. Ann. 651, 17 So. 209.

It is a dreadful abuse to suffer the conviction of a prisoner for conspiracy to commit an offense, when the same evidence, if sufficient for any purpose, ought to prove the offense itself; and this is the opportunity to correct it.

United States v. Kissel, 173 Fed. 828.

The learned trial court committed reversible error in admitting in evidence the so-called "pink books."

Chicago Lumbering Co. v. Hewitt, 12 C. C. A. 129, 22 U. S. App. 646, 64 Fed. 314; Kent v. Garvin, 1 Gray, 148; Gould v. Hartley, 187 Mass. 561, 73 N. E. 656; Norwalk ex rel. Fawcett v. Ireland, 68 Conn. 13, 35 Atl. 804; Swan v. Thurman, 112 Mich. 416, 70 N. W. 1023; People v. Mitchell, 94 Cal. 550, 29 Pac. 1106; Price v. Standard L. & Acci. Ins. Co. 90 Minn. 269, 95 N. W. 1118; Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908.

The admission of this hearsay evidence, in addition to the ordinary error, violated the right of the accused to be confronted with the witnesses against him.

Motes v. United States, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993; Kirby v. United States, 174 U. S. 47, 43 L. ed. 890, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330; Cooley, Const. Lim. 7th ed. p. 451; People v. Bromwich, 200 N. Y. 385, 93 N. E. 933; State v. Thomas, 64 N. C. 74; United States v. Angell, 11 Fed. 43; People v. Goodrode, 132 Mich. 542, 94 N. W. 14.

The trial court committed reversible error in allowing in evidence acts and declarations of a co-conspirator thirteen years prior to the conspiracy.

Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Brown v. United States, 150 U. S. 93, 37 L. ed. 1016, 14 Sup. Ct. Rep. 37; Train v. Taylor, 51 Hun, 217, 4 N. Y. Supp. 492; State v. Crofford, 121 Iowa, 403, 96 N. W. 889; Williams v. Dickenson, 28 Fla. 90, 9 So. 847; Wilson v. People, 94 Ill. 299; People v. Irwin, 77 Cal. 494, 20 Pac. 56; State v. Moberly, 121 Mo. 604, 26 S. W. 364.

Assistant Attorney General Denison argued the cause, and, with Messrs. Henry L. Stimson and Felix Frankfurter, filed a brief for respondent:

The immunity statute, being legislation in derogation of the sovereign powers to punish for crime and to elicit the truth in the administration of justice, is not to be extended by construction beyond the purpose for which it was enacted, namely, to serve as a substitute for the constitutional privilege against self-incrimination. It therefore does not make gratuitous grants of immunity merely because of testimony which never was privileged, and which, irrespective of any immunity statute, never could have been withheld.

Hale v. Henkel, 201 U. S. 43, 69, 50 L. ed. 663, 26 Sup. Ct. Rep. 370; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; United States v. Swift, 186 Fed. 1002; United States v. Armour & Co. 142 Fed. 808; 5 Wigmore, Ev. § 2281a, pp. 240, 241; State v. Murphy, 128 Wis. 201, 107 N. W 470; Warner v. State, 13 Lea. 62; Re Kittle, 180 Fed. 946; United States v. Kimball, 117 Fed. 156.

The immunity provisions are statutes in derogation of essential governmental powers, and as such should not be extended beyond the purpose of their enactment.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 543–554, 9 L. ed. 773, 822–826; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 685, 40 L. ed. 849, 853, 16 Sup. Ct. Rep. 714; Re Kittle, 180 Fed. 948; United States v. Burr, Fed. Cas. No. 14,692e; Hale v. Henkel, 201 U. S. 43, 73, 50 L. ed. 652, 665, 26 Sup. Ct. Rep. 370; American Lithographic Co. v. Werckmeister, 221 U. S. 603, 55 L. ed. 873, 31 Sup. Ct. Rep. 676.

The purpose of the immunity statutes, is shown by their structure and their historical evolution, was to prevent the obstructions of the specified prosecutions by the exercise of the constitutional privilege. This purpose was accomplished by an exchange of immunity for the privilege. There is nothing either in the terms of the act or its history to indicate any intention of granting a bonus in addition to this exchange.

United States v. Swift, 186 Fed. 1016; Wigmore, Ev. § 2192; Brown v. Walker, 161 U. S. 610, 40 L. ed. 825, 5 Inters. Com.

Rep. 369, 16 Sup. Ct. Rep. 644; American Lithographic Co. v. Werckmeister, 221 U. S. 603, 611, 55 L. ed. 873, 878, 31 Sup. Ct. Rep. 676; Foot v. Buchanan, 113 Fed. 156; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; United States v. Armour & Co. 142 Fed. 808; United States v. Kimball, 117 Fed. 163; Jack v. Kansas, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 Ann. Cas. 689.

No possible public policy calls for an extension of the immunity statute to the giving of innocent evidence not protected by the constitutional privilege.

State v. Murphy, 128 Wis. 218, 107 N. W. 470.

None of the evidence adduced by Heike was incriminating, and none of it could have been withheld by him under the constitutional privilege.

United States v. Burr, Fed. Cas. No. 14,962e; Brown v. Walker, 161 U. S. 591, 599, 40 L. ed. 819, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Reg. v. Boyes, 1 Best & S. 321, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32; Ex parte Irvine, 74 Fed. 960; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Dreier v. United States, 221 U. S. 394, 55 L. ed. 784, 31 Sup. Ct. Rep. 550; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; United States v. Burr, Fed. Cas. No. 14,692e.

The admission of the so-called "pink books" on the trial of the plea of not guilty was not error.

First. An unnecessarily complete foundation was laid for these books.

Chicago Lumbering Co. v. Hewitt, 12 C. C. A. 129, 22 U. S. App. 646, 64 Fed. 314.

Second. The pink books would have been sufficiently authenticated without all this complicated, difficult, and cumbersome proof of every figure they contained. It would have sufficed to prove the routine by which they were kept.

Mississippi River Logging Co. v. Robsen, 16 C. C. A. 400, 32 U. S. App. 520, 69 Fed. 773; Greene v. United States, 85 C. C. A. 251, 154 Fed. 414; Kerrch v. United States, 96 C. C. A. 258, 171 Fed. 369; Grunberg v. United States, 76 C. C. A. 51, 145 Fed. 91; Bacon v. United States, 38 C. C. A. 37, 97 Fed. 40, 175 U. S. 726, 44 L. ed. 339, 20 Sup. Ct. Rep. 1022; Morse v. United States, 98 C. C. A. 321, 174 Fed. 555, 20 Ann. Cas. 938; Wigmore, Ev. § 1521, pp. 1888, 1889, § 1530, pp. 1895, 1896; Continental Nat. Bank v. First Nat. Bank, 108 Tenn. 374, 68 S. W. 497.

*The admission on the main* trial of the testimony of Spitzer concerning the early history of the conspiracy was not error.

Wood v. United States, 16 Pet. 342, 360, 361, 10 L. ed. 987, 994, 995; Bottomly v. United States, 1 Story, 135, Fed. Cas. No. 1,688; United States v. 36 Barrels of High Wines, 7 Blatchf. 473, Fed. Cas. No. 16,469; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; 3 Greenl. Ev. 16th ed. § 93; State v. Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

Mr. Justice Holmes delivered the opinion of the court:

The petitioner was indicted for frauds on the revenue; and, in the sixth count, under Rev. Stat. § 5440 (U. S. Comp. Stat. 1901, p. 3676), for a conspiracy to commit such frauds by effecting entries of raw sugars at less than their true weights by means of false written statements as to the same. Rev. Stat. § 5445, U. S. Comp. Stat. 1901, p. 3678. Act of June 10, 1890, chap. 407, § 9, 26 Stat. at L. 131, 135, U. S. Comp. Stat. 1901, pp. 1886, 1895. He pleaded in bar that, in 1909 and 1910, answering the government's subpœna, he had testified and produced documentary evidence before a Federal grand jury investigating alleged breaches of the Sherman anti-trust act [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], that the testimony and documents concerned the subject-matter of [140] the present indictment, and that therefore he was exempted from liability by the act of February 25, 1903, chap. 755, 32 Stat. at L. 854, 904, U. S. Comp. Stat. Supp. 1911, p. 1313, as amended June 30, 1906, chap. 3920, 34 Stat. at L. 798, U. S. Comp. Stat. Supp. 1911, p. 1319. There was a replication; issue was joined; a trial was had upon the plea, in which the court directed a verdict for the government (175 Fed. 852); leave was given to plead over; a premature attempt was made to bring the case before this court (217 U. S. 423, 54 L. ed. 821, 30 Sup. Ct. Rep. 539), and then there was a trial on the merits in which the petitioner was found guilty on the sixth count. The circuit court of appeals affirmed the judgment (112 C. C. A. 615, 192 Fed. 83). Whereupon a writ of certiorari was granted by this court.

The investigation in which the petitioner testified concerned transactions of the American Sugar Refining Company. See Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co. 92 C. C. A. 318, 166 Fed. 254. The petitioner was summoned to produce records of the American Sugar Refining Company and to testify. He appeared

produced the records, and testified that he was the person to whom the subpœnas were addressed, secretary of the New York corporation, and secretary and treasurer of the New Jersey corporation of the same name. He summed up what the books produced showed as to the formation of the New York company. He identified his signature to four checks of the company in a transaction not in question here,—the Kissel-Segal loan mentioned in United States v. Kissel, 218 U. S. 601, 608, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124. These checks were not used in the present case. He testified as to the ownership of the Havemeyer and Elder Refinery in Brooklyn. Finally he produced a table showing how many pounds of sugar were melted each year, from 1887 to 1907, in each refinery; this table, of course, not purporting to represent the petitioner's personal knowledge, but being a summary of reports furnished by the company's different employees, and, the government contends, volunteered by him.

141] *The act of February 25, 1903, chap. 755, 32 Stat. at L. 904, U. S. Comp. Stat. Supp. 1911, p. 1314, appropriates $500,000 for the enforcement of the interstate commerce and anti-trust act, "Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts; Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." (This last proviso was added only from superfluous caution and throws no light on the construction. Glickstein v. United States, 222 U. S. 139, 143, 144, 56 L. ed. 128, 130, 131, 32 Sup. Ct. Rep. 71.) By the amendment of June 30, 1906, chap. 3920, 34 Stat. at L. 798, U. S. Comp. Stat. Supp. 1911, p. 1319, immunity under the foregoing and other provisions "shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath, or produces evidence, documentary or otherwise, under oath."

The petitioner contended that, as soon as he had testified upon a matter under the Sherman act, he had an amnesty by the statute from liability for any and every offense that was connected with that matter in any degree; or, at least, every offense towards the discovery of which his testimony led up, even if it had no actual effect in bringing the discovery about. At times the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play. In favor of the broadest construction of the immunity act, it is argued that when it was passed there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end. The government, on the other hand, maintains that the statute should be limited as nearly as may *be by the boundaries of[142 the constitutional privilege of which it takes the place.

Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment 5. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, chap. 83, 27 Stat. at L. 443, U. S. Comp. Stat. 1901, p. 3173, which read: "No person shall be excused from attending and testifying," etc. "But no person shall be prosecuted," etc., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, "was not coextensive with the constitutional privilege." American Lithographic Co. v. Werckmeister, 221 U. S. 603, 611, 55 L. ed. 873, 878, 31 Sup. Ct. Rep. 676. Compare act of February 19, 1903, chap. 708, § 3, 32 Stat. at L. 848, U. S. Comp. Stat. Supp. 1911, p. 1312. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Ev. § 2261.

There is no need to consider exactly how far the parallelism should be carried. It is to be noticed that the testimony most relied upon was the summary made from the books of the company by its servants, at the petitioner's direction, and simply handed over by him; that apart from the statute the petitioner could not have prevented the production of the books or papers of the company, such as the summary was when made, or refused it if *he[143

had the custody of them, and that the decisions that established the duty to produce go upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a case. Wilson v. United States, 221 U. S. 361, 377, et seq, 55 L. ed. 771, 778, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; Dreier v. United States, 221 U. S. 394, 400, 55 L. ed. 784, 785, 31 Sup. Ct. Rep. 550; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 623, 55 L. ed. 878, 884, 31 Sup. Ct. Rep. 621; Wheeler v. United States, Jan. 6, 1913 [226 U. S. 478, ante, 309, 33 Sup. Ct. Rep. 158]; Grant v. United States, Jan. 20, 1913 [227 U. S. 74, ante, 423, 33 Sup. Ct. Rep. 190]. But this consideration does not stand alone, for the evidence given in the former proceeding did not concern the present one, and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it, even apart from the statute and the fact that it came from the corporation books. Taking all these considerations together we think it plain that the petitioner could take nothing by his plea.

The evidence did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that all were dealings of the same sugar company. The frauds on the revenue were accomplished by a secret introduction of springs into some of the scales in such a way as to diminish the apparent weight of some sugar imported from abroad. The table of meltings by the year had no bearing on the frauds, as it was not confined to the sugar fraudulently weighed, and it does not appear how the number of pounds was made up. The mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds. The same consideration shows that it did not tend to incriminate the witness. It neither led nor could have led to a discovery of his crime. So the admission of his signature to certain checks, although it furnished a possible standard of the peti-[144]tioner's handwriting if there had *been any dispute about it, which there was not, in the circumstances of this case, at least, had neither connection nor criminating effect. When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger, and does not extend to remote possibilities out of the *ordinary* course of law. Brown v. Walker, 161 U. S. 591, 599, 600, 40 L. ed. 819, 821, 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644. See 5 Wigmore, Ev. § 2281, p. 238. Other questions would have to be dealt with before the petitioner could prevail upon his plea; but as we consider what we have said sufficient, we shall discuss it at no greater length. There was no dispute as to the facts, and a verdict upon it for the government properly was directed by the court.

The other matters complained of would not have warranted the issue of the writ of certiorari, and may be dealt with in few words. The petitioner was denied a separate trial, and this is alleged as error. But it does not appear that the discretion confided to the trial judge was abused. United States v. Ball, 163 U. S. 662, 672, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192. Again it is said that if the evidence proved the petitioner guilty of a conspiracy, it proved him guilty of the substantive offense. It may be that there has been an abuse of indictment for conspiracy, as suggested by Judge Holt in United States v. Kissel, 173 Fed. 823, 828, but it hardly is made clear to us that this is an instance. At all events, the liability for conspiracy is not taken away by its success,— that is, by the accomplishment of the substantive offense at which the conspiracy aims. Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136, 32 Sup. Ct. Rep. 812; Reg. v. Button, 11 Q. B. 929, 18 L. J. Mag. Cas. N. S. 19, 12 Jur. 1017, 3 Cox, C. C. 229; Rex v. Spragg, 2 Burr. 993, 999.

An objection is urged to the admission of certain books, called the pink books, in evidence,—they being the books in which were entered weights given by one set of weighers,—the city weighers,—the weighers not having been called. These weights were the higher ones and were introduced as evidence of the discrepancy. They appear *to have been accepted by the com-[145]pany, were checked by the company's tallyman, who testified, and if other evidence than that of the men who made the entries was necessary, it was produced. See 2 Wigmore, Ev. §§ 1521, 1530. Another objection to evidence concerned the admission of testimony that the same course of conduct was going on long before the date in the indictment when it is alleged that the defendants conspired. The indictment, of course, charged a conspiracy not barred by the statute of limitations, but it was permissible to prove that the course of fraud was entered on long before and kept up. Wood v. United States, 16 Pet. 342, 360, 10 L. ed. 987, 994; Standard Oil Co. v. United States, 221 U. S. 176, 55 L. ed.

619, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734. The acts and directions of earlier date tended to show that the same conspiracy was on foot. The petitioner was there. The time of his becoming a party to it was uncertain. The longer it had lasted the greater the probability that he knew of it, and that his acts that helped it were done with knowledge of their effect. We think it unnecessary to discuss the suggestion that the evidence did not warrant leaving the case to the jury, or to add further to the discussion that the case received below.

Judgment affirmed.

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AMERICAN RAILROAD COMPANY OF PORTO RICO, Plff. in Err.,

v.

FEDERICO DIDRICKSEN et ux.

(See S. C. Reporter's ed. 145-150.)

**Master and servant — safety-appliance act — applicability to Porto Rico.**

1. The safety-appliance act of March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314), which provides that the former acts of which it is amendatory shall be held to apply to "common carriers by railroad in the territories and the District of Columbia," is in force in Porto Rico, where, under the Foraker act of April 12, 1900 (31 Stat. at L. 80, chap. 191), § 14, "the statute laws of the United States not locally inapplicable," except the revenue law, have the same force and effect as in the United States.

[For other cases, see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

**Damages for death — pecuniary benefit.**

2. The loss to the parents of the society and companionship of a son is not a pecuniary loss, and therefore is not an element of the damages recoverable in an action brought against a railway carrier under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), for the benefit of the parents of an employee killed in the carrier's service.

[For other cases, see Damages, VI. j., in Digest Sup. Ct. 1908.]

**Trial — instructions — damages.**

3. The court should not instruct the jury that, in estimating the damages recoverable in an action brought against a railway carrier under the employers' liability act of April 22, 1908, for the benefit of the parents of an employee killed in the carrier's service, they may take into consideration the loss of any "care and consideration he might take of them or have for them during his life," where there is no allegation of any such loss, nor any evidence relating to the subject, or from which its pecuniary value may be estimated.

[For other cases, see Trial, VII. b, in Digest Sup. Ct. 1908.]

[No. 72.]

Submitted December 2, 1912. Decided January 27, 1913.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment against a carrier in an action brought under the Federal employers' liability act. Reversed and remanded for a new trial.

See same case below, 5 Porto Rico Fed. Rep. 401; on motion for new trial, 5 Porto Rico Fed. Rep. 427.

The facts are stated in the opinion.

Messrs. N. B. K. Pettingill and F. L. Cornwell submitted the cause for plaintiff in error.

No brief was filed for defendants in error.

Mr. Justice Lurton delivered the opinion of the court:

This is an action under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), before its amendment by the act of April 5, 1910 [36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324]. The plaintiffs were the surviving parents of Pedro Didricksen, an employee of the American Railroad of Porto Rico, who died from an injury sustained while in its service.

1. Many errors have been assigned. One assigned, but not noticed in the brief of plaintiff in error, goes to the capacity of the plaintiffs to maintain the action.

"That the deceased left neither wife[147] nor children is not denied. That the plaintiffs were, therefore, as his surviving parents, the sole beneficiaries under the statute, is also conceded.

One of the defenses made by the answer was that the plaintiffs had not been appointed administrators, as required by law, and had therefore no right to maintain this suit under the liability act of 1908. This was met after the jury had been summoned, by a motion, as shown by the plaintiffs' bill of exceptions, "to amend the complaint by making the following interlineation: 'That plaintiffs are the duly appointed personal representatives of the deceased, appointed by the district court of the Island of Porto Rico,' which leave is granted by the court." To this amendment the defendant excepted. A journal entry of the same date shows that, in support of

NOTE.—On the measure of recovery for *death caused by negligence*—see note to *Morgan v. Southern P. Co.* 17 L.R.A. 71.

the motion, the plaintiffs produced a certain certificate from the district court of Porto Rico, and that the complaint was amended by interlining the words, after the word "support,"—"they were further the only personal representatives of the deceased."

This certificate is not in the transcript, and we have no way of knowing its sufficiency as an appointment. The case went to the jury upon the issue of the capacity of the plaintiffs to sue, as well as upon the other issues. The court neither gave nor refused any instruction upon this point, and there was a general verdict for the plaintiffs.

2. The evidence upon the merits of the case, though obscure and meager as to the circumstances of the accident, was such as to justify its submission to the jury.

3. The complaint averred that the cars composing the train in charge of the deceased as conductor were not equipped as required by the safety appliance act of March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314). There was some evidence tending to show that one or more of the couplers were not in 148]repair, and some evidence tending *to show that this had a causal connection with the accident. The court instructed the jury that the safety appliance act applied to Porto Rico. Was this error?

The acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), and April 1, 1896 (29 Stat. at L. 85, chap. 87, U. S. Comp. Stat. 1901, p. 3175), related only to railroad companies engaged in interstate commerce. The traffic wholly confined to a territory of the United States was therefore not within either. But the act of March 2, 1903, amended the former acts and extended their provisions to "common carriers by railroad in the territories and the District of Columbia."

That the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), does apply to Porto Rico, is plain, since it, on its face, extends to the District of Columbia, the territories, the Panama Canal Zone, and other "possessions" of the United States. That it did extend to Porto Rico was expressly decided in American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603. The question as to whether the safety appliance act extended to that Island was reserved in the Birch Case.

We are of opinion that the act does extend to Porto Rico. It is true that the term, "possessions" of the United States is not used as in the liability act. The act does, however, provide that the former acts of which it is amendatory "shall be held to apply to common carriers by railroad in the territories and the District of Columbia," etc. Though for all purposes the Island of Porto Rico has not been fully incorporated into the United States, it obviously is not foreign territory, nor its citizens aliens. Gonzales v. Williams, 192 U. S. 1, 15, 48 L. ed. 317, 322, 24 Sup. Ct. Rep. 177. Its organization is in most essentials that of those political entities known as territories. It has a territorial legislature and a territorial system of courts. By the 14th section of the Foraker act of 1900 (31 Stat. at L. 80, chap. 191), "the statutory laws of the United States not locally inapplicable . . . have the same *force and effect in[149 Porto Rico as in the United States, except the internal revenue laws."

In New York ex rel. Kopel v. Bingham, 211 U. S. 468, 53 L. ed. 286, 29 Sup. Ct. Rep. 190, Porto Rico was held to be a territory within the meaning of § 5278, Revised Statutes (U. S. Comp. Stat. 1901, p. 3597), providing for the surrender of fugitive criminals by governors of territories.

It is not easy to see how effect can be given to the employers' liability act of 1908 in Porto Rico, without concluding that this act of 1903 is also in force there, since the former, as pointed out in the Birch Case (224 U. S. 555, 56 L. ed. 881, 32 Sup. Ct. Rep. 603), provides in its 3d section, "that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death." The 4th section contains a like provision concerning assumption of risk.

These considerations lead to the conclusion that the court below did not err in ruling that the act extended to Porto Rico.

4. There was error in the rule for measuring the damages recoverable.

The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained. The court below went beyond this limitation by charging the jury that they might, in estimat-

ing Federal rights, privileges, or immunities.

Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 869, 901, 14 Sup. Ct. Rep. 1108; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Ballard v. Hunter, 204 U. S. 241, 259, 260, 51 L. ed. 461, 473, 474, 27 Sup. Ct. Rep. 261; Polk v. Wendell, 5 Wheat. 293, 306, 5 L. ed. 92, 95; 4 Harvard L. Rev. 311; Thayer, Legal Essays, 141; 14 Am. L. Rev. 211; 23 Am. L. Rev. 190; Pepper, Borderland of State & Federal Decisions," p. 17; Gray, Nature & Sources of Law.

The plaintiff in error was justified in reposing upon the decision of the highest court of Oregon in the case of Baker v. Williams Bkg. Co. 42 Or. 213, 70 Pac. 711, as declaring and fixing the law.

Harris v. Jex, 55 N. Y. 424, 14 Am. Rep. 285; Olcott v. Fond du Lac County, 16 Wall. 678, 690, 21 L. ed. 382, 387.

The Constitution has the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States; any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

Scott v. Sandford, 19 How. 393, 426, 15 L. ed. 691, 709; South Carolina v. United States, 199 U. S. 437, 449, 50 L. ed. 261, 264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

Mr. A. M. Crawford, Attorney General of Oregon, and Mr. Martin L. Pipes submitted the cause for defendant in error. Mr. George J. Cameron was on the brief:

The Supreme Court has no jurisdiction to review the decision of a state court except upon a Federal question specially set up or claimed in the state court.

Mutual Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix) 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

The construction given to a statute or Constitution of the state by the highest court of such state is regarded as part of the statute or Constitution, and is as binding as the text upon the Supreme Court of the United States.

Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Russell v. Ely, 2 Black. 575, 17 L. ed. 259; Oaks v. Mase, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102; Sumner v. Hicks, 2 Black, 532, 17 L. ed. 355; Adams v. Nashville, 95 U. S. 19, 24 L. ed. 369; Nobles v. Georgia, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 586, 43 L. ed. 1096, 19 Sup. Ct. Rep. 755; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Aicardi v. Alabama, 19 Wall. 635, 22 L. ed. 215; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Louisiana v. Pilsbury, 105 U. S. 294, 26 L. ed. 1095.

The construction of the state court that a statute under which a person has been convicted is prospective only will be followed in the Federal court on the question whether or not the statute is an *ex post facto* law.

Jaehne v. New York, 128 U. S. 190, 32 L. ed. 399, 9 Sup. Ct. Rep. 70; Re Jaehne, 35 Fed. 357.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Mallett v. North Carolina, 181 U. S. 590, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

The constitutional provision against *ex post facto* laws applies only to criminal or penal statutes.

Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; League v. Texas, 184 U. S. 161, 46 L. ed. 481, 22 Sup. Ct. Rep. 475; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Locke v. New Orleans, 4 Wall. 172, 18 L. ed. 334.

The constitutional provision that no state shall pass an *ex post facto* law refers to a legislative enactment, and not to a judicial decision.

Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Central Land Co. v. Laidley, 159 U. S. 103–109, 40 L. ed. 91–93, 16 Sup. Ct. Rep. 80; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

A contract can only be impaired within the meaning of the United States Constitution so as to give this court jurisdiction on

writ of error to a state court by some subsequent statute of the state which has been upheld or given effect by the state court.

Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Central Land Co. v. Laidley, 159 U. S. 103-109, 40 L. ed. 91-93, 16 Sup. Ct. Rep. 80; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

The Federal Supreme Court will not hold a state statute void on the ground that it impairs the obligation of contracts unless it impairs the obligation of the particular contract which is involved in the controversy.

Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a criminal prosecution in the state of Oregon, instituted by an information charging the defendants, of whom the plaintiff in error was one, with having converted to their own use a large sum of money belonging to the state's irreducible school fund, agricultural college fund, and university fund, collectively spoken of as educational funds, then held for safe-keeping in a bank of which the defendants were in control as its officers and directors. Upon a separate trial of the plaintiff in error he was convicted and sentenced to a term of imprisonment and to pay a fine. An appeal to the supreme court of the state resulted in the elimination of the fine and 156]in the *affirmance of the judgment in other respects. 55 Or. 450, 42 L.R.A.(N.S.) 601, 104 Pac. 596, 106 Pac. 1022. The plaintiff in error then brought the case here, claiming that rights secured to him by the Constitution of the United States, and specially set up in the supreme court of the state, were denied by the judgment of affirmance.

Briefly outlined, the case, as we must take it to be, is as follows: In June, 1907, the bank became an "active depository" under a statute of the state presently to be mentioned, and thereupon an account was opened with the bank as such depository in the name of the state treasurer, with the added designation, "educational." The deposits going into the account consisted of checks and drafts belonging to the state's educational funds, and the money collected by the bank on these checks and drafts, less what was drawn out by the state, amounted on November 6, 1907, to $288,426.87. On that day the bank failed, and it was then disclosed that on August 21 the total cash in the bank was *$296.19 short of* the amount called for by the account, and that this shortage had continued and increased until the day of the failure, when it reached $274,882.73. The defendants had not literally appropriated any of the money to their personal use, but, knowing that it belonged to the state's educational funds, and was received and held by the bank as an active depository, had permitted it to be commingled with other deposits and funds, and had sanctioned its use in paying liabilities of the bank.

The prosecution was founded upon § 1807 of Bellinger & Cotton's Anno. Codes & Statutes of Oregon, which declares: "If any person shall receive any money whatever for this state, . . . or shall have in his possession any money whatever belonging to such state, . . . and shall in any way convert to his own use any portion thereof, . . . such person shall be deemed guilty of larceny."

*By an act taking effect May 26,[157 1907, Laws of 1907, chap. 135, p. 248, the legislature of the state provided for the designation of "state depositories for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer" ( §§ 1, 2); made it the duty of the treasurer to "deposit and at all times keep on deposit" in such depositories the "money in his hands belonging to the several funds in the state treasury," excepting a reserve of not to exceed $100,000 with which to pay current obligations (§ 3); required each depository to pay interest on deposits of such funds at not less than 2 per cent per annum (§§ 3, 4), and to give approved security "for the payment of such deposits and the interest thereon" (§ 5); and made the following declaration relating to educational funds (§ 16): "The word 'funds,' used in this act, shall apply to all funds in the state treasury except the common school,† agricultural college, and university funds."

The same act authorized the designation of "an active depository for the collection of any drafts, checks, certificates of deposit, and coupons that may be received by him [the treasurer] on account of any claim due the state" (§ 6); required such depository to give approved security "for the prompt collection of all drafts, checks, certificates of deposit, or coupons that may be delivered to such active depository by the state treasurer for collection; also, for the safe-keeping and prompt payment on the state treasurer's order of the proceeds of all such col-

†The common school fund and the irreducible school fund appear to have been identical. Or. Const. art. 8, § 2; Or. Law 1907, chap. 117, § 36.

lections" (§ 7); and in that connection provided (§ 8): "The state treasurer, on receipt of any draft, check, or certificate of deposit, on account of state dues, may place the same in such active depository for col-[158] lection, and it shall be the *duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active, depository shall be fixed by the state treasurer upon the best terms obtainable for the state." The words "funds" particularly defined in § 16, as before quoted, was not used in any of the sections having special relation to the active depository.

Before the passage of the depository act the supreme court of the state had occasion to consider and determine, in Baker v. Williams Bkg. Co. 42 Or. 213, 222-225, 70 Pac. 711, whether, in view of § 1807 of Bellinger & Cotton's Anno. Codes & Statutes (then § 1772, Hill's Anno. Laws), the state treasurer lawfully could make a general deposit in a bank of money of the state belonging to its educational funds, and it was held that he could, the court saying:

"It is made a felony by statute for any person having in his possession any money belonging to the state, county, town, or other municipality to convert to his own use or loan the same, with or without interest (Hill's Anno. Laws, § 1772); and while a mere deposit in a bank for safekeeping is not inhibited by this provision, it is manifest that, in case of the failure of the bank, the officer is not entitled to interest in his own right on the fund so deposited, whatever the right of the state or municipality might be in the premises. If, therefore, the claims are in fact for public money, as the objectors allege, no interest should be allowed thereon. A public officer may not loan, with or without interest, any part of the public funds in his possession, without being guilty of a felony; but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return. . . . The deposit is made on his [159] own personal responsibility, *however; and if, in case of the failure of the bank, he makes the loss good, the money deposited must necessarily become his property, and thereafter be considered and treated as such."

After that decision, and before the transactions here in question, the depository act was passed and put in force, but its construction and operation were not determined by the supreme court of the state until it passed upon the case at bar. It was then held (a) that the act made provision for general depositories, wherein moneys of the state, not belonging to the educational funds, were to be placed as general deposits, with the right in the depository to commingle them with other deposits and to loan them in the usual course of business, and with an absolute obligation on the depository to pay interest on them at not less than 2 per cent per annum; (b) that the act also made provision for an active depository for the collection of checks, drafts, and the like, belonging to any state fund, whether educational or otherwise, and the safe-keeping of the proceeds, subject to the treasurer's order, but with no right in the depository to commingle them with other deposits or to loan them, and with no specific or absolute obligation on the depository to pay interest thereon; (c) that by contrasting the provisions relating to general depositories with those relating to the active depository it was evident that deposits in the latter, unlike deposits in the former, were to be special, the title not passing to the depository, but remaining in the state; and (d) that the act operated, and the legislature intended, to take the educational funds out of the custom or right of the treasurer to make general deposits which was recognized in Baker v. Williams Bkg. Co. supra. Then, coming to apply the act, as so construed, together with § 1807, to the facts of the case as reflected by the verdict of the jury, it was further held (1) that the bank held the money as a special deposit, the title being in the state; (2) that the *defendants, being in con-[160] trol of the bank as its officers and directors, and knowing of the deposit, were to be regarded as having the money in their possession within the meaning of § 1807; (3) that the commingling of the money with other deposits and the using of it in paying liabilities of the bank constituted an unlawful appropriation of it; (4) that as the defendants, as controlling officers and directors of the bank, sanctioned that appropriation, knowing that the money belonged to the educational funds of the state and was held by the bank as an active depository, they thereby converted the money to their own use within the meaning of § 1807, even although the appropriation was for the benefit of the bank, and not of themselves personally.

It will be perceived that, but for the depository act, as so construed, the deposit would have been a general one, merely creating the relation of debtor and creditor between the bank and the state, and the commingling and use of the money in the man-

ner shown would not have been a crime under § 1807.

The record shows that the plaintiff in error contended in the supreme court of the state that the depository act was not reasonably susceptible of the construction ultimately adopted, and that to put such a construction upon it would be violative of the prohibition in the Constitution of the United States against *ex post facto* state laws. Both phases of the contention were denied, the second necessarily failing with the first, and the plaintiff in error now assigns error upon that holding, and complains that it deprived him of a right secured by the Constitution.

Bearing in mind what has been said, and especially that the depository act and § 1807 were both in force at the time of the alleged offense, it will be perceived that the real complaint which we are asked to consider is not that the supreme court of the 161 ]state in any wise *rested its judgment upon a statute passed after the time of the alleged offense, but only that it misconstrued a pre-existing statute to the disadvantage of the plaintiff in error, and that such a decision is an *ex post facto* law within the meaning of article I, § 10, of the Constitution, which declares: "No state . . . shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

But that provision of the Constitution, according to the natural import of its terms, is a retraint upon legislative power, and concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning. In Calder v. Bull, 3 Dall. 386, 1 L. ed. 648, one of the first cases in which the provision was considered, it was spoken of as reaching legislative, but not judicial, acts; and in Fletcher v. Peck, 6 Cranch, 87, 138, 3 L. ed. 162, 178, Chief Justice Marshall said of it: "In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained." True, neither of those cases turned upon the question whether the words "no state shall pass a law" embrace a decision of a court construing a statute, but that question was both presented and decided in Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169. There the supreme court of Ohio, in an action upon a contract, had put upon two pre-existing statutes of the state a construction which was claimed to be unreasonable and to impair the obligation of the contract, and it was sought to have that decision reviewed by this court on the ground that it denied a right secured by the Constitution of the United States. But the writ of error was dismissed for want *of jurisdiction*, because, as was said in the opinion (p. 342): "If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the supreme court of *Ohio has[162 erred in its construction of them. It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary." A like question was presented, and similarly disposed of, in New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 30, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741, where it was said: "In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." And in Brown v. Smart, 145 U. S. 454, 458, 36 L. ed. 773, 775, 12 Sup. Ct. Rep. 958, where a decision of the court of appeals of Maryland, expounding a statute of that state, was challenged as impairing the obligation of a contract made after the statute came into existence, it was held that the decision "was not a law" within the meaning of the provision against the impairment of contractual obligations by state laws. Many other cases give effect to this ruling, but it will suffice to cite, from among them, Central Land Co. v. Laidley, 159 U. S. 103, 109, 40 L. ed. 91, 93, 16 Sup. Ct. Rep. 80; Bacon v. Texas, 163 U. S. 207, 220, 41 L. ed. 132, 137, 16 Sup. Ct. Rep. 1023; Hanford v. Davies, 163 U. S. 273, 278, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 105]; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 638, 56 L. ed. 924, 927, 32 Sup. Ct. Rep. 577.

But whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this court, with like uniformity, has regarded it as reaching *every form in which the legislative[163 power of a state is exerted, whether it be a constitution, a constitutional amendment, an

enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the state exercising delegated legislative authority. New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 30, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 216, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; Grand Trunk R. Co. v. Railroad Commission, 221 U. S. 400, 403, 55 L. ed. 786, 787, 31 Sup. Ct. Rep. 537. Of course, the ruling here in question was by an instrumentality of the state; but as its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act, and not an exercise of legislative authority. As was said in Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The plaintiff in error cites the cases of Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; Muhlker v. New York, & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520, and Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490, as holding that a judicial decision may be a law in the sense of the constitutional provision which he invokes. But none of those cases, when rightly considered, sustains that position. The first was a criminal case in which a provision in a new constitution was held to be an *ex post facto* law as to an offense theretofore committed; the second presented the question whether a state statute of 1892 impaired contractual 164]obligations *created by deeds of a much earlier date; the third and fourth were explained in Central Land Co. v. Laidley, 159 U. S. 103, 111, 112, 40 L. ed. 91, 94, 95, 16 Sup. Ct. Rep. 80; Bacon v. Texas, 163 U. S. 207, 221-223, 41 L. ed. 132, 137, 138, 16 Sup. Ct. Rep. 1023, and Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464, and were there shown not to be in conflict with other cases on the subject, and the fifth is in no wise distinguishable from the fourth.

*We conclude that no Federal right was* involved in the ruling respecting the construction of the depository act.

The prosecution was instituted by an information conformably to a law of the state in force at the time. Bellinger & C. Anno. Codes & Statutes, § 1258. Following the judgment of conviction, and while the case was pending on appeal, a constitutional amendment was adopted, declaring: "No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury." [Or. Const. art. 7, § 18.] The plaintiff in error thereupon advanced the contention that the constitutional amendment worked a repeal of the statute under which the information was filed, and made it impossible to enforce the judgment against him without depriving him of his liberty without due process of law, contrary to the 14th Amendment to the Constitution of the United States. The state court ruled that the amendment to the state Constitution was prospective and did not affect pending cases. Error is now assigned upon that ruling. But it involved nothing more than the construction of the constitutional amendment, which was a question of local law, and its decision by the state court is not reviewable here.

As the record presents no Federal question, we are without jurisdiction to review the judgment, and therefore cannot enter into the merits of the questions that were presented and determined in the state court.

Writ of error dismissed.

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*UNITED STATES, Appt., [165
v.
HARVEY STEEL COMPANY. (No. 615.)

MIDVALE STEEL COMPANY, Appt.,
v.
HARVEY STEEL COMPANY. (No. 616.)

(See S. C. Reporter's ed. 165-172.)

**Patents — royalties — liability of United States.**

1. The Harvey process of treating armor plate, and not merely the method described in the patent for such process, was covered by a contract by which the United States agreed to pay a royalty on all armor plate treated by the Harvey process and used by the United States, although the process is

NOTE.—On patent royalties, see note to Dalzell v. Dueber Watch Case Mfg. Co. 37 L. ed. U. S. 749.

also identified in the contract as a patented one.

[For other cases, see Patents, XIII. e, in Digest Sup. Ct. 1908.]

**Patents — royalties — use of process — liability of United States.**

2. The United States cannot escape liability under a contract to pay a royalty on all armor plate treated by the Harvey process and used by it because the use of the sand or other noncarbonaceous material which the Harvey process, as described in the patent, contemplated should be packed on the side of the plate which was not to be carbonized, had been discontinued as unnecessary, where the United States was not only entitled by the contract to a disclosure of the inventor's process, but to his instructions and assistance in the practical application of the patent, and was at liberty to use any part or all of the process.

[For other cases, see Patents, XIII. e, in Digest Sup. Ct. 1908.]

**Patents — royalties — use of process — liability of United States.**

3. The obligation of the United States under a contract to pay a royalty on all armor plate treated by the Harvey process and used by the United States arises whenever armor plate used by the United States was hardened by the Harvey process, although the makers may not have been specifically required by their contracts with the United States to use that process, where, under some of such contracts, the maker was permitted to use the Harvey process, if desired, while under the other contracts the process used was required to be satisfactory to the Navy Department, and under all the contracts the United States had the right to inspect the process used.

[For other cases, see Patents, XIII. e, in Digest Sup. Ct. 1908.]

[Nos. 615 and 616.]

Submitted January 6, 1913. Decided February 3, 1913.

APPEALS from the Court of Claims to review a judgment awarding royalties under a contract for the use by the United States of the Harvey process of treating armor plate. Affirmed.

See same case below, 46 Ct. Cl. 298.

The facts are stated in the opinion.

Assistant Attorney General **Thompson** and Mr. **Philip M. Ashford** submitted the cause for the United States.

Messrs. **Frederic D. McKenney, Frank S. Busser,** and **A. H. Wintersteen** submitted the cause for the Midvale Steel Company.

Mr. **James R. Sheffield** submitted the cause for appellee. Mr. **James J. Cosgrove** was on the brief.

*Mr. Chief Justice **White** delivered[166 the opinion of the court:

These appeals are from a judgment in favor of the Harvey Steel Company and against the United States for $123,467.23. This was the amount of royalty found to be due to the Harvey Steel Company under a contract, dated April 12, 1893, to pay royalty on all armor plate treated by the Harvey process and used by the United States. The armor plate under which the royalty in question was allowed was manufactured for the United States under four contracts with the Midvale Steel Company. 46 Ct. Cl. 298. The Midvale Steel Company, for the protection of its interests under the contracts, was permitted to intervene, and it was also allowed to appeal from the judgment. The case is before us on a motion to affirm under paragraph 5 of rule 6.

The questions for decision involve the construction of the contract between the United States and the Harvey Steel Company. As the meaning of that contract was passed upon by this court in a previous case between the same parties (196 U. S. 310, 49 L. ed. 492, 25 Sup. Ct. Rep. 240), and the construction then given to the contract is here either authoritatively controlling or conclusively persuasive, we recur to that case and what was decided in it as the most direct means of not only analyzing and disposing of the issues here presented for decision, but, moreover, of causing it to be apparent that whatever may have been the original force of the contentions relied on, they are, in the light of the previous decision, "so frivolous as not to need further argument."

Following tests of armor plate treated by the Harvey process an option was given to the government, at the request of the Navy Department, for the purchase of the right to use the process upon vessels the construction of which had at that time been authorized by Congress. The *option[167 was given on March 3, 1891, and the patent for the process—No. 460,262—did not issue until September 29, 1891. The Harvey Steel Company, appellee, became the owner of the patent on October 7, 1891. The process was defined in the patent as follows:

"1. The herein-described method of producing a decrementally hardened tenacious armor plate, which consists of inclosing a low steel plate between a mass of noncarbonaceous material on one side and a mass of granular carbonaceous material firmly packed upon the other side, contained in a compartment formed within the heating chamber of a suitable furnace, and in maintaining the said heating chamber for a predetermined period of time at a temperature

above the melting point of cast iron, and in subsequently chilling said plate, whereby a stratum of steel of prescribed thickness upon the side of the plate against which said carbonaceous material has been pressed is made to acquire a heterogeneous crystalline structure and a condition of excessive hardness upon its exposed surface and a condition of gradually diminishing hardness as the depth from said surface increases."

After further tests the United States entered into an agreement on March 21, 1892, with the Harvey Steel Company, to purchase the right to employ the Harvey process in Harveyizing—as it is sometimes called—the armor for twelve designated vessels. Subsequently, on October 8, 1892, the Harvey process was definitely and formally adopted by the Navy Department; and, as said in the opinion in 196 U. S. p. 314, in pursuance of the contract of March 21, 1892, "the Navy Department required and received from Harvey a revelation of the secret processes and improvements" used in the treatment of armor plate by the Harvey process. Subsequently, at the request of the United States, the contract of March 21, 1892, was abrogated and in its stead a contract was entered into on April 12, 1893. By this contract, the United 168]States was *granted the right to use for the treatment of armor plate for its vessels the "Harvey process" and any and all improvements made by the Harvey Steel Company upon such process, and to use and employ the armor plates manufactured according to said process. The United States agreed to pay the Harvey Steel Company a royalty of ½ cent per pound on the finished plate.

The case in 196 U. S. was brought to recover royalties alleged to be due to the Harvey Steel Company under the contract of April 12, 1893, calculated on the weight of armor supplied to the United States by the Bethlehem Iron Company and the Carnegie Steel Company. The Harvey Steel Company obtained judgment in the court of claims, and that judgment was affirmed by this court. The questions presented and decided were (a) whether, under the contract of 1893, the United States could set up the invalidity of the patent as a defense; and (b) whether the United States ought to have been allowed to show that it had not used the patent, properly construed, although it had used "the process communicated to it, and known in common speech as the Harvey process." After answering the first of these propositions in the negative, the court came to consider the claim asserted under the second proposition, *viz.:* "That at the time of the contract it was *supposed that* the heat required for the process was greater than that actually used, that the patent was valid only for a process with the greater heat, and that the contract covers no more than the patent." In deciding against this contention, the court said (p. 317):

"But the fact that the parties assumed that the process used and intended to be used was covered by the patent works both ways. It shows that they thought and meant that the agreement covered and should cover the process actually used. We think that this can be gathered from the agreement itself, apart from the mere supposition of the parties. The contract dealt with a process 'known as *the[169 Harvey process.' It imported the speech of the parties and the common speech of the time into the description of the subject-matter. The words, Harvey process, commonly are put in quotation marks in the first contract, thus emphasizing the adoption of common speech. They mean the process actually used. The contract states that it is dealing with the same thing that had been the subject of the former agreement. That agreement further identified that subject as a process which was tested at the Naval Ordinance Proving Ground. It also identified it, it is true, as a patented process; but, if the incompatibility of the two marks is more than trivial, as it was regarded by the court which found the facts with which we have to deal, the identification by personal familiarity and by common speech is more pungent and immediate than that by reference to a document couched in technical terms, which the very argument for the United States declares not to have been understood. It is like a reference to monuments in a deed. As we have said, this identification by personal experiment and by common speech is carried forward into the contract in suit. The latter contract manifests on its face that it is dealing with a process actually in use, which requires the communication of practical knowledge, and which further experience may improve."

In concluding the opinion it was observed (pp. 318, 319):

"But the fuller the statement should be made, the more fully it would appear that the United States was dealing with a matter upon which it had all the knowledge that anyone had, that it was contracting for the use of a process which, however much it now may be impugned, the United States would not have used when it did but for the communications of the claimant, and that it was contracting for the process which it actually used,—a process which has revolutionized the naval armor of the world."

*This decision plainly refutes the[170

contention now again urged, that the Harvey process of the contract of 1893 is limited and strictly confined to the method of the patent, and it is here controlling. Furthermore, in no possible view do the findings in the present case present facts which even suggest the possibility of a different construction of the contract than that heretofore given. Those findings may be thus summarized: The method described in the patent for "producing a decrementally hardened tenacious armor plate" consisted in "inclosing a low steel plate between a mass of noncarbonaceous material on one side and a mass of granular carbonaceous material firmly packed upon the other side, contained in a compartment formed within the heating chamber of a suitable furnace," etc. The noncarbonaceous material actually used in the "Harvey process" consisted of sand packed at the back of the plate to protect the same from the carbonaceous material and excessive heat, of which the government was advised by the patentee by an exhibition of the process with the use of sand prior to the contract of April 12, 1893.

The use of sand was gradualy discontinued, because the same result could be accomplished without it, and some of the companies manufacturing plates were so advised late in 1893. Since 1904 no sand or other noncarbonaceous material has been used by the Carnegie and Bethlehem companies manufacturing armor plate.

The process used by the Midvale Steel Company in the manufacture and production of armor plate was as follows: The plate to be carbonized was mounted, face up, on brick piers about 18 inches high, resting on the car bottom, about 1 foot apart. A row of bricks, 2 high, was then placed around the plate, and the carbonizing material was put inside of these bricks on the face of the plate, and raised about three fourths of an inch above the bricks. Mortar was edged up on the sec-
171 ]ond bricks. Then the *second plate was placed on the carbonizing material, face down. The plates were then run into the furnace and the fire started.

The brick box containing the carbonaceous material prevented the same from reaching the back and sides of the plates, thus accomplishing the same result as with the sand which was used to protect the back of the plate from the carbonaceous material and excessive heat, as aforesaid.

The contention of the appellants on this branch of the case was thus stated by the court below in its opinion:

"In the present case the contention of the defendants and the intervener is that in the hardening or Harvey process referred to, one of the elements required was the use of sand, a noncarbonaceous material packed in the back of the plates, and that if not so used it cannot be contended that the Harvey process was applied by the Midvale Steel Company in the process which it used in hardening the plates under its several contracts with the United States though in other respects it concedes that the Harvey process was substantially used. Its contention is that it did not use sand. That is to say, that it accomplished the same result without, as had been accomplished with, sand; and it may be added that the same result was accomplished without the use of any noncarbonaceous material in the back of the plates by confining the carbonaceous material within the brick box, as set forth in the findings."

In view of the construction given to the contract of 1893 by the previous decision, we are of opinion that the court below did not err in deciding as it did that the circumstance that sand was used in the back of the plates in the various tests made by the government to which reference has been made, and was also employed in the treatment of the armor plate which was the subject of the suit decided in 196 U. S., while in the treatment of the armor plate involved in this suit neither sand nor any *other noncarbonaceous material was[172 packed on the side of the plate which was not to be carbonized, did not entitle the United States to claim that the Harvey process of the contract of 1893 was not used. As said by the court below, the government received all it had bargained for, since it was not only entitled by the contract to a disclosure of the inventor's process, but to his instructions and assistance in the practical application of the patent, and was at liberty to use the process, little or much, in whole or in part.

The unsoundness of the remaining contention becomes apparent from its mere statement. The proposition is that even although the armor plate made for the United States by the Midvale Steel Company was hardened by the Harvey process, the obligation to pay royalty as to such armor does not exist, because the United States had not, by its contracts with the Midvale Company, specifically required that company to use the Harvey process. But under the terms of two of the contracts with the Midvale Company, that company was permitted to use the Harvey process if desired, while under the other contracts the process used was required to be satisfactory to the Navy Department, and under all the contracts the United States had the right to inspect the process used. Under the contract of April 12, 1893, the right

was conferred upon the United States to use and employ the "aforesaid 'Harvey process' in the treatment of armor plates for vessels which have been, since July 18, 1892, or which may hereafter be, authorized by Congress, and to use and employ armor plates for such vessels manufactured according to such process, paying therefor to the party of the first part the royalty of ½ of 1 cent per pound of the finished plate." We think the plain meaning of the contract was that the government should pay royalty when it used armor plate treated according to the Harvey process of the contract.

Affirmed.

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173]*JOHN E. C. ROBINSON,† John Beckfelt, George A. Fay, and B. C. Finnegan, Appts.,

v.

JOHN E. LUNDRIGAN.

(See S. C. Reporter's ed. 173–180.)

**Statutes — departmental construction.**

1. Departmental practice in the administration of a statute will control the courts only when such practice is reasonable.

[For other cases, see Statutes, II. e, 2, in Digest Sup. Ct. 1908.]

**Public lands — soldier's additional homestead — right of assignee of invalid right — intervening adverse claim.**

2. The assignee of a soldier's additional homestead right cannot, when his application, made under U. S. Rev. Stat. § 2306, U. S. Comp. Stat. 1901, p. 1415, has been disallowed because his assignor was not entitled to an additional homestead entry, substitute in support thereof a valid right in place of the one rejected, and give his application precedence over an intervening adverse claim of a railroad company.

[For other cases, see Public Lands, I. e, 3; I. f, 1, in Digest Sup. Ct. 1908.]

[No. 108.]

Argued December 19 and 20, 1912. Decided February 3, 1913.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Minnesota, dismissing the bill in a suit to have defendant adjudged trustee of certain lands patented from the United States. Affirmed.

See same case below, 101 C. C. A. 590, 178 Fed. 230.

The facts are stated in the opinion.

Mr. C. D. O'Brien argued the cause, and, with Mr. P. H. Seymour, filed a brief for appellants:

An invalid entry of public land is, so long as it remains of record, an absolute segregation of the land embraced in it.

Re Watkins, 17 Land Dec. 148; Berry v. Towner, 21 Land Dec. 434; Re California & O. Land Co. 33 Land Dec. 598; Germania Iron Co. v. James, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; McMichael v. Murphy, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 460.

The matter of "substitution" was not a new thing in the Land Department, but had its origin in the administration of the law regarding the location of military bounty land warrants.

Hussman v. Berry, 6 Land Dec. 375; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

An applicant, after due notice that a soldier's additional homestead right, upon which his application is based, is for any reason illegal or invalid, may substitute another soldier's additional homestead right as a basis for his original application without waiving any rights acquired by virtue of such original application.

Re White, 30 Land Dec. 63.

A claim asserted to land entered or applied for, which had its inception during the time that the entry was intact, or the application to enter was still pending, cannot be held to be an adverse claim within the meaning of the confirmatory acts of March 3, 1893, and August 18, 1894.

Stanton v. Constantine, 19 Land Dec. 163; Mee v. Hughart, 20 Land Dec. 3; Raymond v. Redifer, 21 Land Dec. 228.

In the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

Williams v. United States, 138 U. S. 514, 524, 34 L. ed. 1026, 1031, 11 Sup. Ct. Rep. 457; Caha v. United States, 152 U. S. 211, 221, 38 L. ed. 415, 419, 14 Sup. Ct. Rep. 513; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692; Roughton v. Knight, 219 U. S. 537, 55 L. ed. 326, 31 Sup. Ct. Rep. 297; Knight v. United Land Asso. 142 U. S. 161, 178–181, 35 L. ed. 974, 980, 981, 12 Sup. Ct. Rep. 258.

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†Death of John E. C. Robinson, one of the appellants herein suggested, and the appearance of Hedwig Robinson as a party appellant in this cause in the place of John E. C. Robinson, deceased, filed and entered on December 19, 1912.

In this particular case the application of the railroad company to select was made with notice that it was subject to the soldier's additional homestead application of Robinson, and with consequent notice of all the rights that he had under the regulations and decisions of the Land Department. The Federal courts have been prompt in such cases as this to protect the equities of the prior applicant.

Shepley v. Cowan, 91 U. S. 330, 338, 23 L. ed. 424, 427; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; Witherspoon v. Duncan, 4 Wall. 210, 218, 18 L. ed. 339, 342; Chotard v. Pope, 12 Wheat. 586, 588, 6 L. ed. 737, 738; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 337–339, 50 L. ed. 499, 505–507, 26 Sup. Ct. Rep. 282.

Rights acquired in conformity with rules and regulations in force at the time are protected from the effects of any subsequent change of rule.

Oliver v. Thomas, 5 Land Dec. 289; Sandy v. Bullock, 37 Land Dec. 23; Re Weaver, 35 Land Dec. 553; Oliver v. Bates, 36 Land Dec. 427; Germania Iron Co. v. James, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811; Howe v. Parker, 111 C. C. A. 466, 190 Fed. 757.

Messrs. **Luther C. Harris** and **William E. Culkin** argued the cause and filed a brief for appellee:

The Department has always permitted the substitution of valid for invalid rights, and has allowed defects and irregularities in entries to be cured, but always upon the condition that they did not conflict with adverse rights already pending.

Re Edens, 7 Land Dec. 229; Kelly v. Quast, 2 Land Dec. 627; Mann v. Huk, 3 Land Dec. 452; Ayers v. Brownlee, 15 Land Dec. 550; Bagley v. Mitchell, 19 Land Dec. 419.

It is not denied that the Department has the power to establish rules affecting questions of practice and procedure. But the Department cannot, under the guise of such authority, either enlarge or diminish the rights created by statute.

Hartman v. Warren, 22 C. C. A. 30, 40 U. S. App. 245, 76 Fed. 162.

Moss v. Dowman, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429, contains many points of similarity to the case at bar.

174] *Mr. Justice **McKenna** delivered the opinion of the court:

Bill in equity by appellants, who were complainants in the circuit court, and we shall so refer to them, and to the appellee as *defendant, to adjudge defendant trustee for complainants of the S. W. ¼ of the S. E. ¼ of section 13, township 55 north, range 26 west of the principal meridian,* and to compel a conveyance to them. The Santa Fe Railroad Company was impleaded with defendant, but it filed a disclaimer and the suit proceeded against him alone.

The rights of complainants are based upon an application for the lands as unappropriated public lands of the United States by Robinson, one of the complainants, as assignee of one James Carroll. The application was duly entered of record upon the tract and plat book in the local land office, and proof of the claim of Carroll for an additional homestead entry was transmitted to the General Land Office for examination and action. Upon investigation the Land Department decided that Carroll was not entitled to make such entry, and held Robinson's application for rejection, and ordered a hearing to be had on June 29, 1905. Robinson did not appear and a decision was rendered, holding that Carroll was not entitled to an additional homestead entry under § 2306 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1415). Robinson was notified of this action and that he had a right to appeal therefrom.

On the 27th of July, 1905, Robinson filed with the local land office for transmission to the General Land Office an application for leave to substitute, in support of his application for entry of the land, another soldier's additional homestead right in lieu of that of Carroll. In his application he said he appealed from the order, canceling Carroll's entry, and excused himself for not appearing at the hearing on June 29, 1905, on account *of the sudden and [175 serious illness of his mother, which prevented his attendance at the hearing, and also prevented him from providing a representative thereat. He disclaimed a desire to incommode the Department, and expressed a willingness to aid it in the adjustment of all matters in which he should be interested. He further said that he was deeply sensible and appreciated the seriousness of defaulting at the hearing, and that he did not want the case reopened. He requested a delay of thirty days, and asked that the decision of the register and receiver of the land office be amended so as to grant him a reasonable time within which to perfect his entry.

An order was made allowing him thirty days after notice to file a proper substitute for the right of Carroll. On October 4, 1905, he, Robinson, filed the additional homestead right of one Justin F. Heath.

On February 15, 1906, the Commissioner of the General Land Office accepted the substitute, and directed the local land office that, upon the payment by Robinson of the legal fees and commissions within sixty days, they should allow the entry mad

by him. He paid the fees as required, and thereupon final certificate No. 715, Cass lake, Minnesota, series, was issued to him.

On July 11, 1905, that is, prior to the filing by Robinson of the homestead right of Heath, the Santa Fe Railroad, through the defendant Lundrigan, its attorney in fact for that purpose, filed in the local land office under the act of Congress of June 4th, 1897 [30 Stat. at L. 11, chap. 2], its application to select the land. The application was received subject to final action on Robinson's application. Upon the allowance of Robinson's application and the issue to him of a final certificate, the local land office rejected the application of the railroad company, from which action the latter appealed to the Commissioner of the General Land Office. The Commissioner held that the application of the railroad company constituted a valid intervening 176]adverse right such as to *bar the substitution by Robinson of the additional homestead right of Heath. On February 25, 1907, the Secretary of the Interior affirmed the decision of the Commissioner. Upon motion for review the decision was affirmed May 13, 1907; and, on petition for rereview, reaffirmed July 18, 1907.

In pursuance of this decision Robinson's entry was canceled, and a patent for the land was issued to the railroad company. The railroad company subsequently conveyed the land to defendant.

The above facts are not denied. It is alleged by complainants that for many years immediately preceding the decision holding Robinson's application for cancelation there was a rule, regulation, and settled practice prevailing in the Department providing that upon the rejection of a soldier's additional homestead right, surrendered by the assignee thereof in support of an application under § 2306 of the Revised Statutes, such applicant might substitute in support thereof a valid additional homestead right in place of that rejected.

The existence and validity of the rule is in dispute between the parties, and also the legality of the decision of the Interior Department against Robinson's application.

The circuit court dismissed the bill, and its decree was affirmed by the circuit court of appeals by a divided court. 101 C. C. A. 590, 178 Fed. 230.

The question in the case is very direct. Robinson's application had no legal foundation, Carroll, upon whose rights it was made, not being entitled to make an additional homestead entry. The question then is, could Robinson substitute another right, and give his application precedence over the intervening claim of the railroad company? An affirmative answer is contended for by complainants upon the practice of the Land Office. The defendant denies the existence of the practice, and contends, besides, that, if it be established, it is destitute of legal effect.

*We have seen that Robinson was[177 given an opportunity to avert the rejection of his application and support it by proof of a right in Carroll. He defaulted; but he did not ask to reopen the case and establish a legal foundation for his application, but that he be given thirty days to "rescript" the land. To this the Commissioner of the Land Office responded, affirming the decision of the local land office rejecting the application, and pronouncing "the case closed." He was, however, given thirty days to "file a proper substitute for the right" rejected, and, if he failed to do so, the local office was directed to hold the tract "subject to entry from that time by the first qualified applicant."

On October 4, 1905, he filed as a substitute the right of Justin F. Heath, but on July 11, 1905, the railroad company had selected the lands as lieu lands. The local land office rejected the application of the railroad company on account of conflict with Robinson's entry, subject, however, to the right of appeal. An appeal was taken and Robinson moved to dismiss it. The motion was denied on the authority of the departmental decision in the case of the Southern P. R. Co. v. Maginnis, in which it was decided, the facts being substantially the same, "that a substitution could not be allowed in the face of an intervening adverse right." The decision was affirmed by Secretary Hitchcock, and successively upon review and re-review by Secretary Garfield and Acting Secretary Woodruff.

Against these rulings complainants urge previous departmental practice. This practice Robinson urged in his petition for review, and cited in support of it the case of Germania Iron Co. v. James, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811. To the contention and the case the Acting Secretary replied as follows: "In that case the court held that a just and reasonable rule of administration adopted and applied by the Department became a rule of property, and could not be *altered to the[178 prejudice of those who had initiated rights under such practice. But the rule contended for by counsel as governing the case is neither reasonable nor just. Robinson attempted to initiate a right by relying upon the invalid claim of another; and insists that even though the Department would be unwarranted in recognizing such claim, he could be allowed to perfect the right thus asserted, to the prejudice of a valid intervening right, of which he had notice, by

the substitution of another and different right. The simple statement of the facts destroys all of the argument in support of such practice. There is neither reason nor equity in it. Had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented. But such is not the case, as he was relying solely upon the rights obtained by the assignments, and of these the first was worthless, and prior to the assertion of the second the right of another had attached. The arbitrary destruction of this intervening right in the manner contended for by counsel would be wholly unwarranted."

Little need be added to this reasoning. We are not disposed to review the cases by which it is contended the practice is established. It could only prevail if it were a reasonable administration of the statute. Webster v. Luther, 163 U. S. 331, 342, 41 L. ed. 179, 182, 16 Sup. Ct. Rep. 963.

Under § 2304 of the Revised Statutes every private soldier and officer who had served in the Army or Navy of the United States during the War of the Rebellion is entitled to enter under the homestead laws 160 acres of land. We omit the qualifying conditions. Section 2306 provides that every person mentioned in § 2304, U. S. Comp. Stat. 1901, p. 1413, who has entered under the latter section less than 160 acres "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." This provision [179] is the foundation of Robinson's *rights. In Webster v. Luther, supra, these sections were considered, and it was decided that the right given by § 2306 was intended as compensation and was assignable. When assigned, however, it is the right of the soldier which is transferred and which must be used to make an entry. Necessarily the right must exist before it can be exerted either by him or his assignee. Or, to put it in another way, a baseless or fraudulent claim cannot initiate or sustain a right. Hence the distinction made by Acting Secretary Woodruff between a right in Robinson and right in his assignor, and the observation that "had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented." Hence, also, the decision of Secretary Garfield that "no right of entry is gained by the filing of an invalid application to enter, and upon the rejection thereof the rights of subsequent applicants attach in the order in which they are asserted. By admitting the rights of substitution, *irrespective of the* intervening rights, the mere filing of an individual soldier's additional application would in effect amount to a segregation of the land." And again: "The refusal of the Department to adopt such a practice does not prejudice the holder of a valid right. The only value of such right lies in the power of the holder to enter thereunder any land subject to it at the date of filing his application. This right is not denied in the present case, as the land there involved was subject thereto only in event there were no prior adverse claims asserted upon which entry should be allowed. The right itself is not destroyed by refusing to allow entry thereunder of this particular tract. The purchaser still has all that he bargained for, and the mere fact that his purchase may have been made upon the mistaken idea that he would be entitled as a matter of right to exercise it upon a particular tract of land does not entitle him to equitable consideration as against a prior, and therefore superior, right of another."

*The ruling was right. Each appli- [180] cation must depend upon its particular basis. And it cannot be kept open for the substitution of another right than that upon which it was made. If one substitution can be permitted, successive substitutions can be permitted, and there might arise the condition of things condemned in Moss v. Dowman, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429. In that case successive formal entries under the homestead law and successive relinquishments of the entries of a tract of land were made. Dowman, who was not a party to the manipulating process, about one month prior to the last relinquishment settled upon the land. It was held that his right attached immediately upon the filing of the last relinquishment and before the last entry, though the latter was made on the same day the relinquishment was filed. It was recognized that the entry which was given up had segregated the land, and that no right could be initiated while it stood of record; but it was decided that the instant its relinquishment was filed in the local office the right of Dowman, the settler on the land, attached, and the Moss entry could not defeat it. And so in the case at bar,—the instant that Robinson's application was rejected as having no legal foundation, the land became subject to appropriation by another. No right, therefore, of Robinson was devested by the ruling of the Department, as contended by complainants, for no right had attached. His application, based on the right of Carroll, was not an entry of the land, and is not within the ruling of McMichael v. Murphy, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 480

that an entry valid on its face segregates the lands from the public domain, and precludes their appropriation by another so long as it remains undisturbed.

Decree affirmed.

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181] *RAFAEL GUTIERREZ DEL ARROYO, Doña Dolores Gutierrez del Arroyo and Francisco Robledo, Appts.,

v.

ROBERT GRAHAM.

(See S. C. Reporter's ed. 181-184.)

**Vendor and purchaser — contract of sale — option — revocable agency.**

1. An agreement signed by both parties by which the owner "compromised himself to sell" certain parcels of land to be paid for in cash, and another parcel to be paid for "in instalments during the two years following the delivery of the document," and the other party agreed to execute a mortgage to secure the payment, the contract to be "extended in a public document" as soon as a "deal" then pending should be "ultimated," failing which the contract should be void,—is a binding contract of sale, and not a mere option agreement, and was not converted into a revocable agency to sell by a supplemental agreement by which "the contracting parties" agreed that any excess in price which which should be obtained on a sale to a third party should be equally divided.

[For other cases, see Vendor and Purchaser, I.; Contracts I. d, 4, in Digest Sup. Ct. 1908.]

**Estoppel — inconsistent positions — tenant and purchaser.**

2. The acceptance of a lease does not estop the acceptor from attempting to enforce specific performance of the lessor's alleged contract to sell the land, where the lease recognized an outstanding dispute as to such land, and provided that it should not affect the rights of either side.

[For other cases, see Estoppel, III. c, in Digest Sup. Ct. 1908.]

[No. 129.]

Submitted January 21, 1913. Decided February 3, 1913.

APPEAL from the District Court of the United States for Porto Rico to review a decree for the specific performance of a contract for the sale of land. Affirmed.

See same case below, 5 Porto Rico Fed. Rep. 544.

The facts are stated in the opinion.

Messrs. Francis H. Dexter and Frederic D. McKenney submitted the cause for appellants.

*Mr. N. B. K. Pettingill submitted the cause for appellee.*

Mr. Justice Holmes delivered the opinion of the court:

This is a bill for the specific performance of a contract to sell land, made by the defendants Gutierrez. The defendant Robledo claims under a lease from the vendors, made since the contract, and found to have been taken with notice. The district court entered a decree for the plaintiff, and the defendants appealed. There is also a motion to dismiss on the ground that the principal appellants have accepted a part of the purchase money paid into court in pursuance of the decree; but we shall not deal *with this because we are of opin-[182 ion that the decision was right, and therefore there is no need to consider whether the appellants are estopped by doing what they say they were compelled to do upon penalty of being held in contempt. The motion to dismiss did not go to the jurisdiction, but raised another question on the merits.

The contract was as follows, according to the translation, the original not being in the record:

Memorandum.

In the city of San Juan, Porto Rico, the 5th day of July, 1906, Don Rafael Gutierrez del Arroyo and Mr. Robert Graham agreed: 1st, Don Rafael Gutierrez del Arroyo compromised himself to sell to Mr. Robert Graham a parcel of his estate in Pueblo Viejo, which both parties have already fixed the boundaries of, and which may extend up to 70 or 75 cuerdas, at the price of $40 per cuerda. 2d, he also compromised himself to sell to him another small extension of land, which they also fixed the boundaries of, and which may have an extension, approximately, of 14 cuerdas, at the price of $50 per cuerda. 3d, he also compromised himself to sell to him the other 200 or 300 cuerdas of the same estate, in that part of which, which they have also already designated, at the price of $55 per cuerda. 4th, the parcels indicated in Nos. 1 and 2 shall be paid in cash. The parcel indicated in the 3d number shall be paid in instalments during the two years following the delivery of the document. Mr. Graham shall not pay any interest for the extended time of payment; but Mr. Arroyo shall remain in possession and usufruct of the part of the estate sold and not paid for until the payment shall be made. Mr. Graham shall execute a mortgage on the estate to secure the payment. 5th, this contract shall be extended in a public document as soon as Mr. Graham will have ultimated the deal which *is now pending with Doña[183 Felicia Fernandez about the purchase of

an undivided part in the same estate. In case that deal should not be carried to effect, this contract will also remain without virtue and effect.

6th, this contract is also subjected to the condition that Don Rafael Gutierrez del Arroyo could rescind the contract of lease which he now has with Don Eleuterio Landrau.

Robert Graham,
Rafael Gutierrez del Arroyo.

The answer admits and it is found that this agreement was made by Rafael Gutierrez on behalf of himself and his sister, the other principal defendant.

Subsequently the following addition was made:

On the 27th of April, 1908, the contracting parties make addition to the 3d clause of this contract in the sense that the excess of price which Mr. Graham may obtain over the $55 per cuerda shall be divided between him and Mr. Arroyo at 50 per cent each.

Robert Graham,
Rafael Gutierrez del Arroyo.

The burden of the argument for the appellants is that this document only gave an option, which expired by time, and that the addition converted the option into a revocable agency to sell. But it appears to us that the argument is answered by reading the instruments. They are signed by both parties. First and second parcels "shall be paid in cash"—the third "shall be" paid for as indicated—Mr. Graham "shall execute a mortgage"—"this contract" shall be extended in a public document as soon, etc. The parties recognized the original agreement as a contract, imposing obligations upon Graham as well as upon Gutierrez, and not merely a promise by the latter. So the addition speaks of "the 184]contracting parties," implying *that both contract, and is simply an undertaking by Graham to pay more in a certain event. There is no suggestion of agency in it, but, on the contract, an assumption that Graham is acting on his own behalf. The answer, although setting up the second point, as to the effect of the addition, also recognizes the original agreement as a contract of sale, and shows very plainly that calling it an option is an afterthought.

The condition as to the lease to Landrau is admitted not to be material now. Graham was ready to perform the conditions imposed upon him. On August 10, 1909, he accepted a lease of parcels one and two, and this is set up as an estoppel against him; but it is enough to answer that the *instrument recognized an outstanding dispute* as to the land, and provided that the lease should not affect the rights on either side. So far as the defenses urged go, they point rather to unwillingness to carry out a bargain than to any reasonable doubt. The most plausible ground for hesitation is the indefiniteness of the boundaries. But no such point was taken. It seems to be a common characteristic of such agreements in Porto Rico (see Veve y Diaz v. Sanchez, 226 U. S. 234, 241, ante, 201, 204, 33 Sup. Ct. Rep. 36), and with the aid of local knowledge the surveyor employed by the court seems to have had no difficulty in fixing the line.

Decree affirmed.

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CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY and Martin A. Barrett, Plffs. in Err.,
v.
ALBERT H. SCHWYHART, Harry L. Reed, and Frank Novak.

(See S. C. Reporter's ed. 184–194.)

Error to state court — scope of review — joint liability.

1. The joint liability of the defendants under the pleadings is a matter of state law, upon which the decision of the highest court of the state before which the question could come will not be revised by the Federal Supreme Court on a writ of error to the state court, presenting the question

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NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to questions of local practice and procedure on writ of error from Federal Supreme Court to state court—see note to Texas & N. O. R. Co. v. Miller, 55 L. ed. U. S. 789.

On writs of error to state court where removal to Federal court was sought—see note to Williams v. First Nat. Bank, 54 L. ed. U. S. 625.

As to removal of causes in cases of separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co. 35 C. C. A. 153; Pollitz v. Wabash R. Co. 100 C. C. A. 4; Sloane v. Anderson, 29 L. ed. U. S. 899; Merchants Cotton Press & S. Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195; Butler v. National Home for Disabled Volunteer Soldiers, 36 L ed. U. S. 346, and Torrence v. Shedd, 36 L. ed. U. S. 528.

On fraud in joining a resident as codefendant with a nonresident defendant for the purpose of preventing a removal to the Federal court on the ground of diverse citizenship—see note to Boatman's Bank v. Fritzlen, 22 L.R.A.(N.S.) 1235.

whether the joinder was fraudulently made to prevent a removal of the cause to a Federal court.

[For other cases, see Appeal and Error, 2072–2123, in Digest Sup. Ct. 1908.]

**Removal of causes — separable controversy — fraudulent joinder.**

2. The motive of plaintiff in joining impecunious resident railway employees as codefendants with the nonresident railroad corporation in a negligence suit is not material upon the question of the right of the latter to remove the cause to a Federal court if such defendants are jointly liable under the local law.

[For other cases, see Removal of Causes, IV. c, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review — removal of causes.**

3. Whether or not the declaration stated a cause of action against a resident joined as codefendant with a nonresident is a matter of local law which is not open on a writ of error from the Federal Supreme Court, presenting the question whether the joinder was fraudulently made for the purpose of preventing a removal to a Federal court.

[For other cases, see Appeal and Error, 2072–2123, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review — fraudulent joinder to prevent removal.**

4. The Federal Supreme Court, on a writ of error to a state court, presenting the question whether a joinder of resident with nonresident defendants was fraudulently made to defeat the removal of the cause to a Federal court, can only consider whether there was a real intention to secure a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied.

[For other cases, see Appeal and Error, 2227–2256, in Digest Sup. Ct. 1908.]

[No. 132.]

Argued January 21 and 22, 1913. Decided February 3, 1913.

IN ERROR to the Kansas City Court of Appeals of the State of Missouri to review a judgment which affirmed in part a judgment of the Circuit Court of Daviess County, in that state, in favor of plaintiff in an action against a foreign railway company and its employees, which the corporate defendant had attempted to remove to a Federal court. Affirmed.

See same case below, 145 Mo. App. 332, 130 S. W. 388.

The facts are stated in the opinion.

**Mr. Paul E. Walker** argued the cause, and, with Mr. F. C. Dillard, filed a brief for plaintiffs in error:

The controversy between plaintiff below and the removing defendant was separable.

*1. No cause of action was stated against either of the resident defendants.*

Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; Cincinnati, N. O. & T. P. R. Co. v. Robertson, 115 Ky. 858, 74 S. W. 1061; Davis v. Chesapeake & O. R. Co. 116 Ky. 144, 75 S. W. 275; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; Nelson v. Hennessey, 33 Fed. 113; Potter v. New York C. & H. R. R. Co. 136 N. Y. 77, 32 N. E. 603; Slaughter v. Nashville, C. & St. L. R. Co. 28 Ky. L. Rep. 1195, 91 S. W. 744; Schwyhart v. Barrett, 145 Mo. App. 332, 130 S. W. 388.

2. The statute of Missouri prohibited the joinder of the several causes of action.

Barnes v. Metropolitan Street R. Co. 119 Mo. App. 303, 95 S. W. 971; Blackmer & Post Pipe Co. v. Mobile & O. R. Co. 137 Mo. App. 497, 119 S. W. 1; Beattie Mfg. Co. v. Gerardi, 166 Mo. 142, 65 S. W. 1035; Enos v. Kentucky Distilleries & Warehouse Co. 111 C. C. A. 74, 189 Fed. 342; Fernandez v. LaMothe, 147 Mo. App. 644, 127 S. W. 408; Gardner v. Robertson, 208 Mo. 605, 106 S. W. 645; Hunter v. Wethington, 205 Mo. 284, 103 S. W. 543, 12 Ann. Cas. 529; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 U. S. 208, 30 Sup. Ct. Rep. 101; Liney v. Martin, 29 Mo. 28; Mann v. Doerr, 222 Mo. 1, 121 S. W. 86; Martinowsky v. Hannibal, 35 Mo. App. 70; Mertens v. Loewenberg, 69 Mo. 208; McAllister v. Chesapeake & O. R. Co. 198 Fed. 660; Nicholas v. Chesapeake & O. R. Co. 115 C. C. A. 601, 195 Fed. 913; O'Riley v. Diss, 48 Mo. App. 62; Scott v. Taylor, 231 Mo. 654, 132 S. W. 1149; Southworth Co. v. Lamb, 82 Mo. 242.

3. The removing defendant was liable, if at all, under the terms of a Missouri statute; the resident defendants were liable, if at all, only under the rules of the common law. The causes of action were therefore separable.

Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Beutler v. Grand Trunk Junction R. Co. 224 U. S. 85, 56 L. ed. 679, 32 Sup. Ct. Rep. 402; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; Chicago, R. I. & P. R. Co. v. Stepp, 151 Fed. 908; Henry v. Illinois C. R. Co. 132 Fed. 715; Jackson v. Chicago, R. I. & P. R. Co. 102 C. C. A. 159, 178 Fed. 432; Lockard v. St. Louis & S. F. R. Co. 167 Fed. 675; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, 1 Am. Neg. Rep. 747; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup.

Ct. Rep. 683, 16 Am. Neg. Rep. 645; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, 7 Am. Neg. Rep. 182; Prince v. Illinois C. R. Co. 98 Fed. 1; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13; St. Paul, M. & M. R. Co. v. Sage, 17 C. C. A. 558, 36 U. S. App. 340, 71 Fed. 40; Texas & P. R. Co. v. Bourman, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; Webber v. St. Paul City R. Co. 38 C. C. A. 79, 97 Fed. 140.

4. Under the decisions of the Missouri courts the defendants were not jointly liable to the plaintiff.

McHugh v. St. Louis Transit Co. 190 Mo. 85, 88 S. W. 853; Stanley v. Union Depot R. Co. 114 Mo. 606, 21 S. W. 832; State ex rel. Iba v. Mosman, 231 Mo. 474, 133 S. W. 38; Veariel v. United Engineering & Foundry Co. 197 Fed. 877.

5. The resident defendants were charged solely with acts of nonfeasance, and, under the decision of the Missouri courts, were not personally liable. The only controversy in the petition was between the plaintiff and the removing defendant.

American Bridge Co. v. Hunt, 64 C. C. A. 548, 130 Fed. 302; Bell v. Catesby, 1 Rolle, Rep. 78, pl. 20; Bryce v. Southern R. Co. 125 Fed. 958; Cameron v. Reynolds, Cowp. pt. 1, p. 403; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; Chicago, R. I. & P. R. Co. v. Stepp, 151 Fed. 908; Clark v. Chicago, R. I. & P. R. Co. 194 Fed. 505; Davenport v. Southern R. Co. 124 Fed. 983, 68 C. C. A. 444, 135 Fed. 960; Ewell's Evans, Agency, p. 438; Feltus v. Swan, 62 Miss. 415; Floyt v. Shenango Furnace Co. 186 Fed. 539; Henshaw v. Noble, 7 Ohio St. 226; Horner v. Lawrence, 37 N. J. L. 46; Jewell v. Kansas City Bolt & Nut Co. 231 Mo. 176, 140 Am. St. Rep. 515, 132 S. W. 703; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Lane v. Cotton, 12 Mod. 488, 4 Taunt. 628; Marsh's Case, Leon, pt. 1, p. 146; Murray v. Usher. 117 N. Y. 542, 23 N. E. 564; McGinnis v. Chicago, R. I. & P. R. Co. 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Prince v. Illinois C. R. Co. 98 Fed. 1; Scheller v. Silbermintz, 50 Misc. 175, 98 N. Y. Supp. 230; Story, Agency, 9th ed. § 308; Steinhauser v. Spraul, 127 Mo. 541, 27 L.R.A. 441, 28 S. W. 620, 30 S. W. 102; Shaffer v. Union Brick Co. 128 Fed. 97; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450.

The decisions of this court do not establish principles in conflict with the contentions of the plaintiffs in error.

Alabama G. S. R. Co. v. Thompson, 200 U. S. *206, 50 L. ed. 441, 26 Sup. Ct. Rep. 57 L. ed.*

161, 4 Ann. Cas. 1147; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 Ann. Cas. 1152; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Johnson v. St. Joseph Terminal R. Co. 203 Mo. 381, 101 S. W. 641; Lanning v. Chicago G. W. R. Co. 196 Mo. 647, 94 S. W. 491; Little v. Giles, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; Louisville & N. R. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Pirie v. Tvedt, 115 U. S. 41, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; Plymouth Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Sloane v. Anderson, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Stotler v. Chicago & A. R. Co. 200 Mo. 107, 98 S. W. 509; Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248.

The allegations of fact contained in the petition for removal matters for the exclusive determination of the Federal court.

Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; Carson v. Hyatt, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; Kansas City Suburban Belt R. Co. v. Herman, 187 U. S. 63, 47 L. ed. 76, 23 Sup. Ct. Rep. 24; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Schwyhart v. Barrett, 145 Mo. App. 332, 103 S. W. 388;

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Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 262, 6 Sup. Ct. Rep. 799; Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184.

Apart from the allegations of negligence with which the resident defendants were charged, the petition contained another and distinct controversy between the plaintiff and the removing defendant.

Adderson v. Southern R. Co. 177 Fed. 571; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Batey v. Nashville, C. & St. L. R. Co. 95 Fed. 368; Beuttel v. Chicago, M. & St. P. R. Co. 26 Fed. 50; Boatmen's Bank v. Fritzlen, 68 C. C. A. 288, 135 Fed. 650; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 53 L. ed. 551, 29 Sup. Ct. Rep. 366; Chicago & A. R. Co. v. New York, L. E. & W. R. Co. 24 Fed. 516; Connell v. Smiley, 156 U. S. 335, 39 L. ed. 443, 15 Sup. Ct. Rep. 353; Elkins v. Howell, 140 Fed. 157; Fergason v. Chicago, M. & St. P. R. Co. 63 Fed. 177; Fraser v. Jennison, 106 U. S. 191, 27 L. ed. 131, 1 Sup. Ct. Rep. 171; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Gudger v. Western North Carolina R. Co. 21 Fed. 81; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; Harter Twp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Hartshorn v. Atchison, T. & S. F. R. Co. 77 Fed. 9; Henry v. Illinois C. R. Co. 132 Fed. 715; McGuire v. Great Northern R. Co. 153 Fed. 434; Nichols v. Chesapeake & O. R. Co. 115 C. C. A. 601, 195 Fed. 913; Southern R. Co. v. Edwards, 115 Ga. 1022, 42 S. E. 375; Wheeling Creek Gas, Coal & Coke Co. v. Elder, 170 Fed. 215.

Messrs. Kendall B. Randolph and Boyd Dudley argued the cause, and, with Mr. J. A. Selby, filed a brief for defendants in error:

This case is not removable. The state court properly retained jurisdiction.

Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 Ann. Cas. 1152; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460.

The right of removal is wholly statutory, and the state court is not ousted of its jurisdiction unless the cause is properly removable

*Hanford v. Davis, 163 U. S. 273,* 41 L. ed. *157, 16 Sup. Ct. Rep. 1051; Börs v. Preston,* 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; Mansfield & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Southern R. Co. v. Carson, 194 U. S. 138, 48 L. ed. 909, 24 Sup. Ct. Rep. 609.

All doubts are to be resolved in favor of the jurisdiction of the state court.

Mexican Nat. R. Co. v. Davidson, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563; Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935.

The necessary jurisdictional facts must appear on the face of the pleadings, to justify a removal.

18 Enc. Pl. & Pr. 297, note 11.

The question as to whether there is a separable controversy is to be determined by the condition of the record in the state court; and the facts necessary to give jurisdiction to the Federal court must appear upon the face of the plaintiff's petition. The petition for removal cannot supply them unless fraud be sufficiently and specifically averred and proved.

Arkansas v. Kansas & T. Coal Co. 183 U. S. 189, 46 L. ed. 146, 22 Sup. Ct. Rep. 47; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 535, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 161; Central R. Co. v. Mills, 113 U. S. 257, 28 L. ed. 951, 5 Sup. Ct. Rep. 456; Tennessee v. Union & Planter's Bank, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460.

The allegations of the petition of the plaintiff below are taken as confessed in determining whether the controversy is separable on application for removal.

Louisville & N. R. Co. v. Wangelin, 132 U. S. 602, 33 L. ed. 476, 10 Sup. Ct. Rep. 203; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147.

In the case at bar the allegations of fraud in the petition for removal are insufficient and present no issuable fact.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Provident Sav. Life Assur. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104;

Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 426, 55 L. ed. 526, 31 Sup. Ct. Rep. 460; Plymouth Consol. Gold Min Co. v. Amador & S. Canal Co. 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147.

In the interpretation of state statutes the United States courts are bound by the decisions of the state court of last resort, and will form an independent judgment as to their meaning only when no such construction has been had.

Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358; Merchants & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; McCain v. Des Moines, 174 U. S. 177, 43 L. ed. 939, 19 Sup. Ct. Rep. 644; Orr v. Gilman, 183 U. S. 283, 46 L. ed. 200, 22 Sup. Ct. Rep. 213; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 107, 43 L. ed. 631, 19 Sup. Ct. Rep. 341.

No question of pleadings can arise and be determined in removal proceedings. Any question as to the sufficiency of the petition is a question on the merits, to be determined by the court which tries the case. Even if no cause of action were stated, it would furnish no ground for removal, and would in no wise affect the jurisdiction of the state courts.

St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Hax v. Caspar, 31 Fed. 499; Evans v. Fulton, 96 Fed. 176; Broadway Ins. Co. v. Chicago G. W. R. Co. 101 Fed. 507; Fogarty v. Southern P. Co. 123 Fed. 973; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 86.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for personal injuries, brought by Schwyhart against the railway company and those of its servants to whose immediate negligence the injuries were alleged to have been due. There was a verdict and judgment against the company and the *defendant Barrett, but at the* proper time a petition had been filed by the railway company for the removal of the action to the circuit court of the United States, and it now contends that all subsequent proceedings in the state courts were void. 145 Mo. App. 332, 130 S. W. 388.

The declaration alleged that the plaintiff was employed by the company as hostler under Barrett as foreman; that it was his duty under Barrett's direction to uncouple the air brake and signal hose from between the ends of the cars on a specified train; that Barrett ordered him to do so, and that while he was between the cars, owing to their proceeding in an unusual manner that is stated, he was crushed; and further, that Barrett negligently ordered him into the dangerous situation without giving him warning of the danger, and by his order and presence assured plaintiff that the work could be proceeded with safely when, by the exercise of ordinary care on Barrett's part, the injury could have been avoided. After the petition *for[192 removal had been overruled the declaration was amended by inserting as to Barrett, "although he well knew of plaintiff's danger and the unusual way by which the said Pullman car was to be switched."

The defendants other than the railway were residents of Missouri, and the petition for removal charged that they were joined for the sole and fraudulent purpose of preventing a removal. The grounds stated for the charge of fraudulent joinder were that the declaration disclosed no cause of action against those defendants, that the company and they were not jointly liable, and that they were persons of little or no property, while the company was fully able to pay. It will be sufficient to consider these grounds with reference to Barrett alone, the party that ultimately was held.

The joint liability of the defendants under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the state before which the question could come. Southern R. Co. v. Miller, 217 U. S. 209, 215, 216, 54 L. ed. 732, 735, 736, 30 Sup. Ct. Rep. 450. That court might hold that the declaration averred the plaintiff to have been led by Barrett into a trap that was set and snapped by the company, the latter being also liable for Barrett's share in the deed. Again, the motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability, he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right. Chicago, B. & Q. R. Co. v. Wil-

lard, 220 U. S. 413, 427, 55 L. ed. 521, 527, 31 Sup. Ct. Rep. 460; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101. Hence the fact that the company is rich and Barrett poor does not affect the case.

The remaining justification for the charge of fraudulent intent is that no cause of action was stated against Barrett. That again is a question of state law, and that the plaintiff had such a cause of action in fact 194]must be taken *now to be established. The suggestion that mere nonfeasance is alleged is shown to be unfounded by the statement that we have made. It is true that the declaration was amended after the petition to remove had been denied, but the amendment, if not unnecessary, merely made the original cause of action more precise. On the question of removal we have not to consider more than whether there was a real intention to get a joint judgment, and whether there was a colorable ground for it shown as the record stood when the removal was denied. We are not to decide whether a flaw could be picked in the declaration on special demurrer. As the record stood, Barrett was alleged negligently to have ordered the plaintiff into a dangerous place, and by his conduct to have assured the plaintiff of safety, when, if Barrett had used ordinary care, the plaintiff need not have been hurt. To add that Barrett knew the specific source of the danger is merely to make plainer what evidently was meant before.

Judgment affirmed.

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BROOKLYN MINING & MILLING COMPANY, Appt.,
v.
CHARLES C. MILLER, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2, and George Miller.

(See S. C. Reporter's ed. 194–202.)

**Appeal — from territorial supreme court — findings of fact — concurrence with trial court.**

1. Findings of fact by the trial court, accepted by a territorial supreme court on appeal, are conclusive upon the Federal Supreme Court.

[For other cases, see Appeal and Error, VIII. 1, 3, e; VIII. 1, 5, in Digest Sup. Ct. 1908.]

**Stipulation — not to plead judgment.**

2. A party may bind itself by a stipulation in open court that, in consideration of the adverse party's consent to a continuance, no judgment which might be obtained in a pending suit in another jurisdiction should be pleaded.

[For other cases, see Stipulation, in Digest Sup. Ct. 1908.]

[No. 144.]

Argued January 23 and 24, 1913. Decided February 3, 1913.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court for the County of Yavapai, in that territory, dismissing a suit for specific performance. Affirmed.

See same case below, 13 Ariz. 217, 108 Pac. 471.

The facts are stated in the opinion.

Mr. F. S. Howell argued the cause, and, with Messrs. A. W. Jefferis, Thomas C. Job, and John J. Hawkins, filed a brief for appellant:

Under the issues presented, and the findings of both lower courts that no sale had been consummated of the West Brooklyn claim to the United Verde Copper Company by defendants prior to January 1, 1908, the plaintiff was entitled to specific performance of the contract in suit, without regard to whether it prevented such consummation or not.

Philip Schneider Brewing Co. v. American Ice Mach. Co. 23 C. C. A. 89, 40 U. S. App. 382, 77 Fed. 142; Kahnweiler v. Phenix Ins. Co. 14 C. C. A. 485, 32 U. S. App. 230, 67 Fed. 483; Micks v. Stevenson, 22 Ind. App. 475, 51 N. E. 493; Beardsley v. Beardsley, 138 U. S. 262, 34 L. ed. 928, 11 Sup. Ct. Rep. 318; Phillips, Code Pl. § 354; First Nat. Bank v. Root, 107 Ind. 224, 8 N. E. 105; Keenan v. Sic, 91 Neb. 582, 136 N. W. 841; Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, 77 N. W. 346.

Where time is not of the essence, the failure of a party to perform a condition will not defeat specific enforcement.

Pom. Const. Law, p. 462, § 390; Whiteman v. Perkins, 56 Neb. 181, 76 N. W. 547.

If time be not of the essence of a portion of the contract, performance of such things as are not controlled by time may be at any time before decree.

Seaver v. Hall, 50 Neb. 878, 70 N. W. 373; King v. Gsantner, 23 Neb. 797, 37 N. W. 654; Story, Eq. Jur. 777.

This court will look into the evidence.

Ward v. Sherman, 192 U. S. 168, 48 L. ed. 391, 24 Sup. Ct. Rep. 227; Southern Pine Lumber Co. v. Ward, 208 U. S. 126, 52 L. ed. 420, 28 Sup. Ct. Rep. 239; Halsell v. Renfrow, 202 U. S. 287, 50 L. ed.

NOTE.—As to review by the United States Supreme Court of territorial decisions—see *note to Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

1032, 26 Sup. Ct. Rep. 610; 6 Ann. Cas. 189.

Two defenses irreconcilably inconsistent may not be enforced, and the position assumed by the party prior to the suit relative to the facts and circumstances involved in the transaction drawn into question will prevail.

Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, 77 N. W. 346.

The court erred in refusing to give effect to the Nebraska decree. It constituted an adjudication of the rights of the plaintiff and certain of the parties defendant by a court of competent jurisdiction, and was therefore conclusive in this case as to such rights and parties as were involved therein.

Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641; Butterfield v. Nogales Copper Co. 9 Ariz. 212, 80 Pac. 345; Heinze v. Butte & B. Consol. Min. Co. 63 C. C. A. 388, 129 Fed. 274; The J. R. Langdon, 90 C. C. A. 18, 163 Fed. 472; Estill County v. Embry, 50 C. C. A. 573, 112 Fed. 882; Southern P. R. Co. v. United States, 168 U. S. 1, 57 L. ed. 355, 18 Sup. Ct. Rep. 18; Niles v. Lee, 169 Mich. 474, 135 N. W. 274; Deposit Bank v. Frankfort, 191 U. S. 499–514, 48 L. ed. 276–282, 24 Sup. Ct. Rep. 154; Fayerweather v. Ritch, 195 U. S. 276, 301, 49 L. ed. 193, 211, 25 Sup. Ct. Rep. 58; Northern P. R. Co. v. Slaght, 205 U. S. 122, 131, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442; Hilton v. Guyot, 159 U. S. 113, 170, 40 L. ed. 95, 110, 16 Sup. Ct. Rep. 139; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084.

Mr. T. G. Norris argued the cause, and, with Messrs. E. J. Mitchell, Reese M. Ling, and John M. Ross, filed a brief for appellees:

The findings of the district court, adopted by the supreme court in its judgment of affirmance, brought here as a statement of facts in the nature of a special verdict, present the sole question for determination, apart from exceptions duly taken to rulings on the admission or rejection of evidence,—Do the findings of fact support the judgment?

Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; Neslin v. Wells F. & Co. 104 U. S. 428, 26 L. ed. 802; Eilers v. Boatman, 111 U. S. 356, 28 L. ed. 454, 4 Sup. Ct. Rep. 432, 15 Mor. Min. Rep. 471; Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co. 151 U. S. 450, 38 L. ed. 229, 14 Sup. Ct. Rep. 384; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; Gildersleeve v. New Mexico Min. Co. 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 18, 41 L. ed. 334, 17 Sup. Ct. Rep. 7; Harrison v. Perea, 168 U. S. 323, 42 L. ed. 482, 18 Sup. Ct. Rep. 129.

The Nebraska decree could not control the court in Arizona.

Ellenwood v. Marietta Chair Co. 158 U. S. 105, 107, 39 L. ed. 913, 914, 15 Sup. Ct. Rep. 771; Fall v. Eastin, 215 U. S. 11, 54 L. ed. 70, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437; Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873; Enos v. Hunter, 9 Ill. 214; Wilson v. Braden, 48 W. Va. 196, 36 S. E. 367; Wimer v. Wimer, 82 Va. 890, 3 Am. St. Rep. 126, 5 S. E. 536; Lindley v. O'Reilly, 50 N. J. L. 636, 1 L.R.A. 79, 7 Am. St. Rep. 802, 15 Atl. 379; Bullock v. Bullock, 52 N. J. Eq. 561, 27 L.R.A. 213, 46 Am St Rep. 528, 30 Atl. 676.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by the appellant for the specific performance of a contract made between it and C. C. Miller, A. V. Miller, now deceased, and G. B. Lasbury, hereafter called the vendors, for the sale by the latter parties, on certain conditions and terms, of 175,000 shares of stock in the appellant, or, in the alternative, of all their interest in the West Brooklyn and certain other mining claims. The bill alleges the failure of the condition referred to, and seeks a conveyance of the interest in the mining claims and an account. It was dismissed by the court below and the plaintiff appealed.

The facts found, abridged, are these. The vendors owned the mining claims and had given an option to purchase the West Brooklyn claim and another, not concerned here, to the United Verde Copper Company, which was extended and kept in force up to January 1, 1908. In 1906 a stockholder in the appellant had begun a suit on behalf of himself and others, afterwards amended so as to make the appellant plaintiff, to have the Millers and Lasbury, also stockholders, declared trustees for the appellant of the mining claim now in question. Miller, on the other hand, had sued the appellants for work done upon the Brooklyn claim. By way of compromise the present contract was made. It recited the two suits and the conditional sale of the West Brooklyn claim to the United Verde Copper Company, and provided, in consideration of the dismissal and settlement of the foregoing *causes of ac-[199

tion, that if the sale to the United Verde Company was consummated by January 1, 1908, the above-mentioned transfer of stock should be made, etc., but that if, for any reason, the sale should not be consummated, then the conveyance now sought for should take place.†

200] *The suit by Miller was dismissed and a dismissal of the company's action was requested, but it was declined. Then on January 2, 1908, the vendors, alleging consummation of the contract with the United Verde Company, tendered performance, which was declined on the ground *that[201 it did not comply with the terms of the present agreement, and there was a second refusal to dismiss the company's suit. On February 15, however, it did dismiss that suit, and ten minutes later began the present one. This was tried in March, 1909, and the court found that the sale to the United Verde Company had not been con-

†The contract in full is as follows:

Whereas, an action is now pending in the district court of Yavapai county, Arizona, entitled Brooklyn Mining & Milling Company et al. v. Charles C. Miller, Alonzo V. Miller, and George B. Lasbury, which action relates to the title of the West Brooklyn, East Brooklyn, and South Brooklyn mining claims located in said county and territory, and relates to an accounting for ores and minerals taken therefrom; and

Whereas, the said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury have made a conditional sale of the above-named West Brooklyn mining claim for the sum of $10,000 to the United Verde Copper Company; and

Whereas, an action is pending in the district court of Yavapai county, Arizona, entitled Charles C. Miller v. Brooklyn Mining & Milling Company, for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company; and

Whereas, it is the desire of the parties connected with the foregoing causes of action to settle the same, and to adjust the matters of difference between the parties in connection therewith;

Therefore, in consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller, and George B. Lasbury that if the sale of the West Brooklyn mining claim to the United Verde Copper Company is consummated on or before the 1st day of January, 1908, the said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred and seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens and encumbrances whatsoever; it being understood that said transfer of stock is to include all of the holdings of said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (three) cents per share for said stock; and in addition *thereto* Charles C. Miller, Alonzo V. Miller, *and George B. Lasbury are to* pay to the *Brooklyn Mining & Milling* Company the sum of eight thousand, five hundred dollars ($8,500) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury are to convey all of their right, title, and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress, and Midway mining claims, and said transfer shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway, and North Brooklyn, and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury shall not be consummated on or before the 1st day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title, and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress, and Midway mining claims, and the assessment work on the North Brooklyn, Empress, and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties, and avoiding further costs and expenses to the parties hereto.

In witness whereof, we have hereunto set our hands this 27th day of August, A. D. 1907.

C. C. Miller.
A. V. Miller.
G. B. Lasbury.
Brooklyn Mining & Milling Company.
By Chas. W. Pearsall, President.

summated, and that the failure was caused by the refusal of the plaintiff to dismiss its former above-mentioned suit, which, it will be remembered, impeached the title of the vendors. (The vendors were not estopped by earlier having alleged consummation.)

The court, however, instead of dismissing the bill outright, made an alternative decree that it be dismissed if the plaintiff did not assent within thirty days to certain terms looking to a carrying out of the sale to the United Verde Company. The plaintiff refused its assent, and the Supreme Court, accepting the finding of the court below, affirmed the dismissal of the bill. This disposes of the case except in one particular to be mentioned. Harrison v. Perea, 168 U. S. 311, 323, 42 L. ed. 478, 482, 18 Sup. Ct. Rep. 129.

On January 28, 1908, the appellant brought a suit in Nebraska for specific performance of the same agreement now sued upon here, and on February 8, 1909, it was decided that the vendors must convey their interest in the West Brooklyn claim, as against Ada M. Miller, grantee of A. V. Miller, and Lasbury, the only parties served, and a master appointed by the court executed a conveyance accordingly. The appellant sought to avail itself of this decree and conveyance. But on December 23, 1908, it was agreed in open court, in consideration of the defendants allowing a continuance of the present Arizona cause, that no judgment that might be obtained in Nebraska should be pleaded. The court properly held the appellant to its agreement. There was a cross complaint by the appellees in the answer to which the decree and conveyance were pleaded, but the 202]Supreme Court, after referring *to Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853, disposed of the matter by noticing that no relief was given on the cross complaint, and that specific performance was denied on other grounds.

Judgment affirmed.

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UNITED STATES, Plff. in Err.,
v.
SIDNEY W. WINSLOW, Edward P. Hurd, George W. Brown, William Barbour, and Elmer P. Howe.

(See S. C. Reporter's ed. 202–218.)

**Appeal — by government in criminal case — scope of review.**

1. The district court's construction of the indictment must be accepted by the Federal Supreme Court when reviewing, under the act of March 2, 1907 (34 Stat. at L. 1246, *chap. 2564*), a *judgment* sustaining a demurrer to certain counts in the in dictment, which is based upon the construc tion of the Federal statute upon which th indictment is founded.

[For other cases, see Appeal and Error, I. c in Digest Sup. Ct. 1908.]

**Monopoly — restraint of trade in pat ented articles.**

2. The union in one corporation of thre companies, each manufacturing a differen noncompeting group of patented machine collectively used for making shoes, is no forbidden by the prohibitions of the Sher man anti-trust act of July 2, 1890 (26 Stat at L. 209, chap. 647, U. S. Comp. Stat. 1901 p. 3200), against combinations in restrain of interstate trade, although a large per centage of all the shoe machinery busines may thus have been put into a single hand

[For other cases, see Monopoly, II. b, in Di gest Sup. Ct. 1908.]

**Appeal — by government in crimina case — repeal.**

3. The criminal appeals act of March 1 1907, was not repealed by the Judicial Cod of March 3, 1911 (36 Stat. at L. 1087, chap 231, U. S. Comp. Stat. Supp. 1911, p. 128) since the former act is not mentione among the statutes expressly repealed b § 297 of the Code, is not superseded by an other regulations of the matter, and is special provision.

[For other cases, see Appeal and Error, I. c Statutes, III. b, in Digest Sup. Ct. 1908.]

[No. 620.]

Argued January 10, 1913. Decided Febru ary 3, 1913.

IN ERROR to the District Court of th United States for the District of Massa chusetts to review a judgment sustainin a demurrer to certain counts in an indict ment charging violations of the Sherma anti-trust act. Affirmed.

See same case below, 195 Fed. 578.

The facts are stated in the opinion.

Solicitor General Bullitt argued th cause and filed a brief for plaintiff in error

The criminal provisions of the Sherma anti-trust act are constitutional.

Northern Securities Co. v. United State 193 U. S. 197, 401, 48 L. ed. 679, 726, 2 Sup. Ct. Rep. 436; Standard Oil Co. v United States, 221 U. S. 1, 69, 55 L. ed 619, 648, 34 L.R.A.(N.S.) 834, 31 Sup. Ct Rep. 502, Ann. Cas. 1912 D, 734; United States v. Kissel, 218 U. S. 601, 54 L. ed

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NOTE.—On illegal trusts under moder anti-trust laws—see note to Whitwell v Continental Tobacco Co. 64 L.R.A. 689.

On restraint of trade in patented article —see note to E. Bement & Sons v. Nationa Harrow Co. 46 L.ed. U. S. 1058.

On review by government in crimina cases—see note to United States v. Stev son, 54 L. ed. U. S. 153.

1168, 31 Sup. Ct. Rep. 124; United States v. Swift, 188 Fed. 92.

The lower court's construction of the indictment is not open to review here.

United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124.

Individuals are criminally liable for acts done through the instrumentality of a corporation, which they actively procure to be done.

Balliet v. United States, 64 C. C. A. 201, 129 Fed. 689; Crall v. Com. 103 Va. 855, 49 S. E. 638; Fitzsimmons v. United States, 13 L.R.A.(N.S.) 1095, 84 C. C. A. 287, 156 Fed. 477; Foster v. United States, 101 C. C. A. 485, 178 Fed. 165; La Société Anonyme v. Panhard-Levassor Motor Co. [1901] 2 Ch. 513, 70 L. J. Ch. N. S. 738, 50 Week. Rep. 74, 85 L. T. N. S. 20, 17 Times L. R. 680, 18 R. P C. 405; People v. Clark, 8 N. Y. Crim. Rep. 179, 14 N. Y. Supp. 645; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; People v. Duke, 19 Misc. 292, 44 N. Y. Supp. 336; State v. Great Works Mill. & Mfg. Co. 20 Me. 41, 37 Am. Dec. 38; United States v. Swift, 188 Fed. 92; United States v. MacAndrews & F. Co. 149 Fed. 823; United States v. Durland, 65 Fed. 408; Durland v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. Rep. 508.

The combination of from 70 per cent to 80 per cent of all the shoe-machinery business of this country into one hand is in itself so great a proportion of the entire business as to constitute a restraint of trade within the meaning of the Sherman anti-trust law.

Standard Oil Co. v. United States, 221 U. S. 1, 75, 55 L. ed. 619, 650, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502; Ann. Cas. 1912 D, 734; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, ante, 107, 33 Sup. Ct. Rep. 9; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v. Union P. R. Co. 226 U. S. 61, 470, ante, 124, 33 Sup. Ct. Rep. 53, 162; United States v. Terminal R. Asso. 224 U. S. 383, 398, 56 L. ed. 810, 815, 32 Sup. Ct. Rep. 507; United States v. Reading Co. 226 U. S. 324, ante, 243, 33 Sup. Ct. Rep. 90.

Messrs. Charles F. Choate, Jr., and Frederick P. Fish argued the cause, and, with Mr. Malcolm Donald, filed a brief for defendants in error:

*This court is limited to a consideration of the particular construction of the Sherman act on which the district court's decision was based.*

United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Mason, 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480; United States v. Mescall, 215 U. S. 26, 54 L. ed. 77, 30 Sup. Ct. Rep. 19; United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35; United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209; United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323.

This court must accept the district court's construction of the indictment, and is limited to the question of the application of the Sherman act to the indictment as so construed.

United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323.

Only such questions as to the construction of the Sherman act are presented to this court as it is affirmatively shown form the basis of the district court's decision.

Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; Ex parte Smith, 94 U. S. 455, 24 L. ed. 165; Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511.

The merger of the three companies was not unlawful under the Sherman act, but, on the contrary, was lawful and proper.

Lowe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502; Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Anderson v. United States, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50.

Because each of the three concerns had such a lawful monopoly over its own machines, and could at its own pleasure exclude each of the other concerns from manufacturing such machines, the three concerns were fully justified in combining in order to produce, market, and keep in repair in an efficient and economical manner a complete line of all the machines.

United States v. American Bell Teleph. Co. 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809.

Assuming that some additional power resulted from the merger, it is clear that the mere acquisition of a power incidentally resulting from the pursuance of a normal and natural trade policy cannot be illegal, because it conceivably might be used to restrain trade. The acquisition of such a power so acquired would have too remote a connection with its oppressive use to constitute a restraint of trade, or give rise to any dangerous probability that a restraint of trade would result.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55.

If any restraint of trade could result from the merger it would be purely incidental to the accomplishment of a lawful purpose.

Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502; Ann. Cas. 1912 D, 734; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The criminal appeals act of 1907, under which the present writ of error was brought, was repealed by the Judicial Code (chap. 231, Act of Congress, 1911), and for this reason this court has no jurisdiction of the present case.

The Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290; McLish v. Roff, 141 U. S. 661, 667, 35 L. ed. 893, 895, 12 Sup. Ct. Rep. 118; Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. 149 U. S. 264, 37 L. ed. 727, 4 Inters. Com. Rep. 347, 13 Sup. Ct. Rep. 837; United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; United States v. Allen, 163 U. S. 499–502, 41 L. ed. 242, 243, 16 Sup. Ct. Rep. 1071; Tracy v. Tuffly, 134 U. S. 206, 222, 223, 33 L. ed. 879, 884, 885, 10 Sup. Ct. Rep. 527.

Mr. William A. Sargent also filed a brief for defendants in error:

The determination of a question of general law has nothing to do with the construction of the Sherman act, and is not within the classes named in the statute (criminal appeals act) giving a right of review in this court.

United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Mason, 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480; United States v. Mescall, 215 U. S. 26, 54 L. ed. 77, 30 Sup. Ct. Rep. 19; United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35.

The organization of the United Shoe Machinery Company by said defendants together, and the turning over by said groups of defendants to and the taking over by the United Shoe Machinery Company of the stocks and business of the three corporations, was not, and is not, a combination in restraint of defendants' own trade, nor a conspiracy in restraint of trade of the shoe manufacturers in shoe machinery.

United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632.

By the organization of the United Shoe Machinery Company there was no restriction of competition. The three groups of defendants, prior to the organization of the United Shoe Machinery Company, were not engaged in competition with each other. Their business related to a different commodity.

Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 L. ed. 689, 23 Sup. Ct. Rep. 521; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; United Shoe Machinery Co. v. Chapelle, 212 Mass. 467, 99 N. E. 289; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. John Reardon & Sons Co. 191 Fed. 454; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, ante, 107, 33 Sup. Ct. Rep. 9; United States v. Union P. R. Co. 226 U. S. 61, ante, 124, 33 Sup. Ct. Rep. 53: United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; United States v. Reading Co. 226 U. S. 324, ante, 243, 33 Sup. Ct. Rep. 90.

By the organization of the United Shoe Machinery Company the defendants, taken individually, or in groups, or together, did not agree to restrain such trade as they had in different commodities, or in any manner to restrain their own trade.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Continental Wall Paper Co.

Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Ellis v. Inman, P. & Co. 65 C. C. A. 488, 131 Fed. 182; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502; Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Blount Mfg. Co. v. Yale & T. Mfg. Co. 166 Fed. 555; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; United States v. Standard Sanitary Mfg. Co. 191 Fed. 172; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721.

The combination created by the organization of the United Shoe Machinery Company was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court.

United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The combination of businesses, each dealing with a different commodity, into one corporation, has never been held a restraint of trade either at common law or under the Sherman act.

United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v. Reading Co. 226 U. S. 324, ante, 243, 33 Sup. Ct. Rep. 90; Union P. Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737; United States v. Standard Oil Co. 173 Fed. 177.

That the district court was right in the only construction of the Sherman act now before this court, to wit, in holding that the organization of the United Shoe Machinery Company was not within the purview of the Sherman act, is further apparent from the fact that such organization of the United Shoe Machinery Company had no direct or immediate effect upon interstate commerce. If it had any effect at all upon interstate commerce, such effect was accidental, secondary, remote, and not even probable.

Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Standard Oil Co. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. *(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734.*

Mr. Justice Holmes delivered the opinion of the court:

*This is a writ of error to determine[215 whether two counts in an indictment, as construed by the district court, charge offenses under the Sherman act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. They were held bad, on demurrer, by the district court. 195 Fed. 578. The two counts allege substantially the same facts; the first laying them as a combination in restraint of the trade of the defendants themselves, the second, as a conspiracy in restraint of the trade of others, shoe manufacturers.

The facts alleged are as follows: For the last twenty-five years practically all the shoes worn in the United States have been made by the help of machines, grouped as lasting machines, welt-sewing machines, and outsole-stitching machines, heeling machines and metallic fastening machines, there being a large variety of machines in each group. (These machines, of course, are not alleged to do all the work of making finished shoes.) There is a great number of shoe factories, and because the machines are expensive and the best of them patented, the manufacturers have had to get them principally from the defendants. Before and up to February 7, 1899, the defendants Winslow, Hurd, and Brown, through the Consolidated and McKay Lasting Machine Company, under letters patent, made 60 per cent of all the lasting machines made in the United States; the defendants Barbour and Howe, through the Goodyear Shoe Machinery Company, in like manner made 80 per cent of all the welt-sewing machines and outsole-stitching machines, and 10 per cent of all the lasting machines; and the defendant Sterrow (against whom the indictment has been dismissed), through the McKay Shoe Manufacturing Company, made 70 per cent of all the heeling machines and 80 per cent of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the states with such of the *shoe manufacturers[216 as are outside Massachusetts, the state where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company, and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and di-

rectly, or through subsidiary companies, carries on all the commerce among the states that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned, furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants are alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights, and control over commerce among the states; to enhance the value of the same at the expense of the public; and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The organization of the new company and the turning over of the stocks and business to it are alleged to constitute a breach of the Sherman act.

It is to be observed that the conditions now inserted in the leases are not alleged to have been contemporaneous with the combination, or to have been contemplated when it was made. The district court construed the indictment as confined to the combination of February 7; that, is, simply to the merger of the companies, without regard to the leases subsequently made (195 217]Fed. 592, 594); *and we have no jurisdiction to review this interpretation of the indictment. United States v. Patten, January 6, 1913 [226 U. S. 525, ante, 333, 33 Sup. Ct. Rep. 141]. Hence the only question before us is whether that combination, taken by itself, was within the penalties of the Sherman act. The validity of the leases, or of a combination contemplating them, cannot be passed upon in this case.

Thus, limited, the question does not require lengthy discussion, and a large part of the argument addressed to us concerned matters not open here. On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, Paper Bag Patent Case (Continental Paper Bag Co. v. Eastern Paper Bag Co.) 210 U. S. 405, 429, 52 L. ed. 1122, 1132, 28 Sup. Ct. Rep. 748, and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below (195 Fed. 591) and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from 70 to 80 per cent of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the states does not appear. But taking it as true, we can see no greater objection to one corporation manufacturing 70 per cent of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. *It is as lawful for one[218 corporation to make every part of a steam engine, and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See Virtue v. Creamery Package Mfg. Co. Jan. 20, 1913 [227 U. S. 8, ante, 393, 33 Sup. Ct. Rep. 202]; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276.

It was argued as an afterthought that the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, under which the United States took this writ of error, was repealed by the Judicial Code of March 3, 1911 chap. 231, 36 Stat. at L. 1087, 1168, U. S. Comp. Stat. Supp. 1911, pp. 128, 244. But it is not mentioned among the statutes expressly repealed by § 297 of the latter act it is not superseded by any other regulations of the matter, it is a special provision, and on principles similar to those discussed in Ex parte United States, Jan. 6 1913 [226 U. S. 420, ante, 281, 33 Sup. Ct. Rep. 170], it must be held not to have been repealed. See further, Johnson v. United States, 225 U. S. 405, 419, 56 L. ed. 1142, 1147, 32 Sup. Ct. Rep. 748; Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 497, 50 L. ed. 281, 286, 26 Sup. Ct. Rep. 13

Judgment affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Plff. in Err.,
v.
ROBERT ALEXANDER.

(See S. C. Reporter's ed. 218–228.)

**Writ and process — service on foreign corporation — resident director.**

1. Service of process upon a resident director of a foreign corporation doing business in the state is valid under the New York statute, in the absence of the other designated officials, if the corporation is doing business in the state, and the cause of action arose therein.

[For other cases, see Writ and Process, III. c, 2, b, in Digest Sup. Ct. 1908.]

**Writ and process — service on foreign corporation — doing local business — Carmack amendment.**

2. An initial carrier, when a foreign corporation, is not made liable to suit on the contract of shipment in a state in which it was not carrying on business in the sense which has heretofore been held necessary to confer jurisdiction because of any agency of a connecting carrier within that state, effected by the provisions of the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), requiring the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to final destination, using the lines of connecting carriers as its agencies.

[For other cases, see Writ and Process, III. c, 2, b, in Digest Sup. Ct. 1908.]

**Writ and process — service on foreign corporation — doing business.**

3. A foreign railway company is doing business within the state, so far as the question of its amenability to service of process there is concerned, where its local representative undertakes to act for and represent it, negotiating for it, and in its behalf declining to adjust a claim made against it.

[For other cases, see Writ and Process, III. c, 2, b, in Digest Sup. Ct. 1908.]

[No. 738.]

Submitted December 2, 1912. Decided February 3, 1913.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action against a foreign railway company. Affirmed.

The facts are stated in the opinion.

Messrs. Lawrence Greer and F. C. Nicodemus, Jr., submitted the cause for plaintiff in error:

The requirements of due process of law forbid that a corporation be held amenable to service of process in a foreign jurisdiction unless engaged in business therein of such character and in such a manner and to such an extent as to bring itself within the jurisdiction, so that service of process upon an agent directly representing the authority of the corporation would constitute reasonable notice to the corporation to appear and defend.

Lafayette Ins. Co. v. French, 18 How. 405, 15 L. ed. 451; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595.

No act of Congress, either expressly or by implication, undertakes to burden such interstate commerce by subjecting the carrier engaged therein to the jurisdiction of a court foreign to its domicil, and until Congress itself speaks its silence must be deemed equivalent to a declaration that in this aspect interstate commerce shall remain free and untrammeled.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 549; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 181, 48 L. ed. 134, 139, 24 Sup. Ct. Rep. 39.

Mr. Phelan Beale submitted the cause for defendant in error:

The cause of action herein arose within the state of New York, and certain acts were to be performed there which bring the case within the purview of Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; therefore the service herein must be sustained.

Illinois C. R. Co. v. Beebe, 174 Ill. 13, 43 L.R.A. 210, 66 Am. St. Rep. 253, 50 N. E. 1019; Waldron v. Canadian P. R. Co. 22 Wash. 253, 60 Pac. 653; Union Nat. Bank v. Chapman, 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672; Scudder v. Union Nat. Bank, 91 U. S. 406, 413, 23 L. ed. 245, 249; Coghlan v. South Carolina R. Co. 142 U. S. 101, 111, 35 L. ed. 951, 954, 12 Sup. Ct. Rep. 150; Connecticut Mut. Life Assur. Co. v. Cleveland, C. & C. R. Co. 23 How. Pr. 180; Burckle v. Eckhart, 3 N. Y.

NOTE.—As to who may be served with process in suit against foreign corporation—see note to Foster v. Charles Betcher Lumber Co. 23 L.R.A. 490.

132; Hiller v. Burlington & M. River R. Co. 70 N. Y. 224; Strawn v. Edward J. Brandt-Dent Co. 71 App. Div. 236, 75 N. Y. Supp. 698, affirmed in 175 N. Y. 463, 67 N. E. 1090; Childs v. Harris Mfg. Co. 104 N. Y. 480, 11 N. E. 50; Ellis v. Willard, 9 N. Y. 529.

The decision in the case of Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164, et al., construing the Carmack amendment to the Hepburn act, shows conclusively that the plaintiff in error was actually engaged in doing business within the state of New York.

See also Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

Mr. Justice Day delivered the opinion of the court:

The defendant in error, Alexander, filed his complaint against the plaintiff in error, 222]St. Louis Southwestern Railway *Company of Texas, a Texas corporation, in the supreme court of New York county, to recover damages for loss sustained by him, arising from the alleged negligence of the railway company in failing to properly ice and re-ice certain poultry shipped from Waco, Texas, to New York city, under a bill of lading given by the railway company to the shipper, the Texas Packing Company. Upon the petition of the railway company the case was removed to the circuit court of the United States for the southern district of New York. That court denied a motion to vacate and quash service of summons and to dismiss for want of jurisdiction, and upon trial judgment was entered for the defendant in error. The district court, succeeding to the jurisdiction of the circuit court, allowed a writ of error, and certified to this court the question of jurisdiction under § 238 of the Judicial Code. 36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128.

When the plaintiff in error received the poultry from the Texas Packing Company at Waco on November 25, 1910, for shipment to New York city, it delivered to the packing company a through bill of lading in which it acknowledged receipt of the property, and agreed to carry the freight "to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination," and in which was set out, among others, the following conditions:

"Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided *by law, acts only as agent* with respect to the portion of the route beyond its own line.

"Sec. 3. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property. . . . Unless claims are so made, the carrier shall not be liable."

The route, as shown by the bill of lading, was "Cotton *Belt to East St. Louis,[223 care of Big 4 E. St. Louis, care of Nickel Plate Route." On December 5, 1910, the freight was delivered in a damaged condition to the defendant in error, to whom the bill of lading had been indorsed.

Alexander brought suit on July 10, 1911, against the plaintiff in error in the supreme court of New York county, and caused summons to be served upon Lawrence Greer, one of the directors of the plaintiff in error, residing in New York, in accordance with the laws of New York. Subsequently the case was removed to the United States circuit court on the ground of diversity of citizenship. The plaintiff in error filed a motion to vacate and quash the attempted service of summons, and to dismiss the cause "for want of jurisdiction over the person of St. Louis Southwestern Railway Company of Texas, for the reason that said St. Louis Southwestern Railway Company of Texas is a foreign corporation, organized and existing under the laws of the state of Texas, is not doing business within the state of New York, is not found within said state, and is not amenable to service therein, and has not waived due service of summons herein by voluntary appearance or otherwise." The circuit court denied the motion, holding that the service was in accordance with the New York laws, provided the action arose in that state, and that the action did so arise, for, although the contract was made in Texas, it called for delivery in New York, and the bill of lading required that the claim be presented to the carrier at the point of delivery; and holding further that, upon the authority of Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164, and Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483, under the Carmack amendment to the Hepburn act (34 Stat. at L. 584, 595, chap. 3591, § 7, U. S. Comp. Stat. Supp. 1911, pp. 1288, 1307), the plaintiff in error was doing business in the state of New York to the extent that the Federal courts acquired *jurisdiction of[224 a removed cause in which summons had been served in accordance with the state law

After an answer had been filed by the plaintiff in error, trial was had in the district court (the Judicial Code having become effective), the plaintiff in error duly renewing, at the opening of the trial and subsequent stages, its motions to vacate and quash the service and to dismiss the action for want of jurisdiction, which was denied upon the authority of the prior order. After final judgment had been entered upon the verdict for the plaintiff, the district court certified to this court the question of jurisdiction.

The record discloses the following facts in regard to the relationship existing between the plaintiff in error and the St. Louis Southwestern Railway Company and their activities in the state of New York: The St. Louis Southwestern Railway Company, a Missouri corporation, and the plaintiff in error, comprise what is commonly known as the "Cotton Belt Route." running from St. Louis, Missouri, through the states of Illinois, Missouri, Tennessee, Arkansas, and Louisiana into Texas, with nearly one half of the mileage in Texas. A map of the two roads contained in their "Official List," showing the route of the system, makes no distinction whatsoever between the trackage routes of the two lines.

All the stock of the plaintiff in error, save qualifying shares, is owned by the Missouri company, and the funded debt, mortgages, and other obligations and assets of the plaintiff in error are owned and controlled by the Missouri company. In a certain application to the New York Stock Exchange, requesting it to list securities of the Missouri company, made by the secretary of that company, it was stated that the proceeds were to be used for equipping and extending certain branches of the plaintiff in error. Certain banks and trust companies in New York city act as registrars, trustees, transfer agents, and 225]agents *for the two companies, the obligations being secured by mortgages upon the properties of both corporations.

The general officers and agents of one company hold similar positions with the other. The annual report of the plaintiff in error and the Missouri company are combined, and the Texas company referred to as a part or division of the Missouri corporation. Throughout the report reference is made to the "entire system," and in various respects the two lines are treated as one system.

It further is shown that upon the door of an office in New York city there appears the sign "Cotton Belt Route," which words are also found on the stationery of the plaintiff in error and the Missouri company, and that beneath the symbol appears "St. Louis Southwestern Lines," and underneath the names of P. H. Coombs, General Eastern Freight and Passenger Agent, and C. W. Braden, Traveling Freight Agent. In official pamphlets of the two roads the names of the plaintiff in error and the St. Louis Southwestern Railway Company are bracketed together to show that they constitute the Cotton Belt Route.

Before the action was commenced the defendant in error had considerable correspondence in regard to the claim with P. H. Coombs, of the New York office, in which the defendant in error stated that the plaintiff in error was the initial carrier, and as such would be held liable for the amount of the damage. Replies were received to all such letters, acknowledging receipt, and showing the attention and investigation which the claim was receiving, and stating that all claims were handled by the general offices at either St. Louis or Tyler, Texas, and that the letters were being sent to the St. Louis office of the Missouri company, and that it was hoped a satisfactory reply from the St. Louis office would be received at an early date. One letter was forwarded to S. C. Johnson, auditor of the Missouri Company, Freight Claim Division, and general *adjuster of all freight claims of[226 the Cotton Belt Route, who replied that he would review the matter and write fully regarding the company's position.

In this class of cases, where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, two questions ordinarily arise: the first, Was the corporation within the jurisdiction in which it is sued? the second, Was process duly served upon an authorized agent of the corporation? As to the latter question, there is little difficulty in this case. The cause of action having accrued in New York by the failure to keep the contract for the safe delivery of the goods there, the service could be properly made under the New York statute, in the absence of other designated officials, upon the resident director. Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, supra.

The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. Lafayette Ins. Co. v. French.

18 How. 404, 15 L. ed. 451; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 84, 27 Sup. Ct. Rep. 513; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125; Herndon-Carter Co. v. James N. Norris Son & Co. 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550.

In the court below it was adjudged that the so-called Carmack amendment, under the circumstances here detailed, had had the effect of making the corporation liable to suit in New York, and, because of the 227]agency within *New York of the connecting carrier, effected by that statute, must be held to be there present and subject to service of process. In view of the recent consideration of the Carmack amendment in this court it is unnecessary to now enter upon any extended discussion of it. The object of the statute was to require the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to the point of destination, using the lines of connecting carriers as its agencies, thus securing for the benefit of the shipper unity of transportation and responsibility. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 203, 55 L. ed. 181, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164. The provisions of the amendment had the effect of facilitating the remedy of the shipper by making the initial carrier responsible for the entire carriage, but the amendment was not intended, as we view it, to make foreign corporations through connecting carriers liable to suit in a district where they were not carrying on business in the sense which has heretofore been held necessary to confer jurisdiction.

We reach the conclusion that this case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process. Lafayette Ins. Co. v. French, 18 How. 407, 15 L. ed. 452; Green v. Chicago, B. & Q. R. Co. 205 U. S. 532, 51 L. ed. 917, 27 Sup. Ct. Rep. 595. Applying the general principles *which we regard as settled by this[228 court, Was this company doing business in the state of New York in that sense?

The testimony discloses that the two roads together constitute a continuous line from St. Louis, through the states of Illinois, Missouri, Tennessee, Arkansas, and Louisiana into Texas, and are together known as the "Cotton Belt Route." This combination has an office in the city of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol, "Cotton Belt Route," is found in use. Underneath appears the general description, "St. Louis Southwestern Lines," and there is also named a general eastern freight agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of the plaintiff's claim was taken up and considered, and correspondence concerning it was had through his office, and a settlement of the claim attempted. It was only after such negotiations for a settlement had failed that this action was brought. Here, then, was an authorized agent attending to this and presumably other matters of a kindred character, undertaking to act for and represent the company, negotiating for it, and in its behalf declining to adjust the claim made against it. In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the district of New York, in which it was sued, and to make it subject to the service of process there. See, in this connection, Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, 197 U. S. 415, 49 L. ed. 813, 25 Sup. Ct. Rep. 483; Commercial Mut. Acci. Co. v. Davis, 213 U. S. 245, 255, 53 L. ed. 782, 787, 29 Sup. Ct. Rep. 445.

In our opinion the court did not err in holding the corporation subject to process and duly served in this case.

Judgment affirmed.

229] *JOHN E. SCOTT, Plff. in Err.,
v.
CHARLES P. LATTIG and Robert Green.

(See S. C. Reporter's ed. 229–245.)

**Evidence — presumption — omission of island from government survey.**

1. There is no room for any inference that an island was not in existence at the time of the government survey of 1868 because the field notes and plat make no mention of it, where such island has an area of nearly 140 acres, has well-defined banks rising from 3 to 5 feet above high water, is largely covered with a growth of wild grass, sage brush, and small timber, bears undoubted evidence of permanency, and concededly was in its present condition only twelve years after the survey.

[For other cases, see Evidence, II. i, 2, in Digest Sup. Ct. 1908.]

**Public lands — survey — errors.**

2. The error in omitting an island in a navigable stream from the field notes and plat of the government survey of 1868 did not devest the United States of title, or interpose any obstacle to a subsequent survey of the island.

[For other cases, see Public Lands, I. e, 4, in Digest Sup. Ct. 1908.]

**Waters — title to bed of navigable stream — effect of statehood.**

3. Upon the admission of Idaho to statehood the ownership of the bed of the Snake river on the Idaho side of the thread of that stream, which forms the state boundary line, passed from the United States to the state, subject to the public rights and to the paramount power of Congress over navigation.

[For other cases, see Waters, I. b, 2, in Digest Sup. Ct. 1908.]

**Waters — title to bed — Federal grant.**

4. The disposal by the United States after the admission of Idaho to statehood of fractional subdivisions on the east bank of the Snake river, where it forms the boundary between Idaho and Oregon, carried with it no right to the bed of the river save as the law of Idaho may have attached such a right to private riparian ownership on a navigable stream.

[For other cases, see Waters, I. b, 2, in Digest Sup. Ct. 1908.]

**Waters — relative rights of state and United States — islands.**

5. A large island on the Idaho side of the Snake river,—a navigable stream,—being in existence when Idaho became a state, did not pass to the state upon admission to statehood, or come within the disposing influence of its laws, but remained the property of the United States, subject to disposal by it.

[For other cases, see Waters, I. b, 2, in Digest Sup. Ct. 1908.]

[No. 86.]

Argued December 13, 1912. Decided February 3, 1913.

IN ERROR to the Supreme Court of the State of Idaho to review a decree which affirmed a decree of the District Court for Canyon County, in that state, quieting title to an island in the Snake river. Reversed and remanded for further proceedings.

See same case below, 17 Idaho, 506, 107 Pac. 47.

The facts are stated in the opinion.

Mr. **Oliver O. Haga** argued the cause, and, with Messrs. James H. Richards and McKeen F. Morrow, filed a brief for plaintiff in error:

Public grants convey nothing by implication; they are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants. Nothing passes by a public grant but that which is necessarily or expressly embraced in its terms.

United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 546, 9 L. ed. 773, 823; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Martin v. Waddell, 16 Pet. 367, 411, 10 L. ed. 997, 1013; Central Transp. Co. v. Pullman's Palace Car. Co. 139 U. S. 24, 49, 35 L. ed. 55, 64, 11 Sup. Ct. Rep. 478.

Whenever the question in any court, state or Federal, is whether the title to land which has once been the property of the United States has passed from the Federal government, that question must be resolved by the laws of the United States.

Wilcox v. Jackson, 13 Pet. 498, 517, 10 L. ed. 264, 273; Irvine v. Marshall, 20 How. 558, 15 L. ed. 994; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534.

Congress alone has, under art. 4, § 3, of the Constitution, the power to determine the manner of disposing of the public lands, and it has the sole power to declare the dignity and effect of titles emanating from the United States.

United States v. Gratoit, 14 Pet. 526, 10

NOTE.—On government grant bounded by nontidal navigable river as carrying title to land thereunder—see notes to report of this case in 44 L.R.A.(N.S.) 107, and Johnson v. Johnson, 24 L.R.A.(N.S.) 1240.

On title to land under water—see notes to *Goff v. Cougle*, 42 L.R.A. 161, and *Kinkead v. Turgeon*, 1 L.R.A.(N.S.) 762.

On the power of Congress to grant land under navigable water in the territories—see note to Kneeland v. Korter, 1 L.R.A. (N.S.) 745.

On the title to islands—see notes to Holman v. Hodges, 58 L.R.A. 673, and Wilson v. Watson, 35 L.R.A.(N.S.) 227.

L. ed. 573; Bagnell v. Broderick, 13 Pet. 436, 10 L. ed. 235; Downes v. Bidwell, 182 U. S. 268, 45 L. ed. 1099, 21 Sup. Ct. Rep. 770; Kean v. Calumet Canal & Improv. Co. 190 U. S. 466, 47 L. ed. 1139, 23 Sup. Ct. Rep. 651.

The United States holds the title to the beds, below high-water mark, of the navigable streams within a territory for the benefit of the whole people, and in trust for the state or states to be ultimately created out of such territory.

Shively v. Bowlby, 152 U. S. 1, 28, 38 L. ed. 331, 342, 14 Sup. Ct. Rep. 548; Weber v. State Harbor Comrs. 18 Wall. 57, 21 L. ed. 798; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; San Francisco v. Leroy, 138 U. S. 656, 34 L. ed. 1096, 11 Sup. Ct. Rep. 364; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27.

In the United States the law does not distinguish between tidal streams and nontidal streams which are navigable in fact.

McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force title to the upland only, or what lies above ordinary high-water mark. And such grants do not impair the title and dominion of the future state, when created, to the bed of the stream below ordinary high-water mark.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Eldredge v. Trezevant, 160 U. S. 452, 467, 40 L. ed. 490, 498, 16 Sup. Ct. Rep. 345.

The use of the shores of navigable streams, and the right, title, or interest of riparian proprietors, or the owners of the upland, to such shores and to the beds of the streams, must be determined by the laws of the several states, subject only to the rights vested by the Constitution in the United States.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 361, 42 L. ed. 497, 502, 18 Sup. Ct. Rep. 157; St. Clair County v. Lovingston, 23 Wall. 46, 68, 23 L. ed. 59, 63; Barney v. Keokuk, 94 U. S. 338, 24 L. ed. 228; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 660, 44 L. ed. 622, 627, 20 Sup. Ct. Rep. 509; Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471, 13 L. ed. 220; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Scranton v. Wheeler, 179 U. S. 141, 187, 45 L. ed. 126, 146, 21 Sup. Ct. Rep. 48; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565.

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants, but whatever incidents or rights to the soil under navigable waters, or below high-water mark, attach to the ownership of the upland conveyed by the government, will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use or enjoyment of the property by the grantee.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27.

Snake river in Southern Idaho is a navigable stream.

Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513.

Whether a riparian owner holds title in fee to the center of a navigable stream, or to low-water mark or high-water mark, must be determined by the laws of the state in which the upland is situated.

McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The owner in fee of the bed of the river or other submerged land is the owner of any bar, island, or dry land which may be subsequently formed thereon.

St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337.

Islands formed in the stream before the admission of the state into the Union are subject to disposal by the Federal government the same as other public lands. If they are formed after the admission of the state, the question whether they belong to the riparian owner, or are the property of the state, is governed by local law.

1 Farnham, Waters, 50; United States v. Mission Rock Co. 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. Rep. 606, 48 C. C. A. 641, 109 Fed. 763; Steinbuchel v. Lane, 59 Kan. 7, 51 Pac. 886; Shoemaker v. Hatch, 13 Nev. 261; Granger v. Swart, Woolw. 88, Fed. Cas. No. 5,685.

Public agents are but servants of the law, and if they depart from its requirements, the government is not bound.

Moffat v. United States, 112 U. S. 24, L. ed. 623, 5 Sup. Ct. Rep. 10; Kirwa

Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.

The failure of a public land surveyor to survey an island of 138.15 acres of high and valuable agricultural land, not subject to inundation or overflow, does not enlarge the title conveyed by the patents to the upland situated across a 400-foot channel from the island.

Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; Barnhart v. Ehrhart, 33 Or. 274, 54 Pac. 195; French-Glenn Livestock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. Rep. 425; Steinbuchel v. Lane, 59 Kan. 7, 51 Pac. 886; Shoemaker v. Hatch, 13 Nev. 261; Whiteside v. United States, 93 U. S. 247, 23 L. ed. 882; Re Peterson, 39 Land Dec. 566.

One receiving a patent for the full acreage of upland paid for will not be heard to insist that, by reason of the failure of the surveyor to note on the official plat the existence of an island of 138.15 acres of agricultural land, not subject to overflow, and situated across a 400-foot channel from the upland, he is entitled to the island also.

Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Barnhart v. Ehrhart, 33 Or. 274, 54 Pac. 195; Lammers v. Nissen, 4 Neb. 245; Bissel v. Fletcher, 19 Neb. 725, 28 N. W. 303; Harrison v. Stipes, 34 Neb. 431, 51 N. W. 976.

An island in existence at the time of the admission of the state into the Union, consisting of 138.15 acres of dry land not subject to overflow, and adapted to ordinary agricultural uses, is not a part of the river bed, and title thereto does not pass by implication or legal intendment either to the state or the riparian owner, but it may be claimed, surveyed, and sold by the government as other public lands.

Mission Rock Co. v. United States, 48 C. C. A. 641, 109 Fed. 763, 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. Rep. 606; Re Peterson, 39 Land Dec. 566; Steinbuchel v. Lane, 59 Kan. 7, 51 Pac. 886; Shoemaker v. Hatch, 13 Nev. 261.

The government as the original proprietor has the right to survey and sell any lands, including islands in the rivers or other bodies of water; and the failure of the surveyor to show an island on the official plat does not estop the government from claiming it when its attention is directed to it.

*Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; Bissel v. Fletcher, 19 Neb. 725, 28 N. W. 303; Barnhart v. Ehrhart, 33 Or. 274, 54 Pac. 195; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.*

Whether an island is open to homestead entry and settlement, and should therefore be surveyed, is a matter within executive judgment or discretion.

Carrick v. Lamar, 116 U. S. 423, 29 L. ed. 677, 6 Sup. Ct. Rep. 424; St. Louis v. Rutz, 138 U. S. 251, 34 L. ed. 951, 11 Sup. Ct. Rep. 337; Kirwan v. Murphy, 189 U. S. 35, 56, 47 L. ed. 698, 705, 23 Sup. Ct. Rep. 599.

The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else.

Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Mor. Min. Rep. 673; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 843; Baldwin v. Stark, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Burfenning v. Chicago, St. P. M. & O. R. Co 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800; Moss v. Dowman, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429; Gertgens v. O'Connor, 191 U. S. 237, 48 L. ed. 163, 24 Sup. Ct. Rep. 94.

The Land Department, in issuing a patent, must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Johnson v. Towsley, 13 Wall. 72, 83, 20 L. ed. 485, 486; French v. Fyan, 93 U. S. 169, 172, 23 L. ed. 812, 813; Quinby v. Conlan, 104 U. S. 420, 426, 26 L. ed. 800, 802.

A decision rendered by the officers of the Land Department upon a question of fact is conclusive, and not subject to be reviewed by the courts in the absence of a showing that such decision was rendered in consequence of fraud or imposition, or mistake other than an error of judgment in estimating the value or effect of evidence, regardless of whether or not it was consistent with the preponderance of the evidence, so long as

there is some evidence upon which the finding in question could be made.

Hartwell v. Havighorst, 196 U. S. 635, 49 L. ed. 629, 25 Sup. Ct. Rep. 793; Jordan v. Smith, 12 Okla. 703, 73 Pac. 308; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398; Love v. Flahive, 33 Mont. 348, 83 Pac. 882; Parsons v. Venzke, 4 N. D. 452, 50 Am. St. Rep. 669, 61 N. W. 1036, affirmed in 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; 32 Cyc. 1020 et seq.; Le Fevre v. Amonson, 11 Idaho, 45, 81 Pac. 71; White v. Whitcomb, 13 Idaho, 490, 90 Pac. 1080, affirmed in 214 U. S. 15, 53 L. ed. 889, 29 Sup. Ct. Rep. 599.

The decisions of the Land Department on the construction of the land laws are entitled to great respect at the hands of the court, and should not be overruled unless they are clearly erroneous.

United States v. Healy, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247; Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; Hand v. Cook, 29 Nev. 518, 92 Pac. 3; Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 809, 71 Pac. 1046, 22 Mor. Min. Rep. 610; O'Reilly v. Nixon, 49 Colo. 362, 113 Pac. 486.

The general rules as to the conclusiveness of decisions of the Land Department apply to decisions of the Commissioner of the General Land Office.

Rutledge v. Murphy, 51 Cal. 388; Shelton v. Keirn, 45 Miss. 106; Perry v. O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100; Hartman v. Smith, 7 Mont. 19, 14 Pac. 648; Parsons v. Venzke, 4 N. D. 452, 50 Am. St. Rep. 669, 61 N. W. 1036, affirmed in 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; Glidden v. Union P. R. Co. 30 Fed. 660.

Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination.

De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519.

When the Land Department accepted the application of plaintiff in error for a survey of the island in question, and directed that such island be surveyed, platted, and offered for sale as public land, it held in effect that it had not been the intention of the government to surrender its title to such island under the patents to defendants in error, or their predecessors in interest, for the fractional lots situated across the channel from the island. And the decision of the Department on those questions has become *res judicata*, at least, so far as the power of that Department extends.

Re Peterson, 39 Land Dec. 566; Case v. Church, 17 Land Dec. 578; Gowdy v. Gilbert, 19 Land Dec. 17; Re Palmer, 26 Land Dec. 24; ReKuhlann, 27 Land Dec. 68.

The decision of the Land Department that an unsurveyed island containing 138.15 acres of agricultural land, and not subject to overflow, was not included in the patent from the government for the upland, situated across a 400-foot channel of a navigable river from the island, will be sustained by the court.

Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530.

Mr. Karl Paine argued the cause, and, with Mr. Ira W. Kenward, filed a brief for defendants in error:

The decision in the present case is based upon the common-law doctrine of riparian ownership in subaqueous land.

Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47; Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513; Fischer v. Davis, 19 Idaho, 493, 116 Pac. 412; Ulbright v. Baslington, 20 Idaho, 539, 119 Pac. 292; Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co. 115 C. C. A. 1, 194 Fed. 643.

At common law the owners of the banks prima facie own the beds of all fresh water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream,—*usque ad filum aquæ*.

Shively v. Bowlby, 152 U. S. 1, 30, 38 L. ed. 331, 343, 14 Sup. Ct. Rep. 548; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Kinkead v. Turgeon, 74 Neb. 580, 1 L.R.A.(N.S.) 762, 7 L.R.A. (N.S.) 316, 121 Am. St. Rep. 740, 104 N. W. 1061, 109 N. W. 744, 13 Ann. Cas. 43; Farnham, Waters, 104–118; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47; Johnson v. Johnson, 24 L.R.A.(N.S.) 1240, note; Goff v. Cougle, 42 L.R.A. 161 and note, 118 Mich. 307, 76 N. W. 489.

The rights of a riparian owner upon a navigable stream in this country are governed by the laws of the state in which the stream is situated.

Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Iowa v. Carr, 112 C. C. A. 477, 191 Fed. 257; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; 1 Weil, Water Rights, 3d ed. § 898, note 11.

A grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof. The bed of the river

could not be conveyed by the patent of the United States alone, but if such is the law of the state, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. The fact that the river is a boundary between different states has not been held to make a difference.

United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47.

Grants by the United States of public lands bounded on streams, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the land lies.

Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47.

Unsurveyed islands between the bank and the thread of the main channel, not omitted from survey by fraud or mistake, pass with the mainland to the riparian patentee.

Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; United States v. Stinson, 197 U. S. 200, 49 L. ed. 724, 25 Sup. Ct. Rep. 426; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

The cases passing on the question of the ownership of islands in a navigable stream, when not necessarily dependent upon the question of whether the adjoining owner takes to the thread of the stream or merely to the shore, are collated in a subject note to Holman v. Hodges, 58 L.R.A. 673, and in a case note to Webber v. Axtell, 6 L.R.A. (N.S.) 194.

It cannot be pretended that private ownership of the bed of the stream or of the island, subject to the public rights, will impair the interest of the public in the waters of Snake river.

United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47.

Snake river is a navigable river, and as such is a public highway and subject to the use of the public, not only to low-water mark, but to high-water mark; and the riparian owner can in no way interfere with this use.

Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499.

Except in cases of omission by accident fraud, or mistake, the United States has no authority to make surveys subsequent to patent of any land between the meander line and the thread of the main channel.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 289, 19 L. ed. 74, 78; Hardin v. Jordan, 140 U. S. 371, 383, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Moore v. Robbins, 96 U. S. 530, 533, 24 L. ed. 848, 850; Davis v. Wiebold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 878, 11 Mor. Min. Rep. 673; Lindsey v. Hawes, 2 Black, 554, 560, 561, 17 L. ed. 265, 268; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Webber v. Pierre Marquette Boom Co. 62 Mich. 635, 30 N. W. 469; Shufeldt v. Spaulding, 37 Wis. 662; State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 587, 87 N. W. 117.

In cases of this kind it is well settled that the meander line is not the boundary.

Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784; Johnson v. Johnson, 14 Idaho, 561, 24 L.R.A.(N.S.) 1240, 95 Pac. 499; Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74.

Ordinarily the government is bound by its own plats, and a patent issued referring to the official plats amounts to an adoption of such plats as a part of the description, and the natural monuments therein designated and shown are ordinarily controlling as to the boundary line.

Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47; Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518.

At common law islands formed in a fresh water river, if altogether on one side of the dividing line, the *filum aquæ*, belong to him who owns the bank on that side.

Ingraham v. Wilkinson, 4 Pick. 268, 16

Am. Dec. 342; Branham v. Bledsoe Creek Turnp. Co. 1 Lea, 704, 27 Am. Rep. 789.

Parties purchasing property shown by the United States surveys and plats to be riparian property should not be excluded from the water front.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; Bartlett Land & Lumber Co. v. Saunders, 103 U. S. 316, 319, 26 L. ed. 546, 548; Bates v. Illinois C. R. Co. 1 Black, 204, 17 L. ed. 158; Lindsey v. Hawes, 2 Black, 554, 17 L. ed. 265; St. Clair County v. Lovingston, 23 Wall. 46, 63, 23 L. ed. 59, 62; Brown v. Huger, 21 How. 305, 16 L. ed. 125; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 412-414, 35 L. ed. 442, 444, 445, 11 Sup. Ct. Rep. 819, 840; Jefferis v. East Omaha Land Co. 134 U. S. 178, 195-197, 33 L. ed. 872, 878, 879, 10 Sup. Ct. Rep. 518; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Boorman v. Sunnuchs, 42 Wis. 233; Wright v. Day, 33 Wis. 264; Watson v. Peters, 26 Mich. 517; Richardson v. Prentiss, 48 Mich. 91, 11 N. W. 819; Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 236, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681.

Where lands are bounded by streams, and monuments on the banks are stated to be corners, the true corner is held to be the point in the middle thread of the stream opposite the given monument.

Luce v. Carley, 24 Wend. 453, 35 Am. Dec. 637; Seneca Nation v. Knight, 23 N. Y. 498; St. Clair County v. Lovingston, 23 Wall. 46, 63-65, 23 L. ed. 59, 62, 63; Cold Spring Iron Works v. Tolland, 9 Cush. 495; Newton v. Eddy, 23 Vt. 319; McCullock v. Aten, 2 Ohio, 307; Handly v. Anthony, 5 Wheat. 375, 380, 5 L. ed. 113, 114; Buck v. Squiers, 22 Vt. 494.

Mr. Justice **Van DeVanter** delivered the opinion of the court:

This was a suit in the district court of Canyon county, Idaho, to quiet the title to Poole island in the Snake river. The plaintiff, Lattig, claimed the northern part by reason of his ownership of lands on the east bank of the river, and rested his claim to the southern part upon adverse possession. One of the defendants, Scott, claimed the entire island under the homestead law of the United States, and the other defendant, Green, claimed the southern part by reason of his ownership of lands on the east bank of the river adjoining those of Lattig. Following a trial of the issues, a decree was entered sustaining Lattig's claim to the northern part and Green's to the southern, and quieting their titles against *the claim of Scott*. The supreme court of the state affirmed the decree (17 Idaho, 506, 107 Pac. 47), and the case was then brought here.

The material facts are as follows: Snake river is a navigable stream, and at the place in question is the boundary between the states of Oregon and Idaho. It flows northward past Poole island in two channels, one on either side, and has a fall of 6 feet from one end of the island to the *other. The channel on the western or[240 Oregon side is about 1,000 feet wide, and the one on the eastern or Idaho side is approximately 300 feet. The island is on the Idaho side of the thread of the stream, is over a mile in length, is from 500 to 1,200 feet in width, and has an area of 138.15 acres. It has well-defined banks extending from 3 to 5 feet above high water, is mostly covered with a growth of wild grass, sage brush and small timber, bears undoubted evidence of permanency and of having been there many years, and concededly was in the same condition as now in 1880, which was several years before Idaho was admitted into the Union, and before the lands on the east bank of the river passed into private ownership. Those lands were surveyed in 1868, and the field notes and plat of the survey showed that the bank on that side of the river was meandered in the usual way, and that the sections and subdivisions bordering thereon were fractional. The island was not mentioned in the field notes or plat. Lattig and green severally own the fractional subdivisions on the east bank opposite the island under United States patents issued in 1894 and 1895, which describe them as containing 73.30 and 98.75 acres, respectively, "according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General." The northern part of the island, which is opposite the lands of Lattig, contains 54.75 acres, and the southern part, which is opposite the lands of Green, contains 83.40 acres. Scott settled upon the island, as unsurveyed public land, in the early part of 1904, with the purpose of acquiring the title under the homestead law of the United States (see act May 14, 1880, 21 Stat. at L. 140, chap. 89, § 3, U. S. Comp. Stat. 1901, p. 1392; Rev. Stat. § 2266), and has ever since resided on and occupied the island and improved and cultivated portions of it. In 1906 it was surveyed as public land by direction of the Commissioner of the General Land Office, and after this survey was approved and the plat *filed[241 Scott tendered, in the regular way, at the proper land office, an application to enter the island as a homestead in virtue of his

prior settlement, and the application was duly accepted. It is said in the brief in his behalf that after the trial in the district court his homestead claim was carried to completion and a patent was issued to him; but as this is not shown on the record, it may be passed without other notice.

As it is manifest that the island, if in existence at the time of the survey in 1868, was then public land of the United States, and also that, if it continued to be public land in 1904, Scott initiated and acquired a valid claim to it under the homestead law, we will come at once to the reasons advanced for holding, as did the state court, that it ceased to be public land before 1904; *viz.*, its omission from the survey of 1868, the admission of Idaho as a state in 1890, and the disposal of the lands on the east bank of the river in 1894 and 1895.

In making the survey of 1868 it was the duty of the surveyor, if the island was there at the time, to ascertain its exact location, to meander its exterior boundary, and to enter both in the field notes (Manual of Surveying Instructions of 1855, pp. 12–14; act of May 30, 1862, 12 Stat. at L. 409, chap. 86); and therefore the absence of such an entry, as also of any representation of the island on the plat constructed from the field notes, naturally suggests that the island may not then have been in existence. But this suggestion is effectually refuted by the size, elevation, and appearance of the island, the character and extent of the vegetation thereon, and the conceded fact that in 1880, only twelve years after the survey, it was in the same condition as now. That it was there at the time of the survey seems certain, although that is not so important as its existence when Idaho became a state. Of course, the error in omitting it from the survey did not devest the United States of the title, or interpose any obstacle to 242]surveying *it at a later time. Neither was the error calculated to induce purchasers of the fractional subdivisions on the east bank to believe that by paying for the 73.30 and 98.75 acres in those tracts they would get, respectively, 54.75 and 83.40 acres more on the island on the other side of the 300-foot channel. Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Niles v. Cedar Point Club, 175 U. S. 300, 306, 44 L. ed. 171, 173, 20 Sup. Ct. Rep. 124.

Coming to the effect to be given to the admission of Idaho as a state and to the disposal of the fractional subdivisions on *the east* bank, it is well to repeat that *Snake river is a navigable stream,* for there is an important difference between navigable and non-navigable waters in such a connection. Thus, Rev. Stat. § 2476, U. S. Comp. Stat. 1901, p. 1567, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. at L. 464, chap. 29, § 9, U. S. Comp. Stat. 1901, p. 1567; March 3, 1803, 2 Stat. at L. 229, chap. 27, § 17), declares: "All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both;" and of this provision it was said in St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 288, 19 L. ed. 74, 78, "the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty, and may be used and disposed of as they may direct, subject always to the rights *of the[243 public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. St. Clair County v. Lovingston, 23 Wall. 46, 68, 23 L. ed. 59, 63; Barney v. Keokuk, 94 U. S. 324, 338, 24 L. ed. 224, 228; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 434–437, 36 L. ed. 1018, 1035–1037, 13 Sup. Ct. Rep. 110; Shively v. Bowlby, 152 U. S. 1, 48–50, 58, 38 L. ed. 331, 349, 350, 352, 14 Sup. Ct. Rep. 548; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27.

Bearing in mind, then, that Snake river is a navigable stream, it is apparent, first, that on the admission of Idaho to statehood the ownership of the bed of the river on the Idaho side of the thread of the stream—the thread being the true boundary of the state—passed from the United States to the state, subject to the limitations just indicated, and, second, that the

subsequent disposal by the former of the fractional subdivisions on the east bank carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership. This is illustrated by the statement in Hardin v. Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685. "When land is conveyed by the United States, bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. . . . When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore." United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 451, 52 L. ed. 881, 887, 28 Sup. Ct. Rep. 579, is to the same effect.

244] *But the island, which we have seen was in existence when Idaho became a state, was not part of the bed of the stream or land under the water, and therefore its ownership did not pass to the state, or come within the disposing influence of its laws. On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws, as did the island which was in controversy in Mission Rock Co. v. United States, 48 C. C. A. 641, 109 Fed. 763, 769, 770, and United States v. Mission Rock Co. 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. Rep. 606.

We think the cases relied upon by the defendants in error do not make for a contrary conclusion. St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 288, 19 L. ed. 78, expressly recognizes "that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream." In Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991, the evidence left it uncertain whether the so-called island was more than "a low sand bar, covered a good part of the year with water," at the time of the survey of the adjacent lands, which was in the year of the state's admission to the Union, and the court said: "We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud." United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579, is sufficiently distinguished by the following excerpt from the opinion: "The islands are little more than rocks rising very slightly above the level of the water, and contain respectively a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We cannot think that these provisions excepted such islands from the admitted transfer to the state of the bed of the streams surrounding them." And Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530, which *related to a small island, in a non-[245 navigable river, which the Land Department of the United States had expressly refused to survey, requires no other notice than to quote the following from the opinion: "It must also be noticed that the government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the government to order a survey of this island, or of the rights which would result in case it did make such survey. . . . Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are the owners of the bed of a stream to the center of the channel; that the government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or pre-emption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler."

For the reasons given the decree is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

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JOHN A. JOHNSON, Appt.,
v.
LUMAN T. HOY, United States Marshal for the Northern District of Illinois.

(See S. C. Reporter's ed. 245-248.)

**Habeas corpus — existence of ordinary remedy.**

1. Habeas corpus is not ordinarily avail

able to test in advance of trial the constitutionality of a statute under which the petitioner was indicted, but the orderly course of the trial should be pursued and the usual remedies exhausted.

[For other cases, see Habeas Corpus, I. b, 3, in Digest Sup. Ct. 1908.]

**Appeal — review in habeas corpus proceeding — changed conditions.**

2. A requirement of excessive bail on prohibitive conditions cannot be urged as a reason for according the accused a hearing as to the constitutionality of the statute under which he was indicted on an appeal from an order denying relief by habeas corpus in advance of trial, where, since the appeal, he has given bond and has been released from arrest under the warrant issued on the indictment.

[For other cases, see Appeal and Error, 3887–3920, 4226–4228, in Digest Sup. Ct. 1908.]

[No. 842.]

Argued and submitted January 7 and 8, 1913. Decided February 3, 1913.

APPEAL from the District Court of the United States for the Northern District of Illinois to review an order denying a writ of habeas corpus. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Benjamin C. Bachrach argued the cause and filed a brief for appellant:

It is unquestionably within the power of the Supreme Court of the United States to discharge a person imprisoned under an unconstitutional Federal statute upon an appeal from an order by a district judge, denying a writ of habeas corpus.

Ex parte Royall, 117 U. S. 241, 246, 29 L. ed. 868, 869, 6 Sup. Ct. Rep. 734, 742.

The Supreme Court of the United States has discretion whether it will discharge the person who claims he is restrained of his liberty in violation of the Constitution of the United States upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action.

Ex parte Royall, 117 U. S. 250, 29 L. ed. 871, 6 Sup. Ct. Rep. 734, 742; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Re Chapman, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753.

The case at bar upon the record recites exceptional circumstances which demand the interposition by this court upon the question by the constitutionality of the act.

The fact that the appellant has since been admitted to bail and is now at liberty, not having been raised by plea of release of errors by the Solicitor General, nor by motion to dismiss cannot be raised by copy of affidavit printed in the appendix.

1 Chitty, Pl. pp. 659, 737.

Solicitor General Bullitt submitted the cause for appellee:

Habeas corpus is never available except where the court is without jurisdiction.

Riggins v. United States, 199 U. S. 547, 548, 50 L. ed. 303, 304, 26 Sup. Ct. Rep. 147.

Where a man is indicted in a Federal court for the violation of an act of Congress, which he attacks as unconstitutional, a writ of habeas corpus will not be granted before trial, but he must rely upon a writ of error after trial.

Re Chapman, 156 U. S. 211, 215, 217, 39 L. ed. 401, 402, 403, 15 Sup. Ct. Rep. 331; Riggins v. United States, 199 U. S. 547, 551, 50 L. ed. 303, 305, 26 Sup. Ct. Rep. 147; Re Lancaster, 137 U. S. 393, 34 L. ed. 713, 11 Sup. Ct. Rep. 117; Glasgow v. Moyer, 225 U. S. 420, 427–429, 56 L. ed. 1147, 1149, 1150, 32 Sup. Ct. Rep. 753.

Even after trial habeas corpus will not lie.

Re Lincoln, 202 U. S. 178, 182, 50 L. ed. 984, 986, 26 Sup. Ct. Rep. 602.

So, too, in the case of an indictment or conviction in a state court where the statute is claimed to be in conflict with the Federal constitution, the remedy is by writ of error to the state court, and not by habeas corpus.

Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Bailey v. Alabama, 211 U. S. 452, 53 L. ed. 278, 29 Sup. Ct. Rep. 141; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734, 742.

Mr. Justice Lamar delivered the opinion of the court:

On November 7, 1912, Johnson was indicted for a violation of the white slave traffic act (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343).

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NOTE.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; Re Huse, 25 C. C. A. 4, and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to habeas corpus to test constitutionality of statute—see note to Hovey v. Elliott, 39 L.R.A. 449.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; Glass v. The Betsey, 1 L. ed. U. S. 489; Ex parte Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464, and Pearce v. Texas, 39 L. ed. U. S. 164.

He was arrested, and the court fixed his bail at $30,000, but declined to accept as surety anyone who was indemnified against loss, or to permit the defendant to deposit cash in lieu of bond. The defendant thereupon applied for a writ of habeas corpus on the ground (1) that excessive bail was required, on terms onerous and prohibitive, and (2) that the act under which he had been indicted was unconstitutional and void. After a hearing the petition was denied and he appealed to this court, where a motion was made that he be admitted to bail pending the hearing. This was resisted by the Solicitor General, and, before a decision thereon, was abandoned. On appellant's motion the case was advanced, to be heard with others involving the constitutionality of the same act. The defendant's counsel took part in the argument of that question, January 6, 1913. From an affidavit attached to the brief of the government, submitted at that time, it appears 247] *that, on November 15, 1912, Johnson had given bond, which had been approved by the district judge, and had been released from arrest under the indictment. The petitioner insists that the release on bail was known to the government when the motion to advance was made, and not then having been urged, he is now entitled to a decision on the constitutional question argued, so that, if in his favor, he would avoid re-arrest and trial.

The writ of habeas corpus is not intended to serve the office of a writ of error even after verdict; and, for still stronger reasons, it is not available to a defendant before trial, except in rare and exceptional cases, as pointed out in Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734. This is an effort to nullify that rule, and to depart from the regular course of criminal proceedings by securing from this court, in advance, a decision on an issue of law which the defendant can raise in the district court, with the right, if convicted, to a writ of error on any ruling adverse to his contention. That the orderly course of a trial must be pursued and the usual remedies exhausted, even where the petitioner attacks on habeas corpus the constitutionality of the statute under which he was indicted, was decided in Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753. That and other similar decisions have so definitely established the general principle as to leave no room for further discussion. Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147.

It is claimed, however, that the defendant was required to give excessive bail, on prohibitive conditions, and that this fact, in connection with the attack on the validity of the statute, takes the case out of the general rule and brings it within the exceptional cases referred to in Ex parte Royall, supra, so as to give petitioner the right to this hearing in advance of a trial. But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled *to the bene-[248 fit of the writ, because, since the appeal, he has given bond in the district court, and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of habeas corpus was intended to afford to those held under warrants issued on indictments, the appeal must be dismissed.

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## NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plff. in Err.,
v.
## BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON.

(See S. C. Reporter's ed. 248-265.)

**Commerce — conflicting state and Federal regulation — interstate ferriage.**

The inclusion of railroad ferries in the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 1, as to § 1, as one of the subjects regulated by that statute, is such an extension of the Federal authority over the operation by a railway company of a ferry upon a naviga-

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On the establishment, regulation, and protection of ferries—see note to Sistersville Ferry Co. v. Russell, 59 L.R.A. 513.

On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Co. v. Croxton, 33 L.R.A. 177.

ble river forming the boundary between two states as to invalidate any regulation under state authority of the rates to be charged by such company for the interstate ferriage of persons, although such regulation relates only to persons other than railroad passengers.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

[No. 50.]

Argued November 13, 1912. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of New Jersey to review a decree entered pursuant to the mandate of the Court of Errors and Appeals of that state, which had reversed a decree of the Supreme Court, enjoining the enforcement of ordinances fixing the rates for foot passengers upon an interstate railway ferry. Reversed and remanded for further proceedings.

See same case below in supreme court, 74 N. J. L. 367, 65 Atl. 860; in court of errors and appeals, 76 N. J. L. 664, 74 Atl. 954, 16 Ann. Cas. 858.

The facts are stated in the opinion.

Mr. Albert C. Wall argued the cause, and, with Messrs. James B. Vredenburgh and Thomas Emery, filed a brief for plaintiff in error:

The regulation of the rates and fares for transportation *via* these ferries is inoperative because it conflicts with the commerce clause of the Constitution of the United States

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Lottery Case (Champion v. Ames) 188 U. S. 352, 47 L. ed. 499, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300; International Transit Co. v. Sault Ste. Marie, 194 Fed. 522.

Congress has legislated concerning ferries operated in connection with railroads.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Missouri P. R. Co. v. Larabee Flour Mills Co. *211 U. S. 612, 623,* 53 L. ed. 352, 29 Sup. Ct. *Rep. 214; Poor v. Chicago, B. & Q. R. Co.* 12 Inters. Com. Rep. 422; Armour Packing Co. v. United States, 209 U. S. 56, 80, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428.

The exercise of the power which the board of chosen freeholders here asserts is in conflict with the exclusive power of regulation of the same subject-matter by Federal authority.

Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243.

The ferryboats are subjects of admiralty jurisdiction.

The St. Louis, 48 Fed. 312; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 22 L. ed. 173; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 484, 31 L. ed. 700, 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096.

Mr. Frank Bergen also argued the cause and filed a brief for plaintiff in error:

The business of carrying passengers and vehicles by a ferry from one state to another, for hire, is interstate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

The power directly to regulate commerce among the states, including whatever power the states previously had to prescribe rates for interstate commerce, whether by virtue of their police power or otherwise, was transferred to the United States by the adoption of the commerce clause of the Constitution, and can only be exercised by or with the authority of Congress.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Story, Const. § 1065; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Brown v. Maryland, 12 Wheat. 419, 445, 6 L. ed. 678, 687; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Hall v. De Cuir, 95 U. S. 485, 488, 24 L. ed. 547, 548.

Congress, by direct legislation, and by extending the jurisdiction of the Interstate Commerce Commission, has regulated interstate ferries to the extent that regulation, in the judgment of Congress, is necessary or desirable at present. The states have no power to supplement those regulations, it being presumed conclusively that in the particulars in which Congress has omitted to

regulate interstate ferries, there shall be no regulation until Congress shall decide to take further action.

Messrs. Henry E. Bodman, Alexis C. Angell, and Herbert E. Boynton filed a brief as *amici curiæ*.

Mr. E. Parmalee Prentice argued the cause, and, with Messrs. John Griffin and George Welwood Murray, filed a brief for defendant in error:

In all local matters state statutes are valid until superseded by Congress.

Cooley v. Port Wardens, 12 How. 310, 13 L. ed. 1001; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 507, 31 L. ed. 700, 714, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Cardwell v. American River Bridge Co. 113 U. S. 205, 210, 28 L. ed. 959, 961, 5 Sup. Ct. Rep. 423; Willoughby, Fed. Const. § 309.

The power to regulate commerce is given to Congress, not to the courts. The question whether a particular statute of a state is prohibited by congressional silence is a question for Congress. State laws should not be held void except in cases so clear that Congress could not overrule the judicial decision.

Thayer, Cases on Const. Law, 2190, 2191.

A practical and long-continued construction of the Constitution by the states and by Congress is conclusive in this court.

Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; License Cases, 5 How. 507, 607, 12 L. ed. 257, 302; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Carroll v. Campbell, 108 Mo. 564, 17 S. W. 884.

Regulation of ferries on intrastate and boundary streams was, until 1885, considered a matter of state police jurisdiction beyond Federal authority.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257, affirming 102 Ill. 560; Mills v. St. Clair County, 7 Ill. 197, affirmed in 8 How. 569, 12 L. ed. 1201; People v. Babcock, 11 Wend. 586; Elizabethport & N. Y. Ferry Co. v. United States, 5 Blatchf. 198, Fed. Cas. No. 4,362; Chilvers v. People, 11 Mich. 43; Marshall v. Grimes, 41 Miss. 27; New York v. Longstreet, 64 How. Pr. 30; Gould, Waters, § 35.

The decision of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive state jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute.

The legal definition of a ferry refers to the point of departure as the situs of the ferry. The ferry franchise consists in the right of transportation from that point.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Memphis v. Overton, 3 Yerg. 390; State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877, 102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104; Power v. Athens, 99 N. Y. 592, 2 N. E. 609, 26 Hun, 282.

Under this definition no conflict of laws can arise upon boundary streams, for a municipality or state upon one side of the stream has complete control of ferriage from its own shore, and cannot interfere with ferriage from the opposite shore.

The franchise to leave a state comes from state law, which imposes also the duty of the carrier to receive, carry, and deliver.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 394, 47 L. ed. 513, 517, 23 Sup. Ct. Rep. 463; Bowman v. Chicago & N. W. R. Co. 115 U. S. 611, 615, 29 L. ed. 502, 504, 6 Sup. Ct. Rep. 192.

The Constitution does not confer the right of intercourse between state and state.

Gibbons v. Ogden, 9 Wheat. 211, 6 L. ed. 73; Federal Common Law & Interstate Carriers, 9 Columbia L. Rev. 375; Macmillan, Federal Power over Carr. & Corp. 1907, pp. 23–37, 124–130; Re Transportation of Fruit, 10 Inters. Com. Rep. 360.

Some recent cases suggest that there is also a Federal right to engage in interstate commerce, but this proposition has never been advanced without dissent, and in any event does not deny the right derived from state law. The state franchise is the historic right upon which the common law of carriers is built.

Crouch v. London & N. W. R. Co. 14 C. B. 255; Gloucester Ferry Co. v. Pennsylvania, 89

114 U. S. 196, 217, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877, 102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104; Sistersville Ferry Co. v. Russell, 52 W. Va. 356, 59 L.R.A. 513, 43 S. E. 107; Cross v. Hopkins, 6 W. Va. 323; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 844; State v. Sickmann, 65 Mo. App. 499; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654; Parsons v. Hunt, 98 Tex. 420, 84 S. W. 644; Nixon v. Reid, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57; Hatten v. Turman, 123 Ky. 844, 97 S. W. 770, 98 S. W. 1000. See also St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300; Burlington & H. County Ferry Co. v. Davis, 48 Iowa, 133, 30 Am. Rep. 390; Phillips v. Bloomington, 1 G. Greene, 502; Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740; Challiss v. Davis, 56 Mo. 25; Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39; Gear v. Bullerdick, 34 Ill. 74.

The majority opinion in the Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, considered in connection with the facts before the court, announces no new rule.

That the cases which recognize state power to regulate ferries over boundary streams are still authoritative is shown by the fact that in Williams v. Wingo, 177 U. S. 601, 603, 44 L. ed. 905, 906, 20 Sup. Ct. Rep. 793, this court based its decision upon Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043, holding that case in point and decisive.

The second resolution, regulating rates for a round trip starting from New Jersey side, is within the jurisdiction of New Jersey.

State v. Sickmann, 65 Mo. App. 499.

The distinction between ordinary ferriage and ferriage which is connected with railroad transportation is well recognized.

St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300.

The construction of a state law by the state courts is accepted in this court as final.

Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 213; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Randall v. Brigham, 7 Wall. 523, 19 L. ed. 285; Gut v. Minnesota, 9 Wall. 35, 19 L. ed. 573; Richmond v. Smith, 15 Wall. 429, 21 L. ed. 200; Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261.

The interstate commerce act is not involved. The statute applies only to transportation wholly by railroad, or partly by railroad and partly by water, when both are used under a common control. Ferriage disconnected from railroad transportation is not affected.

Goodrich Transit Co. v. Interstate Commerce Commission, 190 Fed. 943, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436.

Federal statutes concerning enrolment and inspection of vessel, licensing officers, etc., are not involved.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; New York v. Starin, 106 N. Y. 1, 12 N. E. 631; New York v. Longstreet, 64 How. Pr. 30; Midland Terminal & Ferry Co. v. Wilson, 28 N. J. Eq. 537; Carroll v. Campbell, 108 Mo. 562, 17 S. W. 884; Marshall v. Grimes, 41 Miss. 27; People v. Babcock, 11 Wend. 586; Chilvers v. People, 11 Mich. 43.

The Federal statute of 1866 is not involved. The history of the statute as well as its express provisions shows that, like the interstate commerce act, this is a railroad statute. It has been in force forty-six years, and has never been applied to ferriage disconnected from railroad transportation.

Macmillan, Federal Power over Carr. & Corp. 1907, pp. 95, 209.

Mr. Chief Justice White delivered the opinion of the court:

The rails of the main line of the West Shore Railroad Company extend from Buffalo to Albany, New York, and beyond, through the state of New York into New Jersey, to the terminus of the road at Weehawken, on the west *bank of the[257 Hudson river. From Weehawken steam ferries known as the West Shore Railroad ferries are operated over the river to several terminal points in New York city for the purpose of carrying railroad passengers and traffic from Weehawken to New York and from New York to Weehawken. Although these ferries are known as West Shore Railroad ferries, and are operated as railroad ferries, their business is not limited to incoming persons or traffic carried over the lines of the railroad, or to persons or traffic conveyed from New York to Weehawken, to be transported from there over the railroad. Indeed, from both directions a very large number of persons besides considerable traffic "constantly move to and fro between the two states, not having used or intending to use the lines of the West Shore Railroad."

In 1905 the board of chosen freeholders of

Hudson county, New Jersey, adopted two ordinances: one fixing the rate for foot passengers ferried from New Jersey to New York, and the other for a round trip commencing on the New Jersey shore, which rates were applicable to the ferries in question. The New York Central & Hudson River Railroad, engaged as a lessee in operating the lines of the West Shore Railroad, and its railroad ferries, commenced this proceeding to prevent the enforcement of the rates fixed by the ordinances. The contention was that the ordinances were an unwarranted interference with the interstate business of the company, and that the enforcement of the ordinances would constitute a direct burden on interstate commerce, which could not be done consistently with the Constitution. The supreme court of New Jersey maintained the contentions of the railroad company. The court of errors and appeals reversed the judgment of the supreme court. 76 N. J. L. 664, 74 Atl. 954, 16 Ann. Cas. 858. The case is now here, the writ of error having been directed to the supreme court, to which the record was remitted from the court of errors and appeals.

258] *At the outset it is to be observed that the contentions pressed in argument by both parties take a wider range than the necessities of the case require. We make a very brief reference to certain decisions of this court referred to in argument by both parties in order that they may aid us to plainly mark the boundaries of the real issues required to be decided, thus enabling us to put out of view irrelevant considerations and confine our attention to things essential.

Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043, required a consideration of the right of the legislature of Iowa to authorize a ferry across the Mississippi river at Dubuque. Without going into details it suffices to say that the subject was elaborately considered and the power of the state to grant the ferry right was sustained. In Conway v. Taylor, 1 Black, 603, 17 L. ed. 191, the right of the state of Kentucky to grant franchises for ferrying across the Ohio river was considered and the power was upheld, the general reasoning stated in Fanning v. Gregoire being reiterated and approved. It is undoubtedly true that, in the course of the reasoning of both the cases just referred to, expressions were made use of which give some support to the view that the power to regulate ferriage, even as to a stream bounding two states, was purely local, not transferred by the states to Congress, and therefore not within the grant of power to Congress to regulate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, concerned the validity of a tax imposed by the state of Pennsylvania on a ferry company operating between Gloucester, New Jersey, and the city of Philadelphia. The tax was resisted on the ground that it was a direct burden on interstate commerce, and therefore void as an interference with the power of Congress to regulate commerce. The contention was sustained. The whole subject of ferriage was elaborately considered, and in the course of the opinion it was expressly declared, after *considering the[259 decisions in Fanning v. Gregoire and Conway v. Taylor, that ferriage over a stream constituting a boundary between two states was within the grant to Congress to regulate commerce, and therefore not subject to be directly burdened by a state. It was also, however, held that, in view of the character of such ferries and the diversity of regulation which might be required, the right to regulate them came within that class of subjects which, although within the power of Congress, the states had the right to deal with until Congress had manifested its paramount and exclusive authority.

In Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, the right of the state of Kentucky to impose tolls for use of a bridge across the Ohio river was challenged on the ground that the state had no authority to fix the tolls, because to do so was the assertion of a power to regulate commerce, and therefore was an interference with the exclusive power of Congress on that subject. The tolls were held to be invalid. The opinion beyond question reasserted the principle enforced in the Gloucester Ferry Case, that the movement across a stream, the boundary between two states, was within the grant of power to Congress to regulate commerce, and therefore, generically speaking, not subject to the exertion of state authority. Indeed, in view of the fact that there was no act of Congress dealing with the subject of the tolls which were under review in the Covington Case, it is true to say that there are expressions in the opinion in that case which have been considered, whether rightly or wrongly we do not feel called upon to say, as qualifying or overruling the conclusion expressed in the Gloucester Case as to the power of a state to regulate ferries upon a stream bordering two states until Congress had manifested its purpose to exert its authority over the subject.

In St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300, the question con-

260]sidered was the liability of the *transfer company to penalties imposed by the county of St. Clair, a municipal corporation of the state of Illinois, for having failed to obtain a license "for carrying on a ferry for transferring railroad cars, loaded or unloaded, over the county of St. Clair, in Illinois, to the Missouri shore, and from the Missouri shore to the county of St. Clair." It was decided that there was no liability for the penalty (a) because the business of transferring freight cars in the sense disclosed was not ferriage in the proper meaning of that word, and was the transaction of interstate commerce not in any view subject to state control; and (b) because the particular ordinance relied upon as the basis for imposing the penalty was void because of provisions discriminating against interstate commerce which it contained. The cases of Fanning v. Gregoire, Conway v. Taylor, Gloucester Ferry Co. v. Pennsylvania, and the Covington Bridge Case were referred to. It was expressly declared, in view of the special grounds upon which the case was decided, that it was unnecessary to consider whether the decision in the Covington Bridge Case had established the doctrine that the interstate business of ferrying over navigable rivers bordering two states was exclusively within the authority of Congress to regulate, and therefore was not, as declared in the Gloucester Ferry Case, subject to state regulation until Congress had exerted its authority over the matter.

In the light of this statement we come to state the contentions of the parties. The plaintiff in error insists, not following the exact order of their argument (a) that the assailed ordinances are repugnant to the commerce clause because Congress has legislated concerning railroad ferries and thereby manifested its purpose that there should be no longer room for the exertion of state power on the subject; and (b) that if this is not so, it is now necessary to pass on the question reserved in the St. Clair Case, and to decide that the ruling in the 261]Covington Bridge Case *affirmatively established that interstate ferriage like that here in question is so absolutely within the power of Congress as to exclude, even in case of the inaction of Congress, the presumption of a license for the exercise of state power. On the other hand, the argument for the defendant in error is this: That the carrying on of the business of ferriage on navigable rivers constituting a boundary between states is not interstate commerce, that the power to regulate it was not surrendered by the states, and consequently no authority was given over the subject to Congress. This is sought to be shown by a copious review of adjudged cases, by an analysis of what it is urged was the clear intendment of the opinion in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, especially as elucidated by the opinions in Fanning v. Gregoire and Conway v. Taylor. It is not denied that these theories are directly contrary to the ruling in the Gloucester Ferry Case, but it is urged that that case for the first time announced the doctrine of a national power over interstate ferriage, and therefore practically amounted to making a new constitutional provision on the subject. Obviously, however, the views just stated are advanced in a mere academic sense, since the argument admits that the ruling in the Gloucester Ferry Case is now conclusive and has settled the significance of the Constitution contrary to the views mentioned. Thus, at the very outset of the argument, after stating and elaborating the theory of exclusive state power over interstate ferriage, it is said: "The decision of the Gloucester Ferry Case, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive state jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute." Again, after copiously reiterating the conceptions as to the novelty and its assumed *conflict with what had[262 gone before, it is said: "The result of the Gloucester Ferry Case, therefore, with the other cases which have followed, has probably been to so extend the Federal authority over interstate ferriage as to bring the subject within the concurrent jurisdiction of Congress and of the states. It is a concurrent jurisdiction only, however, which has been established. In the absence of Federal legislation the states have have all the power that they have been accustomed to exercise." Thus conceding the controlling force of the Gloucester Ferry Case, and therefore not questioning the power of Congress which that case upheld, it is urged that the Covington Bridge Case should not be now held to have overruled or qualified the Gloucester Ferry Case so as to exclude the states from any right to regulate interstate ferriage before and until Congress has manifested its intention to exert its authority by dealing with the subject. Upon the assumption thus stated it is insisted that the court below rightly upheld the assailed ordinances because there has been no action by Congress exerting its authority over the subject with which the ordinances deal, and therefore no room for the contention that it was

not within the power of the state to enact them.

It is therefore apparent that the contentions of the plaintiff in error primarily invoke only the controlling effect of the ruling in the Gloucester Ferry Case, and insist that there has been action by Congress which destroys the presumption of authority in the state to act. It follows that the proposition that the Covington Bridge Case overruled the Gloucester Ferry Case is merely subordinate, and need not be considered unless it becomes necessary in consequence of an adverse ruling on the primary contention concerning the application of the Gloucester Ferry Case.

It is equally clear that the contention of the defendant in error as to the absence of 263]all power in Congress over *interstate ferries is merely academic. From this it necessarily arises that the only ground relied upon to sustain the judgment below is the ruling in the Gloucester Ferry Case, and the further proposition that there has been no action of Congress over the subject of the ferriage here involved which authorizes the holding that state power no longer obtains. As, therefore, the claim on the one side of an all-embracing and exclusive Federal power may be, temporarily, at least, put out of view, and the assertion on the other of an absolutely exclusive state power may also be eliminated from consideration, because not relied upon, or because it is both demonstrated and admitted to be without foundation, it follows that to dispose of the case we are called upon only, following the ruling in the Gloucester Ferry Case, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the state of vicarious and revocable authority over the subject. We say simple question because its decision is, we think, free from difficulty, in view of the express provision of the 1st section of the act to regulate commerce (act of February 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154), subjecting railroads as therein defined to the authority of Congress, and expressly declaring that "the term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease. . . . " The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that, as the text only embraces railroad ferries, and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend *to the subject embraced by the[264 ordinances. But as all business of the ferries between the two states was interstate commerce within the power of Congress to control, and subject in any event to regulation by the state as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the state. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the power of Congress and the power of the states over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate. To concede that the right of a state to regulate interstate ferriage exists "only in the absence of Federal legislation," and at the same time to assert that the state and Federal power over such subject is concurrent, is a contradiction in terms. But this view has been so often applied as to cause the subject to be no longer open to controversy. Chicago, R. I. & P. R. Co. v. Hardwick Farmer's Elevator Co. decided January 6, 1913 [226 U. S. 426, ante, 284, 33 Sup. Ct. Rep. 174]. *Because in the St. Clair[265 Case, 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300, it was decided that a particular character of transportation of interstate commerce was not ferriage, and not within state power, even where there had been no action by Congress, affords no reason for in this case extending state authority to a subject to which, consistently with the action of Congress, it cannot be held to appl

The judgment of the Supreme Court of the State of New Jersey will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

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ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

E. H. EDWARDS.

(See S. C. Reporter's ed. 265–270.)

**Commerce — conflicting state and Federal regulations — state demurrage law.**

The subject of the delivery of an interstate shipment by the carrier to the consignee is so embraced by the provisions of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288, amendatory of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 1, as to invalidate, when applied to interstate shipments, the provisions of the Arkansas demurrage law of April 19, 1907, § 3, exacting a *per diem* penalty from a carrier failing to notify the consignee promptly of the arrival of the shipment at destination, the intent of which section, under the construction of the state court, being to subject the carrier to the penalties therein prescribed because of failure to make prompt delivery.

[For other cases, see Commerce, I. c; III., in Digest Sup. Ct. 1908.]

[No. 126.]

Submitted January 20, 1913. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed in part a judgment of the Faulkner Circuit Court for the recovery from a carrier of penalties imposed under a state demurrage law. Reversed and remanded for further proceedings.

See same case below, 94 Ark. 394, 127 S. W. 713.

The facts are stated in the opinion.

Messrs. **Martin L. Clardy**, **H. G. Hebel**, and **Lovick P. Miles** submitted the cause for plaintiff in error. Mr. **Thomas B. Pryor** was on the brief:

Until the delivery of an interstate shipment to the consignee is consummated, Federal authority over the shipment is supreme and exclusive.

Peale v. Central R. Co. 18 Inters. Com. Rep. 33; Wilson Produce Co. v. Pennsylvania R. Co. 14 Inters. Com. Rep. 170; Barnes, Interstate Transp. Rev. ed. §§ 276, 282; Shephard v. Northern P. R. Co. 184 Fed. 770; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; McNeill v. Southern R. Co. 202 U. S. 561, 50 L. ed. 1144, 26 Sup. Ct. Rep. 722.

No brief was filed for defendant in error.

Mr. Chief Justice **White** delivered the opinion of the court:

This writ of error is prosecuted to secure the reversal of a judgment for $75, the amount of penalties imposed upon the plaintiff in error for delay in giving notice to the consignee, defendant in error, of the arrival of a carload of freight at the termination of an interstate commerce shipment. The exaction was authorized by § 3 of a law of the state of Arkansas, approved April 19, 1907, entitled, "An Act to Regulate Freight Transportation by Railroad Companies Doing Business in the State of Arkansas." The section is copied in the margin. †

*The right to impose the penalty was [268 challenged and the validity of the section of the statute authorizing it was assailed by demurrer on the ground of repugnancy to the commerce clause of the Constitution

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NOTE.—On state regulations requiring carrier to furnish cars to shipper as interference with interstate commerce—see notes to St. Louis Southwestern R. Co. v. Arkansas, 54 L. ed. U. S. 699; Southern R. Co. v. Com. 17 L.R.A.(N.S.) 364. and Chicago, R I. & P. R. Co. v. Beatty, 42 L.R.A.(N.S.) 984

As to the duty of a railroad company to *furnish* cars to shippers—see note to Houston, E. & W. T. R. Co. v. Campbell, 43 L.R.A. 225.

†Sec. 3. Railroad companies . . . give notice, by mail or otherwise, to consignee of the arrival of shipments, together with the weight and amount of freight charges due thereon; and where goods or freight in carload quantities arrive, such notices shall contain also identifying numbers, letter and initials of the car or cars, and if transferred in transit, the number and initials of the car in which originally shipped. Any railroad company failing to give such notice shall forfeit and pay to the shipper, or other party whose interest is affected, the sum of $5 per car per day, or fraction of a day's delay, on all carload shipments, and 1 cent per hundred pounds per day, or fraction thereof, on freight in less than carloads, with a minimum charge of 5 cents for any one package, after the expiration of the said twenty-four hours; provided, that not more than $5 per day be charged for any one consignment not in excess of a carload. [Acts 1907, p. 457.]

of the United States. The question here for decision is whether the court below was right in overruling the Federal defense which was thus relied upon. 94 Ark. 394, 127 S. W. 713.

The Arkansas statute is styled in the opinion of the court below "the demurrage statute," and the penalty imposed by § 3 is referred to as a "demurrage charge." And in the same connection it is observed: "There are other sections of the statute imposing demurrage charges on consignees for failure to remove freight, thus making the burdens of the whole statute reciprocal." It follows that the section under consideration was but intended to subject carriers to the penalties which the section provides because of a failure to make prompt delivery of freight on arrival at destination. As applied to interstate commerce, however, we think such penalties were not enforceable because of a want of power in the state to impose them, in view of the legislation of Congress existing at the time the alleged duty to give notice arose. Recently, in Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. [226 U. S. 426, ante, 284, 33 Sup. Ct. Rep. 174], a regulation of the state of Minnesota enacted after the passage of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288], imposing penalties on carriers for failing on demand to furnish a supply of cars for the movement of interstate traffic, was held invalid because of the absence of power in a state, in consequence of the Hepburn act, to provide for such penalties. While the case before us concerns the power of a state over the delivery of cars in consummation of an interstate shipment, we nevertheless think that the Hardwick Case is controlling because the legislation of Congress as clearly excludes the right of a state to penalize for failure to deliver interstate freight at the termination of an interstate shipment as it 269]was *found to prevent a state from penalizing for failure to furnish cars for the initiation of the movement of interstate traffic. This conclusion is necessary, since the amendment to § 1 of the act to regulate commerce, by which a definition is given to the term "transportation," and which, in the Hardwick Case, was held to exclude the right of a state to penalize for the nondelivery of cars to initiate the movement of an interstate shipment, by its very terms embraces the obligation of a carrier to deliver to the consignee, and therefore by the same token excludes the right of a state to *penalize on that subject.* The provision of the Hepburn act in question is copied in the margin. †

We are referred in argument to no other provision of the act tending in the slightest degree to indicate that the duties which were united by the provisions of one section of the act were divorced by another, and were made therefore subject to the possibility of varying and it may be conflicting state penalties. On the contrary, in this instance, as in the one considered in the Hardwick Case, the context of the act adds strength to the conviction produced by the definition of the 1st section, and therefore gives rise to the conviction that the context of the statute, not only as was held in the Hardwick Case, excludes the right of a state to regulate by penalties or demurrage charges the obligation of furnishing the means of interstate transportation, but also excludes power in a state to impose penalties as a means of compelling the performance *of the duty to[270 promptly deliver in consummation of such transportation.

The judgment of the Supreme Court of Arkansas is reversed with costs, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

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PEOPLE OF PORTO RICO, Appts.,
v.
MANUEL ROSALY Y CASTILLO.

(See S. C. Reporter's ed. 270-277.)

**Porto Rico — immunity from suit.**

The government which the organic act of April 12, 1900 (31 Stat. at L. 77, chap. 191), established in Porto Rico, is not taken out of the general rule exempting a government sovereign in its attributes from suit without its consent, by § 7, which, after enumerating the classes of persons who, by that act, are made constituent elements of the government for which the act provides, declares that the persons embraced in its provisions "shall constitute a body politic under the name of the people of Porto Rico,

†. . . The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

[No. 145.]

Submitted January 24, 1913. Decided February 24, 1913.

APPEAL from the Supreme Court of Porto Rico to review a judgment which affirmed a judgment of the District Court of Ponce in favor of plaintiff in a suit against the People of Porto Rico. Reversed.

See same case below, 16 P. R. R. 481.

The facts are stated in the opinion.

Mr. Felix Frankfurter submitted the cause for appellants. Mr. Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, was on the brief:

The purpose of the Foraker act is to give local self-government, conferring an autonomy similar to that of the states and territories.

Gromer v. Standard Dredging Co. 224 U. S. 362–370, 56 L. ed. 801–805, 32 Sup. Ct. Rep. 499.

Only for political reasons has the technical designation of "territory" been withheld by Congress, but every attribute of sovereignty that any of the territories possess has been conferred.

Re Kopel, 148 Fed. 505; New York ex rel. Kopel v. Bingham, 211 U. S. 468–476, 53 L. ed. 286–289, 29 Sup. Ct. Rep. 190.

From the very nature of the government of Porto Rico thus established by Congress flows the immunity from suit without its consent. It is a right conferred by reason of the governmental powers granted and the responsibilities created by the organic act.

Kawananakoa v. Polyblank, 205 U. S. 349–353, 51 L. ed. 834–836, 27 Sup. Ct. Rep. 526.

Porto Rico's immunity from suit, by virtue of its organic act creating a sovereign body politic, was not limited by the specific provision conferring upon the island "power to sue and be sued as such."

Bank of United States v. Deveaux, 5 Cranch, 61, 85, 86, 3 L. ed. 38, 44.

No appearance for appellee.

273] *Mr. Chief Justice White delivered the opinion of the court:

The appellee was plaintiff in the first instance. The defendants were the People of Porto Rico (the government of the island) and several named individuals. Recovery was sought of property in possession of the defendants and for rents and profits. The individual defendants defaulted. The government defended, and from a judgment ousting it from the property, and for rents and profits, appealed to the supreme court. The court, giving its reasons for affirmance, thus stated the only issue presented and which was decided: "The appeal was taken by the People of Porto Rico, the only ground alleged in support thereof in this supreme court being that, inasmuch as the People of Porto Rico cannot be sued without its consent, and it appears that such consent had not been given in the present case, the district court acted without jurisdiction; wherefore the judgment rendered by it was null and void." [16 P. R. R. 483.] The court did not overlook the importance of the question, as is shown by its careful and perspicuous opinion. A member of the court fully stated his reasons for dissenting. On this appeal, taken by the People of Porto Rico, the case having been tried without a jury, the question for decision is narrower than would seem to be the case, regarding alone the general terms in which the question is mentioned in the passage previously quoted from the opinion of the court below.

It is not open to controversy that, aside from the existence of some exception, the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent. In the first place, this is true because, in a general sense, so far as concerns the framework of the Porto Rican government and the legislative, judicial, and executive authority with which it is endowed, there is, if not a complete *identity, at least, in[274 all essential matters, a strong likeness to the powers usually given to organized territories, and, moreover, a striking similarity to the organic act of the Hawaiian Islands (act of April 30, 1900, chap. 339, §§ 6, 55, 31 Stat. at L. 141, 142 and 150). But, as the incorporated territories have always been held to possess an immunity from suit, and as it has been, moreover, settled that the government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico. Kawananakoa v. Polyblank, 205 U. S. 349, 353, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526. This, moreover, is additionally beyond question because, in considering the nature and character of the government of Porto Rico in New York ex rel. Kopel v. Bingham, 211 U. S. 468, 53 L. ed. 286, 29 Sup. Ct. Rep. 190, it was said (p. 476): "It may be justly asserted that Porto Rico is a completely organized territory, although not a territory incorporated into the United States, and that there is no reason why

Porto Rico should not be held to be such a territory." Besides, in Gromer v. Standard Dredging Co. 224 U. S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499, in considering the subject and giving due weight to "the precaution against abuse" of the Porto Rican legislative power, and after calling attention to the reservation made by Congress of the right to repeal any Porto Rican act of legislation, it was nevertheless declared (p. 370): "The purpose of the act is to give local self-government conferring an autonomy similar to that of the states." There being, then, no doubt that immunity from suit without its consent is necessarily inferable from a mere consideration of the nature of the Porto Rican government, the issue is whether there is any ground which removes Porto Rico from the general rule. That such an exception is the result of the concluding portion of § 7th of the organic act was the sole basis upon which the court below rested its conclusion, and the correctness of that view is the only issue we are called upon to decide.

275] *The section in question, § 7th, is the one which enumerates the classes of persons who, by the act, are made constituent elements of the government for which the act provides; and after making such enumeration the section declares that the persons embraced in its provisions "shall constitute a body politic under the name of the People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

Unquestionably the provision, disconnected from its context, would sustain the conclusion that there exists a general liability to be sued without reference to consent. Indeed, the words "to sue and be sued" are but a crystallized form of expression resorted to for the purpose of aptly stating the right to sue and the liability to be sued, which springs from a grant of corporate existence, private or public. But this does not solve the question here arising, which is the meaning of the words in the act under consideration, for it may be that like words may have one significance in one context and a different signification in another. And this is made clear by bearing in mind that, as usually applied, the words "to sue and be sued" but express implications as to the existence of powers flowing from the matter to which they relate, while here, if the words have the meaning insisted on, they serve, if not to destroy, at least to seriously modify or greatly restrict, the grant of powers conferred by the organic act. The destructive potency of the words if given the meaning insisted upon is *self-evident, since* the claim here is that they denature the government created by the organic act by depriving it of an immunity which has been frequently decided by this court would otherwise necessarily arise from the scope of the powers conferred. As, however, a full appreciation of the operation of the words, if they are interpreted as insisted upon, affords the truest means of ascertaining their real signification, we do not rest content with that which is self-evident, but pursue the subject further. *The proposition is that, by[276 giving to the words the meaning insisted upon, it has come to pass that the existence of claims of every kind and nature, whether in contract or in tort, against the government, is a matter for exclusive judicial determination. But, as the essence of paramount judicial power over a subject confers the authority and imposes the duty to enforce a judgment rendered in the exercise of such power (Gordon v. United States, 117 U. S. 697, 702; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 457, 44 L. ed. 223, 235, 20 Sup. Ct. Rep. 168; District of Columbia v. Eslin, 183 U. S. 62, 65, 46 L. ed. 85, 86, 22 Sup. Ct. Rep. 17), it follows that the contention is that the government created by the organic act is not the character of government which this court has declared it to be in the cases to which we have referred, that is, one founded upon the American system, but is, on the contrary, one in which the legislative power concerning claims of every kind against the government is subordinated to the judicial. That such was the view taken by the court below of the result of the meaning which it affixed to the clause in questions was plainly stated in the opinion as follows:

"The presence of the words 'with power to sue and be sued,' in our organic act, cannot be ascribed to an oversight of Congress, but, on the contrary, it may be presumed that Congress employed them having in mind the obligations contracted in the treaty of Paris [30 Stat. at L. 1754], and with the desire of giving to the persons included in its stipulations ready access to courts of justice, against any invasion of their rights by governmental action. And, indeed, there should be no fear of intrusting to the courts the protection, not only of the persons mentioned in the treaty, but of any other persons, without excluding the people of Porto Rico. This has been demonstrated sufficiently by an experience of more than ten years."

In view, however, of the terms of the organic act, of the prior decisions recognizing that the purpose of Congress *in[277 adopting it was to follow the plan applied from the beginning to the organized terr

tories by creating a government conforming to the American system, with defined and divided powers,—legislative, executive, and judicial,—in further view of the fact that the exercise of the judicial power here claimed would be destructive of that system, we are of opinion that it cannot be supposed that Congress intended by the clause in question to destroy the government which it was its purpose to create. In a sense the words "to sue and be sued," applied, as they normally have been, in grants of private or public charters, are redundant, since they but express the existence of powers which would naturally be implied. It may be true, also, to say that if they be likewise confined in the case before us they will also be in a sense redundant. Despite this, we think they should be construed with reference to the powers conferred by the provisions to which they relate, and therefore cannot be treated as destructive of the authority otherwise conferred by the act. Thus interpreting the clause, it is but an expression of the power to sue arising from the terms of the organic fact, and a recognition of a liability to be sued consistently with the nature and character of the government; that is, only in case of consent duly given. The words, "shall have the governmental powers hereinafter conferred and with the power to sue," etc., exclude the possibility in reason of holding that the right to sue and be sued which was given, "and with," that is, because of or along with the powers conferred, was intended to or does distort or limit the powers of government which the act conferred.

Reversed.

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278] *HOME TELEPHONE & TELEGRAPH COMPANY, Appt.,

v.

CITY OF LOS ANGELES et al.

(See S. C. Reporter's ed. 278–296.)

**Federal courts — jurisdiction — Federal question — coincident state guaranty.**

1. A Federal district court may not decline to take jurisdiction of a suit to enjoin the enforcement of a municipal ordinance which is averred to violate the due process of law clause of U. S. Const., 14th Amend., on the theory that state action cannot be predicated upon the ordinance because, if it should be treated as repugnant to that clause, it would also have to be considered as in conflict with a similar provision of the state Constitution until the court of last resort of that state had adjudged to the contrary.

[For other cases, see Courts, V. c, 2, in Digest Sup. Ct. 1908.]

**Constitutional law — applicability of 14th Amendment — state agencies.**

2. The prohibitions and guaranties of U. S. Const., 14th Amend., are addressed to, and control, not only the states, but also every person, whether natural or juridical who is the repository of state power.

[For other cases, see Constitutional Law, 76, 92, 175–180, 426, 427, in Digest Sup. Ct 1908.]

**Constitutional law — operation of 14th Amendment — abuse of authority.**

3. A case where one in possession of state power uses that power to the doing of wrongs which are forbidden by U. S. Const., 14th Amend., is within the purview of that Amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer.

[For other cases, see Constitutional Law, 76, 92, 175–180, 426, 427, in Digest Sup. Ct. 1908.]

**Constitutional law — operation of 14th Amendment — acts under authority of municipal ordinance.**

4. Acts done under the authority of a municipal ordinance passed in virtue of power conferred by a state are embraced by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 76, 92, 175–180, 426, 427, in Digest Sup. Ct 1908.]

[No. 610.]

Submitted October 28, 1912. Decided February 24, 1913.

APPEAL from the District Court of the United States for the Southern District of California to review a decree dismissing, for want of jurisdiction, the bill in a suit to enjoin the enforcement of a municipal orlinance averred to be repugnant to the due process of law clause of the 14th Amendment to the Federal Constitution. Reversed.

The facts are stated in the opinion.

Mr. James A. Gibson submitted the cause for appellant:

Every act of a state officer or agency, exercising the power of the state, by which any individual may be deprived of property without due process of law, is prohibited by the 14th Amendment; and the Federal courts, when seasonably appealed to, have original jurisdiction to enjoin every such act.

NOTE.—As to Federal question as conferring jurisdiction on United States courts —see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Earnhart v. Switzler, 105 C. C. A. 262.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Ex parte Young, 209 U. S. 123, 144, 52 L. ed. 714, 722, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 369–399, 38 L. ed. 1017–1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Smyth v. Ames, 169 U. S. 466–522, 42 L. ed. 819–840, 18 Sup. Ct. Rep. 418.

At every turn, the prima facie validity of a rate prescribed by an authorized agency of the state confronts the utility owner and places upon him the burden of judicially establishing the unreasonableness and invalidity of such rate, as a condition precedent to exercising his constitutional right to charge and receive reasonable compensation for services rendered.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 464, 465, 51 L. ed. 1128, 1137, 1138, 27 Sup. Ct. Rep. 700; Ex parte Young, 209 U. S. 123, 165, 52 L. ed. 714, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Robertson v. Frank Bros. 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; Burke v. Gould, 105 Cal. 281, 38 Pac. 733; Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 40, 1 L.R.A.(N.S.) 770, 75 N. E. 803.

In determining the coercive effect of such a rate regulation, and of the penalties, if any, prescribed for its violation, there must be considered the uncertainty of judicially establishing the confiscatory character of rates legislatively prescribed.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Louisville v. Cumberland Teleph. & Teleg. Co. 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741; Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668; Ex parte Young, 209 U. S. 123, 165, 52 L. ed. 714, 731, 13 L.R.A.(N.S.) 932, 24 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The act of a state officer, although a violation of his duty under the law of the state, may nevertheless be the act of the state within the purview of the 14th Amendment.

Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; Virginia v. Rives, 100 U. S. 313, 318, 25 L. ed. 667, 669, 3 Am. Crim. Rep. 524; Ex parte Virginia, 100 U. S. 339, 346, 348, 25 L. ed. 676, 679, 680, 3 Am. Crim. Rep. 547; Neal v. Delaware, 103 U. S. 370, 397, 26 L. ed. 567, 574; Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687; Gibson v. Mississippi, 162 U. S. 579, 40 L. ed. 1078, 16 Sup. Ct. Rep. 904; Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; Tarrance v. Florida, 188 U. S. 519, 47 L. ed. 572, 23 Sup. Ct. Rep. 402; Martin v. Texas, 200 U. S. 316, 50 L. ed. 497, 26 Sup. Ct. Rep. 338; Yick Wo. v. Hopkins, 118 U. S. 356, 373, 374, 30 L. ed. 220, 227, 228, 6 Sup. Ct. Rep. 1064; Dobbins v. Los Angeles, 195 U. S. 223, 240, 49 L. ed. 169, 176, 25 Sup. Ct. Rep. 18; Bailey v. Alabama, 219 U. S. 219, 231, 55 L. ed. 191, 197, 31 Sup. Ct. Rep. 145; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 35, 37, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

In enacting the ordinance complained of here, prescribing the rates to be charged to the public by the complainant for telephone service, the defendant city was exercising one of the powers of the state, which had been duly delegated to it.

Dill. Mun. Corp. 5th ed. § 1325; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 271, 273, 53 L. ed. 176, 181, 182, 29 Sup. Ct. Rep. 50.

The defendants having asserted their authority to enact and enforce the rate regulation here in question, and admitting their intention, unless restrained, to continue its enforcement, are estopped to question their own authority in the premises, for the sole purpose of compelling complainant to litigate that question in the state courts.

Daniels v. Tearney, 102 U. S. 415, 420, 26 L. ed. 187, 188.

Federal jurisdiction to grant relief in a given case is not defeated by the possibility of obtaining like relief in the state courts. The suitor cannot be denied his choice of forum.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 228, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Re

722; Ex parte Young, 209 U. S. 123, 165, 52 L. ed. 714, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Osborn v. Bank of United States, 9 Wheat. 738, 822, 6 L. ed. 204, 224; Cohen v. Virginia, 6 Wheat. 264, 382, 387, 420, 5 L. ed. 257, 285, 287, 295.

Although the Constitution of the state prohibits deprivation of property without due process of law in the same terms as the Federal Constitution, the allegation that an act is contrary to the Federal prohibition is not an allegation that such act is contrary to the state prohibition. The assumption, implied in defendant's contention, that the two constitutional prohibitions are identical in operation and effect, is contrary to historical fact.

State ex rel. Railroad & Warehouse Commission v. Chicago, M. & St. P. R. Co. 38 Minn. 287, 37 N. W. 782; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; San Diego Water Co. v. San Diego, 118 Cal. 566, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Spring Valley Waterworks v. San Francisco, 82 Cal. 305, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; Contra Costa Water Co. v. Oakland, 159 Cal. 334, 113 Pac. 668.

The penal provisions of the ordinance here complained of deny to complainant the equal protection of the laws, regardless of the reasonableness of the rates thereby prescribed.

The allegations of the bill showing such denial of equal protection present a Federal question which is wholly independent of the question whether the enforcement of the rate prescribed by the ordinance would take complainant's property without due process of law.

Such Federal question gave the district court jurisdiction, even though the case presents state questions.

Ex parte Young, 209 U. S. 123, 165, 52 L. ed. 714, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; New Orleans, M. & F. R. Co. v. Mississippi, 102 U. S. 135, 140, 141, 26 L. ed. 96, 98; Osborn v. Bank of United States, 9 Wheat. 738, 822, 823, 6 L. ed. 204, 224; Nashville v. Cooper, 6 Wall. 247, 252, 18 L. ed. 851, 852; Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

Mr. John W. Shenk submitted the cause for appellees. Mr. George E. Cryer was on the brief:

An unauthorized act of a state agent is not, under the authorities, state action, within the meaning of the 14th Amendment to the Constitution of the United States.

Huntington v. New York, 118 Fed. 683; Barney v. New York, 193 U. S. 430, 48 L. ed 737, 24 Sup. Ct. Rep. 502; Louisville v. Cumberland Teleph. & Teleg. Co. 84 C. C. A. 151, 155 Fed. 725, 12 Ann. Cas. 500; San Francisco v. United R. Co. 42 L.R.A.(N.S.) 752, 111 C. C. A. 345, 190 Fed. 507; Memphis v. Cumberland Teleph. & Teleg. Co. 218 U. S. 624, 54 L. ed. 1185, 31 Sup. Ct. Rep. 115.

The result of this suit does not depend upon the effect or construction of the 14th Amendment, hence the suit is not one arising under the Constitution or laws of the United States.

Memphis v. Cumberland Teleph. & Teleg. Co. 218 U. S. 624, 54 L. ed. 1185, 31 Sup. Ct. Rep. 115; Seattle Electric Co. v. Seattle, R. & S. R. Co. 107 C. C. A. 421, 185 Fed. 365; San Francisco v. United R. Co. 111 C. C. A. 339, 190 Fed. 507.

Mr. Chief Justice White delivered the opinion of the court:

The appellant, a California corporation furnishing telephone service in the city of Los Angeles, sued the city and certain of its officials to prevent the putting into effect of a city ordinance establishing telephone rates for the year commencing July 1, 1911.

It was alleged that by the Constitution and laws of the state the city was given [281 a right to fix telephone rates, and had passed the assailed ordinance in the exercise of the general authority thus conferred. It was charged that the rates fixed were so unreasonably low that their enforcement would bring about the confiscation of the property of the corporation, and hence the ordinance was repugnant to the due process clause of the 14th Amendment. The averments as to the confiscatory character of the rates were as ample as they could possibly have been made. The charge of confiscation was supported by statements as to the value of the property, and the sum which might reasonably be expected from the business upon the application of the rates assailed. The confiscatory character of the rates, it was moreover alleged, had been demonstrated by the putting into effect during the previous year of rates of the same amount as those assailed, which it was charged the corporation, at great sacrifice, had, after

protest, submitted to in order to afford a practical illustration of the confiscation which would result.

Being of the opinion that no jurisdiction was disclosed by the bill, the court refused to grant a restraining order or allow a preliminary injunction, and thereafter, on the filing of a formal plea to the jurisdiction the bill was dismissed for want of power as a Federal court to consider it. This direct appeal was then taken.

The plea to the jurisdiction was as follows:

" . . . that this court ought not to take jurisdiction of this suit, for that the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of this court, forasmuch as the Constitution of the state of California, in article 1, § 13 thereof, provides that 'no person shall be . . . deprived of life, liberty, or property without due process of law;' that this complainant, a citizen of the state of California, has never invoked the aid or protection of its said state to prevent the alleged taking of 282]its property, *nor has complainant appealed to the courts of said state, nor to any of them, to enforce the law of said state."

The ground of challenge to the jurisdiction advanced by the plea may be thus stated: As the acts of the state officials (the city government) complained of were alleged to be wanting in due process of law, and therefore repugnant to the 14th Amendment,—a ground which, on the face of the bill, if well founded, also presumptively caused the action complained of to be repugnant to the due-process clause of the state Constitution,—there being no diversity of citizenship, there was no Federal jurisdiction. In other words, the plea asserted that where, in a given case, taking the facts averred to be true, the acts of state officials violated the Constitution of the United States, and likewise, because of the coincidence of a state constitutional prohibition, were presumptively repugnant to the state Constitution, such acts could not be treated as acts of the state within the 14th Amendment, and hence no power existed in a Federal court to consider the subject until, by final action of an appropriate state court, it was decided that such acts were authorized by the state, and were therefore not repugnant to the state Constitution. There is no room for doubt that it was upon this interpretation of the plea that the court held it had no power as a Federal court. The court said:

"It is true that the bill in the present case alleges that, if the ordinance complained of 'is enforced, and your complainant *thereby prevented from* charging and receiving higher rates than the rates fixed by said ordinance, the state of California will thereby deprive your complainant of its property without due process of law,' etc. This charge, however, that the ordinance complained of is state action, is but a legal conclusion, while the facts alleged are, that the ordinance, if confiscatory, as shown by the bill, is directly prohibited by the Constitution of *the state, which, [283 in article 1, § 13, expressly provides, among other things:

"No person shall . . . be deprived of life, liberty, or property without due process of law.

"Thus, the case at bar comes within the rulings of the circuit court of appeals in the Seattle and San Francisco cases, and is precisely covered by the conclusions of the court in the latter case as follows:

" 'What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal court as a case arising under the Constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contracts have been enacted in violation of the positive law of the state.' "

It is true that in passages of the opinion subsequent to those just quoted there are forms of expression which, when separated from their context, might tend to justify the inference that the court thought city ordinances of the character of the one assailed could not, in any event, be treated as state action. But when the passages referred to are considered in connection with the context of the opinion, it is certain that those expressions were but a reiteration in a changed form of statement of the previous ground; that is to say, that state action could not be predicated upon the ordinance because, if it was treated as repugnant to the due-process clause of the Constitution of the United States, it would also have to be considered as in conflict with the state Constitution. Under this hypothesis the decision was that it could not be assumed that the state had authorized its officers to do acts in violation of the state Constitution until the court of last resort of the state had determined that such acts were authorized.

Coming to consider the real significance of this doctrine, we think it is so clearly in conflict with the decisions of this *court [284 as to leave no doubt that plain error was committed in announcing and applying it. In view, however, of the fact that the proposition was sanctioned by the court below, and was by it deemed to be supported by the persuasive authority of two opinions of the circuit court of appeals for the nin

circuit, before coming to consider the decided cases we analyze some of the conceptions upon which the proposition must rest, in order to show its inherent unsoundness, to make its destructive character manifest, and to indicate its departure from the substantially unanimous view which has prevailed from the beginning.

In the first place, the proposition addresses itself not to the mere distribution of the judicial power granted by the Constitution, but substantially denies the existence of power under the Constitution over the subject with which the proposition is concerned. It follows that the limitation which it imposes would be beyond possible correction by legislation. Its restriction would, moreover, attach to the exercise of Federal judicial power under all circumstances, whether the issue concerned original jurisdiction or arose in the course of a controversy to which otherwise jurisdiction would extend. Thus, being applicable equally to all Federal courts, under all circumstances, in every stage of a proceeding, the enforcement of the doctrine would hence render impossible the performance of the duty with which the Federal courts are charged under the Constitution. Such paralysis would inevitably ensue, since the consequence would be that, at least in every case where there was a coincidence between a national safeguard or prohibition and a state one, the power of the Federal court to afford protection to a claim of right under the Constitution of the United States, as against the action of a state or its officers, would depend on the ultimate determination of the state courts, and would therefore require a stay of all action to 285]await such determination. While *this would be obviously true as to cases where there was a coincident constitutional guaranty, in reason it is clear that the principle, if sound, could not be confined to a case of coincident Federal and state guaranty or prohibition, since, as the Constitution of the United States is the paramount law, as much applicable to states or their officers as to others, it would come to pass that in every case where action of a state officer was complained of as violating the Constitution of the United States, the Federal courts, in any form of procedure, or in any stage of the controversy, would have to await the determination of a state court as to the operation of the Constitution of the United States. It is manifest that, in necessary operation, the doctrine which was sustained would, in substance, cause the state courts to become the primary source for applying and enforcing the constitution of the United States in all cases covered by the 14th Amendment.

It would certainly be open to controversy if the proposition were carried to its logical result, whether the only right under the 14th Amendment, which the proposition admits, to exert Federal judicial power growing out of wrongful acts of state officers, would not be unavailing. This naturally suggests itself, since, if there be no right to exert such power until, by the final action of a state court of last resort, the act of a state officer has been declared rightful and to be the lawful act of the state as a governmental entity, the inquiry naturally comes whether, under such circumstances, a suit against the officer would not be a suit against the state, within the purview of the 11th Amendment. The possibility of such a result, moreover, at once engenders a further inquiry; that is, whether the effect of the proposition would not be to cause the 14th Amendment to narrow Federal judicial power instead of enlarging it and making it more efficacious. It must be borne in mind, also, that the limitations which the proposition, if adopted, would impose upon *Federal judicial power,[286 would not be in reason solely applicable to an exertion of such power as to the persons and subjects covered by the 14th Amendment, but would equally govern controversies concerning the contract and possibly other clauses of the Constitution.

The vice which not only underlies but permeates the proposition is not far to seek. It consists, first, in causing by an artificial construction the provisions of the 14th Amendment not to reach those to whom they are addressed when reasonably construed; and, second, in wholly misconceiving the scope and operation of the 14th Amendment, thereby removing from the control of that Amendment the great body of rights which it was intended it should safeguard, and in taking out of reach of its prohibitions the wrongs which it was the purpose of the Amendment to condemn.

Before demonstrating the accuracy of the statement just made as to the essential result of the proposition relied upon by a reference to decided cases, in order that the appreciation of the cases may be made more salient, we contrast the meaning as above stated, which the 14th Amendment would have if the proposition was maintained, with the undoubted significance of that Amendment as established by many decisions of this court.

1. By the proposition the prohibitions and guaranties of the Amendment are addressed to and control the states only in their complete governmental capacity, and as a result give no authority to exert Federal judicial power until, by the decision of a court of last resort of a state, acts

complained of under the 14th Amendment have been held valid, and therefore state acts in the fullest sense. To the contrary, the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person, whether natural or juridical, who is the repository of state power. By this construc-[287]tion the *reach of the Amendment is shown to be coextensive with any exercise by a state of power, in whatever form exerted.

2. As previously stated, the proposition relied upon presupposes that the terms of the 14th Amendment reach only acts done by state officers which are within the scope of the power conferred by the state. The proposition, hence, applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals, and consequently assumes that no act done by an officer of a state is within the reach of the Amendment unless such act can be held to be the act of the state by the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them, and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

To speak broadly, the difference between [288]the proposition *insisted upon and the true meaning of the Amendment is this: that the one assumes that the Amendment virtually contemplates alone wrongs authorized by a state, and gives only power accordingly, *while in truth the* Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus, the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed. Under these circumstances it may not be doubted that where a state officer, under an assertion of power from the state, is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the 14th Amendment cannot be avoided by insisting that there is a want of power. That is to say, a state officer cannot, on the one hand, as a means of doing a wrong forbidden by the Amendment, proceed upon the assumption of the possession of state power, and at the same time, for the purpose of avoiding the application of the Amendment, deny the power, and thus accomplish the wrong. To repeat: for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer, in virtue of state power, is doing an act which, if permitted to be done, prima facie would violate the Amendment, the subject must be *tested by assuming that the officer pos-[289] sessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.

Let us consider the decided cases in order to demonstrate how plainly they refuse the contention here made by the court below, and how clearly they establish the converse doctrine which we have formulated in the two propositions previously stated. As to both the propositions, the cases are so numerous that we do not propose to review them all, but simply to select a few of the leading cases as types, concluding with a brief consideration of a few cases which are supposed to give support to a contrary view.

In Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524, the case briefly was this: An accused person sought to remove from a state to a Federal court the trial of an indictment pending again

him on the ground that he was a colored person, and although by the state statute he had a right to have people of his race serve on juries, that in practice, on account of race prejudice, they were excluded, and thereby he was denied the equal protection of the laws. Two questions arose for decision: first, was the alleged exclusion a violation of the 14th Amendment? and second, if it was, did it afford ground for a removal of the case? Considering the first, the court said (p. 318):

"The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals."

Determining whether the enforcement by the state officer of a nondiscriminating statute in a discriminatory manner was within the Amendment, it was said (p. 318):

"It is doubtless true that a state may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the Amendment extend to all action of the state [290] denying equal protection *of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied, into a Federal court, where it will be acknowledged."

Thus holding that the enforcement by a state official of a statute in a discriminatory manner, although the statute might not be inherently discriminating, was within the Amendment, the question of the right to remove was considered, and it was decided that the removal act of Congress was narrower than the constitutional Amendment, and did not confer the right to remove.

In Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547, the case was this: A judge of a Virginia county court was indicted under the civil rights act for excluding negroes from juries on account of their race, color, etc. The accused applied to this court for a writ of habeas corpus and a writ of certiorari to bring up the record, and a like petition was presented on behalf of the state of Virginia, and both applications were disposed of at the same time. The first issue to be determined was the meaning of the 14th Amendment. The ruling in Virginia v. Rives was reiterated, the court saying:

"They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue *of public [291] position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it."

Answering the claim that there was no power to punish a state judge for judicial action, and therefore that the charge made was not within the 14th Amendment, it was said that the duty concerning the summoning of jurors upon which the charge of discrimination was predicated was not a judicial but merely a ministerial one. It was, however, pointed out that even if this was not the case, as the state statute gave no power to make the discrimination, it was therefore such an abuse of state power as to cause the act complained of to be not within the state judicial authority, but a mere abuse thereof; and that it was "idle" under such circumstances to say that the offense was not within the Amendment (p. 348).

In Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567, a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the Amendment, the language which we have quoted from Ex parte Virginia being reiterated.

In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the enforcement of certain city ordinances was prohibited on the ground that they were within the reach of the 14th Amendment. The court, reiterating the doctrine of Virginia v. Rives and Ex parte Virginia, held that this conclusion was sustained from a twofold point of view,—first, the terms of the ordinances, and second, in any event from the discriminatory manner in which the ordinances were applied by the officers.

*In Raymond v. Chicago Union Trac- [292] tion Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, the whole subject—almost in the identical aspect which is here involved—came under con-

sideration. The case concerned the repugnancy to the 14th Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a Federal court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state Constitution, in that the board had "disobeyed the authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property," the act of the subordinate board could not be deemed the act of the state. This contention was held to be unsound, and it was decided that even although the act of the board was wrongful from the point of view of the state Constitution or law, it was nevertheless an act of a state officer within the intendment of the 14th Amendment. It was pointed out that, as the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the 14th Amendment forbade, the claim of right to prevent such act under the 14th Amendment "constitutes a Federal question beyond all controversy." It was then said (pp. 35-37):

"The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. . . . Acting under the Constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the 14th Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts; and so it has been held that whoever, by virtue of 293]public position under a *state government, deprives another of any right protected by that Amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state."

Referring to some reliance to the contrary, placed upon a decided case, it was said:

"Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here."

The reassessment complained of was held to be repugnant to the 14th Amendment.

Finally the subject was elaborately considered in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. Without attempting to fully state the case it suffices to say that although the proceeding was one in habeas corpus, the controversy in its ultimate aspect concerned the power of a Federal court to prevent the enforcement of railroad rates fixed under state legislative authority, which were confiscatory. In the course of an opinion reviewing the whole field it was said (p. 155):

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

Although every contention pressed and authority now relied upon in favor of affirmance is disposed of by the general principles which we have previously stated, before concluding we specially advert to some of the contentions *urged to the con-[294 trary. 1. Much reliance is placed upon the decisions in Barney v. New York, supra, and Memphis v. Cumberland Teleph. & Teleg. Co. 218 U. S. 624, 54 L. ed. 1185, 31 Sup. Ct. Rep. 115. The latter we at once put out of view with the statement that, on its face, the question involved was one of pleading, and in no sense of substantive Federal power. As to the other,—the Barney Case,—it might suffice to say, as we have already pointed out, was considered in the Raymond Case, and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of Ex parte Young, is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the Barney Case it is to be observed that however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the Barney Case, and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly, at least, it recognized. If there were room for such conclusion, in view of what we have said, it would be our plain duty to qualify and restrict the Barney Case in so far as it might be found to conflict with the rule here applied. 2. In the opinion of the court below, there is a suggestion that even though the 14th Amend-

ment embraces acts of state officers to the extent and scope which we have stated, nevertheless the case here presented is not controlled by the Amendment, since the case concerns not acts of officers done under state authority, but merely acts of city officials done under the authority of a municipal ordinance. But, as we have already pointed out, it was long since settled that acts done under the authority of a municipal ordinance passed in virtue of power conferred by a state are embraced by the 14th Amendment.

295] *Apart, however, from the controlling effect of the decisions rendered in cases concerning the enforcement of the 14th Amendment, the unsoundness of the contention is plainly demonstrated by applying the established principle that the exercise of municipal legislative authority under the sanction of a state law is the exertion of state legislative power within the purview of the contract clause of the Constitution (article 1, § 10), declaring: "No state . . . shall pass any . . . law impairing the obligation of contracts." That this interpretation is here conclusive must be apparent, since it cannot be said that an act which is the exertion of state legislative power for the purpose of one provision of the Constitution is not the exertion of state legislative power under the operation of another constitutional provision, both being addressed to the same subject; that is, state legislative power.

And this gives rise at once to a demonstration from another and more final point of view of the incongruity which would result from maintaining the contention insisted upon. While the guaranties of the 14th Amendment cover subjects not included in the contract clause, since the former embraces every manifestation of state power and the latter is concerned only with legislative power when exerted so as to impair contracts, yet the fundamental assertion of Federal power made by each Amendment is the same when the different subjects to which each is applicable are put out of view. To illustrate: The command of the 14th Amendment, "No state shall make any law abridging . . . nor shall any state deprive any person," etc., is in substance a manifestation of the same power exerted in the contract clause, saying, "No state shall pass," etc. This being true, as it must be, the fact that from the foundation of the government the contract clause has been enforced without any intimation that the 296]power manifested by the *clause was restricted by limitations such as those which *it is here insisted* limit the power to enforce *the guaranties of the 14th Amendment, affords the most conclusive* demonstration of the unsoundness of the contentions here made. The immediate and efficient Federal right to enforce the contract clause of the Constitution as against those who violate or attempt to violate its prohibition, which has always been exerted without question, is but typical of the power which exists to enforce the guaranties of the 14th Amendment. See authorities as to the contract clause, referred to in the opinion in Ross v. Oregon, decided January 27, 1913. [227 U. S. 150, ante, 458, 33 Sup. Ct. Rep. 220.]

Reversed.

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WILLIAM H. WINFREE, as Administrator of the Estate of Albert E. Phipps, Deceased, Plff. in Err.,

v.

NORTHERN PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 296-302.)

**Master and servant — employers' liability act — retroactive effect.**

1. A retroactive effect will not be given to the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), so as to make its provisions applicable to an alleged cause of action for death which accrued, if at all, before the passage of such statute, since this statute permits a recovery in cases where a recovery could not have been had before, and takes away from the defendant defenses which theretofore were available.

[For other cases, see Master and Servant, II.; Statutes, II. v, in Digest Sup. Ct. 1908.]

**Death — who may maintain action — administrator or parent.**

2. The administrator of a deceased minor's estate cannot maintain, for the benefit of the parents, the right of action for death given by the state statutes to the decedent's father, although the compensation recovered in the action by the father belongs, under the local law, to the mother as well as to the father.

[For other cases, see Death, II. b; Parties, I. a, 5, in Digest Sup. Ct. 1908.]

[No. 139.]

Submitted January 23, 1913. Decided February 24, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judg-

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NOTE.—On retrospective laws generally—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331, and Barnitz v. Beverly, 41 L. ed. U. S. 94.

On retroactive effect of statutes relative to employers' liability for injury to servants, see note to the decision of the principal case in the circuit court of appeals as reported in 44 L.R.A.(N.S.) 841.

ment of the Circuit Court for the Eastern District of Washington, Eastern Division, sustaining a demurrer to, and dismissing, the complaint in an action for death, brought under the Federal employers' liability act. Affirmed.

See same case below, 44 L.R.A.(N.S.) 841, 97 C. C. A. 392, 173 Fed. 65.

The facts are stated in the opinion.

Mr. B. C. Mosby submitted the cause for plaintiff in error:

Statutes modeled from Lord Campbell's act are not penal, but remedial, for the benefit of persons injured by the death.

Stewart v. Baltimore & O. R. Co. 168 U. S. 448, 42 L. ed. 538, 18 Sup. Ct. Rep. 105; Spain v. St. Louis & S. F. R. Co. 151 Fed. 529; Hayes v. Williams, 17 Colo. 468, 30 Pac. 352; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

To correct the imperfections of the former act, Congress passed the act of April 22, 1908. The second is, like the first, clearly remedial, and should accordingly receive a catholic construction.

36 Cyc. 1173, 1174, 1188; 13 Cyc. 312; 1 Chitty's Bl. Com. 19th London ed. 88, note 30; Black, Constitutional Prohibitions, 1st ed. 1887, § 134, p. 160; 2 Lewis's Sutherland, Stat. Constr. 2d ed. 1904, 643, 644, 1291, § 519; Stewart v. Baltimore & O. R. Co. 168 U. S. 448, 42 L. ed. 538, 18 Sup. Ct. Rep. 105; Soule v. New York & N. H. R. Co. 24 Conn. 575; Lamphear v. Buckingham, 33 Conn. 237; Wabash, St. L. & P. R. Co. v. Shacklett, 10 Ill. App. 404; Merkle v. Bennington Twp. 58 Mich. 156, 55 Am. Rep. 666, 24 N. E. 776; Bolinger v. St. Paul & D. R. Co. 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; Vance v. Southern R. Co. 138 N. C. 460, 50 S. E. 860; Haggerty v. Central R. Co. 31 N. J. L. 349; Beach v. Bay State S. B. Co. 27 Barb. 248.

The act of 1908, being, then, of a remedial nature, should be construed as retroactive if such construction is not precluded by its terms. Larkin v. Saffarans, 15 Fed. 147. Its terms, however, so far from precluding that construction, rather force it.

36 Cyc. 1209, 1213; Wade, Retroactive Laws, 1st ed. § 24; Myer, Vested Rights, 1st ed. 1891, § 25, p. 18; Black, Interpretation of Laws, 1st ed. 1896, p. 261; Black, Constitutional Prohibitions, 1st ed. 1887, pp. 176, 276, 277; 8 Cyc. 910, 1021; New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) 95 U. S. 644, 24 L. ed. 521; Lycoming County v. Union County, 15 Pa. 166, 53 Am. Dec. 575; Barbour County v. Horn, 48 Ala. 659; Sedgwick County v. Bunker, 16 Kan. 498; Plummer v. Northern P. R. Co. 152 Fed. 206; Chapman v. State, 104 Cal. 690, *43 Am. St. Rep. 158, 38* Pac. 457; Cannon v. Rowland, 34 Ga. 422; Bevier v. Dillingham, 18 Wis. 530; Rouge v. Rouge, 15 Misc. 36, 36 N. Y. Supp. 436; Brower v. Bowers, 1 Abb. App. Dec. 214; Kuehn v. Paroni, 20 Nev. 203, 19 Pac. 273; Sohn v. Waterson, 17 Wall. 599, 21 L. ed. 738; Gage v. Gage, 66 N. H. 294, 28 L.R.A. 829, 29 Atl. 543; Milne v. Huber, 3 McLean, 217, Fed. Cas. No. 9,617.

An evident purpose of Congress in its later legislation was to save the rights of those persons whose suits had abated in consequence of the decision in the first employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Expired and repealed acts *in pari materia* with the statute to be construed may also be considered in the interpretation thereof.

United States v. Bowen, 100 U. S. 508, 25 L. ed. 631; Viterbo v. Friedlander, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962.

The occasion of the enactment of a law may be looked into in determining its character as retrospective or prospective.

People ex rel. Witherbee v. Essex County, 70 N. Y. 236; People ex rel. Peake v. Columbia County, 43 N. Y. 132.

A person has no property, no vested interest, in any rule of the common law. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 50, 56 L. ed. 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

There can be no vested right to do wrong, —no vested wrong.

Walker v. Ware, H. & B. R. Co. 12 Jur. N. S. 18, 35 Beav. 52, 35 L. J. Ch. N. S. 94, L. R. 1 Eq. 195, 13 L. T. N. S. 517, 14 Week. Rep. 158; Cooley, Const. Lim. 6th ed. 438.

If there be virtue in the rule of *stare decisis*, the recent case of Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892–900, effectually disposes of the defendant's contention.

If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as the other.

Cooley, Const. Lim. 6th ed. p. 211.

If the Federal remedy were inapplicable, nevertheless the parent's right in the state remedy for the lesser injury is unimpaired and enforceable through the plaintiff.

Stewart v. Baltimore & O. R. Co. 168 U. S. 450, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Kleps v. Bristol Mfg. Co. 189 N. Y. 516, 12 L.R.A.(N.S.) 1039, 81 N. E. 765; Parnaby v. Lancaster Canal Co. 11 Ad. & El. 223, 3 Perry & D. 162, 9 L. J. Exch. N. S. 338.

Mr. Charles W. Bunn submitted the cause for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This action was brought in the circuit court of the United States for the eastern district of Washington, eastern division, by plaintiff in error (herein referred to as plaintiff, as administrator of the estate of Albert E. Phipps, deceased, against defendant in error (herein referred to as defendant), for the wrongful death, it is alleged, of Albert E. Phipps, a minor, of the age of eighteen years and five months, while acting as fireman upon a freight locomotive of the defendant in the state of Washington. The negligence of defendant is alleged, and that defendant was engaged in interstate commerce; that decedent had not been emancipated nor had his parents knowledge of his employment; that they lived in the 301]state of Wyoming, *and that the action was brought for their benefit under the provisions of the act of Congress of April 22, 1908, entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases." [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322.]

Defendant demurred to the complaint on the ground, among others, that the act of Congress upon which plaintiff relied was passed, approved, and became a law after plaintiff's alleged cause of action accrued, and imposed no liability, therefore, on defendant by reason of the facts set forth in the complaint. The demurrer was sustained, and, plaintiff refusing to plead further, judgment was entered dismissing the complaint and for costs. The court of appeals affirmed the judgment. 44 L.R.A. (N.S.) 841, 97 C. C. A. 392, 173 Fed. 65.

Plaintiff, to support his contention that the act of Congress has retroactive operation, presents a very elaborate argument based on the extensive effect which courts have given to remedial statutes, applying them, it is contended, to the past as well as to the future. The court of appeals met the argument, as we think it should be met, by saying that statutes that had received such extensive application such as were "intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings, or to give effect to the acts and contracts of individuals according to the intent thereof." It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men, and should not be held to affect what has happened unless, *indeed,* explicit words be used, or by clear *implication that construction be required.* It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress, and the act has only given a more efficient and *a more complete[302 remedy. It, however, takes away material defenses,—defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character. The court of appeals aptly characterized it, and we may quote from its opinion: "It is a statute which permits recovery in cases where recovery could not be had before, and takes away from the defendant defenses which formerly were available,—defenses which, in this instance, existed at the time when the contract of service was entered into and at the time when the accident occurred." Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law.

It is contended that, apart from the act of Congress, the complaint "states a cause of action under the statutes of the state of Washington." This does not avail plaintiff. He admits that the statutes of Washington give the right of action to the father of the deceased minor, not to a personal representative. He, however, to justify his right of action, says that the compensation recovered in an action by the father of the minor belongs, under the community system, to the mother as well as to the father. But we are not informed how this, if true, gives a right of action in the administrator of the minor's estate. Damages to his estate would be a distinct cause of action from damages to his parents. Hedrick v. Ilwaco R. & Nav. Co. 4 Wash. 400, 30 Pac. 714.

Judgment affirmed.

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*SARAH M. HUTCHINSON, Appt.,[303

v.

CITY OF VALDOSTA, Samuel M. Varnedoe, Recorder, and Calvin Dampier, Marshal.

(See S. C. Reporter's ed. 303-308.)

**Constitutional law — police power — due process of law — equal protection of the laws — requiring connection with sewer system.**

An ordinance adopted under legislative

NOTE.—On the right and duty to connect property with drain or sewer—see note to Fergus Falls v. Edison, 70 L.R.A. 238.

authority by an inland town containing less than 6,000 inhabitants, by which the owners of property abutting upon any street along which sewer mains had been laid were required to install water-closets in their houses, and connect the same with the main sewer pipe within thirty days from the passage of the ordinance, under penalty of fine and imprisonment for noncompliance, is a valid exercise of the police power, and does not, although affording no notice or opportunity to be heard, deny either due process of law or the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 1; IV. b, 8, c; IV. c, in Digest Sup. Ct. 1908.]

[No. 146.]

Submitted January 24, 1913. Decided February 24, 1913.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia to review a decree sustaining a demurrer to and dismissing the bill in a suit to restrain the enforcement of a municipal ordinance requiring property owners to connect with the sewer system. Affirmed.

The facts are stated in the opinion.

Mrs. Sarah M. Hutchinson, *in propria persona*, submitted the cause for appellant. Mr. Charles S. Morgan was on the brief:

In an inland town of the size, situation, and population of the city of Valdosta, the extreme and arbitrary measures used by virtue of and under the said legislative act and municipal ordinance, against the appellant, and in the absence of any condemnatory proceedings of the premises as a nuisance to the public, or public health, by a board of health, or some proper legal authority, are without warrant or authority of law, are in violation of the 14th Amend., U. S. Const., because depriving the plaintiff in error of property without due process of law, and a denial of the equal protection of the laws.

North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276; Railroad Commission v. Louisville & N. R. Co. 225 U. S. 272, 56 L. ed. 1087, 32 Sup. Ct. Rep. 756; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed 778, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Nashville v. Cooper, 6 Wall. 247, 18 L. ed. 851; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Giles v. Harris, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639.

No brief was filed for appellees.

Mr. Justice McKenna delivered the opinion of the court:

*Bill in equity brought by appellant[304 to restrain appellees from proceeding against her for the alleged violation of an ordinance of the City of Valdosta.

The facts as alleged are these:

The City of Valdosta is a municipal corporation under the laws of Georgia, and the appellees, Varnedoe and Dampier, are respectively the recorder of the mayor's court of the city and marshal. Appellant owns and resides with her husband and children on a lot of land containing about 1 acre, more or less, situated near three quarters of a mile from the main business part of the city. The lot is elevated and dry, with good natural surface drainage, clean and clear of garbage or anything which would create a nuisance, free from miasmatic conditions, and is healthy, with a wide street on three sides and a railroad right-of-way and almost open country in the rear. She has lived on the lot for more than twenty years.

The city is an inland town, built and standing upon a high pine ridge about 75 miles from the Gulf of Mexico "and not 100 miles from the Atlantic ocean," with no swamp near. The city has a population of not exceeding five or six thousand white inhabitants and covers an area 2 miles in extent. It was incorporated by an act of the legislature of Georgia on the 21st of November, 1901, under the name and style of the City of Valdosta, and under that name may sue and be sued, through its mayor and council, and enact such rules and regulations for the transaction of its business and for the welfare and proper government thereof as said mayor and council may deem best, not inconsistent with the laws of Georgia and of the United States.

On the 1st of September, 1909, the city passed an ordinance requiring persons and property owners residing upon any street along which sewer mains have been laid, within thirty days after the passage of the ordinance, to install water closets in their 305]houses, and connect the same *with the main sewer pipe, and to provide the closets with water, so that they may be ready for use in the ordinary and usual way, and such persons shall not be permitted to use or keep on their premises a surface closet.

A house without a closet, situated as stated above, is, by the passage of the ordinance, condemned as a menace to the public health, and the owner of the premises who does not comply with the ordinance is subject to a fine of not exceeding $200, or to labor on the streets or public works, or to be confined in the guardhouse of the city for not exceeding ninety days.

Appellant's house is a wooden building, with rooms only sufficient for the immediate use of herself and family, and to comply with the ordinance she would be compelled to build an addition to the house, which, with connection to the sewer and payment for the necessary water, would cost her a considerable sum of money.

The personal appellees are threatening to arrest her for the purpose of fine and imprisonment or labor on the streets for not complying with the ordinance, and to avoid arrest she has at several times left her home and family, to her great inconvenience, mortification, and wounded feelings.

That part of the city where her residence is situated is thinly settled, and there is no necessity on account of health or sanitary conditions of the city or any part thereof to force her, against her wish, to connect a water-closet in her house by a pipe to the main sewer, and would subject her and her family to the noxious gases, odors, and noisome smells from the sewer, thereby endangering her health and impairing her comfort and that of her family, and thereby creating a nuisance.

She had no notice nor opportunity to be heard before the commencement of proceedings to force her before the recorder to answer to the charge of violating the ordinance. For that reason she alleges that 306]the proceedings *were in violation of the 5th and 14th Amendments to the Constitution of the United States, in that the proceedings deprived her of liberty and property without due process of law, and denied to her the equal protection of the laws.

She alleges that the act of the legislature of Georgia incorporating the city, and under which the ordinance was passed and the proceedings against her taken, violates the 14th Amendment to the Constitution because it provides neither for notice nor an opportunity to be heard before the premises are condemned and the owner required to comply with its provisions.

She further alleges that there is a conspiracy against her to force her, against her desire, to connect with the sewer under color of the act and the ordinance, in violation of the 14th Amendment and the statute laws passed by Congress in pursuance thereof, to her damage in the sum of $10,000.

That at the time of the commencement of the proceedings against her she applied to the superior court of the county of Lowndes, state of Georgia, for an injunction restraining the proceedings, and, upon the refusal of the court to grant the injunction, carried the case to the supreme court of the state, which court refused to require the granting of an injunction.

And, finally, she alleges that the proceedings are discriminating because all of the inhabitants and owners of property are not required to comply with the ordinance, and that therefore her property is taken without compensation and without due process of law, in violation of the 5th and 14th Amendments to the Constitution of the United States, and that she is without a remedy at law. She prayed an injunction.

Appellees demurred to the bill, alleging a want of equity, that appellant had a remedy at law, that she was attempting to restrain the prosecution of the city's penal ordinances *passed under its police powers[307 for the protection of the public health, and that it appears from the bill that the matters and things set out are *res judicata*. The appellees also by plea set up the defense of *res judicata* based on the proceedings in the state court, referred to in the bill. A copy of the proceedings was attached to the plea, from which it appears that she set out in her petition and amendment to it in the state court the same grounds of action as in her bill in the case at bar, varying somewhat in details and expression, including the violation of the 5th and 14th Amendments to the Constitution of the United States.

A writ of subpœna was prayed against the City of Valdosta, requiring it, by and through its mayor and council, naming them, to appear and answer the petition. In the present suit the injunction is prayed against the city and the recorder and marshal.

The appellees also filed an answer, which appellant moved to strike out. The motion was denied. The demurrer, then coming on to be heard, was sustained "on each and

every ground thereof," and the bill dismissed. This appeal was then taken.

There was no oral argument of the case, and in her brief appellant says that "the jurisdiction of the United States circuit court to take cognizance of the case depends largely upon the 14th Amendment to the Constitution of the United States," and then discusses the power of the court to restrain unconstitutional exercise of power by states and their officers and municipalities. On that proposition we need not waste any time. We have seen that the circuit court sustained the demurrer not only on the ground that the ordinance did not violate the Constitution of the United States, but also on the ground that the suit in the state court which appellant alleges was brought and which was determined against her was *res judicata*. But 308]passing that ground, we *think the court's ruling was right on the other ground; that is, the ordinance does not violate the 14th Amendment of the Constitution of the United States. According to the bill, the city is given the power, through its mayor and council, "to enact such rules and regulations for the transaction of its business and for the welfare and proper government thereof," as the mayor and council may deem best; and the bill shows that the courts of the state decided that the ordinance was within this delegation of power. It is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560. It may be that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. There is certainly nothing in the facts alleged in the bill to justify the conclusion that the city was induced by anything in the enactment of the ordinance other than the public good, or that such was not its effect.

Decree affirmed.

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**EFFIE HOKE and Basile Economides, Plffs. in Err.,**
**v.**
**UNITED STATES.**

(See S. C. Reporter's ed. 308–326.)

**Commerce — power of Congress.**

1. If a congressional enactment is a valid exercise of the power of Congress under the commerce clause of the Federal Constitution, how it may affect persons or states is not material.

[For other cases, see Commerce, I. a, in Digest Sup. Ct. 1908.]

**Commerce — power of Congress — police regulation.**

2. The power of Congress over interstate transportation is complete in itself, and Congress, as an incident to it, may adopt not only the means necessary but convenient to its exercise, and such means may have the quality of police regulations.

[For other cases, see Commerce, I. a, in Digest Sup. Ct. 1908.]

**Commerce — power of Congress — white slave act.**

3. Congress, in the exercise of its power to regulate commerce, could lawfully enact the provisions of the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing of such transportation.

**Appeal — harmless error — variance.**

4. A variance between the allegation, in an indictment under the white slave act of June 25, 1910, for obtaining, aiding, or inducing the interstate transportation of women for immoral purposes, that such women were transported over the Texas & New Orleans Railroad, and the proof which failed to show that such railroad extended from the beginning to the end of the transportation, but did show that the tickets were purchased over the Southern Pacific Railroad, if error at all, where the indictment alleged that the former railroad was a part of the Southern Pacific system, and there was through transportation, is not fatal, being not much more than verbal, and not even embarrassing the defense.

[For other cases, see Appeal and Error, VIII. m, 3, d, in Digest Sup. Ct. Rep. 1908.]

**Trial — question of fact — sufficiency of evidence.**

5. The sufficiency of the evidence in a criminal case is solely for the consideration and determination of the jury.

[For other cases, see Trial, VI. a, in Digest Sup. Ct. 1908.]

**Evidence — relevancy — part of scheme.**

6. Testimony showing that defendant charged with violating the white slave act of June 25, 1910, by obtaining, aiding, or inducing the interstate transportation of women or girls for immoral purposes, re-

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NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216, and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

strained the liberty of the women at her house in the place where the transportation ended, and coerced their stay with her, is relevant as illustrating and constituting a completion of what was done at the beginning of the transportation.

[For other cases, see Evidence XI. r, in Digest Sup. Ct. 1908.]

[No. 381.]

Argued January 7 and 8, 1913. Decided February 24, 1913.

IN ERROR to the District Court of the United States for the Eastern District of Texas to review a conviction under the white slave act. Affirmed.

See same case below, on demurrer, 187 Fed. 992.

The facts are stated in the opinion.

Mr. C. W. Howth argued the cause and filed a brief for plaintiff in error Effie Hoke.

Messrs. Hal W. Greer, T. H. Bowers, and Chardler C. Luzenberg filed a brief for plaintiff in error Basile Economides:

Prostitutes, both male and female, are citizens of their respective states, with all the "privileges and immunities" possessed by any other citizen; and one of their "privileges" is to travel interstate; and so long as this privilege exists as a lawful right, it is the "privilege" and lawful right of any other citizen to aid and assist, persuade and entice, them to take the journey, regardless of their motive or purpose, and regardless of the motive and purpose of the one rendering the aid, as to what they shall do or intend to do at the end of their journey.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.

The white slave act is void in that it conflicts with the reserved police powers of the states individually to regulate or prohibit prostitution or any other immoralities of their citizens.

Keller v. United States, 213 U. S. 143, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

While the carrying of passengers interstate comes within "the power to regulate commerce," the motive or intent of the passenger, either before beginning the journey, or during, or after completing it, is not a matter of interstate commerce.

Keller v. United States, 213 U. S. 143, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; United States v. Popper, 98 Fed. 423; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

Assistant Attorney General Harr argued the cause and filed a brief for defendant in error:

The transportation and transit of persons is commerce, persons being both the subject and the means of commercial intercourse.

Passenger Cases, 7 How. 283, 429, 431, 436, 12 L. ed. 702, 763, 764, 766; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Lottery Case (Champion v. Ames) 188 U. S. 321, 352, 47 L. ed. 492, 499, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

The regulative power of Congress extends to the absolute prohibition of the transportation and transit in interstate or foreign commerce of certain subjects of commerce.

Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 387, 389, 46 L. ed. 1209, 1213, 1214, 22 Sup. Ct. Rep. 811.

The transportation of women and girls for the purpose of prostitution or debauchery or other immoral purpose is one of the kinds of interstate or foreign commerce that may be suppressed by Congress.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Lottery Case (Champion v. Ames) 188 U. S. 358, 359, 47 L. ed. 502, 13 Am. Crim. Rep. 561, 23 Sup. Ct. Rep. 321; Addyston Pipe & Steel Co. v. United States, 175 U. S. 229, 44 L. ed. 143, 20 Sup. Ct. Rep. 96.

Having the power to prohibit the transportation of women and girls in interstate and foreign commerce for immoral purposes, and having exercised such power, Congress may make the prohibition effectual by punishing any person who knowingly induces, solicits, or facilitates such illegal transportation.

Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; United States v. Craig, 28 Fed. 795.

The case is here on writ of error, and

this court will not undertake to weigh the evidence.

Crumpton v. United States, 138 U. S. 361, 363, 34 L. ed. 958, 959, 11 Sup. Ct. Rep. 355.

Nor would the rule be different if this court believed there was reasonable doubt as to the guilt of the defendants.

Johnson v. United States, 157 U. S. 320, 326, 39 L. ed. 717, 719, 15 Sup. Ct. Rep. 614.

The particular railroad in this case represents the means used by the accused in committing the offense, and proof of any common carrier would suffice, by analogy to the rule that where an indictment charges a murder by poisoning, and specifies the poison, proof that death was brought about by a different poison would not constitute a material variance.

Westmoreland v. United States, 155 U. S. 545, 549, 39 L. ed. 255, 256, 15 Sup. Ct. Rep. 243.

The refusal of the court to grant a new trial cannot be assigned as error.

Addington v. United States, 165 U. S. 185, 41 L. ed. 679, 17 Sup. Ct. Rep. 288; Wheeler v. United States, 159 U. S. 523, 524, 40 L. ed. 244, 245, 16 Sup. Ct. Rep. 93.

The variance between allegations and proof respecting the names of the women charged to have been transported was not fatal.

People v. Plyler, 121 Cal. 160, 53 Pac. 553; State v. Brecht, 41 Minn. 54, 42 N. W. 602; Putnam v. United States, 162 U. S. 687, 691, 40 L. ed. 1118, 1120, 16 Sup. Ct. Rep. 923; Faust v. United States, 163 U. S. 452, 454, 41 L. ed. 224, 225, 16 Sup. Ct. Rep. 1112; Com. v. Warren, 167 Mass. 53, 44 N. E. 1073; Reg. v. Gregory, 8 Q. B. 514, 15 L. J. Mag. Cas. N. S. 38, 10 Jur. 387; Beale, Crim. Pl. & Pr. § 121.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment of conviction under the act of Congress of June 25, 1910, 317 entitled, "An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes." 36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343. It is commonly known as the white slave act.

The constitutionality of the act was assailed by demurrer, and as its sufficiency otherwise was not questioned, a brief summary of its allegations is all that is necessary.

The charge against Effie Hoke is that she "did, on the 14th day of November, A. D. 1910, in the city of New Orleans and state of Louisiana, unlawfully, feloniously, and knowingly persuade, induce, and entice one Annette Baden, alias Annette Hays, a woman, to go from New Orleans, a city in the state of Louisiana, to Beaumont, a city in the state of Texas, in interstate commerce, for the purpose of prostitution," etc.

The charge against Basile Economides is that he "did unlawfully, feloniously, and knowingly aid and assist the said Effie Hoke to persuade, induce, and entice the said Annette Baden . . . to go in interstate commerce . . . for the purpose of prostitution," with the intent and purpose that the said woman "should engage in the practice of prostitution in the said city of Beaumont, Texas."

The second and third counts make the same charge against the defendants as to another woman, the one named in the third count being under eighteen years.

The demurrers were overruled, and after trial the defendants were convicted and sentenced, each to two years' imprisonment on each count. 187 Fed. 992.

The indictment was drawn under §§ 2, 3, and 4 of the act, which sections are as follows:

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or 318 debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such

fine and imprisonment, in the discretion of the court."

The 3d section is directed against the persuasion, inducement, and enticement of any woman or girl to go from one place to another in interstate or foreign commerce, whether with or without her consent, to engage in the practices and for the purposes stated in the 1st section, and provides that anyone "who shall thereby knowingly cause, or aid or assist in causing, such woman or girl to go or to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia," shall be punished as prescribed in the 1st section.

Section 4 makes criminal persuasion, inducement, and enticement of a woman or 319]girl under the age of eighteen *years from any state or territory or the District of Columbia to any other state or territory or the District of Columbia to engage in the immoral practices enumerated. The person guilty thereof, and who shall, in furtherance thereof, knowingly induce or cause such woman or girl to be carried or transported as a passenger in interstate commerce, shall be deemed guilty of a felony, and on conviction the offender's punishment may be a fine of $10,000 or imprisonment for ten years, or by both fine and imprisonment, in the discretion of the court.

The grounds of attack upon the constitutionality of the statute are expressed by counsel as follows:

"1. Because it is contrary to and contravenes art. 4, § 2, of the Constitution of the United States, which reads: 'The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.'

"2. Because it is contrary to and contravenes the following two amendments to the Constitution:

"Art. 9. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

"Art. 10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

"3. Because that clause of the Constitution which reserves to Congress the power (art. 1, § 8, subdiv. 2) 'to regulate commerce with foreign nations, and among the several states,' etc., is not broad enough to include the power to regulate prostitution or any other immorality of citizens of the several states as a condition precedent (or subsequent) to their right to travel interstate, or to aid or assist another to so travel.

"4. Because the right and power to regulate and control prostitution, or any other immoralities of citizens, comes within the reserved police power of the several states, *and under the Constitution Congress[320 cannot interfere therewith, either directly or indirectly, under the grant of power 'to regulate commerce between the states.'"

We shall discuss at length but one of these grounds; the others will be referred to incidentally. The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered. It is the supreme law of the land, and persons and states are subject to it.

Congress is given power "to regulate commerce with foreign nations and among the several states." The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and made a ground of attack. The present case is an example.

Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided, or transportation induced, in interstate commerce, for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between states, and that such being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exercise of it, and "that the *motive or [321 intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one state

to another. 29 Stat. at L. 512, chap. 172, U. S. Comp. Stat. 1901, p. 3180; United States v. Popper, 98 Fed. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. Lottery Case (Champion v. Ames) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise, as in the instances stated, and which finds further illustration in Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions.

Plaintiffs in error admit that the states may control the immoralities of its citizens. Indeed, this is their chief insistence; and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens, and assert that it is in consequence an invasion of the reserved powers of the states. There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states. 322]We have *cited examples; others may be adduced. The pure food and drugs act is a conspicuous instance. In all of the instances a clash of national legislation with the power of the states was urged, and in all rejected.

Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

This is the aim of the law, expressed in broad generalization; and motives are made of determining consequence. Motives executed by actions may make it the concern of government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibitions must be applied. We may illustrate again by the pure food and drugs act. Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a state. It may be that Congress could not prohibit in all of its conditions its sale within a state. But Congress may prohibit its transportation between the states, and by that means defeat the motive and evils of its manufacture. How far-reaching are the power and the *means which may be used to[323 secure its complete exercise we have expressed in Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364. There, in emphasis of the purpose of the law, are denominated adulterated articles as "outlaws of commerce," and said that the confiscation of them enjoined by the law was appropriate to the right to bar them from interstate transportation, and completed the purpose of the law by not merely preventing their physical movement, but preventing trade in them between the states. It was urged in that case, as it is urged here, that the law was an invasion of the power of the states.

Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of July 25, 1910, and we need go no farther in the present case.

The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several states;" that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166,

1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Cooley, Const. Lim. 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress.

There are assignments of error based upon rulings on the admission and rejection of evidence and upon the instructions to the jury 324]and the refusing of instructions. *The asserted errors are set forth in twenty-five bills of exceptions, and the special assignment of errors in this court occupy twenty-eight pages of the record, and present the constitutional objections to the law in all the aspects that counsel's ingenuity can devise. A like ingenuity has been exercised to represent the many ways in which the conduct of the accused can be viewed and shown to be inconsistent with a guilty purpose. To discuss them all is unnecessary. We shall pass more or less rapidly over those we consider to be worthy of attention.

1. It is contended that there is variance between the indictment and the proof, in that the indictment charges that the women were transported over the Texas & New Orleans Railroad Company's road, and that the government failed to prove that such road was a line extending from New Orleans to Beaumont, Texas, these places marking the beginning and end of the transportation of the women. Further, that the proof showed that their tickets were purchased over the Southern Pacific Road. The indictment alleges that the Texas & New Orleans Railroad was a part of the Southern Pacific System, and was commonly known as the "Sunset Route," and there was through transportation. The variance is not much more than verbal, and that it prejudiced their defense in any way is not shown. If it is error at all, it does not appear to have caused even embarrassment to the defense. But was it error? See Westmoreland v. United States, 155 U. S. 545, 549, 39 L. ed. 255, 256, 15 Sup. Ct. Rep. 243. Also § 1025, Rev. Stat., U. S. Comp. Stat. 1901, p. 720.

2. The evidence does not show that the defendants or either of them induced, etc., the women to become passengers in interstate commerce. The particulars are recited wherein it is contended that the evidence is deficient. It is not necessary to review them. It was for the jury to consider and determine the sufficiency of the evidence, and we cannot say they were not justified by it in the judgment they pronounced.

325] *3. It is contended that Florence Baden persuaded her sister Gertrude to go to Beaumont, and an instruction of the court *is attacked* on the ground that it declared *the charge of the indictment was* satisfied against the defendants if Florence acted for them. There was no error in the instruction under the circumstances shown by the record.

4. Error is assigned on the refusal of the court to give certain instructions requested by defendants. To consider them in detail would require a lengthy review of the evidence, for they present arguments on certain phases of it as to the degree of persuasion used or its sufficiency to induce or entice the women. There was no error in refusing the instructions.

5. The court permitted the women to testify as to the acts of Effie Hoke at her house at Beaumont, restraining the liberty of the women, and coercing their stay with her. Such testimony was relevant. The acts illustrated and constituted a completion of what was done at New Orleans. They were part of the same scheme and made clear its purpose.

There were other instructions asked by which the jury was charged that they could not convict Effie Hoke for the character of the house she kept or Economides for the business he conducted. The charge of the court sufficiently excluded both views. It explained the act of Congress and the offenses it condemned and directed the attention of the jury to them.

6. Defendants complain that they were not permitted to show that the women named in the indictment were public prostitutes in New Orleans. Such proof, they contend, was relevant upon the charge of persuasion or enticement. This may be admitted, but there was sufficient evidence, as the court said, of the fact of the immorality of their lives, and explicitly ruled that they could be shown to be public prostitutes. The court, however, excluded *certain[326 details sought to be proved. Under the circumstances there was no error in the ruling.

In conclusion we say, after consideration of all errors assigned, that there was no ruling made which was prejudicial to defendants.

Judgment affirmed.

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LOUIS ATHANASAW and Mitchell Sampson, Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 326-333.)

**Commerce — power of Congress — white slave act.**

1. Congress, in the exercise of its power

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas. & Min. Co. 227 U. S.

to regulate commerce, could lawfully enact the provisions of the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing of such transportation.

**White slave trade — inducing debauchery.**

2. Procuring or aiding the interstate transportation of a girl for the purpose of employing her under such surroundings as tended to induce her to give herself up to a condition of debauchery which virtually and naturally would lead to a course of sexual immorality constitutes the offense denounced by the white slave act of June 25, 1910, as the obtaining, aiding, or inducing the interstate transportation "of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to debauchery, or to engage in any other immoral practice."

[No. 588.]

Argued and submitted January 7 and 8, 1913. Decided February 24, 1913.

IN ERROR to the District Court of the United States for the Southern District of Florida to review a conviction under the white slave act. Affirmed.

The facts are stated in the opinion.

Mr. W. A. Carter submitted the cause for plaintiffs in error. Mr. John P. Wall was on the brief:

The act of Congress passed June 25, 1910, commonly called the white slave act, is unconstitutional because it violates § 2, article 4, of the Constitution of the United States.

Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; 2 Tucker, Const. pp. 256, 530; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.

Power to pass the white slave act is not granted to the Federal Congress by the commerce clause of the Constitution.

2 Tucker, Const. p. 528.

The white slave act conflicts with the 9th and 10th Amendments to the Constitution, and infringes on the reserve police powers of the state.

New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Lottery Case (Champion v. Ames) 188 U. S. 322, 47 L. ed. 495, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; State v. Baltimore & O. R. Co. 24 W. Va. 783, 49 Am. Rep. 290.

Assistant Attorney General Harr argued the cause and filed a brief for defendant in error.

For his contentions, see his brief as reported in Hoke v. United States, ante, 523.

Mr. Justice McKenna delivered the opinion of the court:

Indictment for violating the act of Congress of June 25, 1910, known as the white slave act. 36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343.

The charge is that the defendant transported or caused to be transported, or aided in the transportation of, a girl "by[328 the name of Agnes Couch, from Atlanta, Georgia, to Tampa, Florida, for the purpose of debauchery.

A crime is variously charged against §§ 2 and 3 of the act in thirty-nine counts, alleging that the transportation was for "the purpose of debauchery" or "to give herself up to debauchery."

A demurrer was filed to the indictment, alleging as grounds thereof the unconstitutionality of the act and that the indictment was insufficient in certain particulars of fact. The demurrer was overruled, and after a trial upon a plea of not guilty defendants were convicted. Defendant Athanasaw was sentenced to imprisonment for two years and six months and the defendant Sampson for one year and three months. The contentions of the defendants are that the act of Congress is unconstitutional and that errors were committed by the district court in giving and refusing to give certain instructions to the jury.

1. This case was argued and submitted with No. 381. The constitutionality of the law was sustained in that case, and further discussion is unnecessary.

2. To understand the ruling of the court on the instructions an outline of the facts must be stated. Agnes Couch was a girl of seventeen years. She lived at Suwanee, Georgia; but, being in Atlanta in September, 1911, and seeing an advertisement by

6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216, and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

one Sam Massel for chorus girls, she applied at his office and signed a contract to appear with the Imperial Musical Comedy Company at the Imperial Theater, Tampa, Florida, as a chorus girl at a salary of $20 a week for the first four weeks and $15 a week thereafter, she to room and board in the theater. The theater was operated by the defendants, and Massel acted as their booking representative at Atlanta. After she signed the contract, Massel gave her a railroad ticket which had been provided by 329]the defendants for that *purpose. She arrived at Tampa about 6:30 A. M. and met the defendant Athanasaw at 7 o'clock.

As to what then took place, the girl testified as follows: "He showed me to my room and took the check to get my trunk. I went to sleep and slept until 2 o'clock in the afternoon. At that hour one of the girls woke me up to rehearse. I went down in the theater and stayed there about an hour, rehearsing, singing, and then went to lunch in the dining room. All of the girls were there and several boys. I had never had any stage experience. At lunch they were all smoking, cursing, and using such language I couldn't eat. After lunch I went to my room, and about 6 o'clock Louis Athanasaw, one of the defendants, came and said to me I would like it all right; that I was good looking and would make a hit, and not to let any of the boys fool me, and not be any of the boy's girl; to be his. He wanted me to be his girl; to talk to the boys and make a hit, and get all of the money I could out of them. His room was next to mine, and he told me he was coming in my room that night and sleep with me; and he kissed and caressed me. He told me to dress for the show that night and come down into the boxes. I went into the box about 9 o'clock. About that time Louis Athanasaw's son knocked on my door and told me to come to the boxes. In the box where I went there were four boys; they were smoking, cursing, and drinking. I sat down and the boys asked me what was the matter; I looked scared. I told them I was ashamed of being in a place like that; and Arthur Schlemann, one of the boys, said he would take me out. The others insisted on my staying, and said I would like it when I got broke in. I tried to go out with Schlemann, but a boy named Gilbert pulled me back, saying 'Let that cheap guy alone.' Schlemann said he would send a policeman, and in about fifteen minutes Mr. Thompson and Mr. Evans came in for me."

330] *Athanasaw denied that he made improper proposals to the girl, and it was testified that at the preliminary hearing she did not charge him with such. In all else, however, her testimony was not contradicted, and it was supported as to the character of the house and as to what took place.

Three propositions are presented by defendants: (1) The gist of the offense is the intention of the person when the transportation was procured or aided to be procured. (2) The word "debauchery," as used in the statute, means sexual intercourse. (3) The act did not intend to prohibit the transportation of women for the purpose of any other vice or immorality than that applicable to sexual actions.

The instructions requested by the defendants presented these propositions, and by refusing them and giving others inconsistent with them it is contended that the court erred. The ruling of the court is sufficiently exhibited by the instructions which it gave, and they can be made the basis as well of a consideration of the errors assigned by the refusal of the instructions requested by defendants.

The instructions given by the court are as follows:

"The intent and purpose of the defendants at the time of the furnishing of this transportation for Agnes Couch is the very gist and question in this case. Did they intend to induce or entice or influence her to give herself up to debauchery? It makes no difference whether the profits which would be made by the defendants came from the sale of liquor or other immoral purpose. The question here is of intent; what was the intent with which they brought her; that she should live an honest, moral, and proper life? or that she came and they engaged and contracted with her for the purpose of her entering upon a condition which might be termed debauchery, or lead to or would necessarily and naturally lead her to, a condition of debauchery just referred to?

"The term 'debauchery' is not a legal or technical term. There is no allegation that the defendants brought her *here with[331 the purpose or with the intent to debauch her; but to induce her or entice her, or influence her to enter upon a course of debauchery. The term 'debauchery' is not a legal or technical term. To debauch is to corrupt in morals or principles: to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery, then, is an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up vicious habits. The term 'debauchery,' as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually, or tends to lead, to sexual immorality; not necessarily drunkenness or immorality, but

here it leads to the question in this case as to whether or not the influences in which this girl was surrounded by the employment which they called her to did not tend to induce her to give herself up to a condition of debauchery which eventually, necessarily, and naturally would lead to a course of immorality sexually. That is the question for you to determine, and it is a question that you alone can determine. You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendant. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?

"Now, it is contended that they must have had a deliberate intent to debauch her when she came here; that either one or the other intended to debauch her or to get somebody else to debauch her. Now, that term debauch is used in a great many instances in the law, and the usual connection is to have carnal intercourse with: but there is no such language in this stat-332]ute, nor is it the language of *the indictment. The charge of the indictment in substance is that they induced or influenced her to enter into a life or condition of debauchery.—'to induce or compel her to give herself up to debauchery.'"

The language of the statute is directed against the transportation "of any woman or girl for the phrpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice."

The instructions of the court were justified by the statute. It is true that the court did not give to the word debauchery or to the purpose of the statute the limited definition and extent contended for by defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that someone else should do so. In the view of the court the statute had a more comprehensive prohibition, and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in "sexual actions." The general expressions of the court, however, were qualified to meet and not go beyond the conduct of the defendants. The court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended "to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually." That question, the court said, the jury should determine, and further: "You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendants. *Was or was not it a[333 condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?" The plan and place justified the instructions. The plan might have succeeded if the coarse precipitancy of one of the defendants and the ribaldry of the *habitués* of the place had not shocked the modesty of the girl. And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover.

Judgment affirmed.

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DELLA BENNETT, Plff. in Err. and Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 333–339.)

**Commerce — power of Congress — white slave act.**

1. Congress, in the exercise of its power to regulate commerce, could lawfully enact the provisions of the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing of such transportation.

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NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216, and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

**Variance — misnomer — criminal case.**

2. A double variance between the name by which the woman transported contrary to the white slave act of June 25, 1910, was called in the indictment, and the name by which she was known to the defendant, and her real name, is not fatal, where the record shows that the defendant was informed of the charge against her, and is in such shape as to protect her against another prosecution for the same offense.

[For other cases, see Evidence, 2774–2783, in Digest Sup. Ct. 1908.]

**Variance — in prosecution under white slave act — place of procuring tickets.**

3. Proof that the railroad tickets on which women were transported contrary to the white slave act of June 25, 1910, were purchased in Cincinnati and sent to Chicago, where the women obtained them and used them for transportation from that place, is not a fatal variance from the allegation in the indictment that the tickets were procured in Chicago.

[For other cases, see Evidence, 2774–2783, in Digest Sup. Ct. 1908.]

**Variance — in prosecution under white slave act — number of women transported.**

4. Proof establishing the transportation of one woman, contrary to the white slave act of June 25, 1910, instead of two, as charged in the indictment, does not constitute a fatal variance.

[For other cases, see Evidence, 2774–2783, in Digest Sup. Ct. 1908.]

**Trial — requested instruction — substance contained in charge given.**

5. The court is not bound to give a requested instruction where the subject-matter was covered by the general charge.

[For other cases, see Trial, 796–822, in Digest Sup. Ct. 1908.]

**Trial — instructions — corroboration.**

6. An instruction that there was evidence tending to corroborate the testimony of an accomplice is not open to the objection that the court thereby instructed the jury that there was corroborating evidence,—especially where the court added that the force and weight of its corroborating power was for the jury to determine.

[For other cases, see Trial, VII., in Digest Sup. Ct. 1908.]

[No. 603.]

Argued January 7 and 8, 1913. Decided February 24, 1913.

IN ERROR to and on Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to review a judgment which affirmed a conviction in the District Court for the Southern District of Ohio for a violation of the white slave act. Affirmed.

See same case below, 114 C. C. A. 402, *194 Fed.* 630.

*The facts are stated in the opinion.*

Mr. Max Levy argued the cause and filed a brief for plaintiff in error and petitioner:

Persons are not subjects of commerce.

New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Boyce v. Anderson, 2 Pet. 150, 7 L. ed. 379.

The true test as to whether an article or thing is a proper subject of commerce and can be considered as a commercial article is whether the said article or thing is merchantable.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 489, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Peirce v. New Hampshire, 5 How. 599, 12 L. ed. 299.

Under power to regulate commerce, Congress has no power to declare the status which any person shall sustain while in a state.

17 Am. & Eng. Enc. Law, 2d ed. p. 52; Lemmon v. People, 26 Barb. 270, affirmed in 20 N. Y. 562.

The intent in a case of this character does not govern, but it is the condition in which each article or subject is found.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The various states of the Union have not delegated to Congress the right to interfere with their police powers, such as the regulation of prostitution, etc.

Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

Congress cannot interfere with the police powers of the states.

United States v. E. C. Knight Co. 156 U. S. 13, 39 L. ed. 329, 15 Sup. Ct. Rep. 249.

Congress having passed no act making it unlawful for women to travel from state to state for any purpose, it is equivalent to the declaration of Congress that such travel by such persons shall be free and untrammeled.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Hall v. DeCuir, 95 U. S. 485, 490, 24 L. ed. 547, 548; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.

The only right that Congress has, under the enumerated powers of the Constitution, is in cases of immigration; as the subject of immigration comes under the power of Congress to regulate commerce with foreign countries.

Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

The power conferred upon Congress to regulate commerce with foreign nations and among the several states is the power to

prescribe the rules by which such commerce shall be governed,—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled; how far it shall be burdened by all duties and imposts; and how far it shall be prohibited.

7 Enc. U. S. Sup. Ct. Rep. 304.

Under the power to regulate commerce, Congress can exclude, either partially or wholly, any subject belonging within the legitimate sphere of commercial regulation.

United States v. Marigold, 9 How. 560, 13 L. ed. 257.

Freedom of travel and intercourse cannot be infringed.

Passenger Cases, 7 How. 283, 426, 12 L. ed. 702, 762.

Moral considerations in the special facts of any case should not be considered, if no authority existed for the enactment of any particular law.

Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; 9 Enc. U. S. Sup. Ct. Rep. 509; Mugler v. Kansas, 123 U. S. 623–661, 31 L. ed. 205–210, 8 Sup. Ct. Rep. 273; Powell v. Pennsylvania, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257.

The various states have never surrendered the police power to Congress, and therefore the law in question is an infringement upon the police powers of the state.

King v. American Transp. Co. 1 Flipp. 1, Fed. Cas. No. 7,787.

It is not within the province of Congress, or any legislative body, to restrict or restrain the migration of any persons, or their social intercourse.

Freund, Pol. Power, pp. 487, 488 § 457; Ex parte Smith, 135 Mo. 223, 33 L.R.A. 606, 58 Am. St. Rep. 576, 36 S. W. 628; Paralee v. Camden, 49 Ark. 165, 4 Am. St. Rep. 35, 4 S. W. 654; Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629; Re Lee Sing, 43 Fed. 359.

There was a material variance between the facts alleged in the indictments and the proof submitted in the cases.

Goodlove v. State, 82 Ohio St. 365, 30 L.R.A.(N.S.) 134, 92 N. E. 491, 19 Ann. Cas. 893; Underhill, Crim. Ev. 2d ed. §§ 33, 316; Elliott, Ev. § 2715; Penrod v. People, 89 Ill. 150; Hodnett v. State, 117 Ga. 705, 45 S. E. 61; Wharton, Crim. Ev. § 124; Jones, Ev. § 234, pp. 295, 296.

The charge of the trial court on the subject of corroboration is prejudicial error.

Hickory v. United States, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327; Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; Starr v. United States, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919.

The mere aiding of a person, such as the procuring of a railroad ticket, or the lending of money to a traveler with which to purchase a ticket (which is a mere incident), does not come under interstate commerce regulations.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

Assistant Attorney General Harr argued the cause, and, with former Solicitor General Lehmann, filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Plaintiff in error and petitioner was indicted in the district court for the southern district of Ohio for the violation of the act of June 25, 1910 [36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343]. She filed a motion to quash and a demurrer to the indictment, which were overruled, and upon a plea of not guilty she was tried, convicted, and sentenced to eleven months' imprisonment in the county jail in Miami county, Ohio, and to pay the costs of the prosecution.

She made motions for a new trial and in arrest of judgment, which were overruled, and she then prosecuted error to the circuit court of appeals, where the judgment against her was affirmed. 114 C. C. A. 402, 194 Fed. 630.

The demurrer and the motion in arrest of judgment raised the question of the constitutionality of the statute, and the decision of the circuit court of appeals sustaining the ruling of the district court, is assigned as error. The constitutionality of the law was decided in No. 381 [227 U. S. 308, ante, 523, 33 Sup. Ct. Rep. 281], and the reasons there given need not be repeated.

Rulings of the district court and the decision of the circuit court of appeals upon them are also assigned as error.

*(1) Defendant was indicted for hav- [338
ing caused the transportation of Opal Clarke; and, it is said, the testimony showed that her correct name was Jeanette, but that she had gone by the names of Opal and Nellie, her real name, however, being Jeanette Laplante. A variance is hence asserted between the allegation and the proof. The court of appeals rightly disposed of the contention. As the court said, the essential thing in the requirement of correspondence between the allegation of the name of the woman transported and the proof is that the record be in such shape as to inform the defendant of the charge against her and to protect her against another prosecution for the same offense. The rec-

ord is sufficient for both purposes. As the court of appeals said: "This leaves no possible ground for prejudice resulting from the double variance between the name used in the indictment and the name known to the respondent and the real name."

(2) The defendant, at the conclusion of the testimony, moved the court to instruct the jury to return a verdict of not guilty on the second count of the indictment for the reason that the indictment alleged that the tickets were procured at Chicago, Illinois, whereas the testimony showed that they were procured in Cincinnati, Ohio. The circuit court of appeals did not pass on that assignment. It was either not made, or it was considered to have no substantial support by the testimony. The only testimony referred to is that the tickets were purchased in Cincinnati and sent to the depot at Chicago, where the women transported got them and used them for transportation from there. It is not possible to imagine that the variance caused any prejudice, and the assignment may be passed without further comment.

(3) Another variance is asserted, in that the indictment charged the transportation of two women and the proof established the transportation of one. This again is a contention which has more of technicality 339]than substance. *How what the defendant did not do can be considered material description of what she did do is not easy to imagine.

(4) There are errors assigned on instructions requested and instructions refused. The contention of defendant apparently is that both women charged to have been transported should have been objects of her intention and purpose. That aspect of the contention we have disposed of. So far as the instructions refused directed the attention of the jury to the intent and purpose alleged, they were covered by the general charge of the court.

(5) The basis of this contention is that Opal Clarke was the accomplice of defendant as to Ella Parks, and that hence the court erred in its instructions to the jury in regard to the extent of the corroboration Opal Clarke's testimony had received.

The instruction complained of submitted to the jury the fact, and warned against a conviction upon the uncorroborated testimony of an accomplice, and said: "Necessarily, if you find that she was an accomplice with respect to these charges or any of them, you will then necessarily have to inquire into the facts as to whether or not there is corroborating testimony. There is evidence tending to corroborate her testimony, and it is for you to consider its force and value and the weight to give to it." The contention is that this was error, "as the court instructed the jury that there *was* corroborating evidence, when the court should have charged the jury that it was for them to ascertain from the testimony whether or not there was corroborating testimony." The objection is hypercritical. The court did not instruct the jury that there was corroborating testimony, but testimony of that tendency; and added that the force and weight of its corroborating power was for the jury to determine.

The record presents no error and the judgment is affirmed.

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*EMMA HARRIS, alias Emma R.[340 Smith, and Bessie Green, Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 340, 341.)

**Commerce — power of Congress — white slave act.**

1. Congress, in the exercise of its power to regulate commerce, could lawfully enact the provisions of the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing of such transportation.

**Appeal — objections not raised below — variance.**

2. The objection that there was a variance between allegations and proof in a prosecution under the white slave act of June 25, 1910, in that the names by which the women transported were called in the indictment were shown by the proof to differ from their real names, if available at all, comes too late where not raised either in the trial court or in the circuit court of appeals.

[For other cases, see Appeal and Error, VIII. j. 5, in Digest Sup. Ct. 1908.]

[No. 602.]

Argued January 7 and 8, 1913. Decided February 24, 1913.

IN ERROR to and on Writ of Certiorari to the United States Circuit Court of

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Note.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216, and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

Appeals for the Sixth Circuit to review a judgment which affirmed a conviction in the District Court for the Southern District of Ohio of a violation of the white slave act. Affirmed.

See same case below, 114 C. C. A. 406, 194 Fed. 634.

The facts are stated in the opinion.

Mr. **Max Levy** argued the cause and filed a brief for plaintiffs in error.

Assistant Attorney General **Harr** argued the cause, and, with former Solicitor General Lehmann, filed a brief for defendant in error.

For contentions of counsel, see their briefs as reported in Bennett v. United States, ante, 531.

Mr. Justice **McKenna** delivered the opinion of the court:

Indictment under the act of June 25, 1910 [36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343]. It contains three counts charging defendants (we 341 shall so call plaintiffs *in error and petitioners) with transporting and causing to be transported in interstate commerce certain named women, for the purpose of prostitution.

After a demurrer to the indictment was overruled and trial upon the plea of not guilty, defendants were convicted, and defendant Harris was sentenced to four years' imprisonment and defendant Green for one year, both to pay costs of prosecution, and judgment was entered accordingly. The judgment was affirmed by the circuit court of appeals. 114 C. C. A. 406, 194 Fed. 634.

The question of the constitutionality of the law was raised as in the cases which we have just decided, and nothing need be added to the opinion expressed in No. 381 [227 U. S. 308, ante, 523, 33 Sup. Ct. Rep. 281], and we will pass to the errors assigned.

It is contended that there is a variance between the allegations and proof, in that the women transported were named in the indictment as Nellie Stover and Stella Larkins, and that the proof shows the latter's name was Estelle Bowles and the right name of Nellie Stover was Myrtie Watson. The point was not made either in the trial court or in the court of appeals. It comes, therefore, too late. But see, however, the opinion in No. 603 [227 U. S. 333, ante, 531, 33 Sup. Ct. Rep. 288].

The next point made by defendants is that defendant Harris was entitled to an acquittal because of the insufficiency of the evidence to support a verdict of guilty. In passing on this contention the court of appeals reviewed the evidence and added its judgment of its sufficiency to that of the jury. We refer to the opinion of the court and concur in its comment and conclusion.

Judgment affirmed.

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*THOMAS B. STUART and Charles[342 A. Murray, Petitioners,
v.
UNION PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 342–354.)

**Public lands — railroad land grant — right of way.**

1. The grant of a right of way through the public lands from the Missouri river to the initial point of the Union Pacific Railroad on the 100th meridian, made by the act of July 1, 1862 (12 Stat. at L. 489, chap. 120), § 9, for the benefit of the Leavenworth, Pawnee, & Western Railroad Company, was extended westerly to the point where that road or its successor connected with the Union Pacific Railroad by the act of July 2, 1864 (13 Stat. at L. 356, chap. 216), § 9, under which "any company authorized by this act to construct its road" from the Missouri river to the aforesaid initial point was empowered to construct its road so as to connect with the Union Pacific Railroad at any point farther west, deemed desirable, the company in such case to be entitled to all the benefits and subject to all the conditions and restrictions of the act.

[For other cases, see Public Lands, 320–329, in Digest Sup. Ct. 1908.]

**Public lands — railroad land grants — relation.**

2. The Leavenworth, Pawnee, & Western Railroad Company, or its successor, was not excluded from the benefit of the provision of the act of July 2, 1864, § 9, under which "any company authorized by this act to construct its road" from the Missouri river to the initial point of the Union Pacific Railroad was authorized to construct such road so as to connect with the latter railroad at any point farther west deemed desirable, because it was not one of the two roads whose construction was authorized by that act, since this act must be construed in connection with the act of July 1, 1862, which, in § 9, authorized the former railroad to build from the Missouri river to the initial point of the Union Pacific Railroad, the later act not making a new and additional grant, but enlarging the original grant by substituting words of larger import.

[For other cases, see Public Lands, 108–124, in Digest Sup. 1908.]

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NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On adverse possession of railroad right of way—see note to Roberts v. Sioux City & P. R. Co. 2 L.R.A.(N.S.) 272.

L. ed. 975, 979, 14 Sup. Ct. Rep. 11; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 497, 24 L. ed. 1095, 1097; United States v. Southern P. R. Co. 146 U. S. 570, 593, 594, 598, 36 L. ed. 1091, 1097, 1098, 13 Sup. Ct. Rep. 152.

As to what was the intent of Congress in making such liberal grants to the predecessors in title of the appellee, including the grant of the right of way, it is proper to inquire what were the conditions existing at the time, and what was the aim and purpose of Congress in enacting the statutes.

United States v. Union P. R. Co. 160 U. S. 1, 19–28, 40 L. ed. 319, 325–328, 16 Sup. Ct. Rep. 190; United States v. Union P. R. Co. 91 U. S. 72, 32 L. ed. 224.

In respect of the grant of odd-numbered sections, it has always been held from the beginning that these acts of Congress granted the same, as of the date of the act, and that when the sections were identified by the final and definite location of the railroad, all intervening claims yielded, except as to those sections mentioned above, specifically reserved or excepted from the grant by the act of Congress.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 496, 24 L. ed. 1095, 1096; United States v. Burlington & M. River R. Co. 98 U. S. 334, 25 L. ed. 198; Van Wyck v. Knevals, 106 U. S. 360, 365, 27 L. ed. 201, 202, 1 Sup. Ct. Rep. 336; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 416–418, 28 L ed. 795, 796, 5 Sup. Ct. Rep. 208; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 633, 28 L. ed. 1122, 1123, 5 Sup. Ct. Rep. 566; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 5, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389; United States v. Southern P. R. Co. 146 U. S. 570, 593, 36 L. ed. 1091, 1097, 13 Sup. Ct. Rep. 152.

When identified by the definite or final location of the railroad, all rights or claims which had attached to the lands between the date of the act of Congress and the date of the final and definite location necessarily yielded and were subject to the paramount and prior grant.

St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Bybee v. Oregon & C. R. Co. 26 Fed. 588, 139 U. S. 663, 674–679, 35 L. ed. 305, 306–308, 11 Sup. Ct. Rep. 641; Smith v. Northern P. R. Co. 7 C. C. A. 397, 19 U. S. App. 131, 58 Fed. 515, 171 U. S. 260, 267, 43 L. ed. 157, 160, 18 Sup. Ct. Rep. 794; Northern P. R. Co. v. Ely, 197 U. S. 1, 5, 49 L. ed. 639, 640, 25 Sup. Ct. Rep. 302; Northern P. R. Co. v. Hasse, 197 U. S. 9, 10, 49 L. ed. 642, 643, 25 Sup. Ct. Rep. 305; Union P. R. Co. v. Harris, 215 U. S. 386, 389, 54 L. ed. 246, 248, 30 Sup. Ct. Rep. 138; Kindred v. Union P. R. Co. 94 C. C. A. 112, 168 Fed. 652, affirmed in 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Union P. R. Co. v. Karges, 169 Fed. 459.

The act of 1864 authorized the line of railroad which was constructed across petitioners' land, and therefore granted the right of way.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 494, 24 L. ed. 1095, 1096; United States v. Union P. R. Co. 37 Fed. 551; United States v. Kansas P. R. Co. 99 U. S. 455, 457, 25 L. ed. 289, 290; United States v. Union P. R. Co. 148 U. S. 562, 569, 37 L. ed. 560, 562, 13 Sup. Ct. Rep. 724; 11 Ops. Atty. Gen. p. 462; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 637, 28 L. ed. 1124, 5 Sup. Ct. Rep. 566.

The requirement that a map of general route be filed had no relation to the right-of-way grant. There was no requirement that a map of definite location be filed. Therefore, the failure to file either or both maps, or the actual construction upon a line entirely different from that specified in the map of general route, could not affect the right of way.

Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 634, 28 L. ed. 1122, 1123, 5 Sup. Ct. Rep. 566; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 417, 28 L. ed. 795, 5 Sup. Ct. Rep. 208; Walden v Knevals, 114 U. S. 373, 29 L. ed. 167, 5 Sup. Ct. Rep. 898; Knevals v. Hyde, 6 Fed. 651; United States v. McLaughlin, 30 Fed. 147.

The lands granted might be made definite, either by filing a map of definite location or by actual construction. In either event, the title to the lands, when thus identified, related back to the date of the act.

Central P. R. Co. v. Dyer, 1 Sawy. 641, Fed. Cas. No. 2,552; Buttz v. Northern P. R. Co. 119 U. S. 55, 71, 72, 30 L. ed. 330, 336, 337, 7 Sup. Ct. Rep. 100; Union P. R. Co. v. Greeley, 110 C. C. A. 571, 189 Fed. 1; Nielsen v. Northern P. R. Co. 106 C. C. A. 581, 184 Fed. 601; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; Union P. R. Co. v. Douglass County, 31 Fed. 540; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 Pac. 401; Wilkinson v. Northern P. R. Co. 5 Mont. 547, 6 Pac. 349; Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568; Denver & R. G. R. Co. v. Hanoum. 19 Colo. 162, 34 Pac. 838.

Even if there had been an express requirement in the act that a map of definite location be filed, yet the failure to file the same, like the failure to make the reports

required by § 20 of the act of 1862, adverted to by the petitioners, or the failure, if such failure had occurred, to complete the line of railroad within the time required, would not avail petitioners. These and similar requirements, if conditions at all, which we dispute, were conditions subsequent, for the title to the lands embraced within the right of way had vested before the time when any of these acts were required to be done. Viewed in that light, a failure on the part of the railroad company to fulfil any or all of such requirements cannot be taken advantage of by a private individual. That privilege rests with the United States alone.

Schulenberg v. Harriman, 21 Wall. 44, 62, 22 L. ed. 551, 555; Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; St. Louis, I. M. & S. R. Co. v. McGee, 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 123; Bybee v. Oregon & C. R. Co. 26 Fed. 588, 139 U. S. 663, 673–681, 35 L. ed. 305, 306–309, 11 Sup. Ct. Rep. 641; Atlantic & P. R. Co. v. Mingus, 165 U. S. 414, 431, 41 L. ed. 770, 777, 17 Sup. Ct. Rep. 348; United States v. Northern P. R. Co. 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. Rep. 706; Denny v. Dodson, 32 Fed. 899; Utah, N. & C. R. Co. v. Utah & C. R. Co. 110 Fed. 879; Chicago, R. I. & P. R. Co. v. Grinnell, 51 Iowa, 476, 1 N. W. 712.

The reference by the words "this act" must be the act of 1862, as amended by the act of 1864; and the Supreme Court of the United States, in construing this sentence, has so held.

Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; United States v. Stanford, 17 C. C. A. 143, 44 U. S. App. 68, 70 Fed. 346.

The repeal of statutes by implication is not favored by law. It is not to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs.

Osborn v. Nicholson, 13 Wall. 654, 662, 20 L. ed. 689, 695; Doolittle v. Bryan, 14 How. 563, 14 L. ed. 543.

The same rule applies if the later act be regarded merely as a legislative construction of the language of the prior act.

Ogden v. Blackledge, 2 Cranch, 275, 2 L. ed. 277; Koskonong v. Burton, 104 U. S. 668, 669, 26 L. ed. 886, 887; Reynolds v. M'Arthur, 2 Pet. 417, 435, 7 L. ed. 470, 476.

The fact that the railroad company placed fences on the 50-foot line is of no significance.

Kindred v. Union P. R. Co. 94 C. C. A. 112, 168 Fed. 654, 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Slocumb v. Chicago, B. & Q. R. Co. 57 Iowa, 675, 11 N. W. 641; East Tennessee, V. & G. R. Co. v. Telford (East Tennessee, V. & G. R. Co. v. West) 89 Tenn. 294, 10 L.R.A. 855, 14 S. W. 776; Louisville & N. R. Co. v. French, 100 Tenn. 209, 66 Am. St. Rep. 752, 43 S. W. 771; Pennsylvania R. Co. v. Freeport, 138 Pa. 91, 20 Atl. 940; Sapp v. Northern C. R. Co. 51 Md. 115; Union P. R. Co. v. Kindred, 43 Kan. 134, 23 Pac. 112; McLucas v. St. Joseph & G. I. R. Co. 67 Neb. 612, 93 N. W. 928, 97 N. W. 312, 2 Ann. Cas. 715; Roberts v. Sioux City & P. R. Co. 73 Neb. 8, 2 L.R.A. (N.S.) 272, 102 N. W. 60, 10 Ann. Cas. 992; Moran v. Chicago, B. & Q. R. Co. 83 Neb. 680, 120 N. W. 192.

After the passage of the act of Congress, all public lands must be disposed of subject to the right of way, without regard to the date of definite location of the road.

Washington & I. R. Co. v. Osborn, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219; Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728; Denver & R. G. R. Co. v. Wilson, 28 Colo. 6, 62 Pac. 843; Jamestown & N. R. Co. v. Jones, 7 N. D. 619, 76 N. W. 227, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568; Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty, 208 U. S. 251, 52 L. ed. 474, 28 Sup. Ct. Rep. 291.

Even under the act of March 3, 1875, the subsequent abandonment or relinquishment of a pre-emption filing which was in full force and effect at the time of the grant to the railroad company serves to vest complete title in the railroad company as of the date of its grant.

Jamestown & N. R. Co. v. Jones, 7 N. D. 619, 76 N. W. 227, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568; Bonner v. Rio Grande Southern R. Co. 31 Colo. 446, 72 Pac. 1065; Alexander v. Kansas City, Ft. S. & M. R. Co. 138 Mo. 464, 40 S. W. 104; Hamilton v. Spokane & P. R. Co. 3 Idaho, 164, 28 Pac. 408; Wagstaff v. Collins, 38 C. C. A. 19, 97 Fed. 3; Norton v. Evans, 27 C. C. A. 168, 49 U. S. App. 669, 82 Fed. 804; Hebert v. Brown, 65 Fed. 2; Edwards v. Begole, 57 C. C. A. 245, 121 Fed. 1; Moss v. Dowman, 31 C. C. A. 447, 60 U. S. App. 69, 88 Fed. 181, affirmed in 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429.

Even though petitioners' contention be sustained, they are not entitled to recover, under the doctrine announced by this court in Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; Denver & R. G. R. Co. v. Doelz, 49 Colo. 55, 111 Pac. 595; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 698, 42 L. ed. 626, 631, 18 Sup. Ct. Rep. 223; Northern P. R. Co. v. Smith, 171 U. S. 260, 271, 43 L. ed. 157, 161, 18

Sup. Ct. Rep. 794; Texas & P. R. Co. v. Scott, 37 L.R.A. 94, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726; Northern P. R. Co. v. Murray, 31 C. C. A. 183, 59 U. S. App. 487, 87 Fed. 648; Maffet v. Quine, 93 Fed. 347; King v. Southern R. Co. 119 Fed. 1017; Louisville & N. R. Co. v. Smith, 63 C. C. A. 1, 128 Fed. 1; Fortune v. Chesapeake & O. R. Co. 22 Ky. L. Rep. 749, 58 S. W. 711; Buckwalter v. Atchison, T. & S. F. R. Co. 64 Kan. 403, 67 Pac. 831; Chicago, B. & Q. R. Co. v. Englehart, 57 Neb. 444, 77 N. W. 1092; Kindred v. Union P. R. Co. 225 U. S. 582, 596, 597, 56 L. ed. 1216, 1220, 32 Sup. Ct. Rep. 780.

Mr. Justice McKenna delivered the opinion of the court:

Suit to quiet title to the E. ½ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ of section 20, township 38, range 67 west, situated in the city and county of Denver (formerly in Arapahoe county), state of Colorado.

The suit was brought in the district court of the city and county of Denver, against the Kansas Pacific Railway Company, the Colorado Eastern Railroad Company, and the Union Pacific Railroad Company, and removed on the petition of the latter company to the United States circuit court for the district of Colorado, on the ground of a separable controversy. A motion to remand was made and denied. The railroad company answered, joining issue as to so much of the lands as constituted a tract 200 feet in width on each side of its road. It asserted title as successor of the Kansas Pacific Railway Company, which had been granted the tract as a right of way, it was alleged, by the acts of Congress generally denominated the Pacific Railroad acts.

The discussion in the case will turn upon the title of the railroad rather than upon 344]the title of petitioners. There is *no question of their title if that of the respondent company be not good. The circuit court held that the title of the company was good, and dismissed the bill. The circuit court of appeals decided that the dismissal of the bill was error; that the court should have recognized the company's title to the right of way, and have quieted petitioners' title to the remainder. The decree of the circuit court was modified accordingly. 103 C. C. A. 89, 178 Fed. 753.

The Pacific Railroad acts have been before this court so many times that it seems unnecessary to make further quotation from them. The first of them was passed July 1, 1862 (12 Stat. at L. 489, chap. 120); the second one, July 2, 1864 (13 Stat. at L. 356, chap. 216); and two others respectively on July 3, 1866 (14 Stat. at L. 79, chap. 159), and March 3, 1869 (15 Stat. at L. 324, chap. 127). Their relation constitutes the controversy in the case, and, simply stated, it is whether the right of way granted to the Leavenworth, Pawnee, & Western Railroad Company, the name of which was changed in 1863 to Union Pacific Railway Company, Eastern Division, and in 1864 to the Kansas Pacific Railway Company, terminated at the 100th meridian or extended westward of that point to Denver. The petitioners contend for the former; the railroad company, for the latter.

The explicit contention of petitioners is that the right of way granted to the Kansas Pacific Railway Company (we use the latest name) does not extend to the lands in question, for that company, under its first name of Leavenworth, Pawnee, & Western Railroad Company, and all other eastern branches of the main line, were authorized to build only to the 100th meridian, and no farther.

The main line was, under the act of July 1, 1862, authorized to be constructed by the Union Pacific Railroad Company westward through Cheyenne to the western boundary of Nevada, and possibly farther, to meet the Central Pacific Railroad, which was authorized to *build from the[345 coast eastward. To the main line so constituted grants of land and bonds were made and a right of way was granted through all public lands "200 feet in width on each side of said railroad where it may pass over public lands." The initial point of the Union Pacific was to be the "100th meridian . . . between the south margin of the valley of the Republican and the north margin of the valley of the Platte, in the territory of Nebraska."

Section 9 of the act authorized the Leavenworth, Pawnee, & Western Railroad to construct a road from the Missouri river at the mouth of the Kansas "to the aforesaid point on the 100th meridian . . . upon the same terms and conditions in all respects" as provided for the main line. The road was required to be so located through Kansas as to be between the mouth of the Kansas river and the designated point on the 100th meridian, and it was provided that the several roads from Missouri and Iowa authorized by the act to connect with the same could make the connection within the limits prescribed in the act, providing it could be done without deviating from the general direction of the whole line to the Pacific coast.

There is no uncertainty in the act of 1862. The initial point of the main line was the 100th meridian, and at that point

the Leavenworth, Pawnee, & Western Railroad Company (now the Kansas Pacific Railway) and other eastern branches were to connect with the main line.

The next act is that of July 2, 1864, and on its provisions arise the principal controversy in the case. It is contended by the respondent railroad company that the act authorized the Kansas Pacific Road (then, as we shall see, the Union Pacific Railroad, Eastern Division) to build westward of the 100th meridian, and granted it, besides certain sections of the public lands, 346]a right of way *400 feet wide, 200 feet either side of the center of its track. Petitioners oppose the contention, and insist that the act only aimed to provide for the convenient connection of certain branch roads with the main trunk line at or near the 100th meridian, and did not extend a right of way to any branch beyond the 100th meridian. Comparing the two acts, petitioners say that the act of 1862 referred solely to the right of way through *public* lands. The act of 1864 referred solely to condemnation of right of way through *private* lands and to granting facilities of connection with the Union Pacific through ferries and bridges over navigable rivers. The permission to build westwardly, it is further urged, was not given to all branches, but only to such as were made branches by the act of 1864. The contentions are earnestly argued and are made to rest mainly on § 9 of the act.

The act of 1864 was entitled, "An Act to Amend" the act of 1862, and it was provided by § 9 that ". . . any company authorized by *this* act to construct its road and telegraph line from the Missouri river to the initial point aforesaid [100th meridian] may construct its road and telegraph line so as to connect with the Union Pacific Railroad *at any point westwardly of such initial point*, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, *such company shall be entitled to all the benefits* and be subject to all the conditions and restrictions of this act: Provided further, however, that the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the 100th degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided." (Italics ours.)

347] *At the time of the passage of that act, the Leavenworth, Pawnee, & Western Railroad Company (now the Kansas Pacific Railway Company) was known as the Union Pacific Railroad Company, Eastern Division, in accordance with lawful authority given in 1863. The time for the completion of its line was extended, and by the act of July 3, 1866, it was given until December 1, 1866, to file the map of general route. Upon filing the map the lands along the entire line of the general route were to be reserved by the Secretary of the Interior. It was provided that the company should be entitled only to the same amount of bonds "as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the 100th degree of longitude, as now required by law. And, provided further, that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westward from the meridian of Denver in Colorado."

By applying very simple rules of construction to these acts, and from a consideration of their purpose and the means which were deemed necessary to accomplish that purpose, we should have to reject the contention of plaintiffs. We are relieved, however, of the necessity of a lengthy discussion, and one which we might consider necessary, in deference to the earnestness of counsel, by the previous decisions of this court, and may rest our judgment on their authority.

The acts of Congress came up for consideration and construction in Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 494, 24 L. ed. 1095, 1096, upon the very points now involved. The contest was between the two railroad companies as to which was entitled to certain lands; whether the Kansas Pacific Railway Company took them under the act of 1862, as amended in 1864, or whether the Missouri, etc. Railway Company was entitled to them under a grant to it made July 26, 1866. It is manifest *that the issue presented[348 was an important one and had important consequences. The court intimated that principles and considerations upon which it should be decided affected other rights as well as those contested, and necessarily gave them a proportional consideration. The opinion demonstrated it. It was decided that the act of 1862 and that of 1864 practically constituted one act, and the enlargement by the latter of the grant made by the former took effect at the date of the former; and "this was done," it was said, "not by words of a new and an additional grant, but by a change of words in the original act, substituting for those

there used words of larger import." It was further decided that the act of 1864 "authorized the plaintiff [the Kansas Pacific Railway Company] to construct its road and telegraph line so as to connect with the Union Pacific road at a point west of its initial point, in case it deemed such westward connection more practicable or desirable." This is the language, it will be observed, of § 9 of the act of 1864. The court used it as the best means of expressing the purpose of the act.

In United States v. Kansas P. R. Co. 99 U. S. 455, 25 L. ed. 289, the extent of the grant made by the acts of 1862 and 1864 again came up for decision, and upon issues more pertinent to the present controversy, if possible, than those in the other case. The case concerned the extent of the lien of the government and the liability of the company for 5 per cent of the net earnings of that portion of the road of the company west of the 100th meridian. The answer was considered as turning on the construction of § 9, supra. Commenting on its provisions, the court said: "It thus appears that whilst the company was authorized to extend its road west of the 100th meridian, if it saw fit so to do, it was entirely in its option; and if it did, it was not to expect, or have, any subsidy of government bonds for such extension."

349] *The road was actually built to Denver, 245 miles beyond the 100th meridian, and upon this part of the road the government claimed a lien as well as upon the road east of the meridian. Passing on the claim, the court said: "A material question in this case is whether the whole line to Denver, or only the line which the company was first authorized to construct (which terminated at the 100th meridian), is liable to the lien for the government subsidy, and the payment of 5 per cent of net earnings." Answering the question, it was observed: "From a careful examination of the statutes relating to this subject, we are of opinion that, whilst, as to its entire line, the company, in the words of the 9th section of the act of 1864, is 'entitled to all the benefits and subject to all the conditions and restrictions of the act,' and is bound to furnish transportation and telegraphic accommodations to the government on the usual terms, yet that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the 100th meridian, are a lien on that portion only; and that the 5 per cent of the net earnings is only demandable on the net earnings of said portion." See also United States v. Union P. R. Co. 148 U. S. 562, 37 L. ed. 560, 13 Sup. Ct. Rep. 724; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566.

It may be said that Union P. R. Co. v. Harris, 215 U. S. 386, 54 L. ed. 246, 30 Sup. Ct. Rep. 138, puts a different construction upon the acts of 1862 and 1864 from that received in the cases cited, and, it must be admitted, there is language in the opinion which may be so understood; but that it was not so intended is made clear by Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780, where it is again declared that under congressional authority the route of the road was changed so that its connection with the Union Pacific Railroad would be made at a point farther west than was originally intended.

*These cases decided that the Kansas[350 Pacific Railway Company had a right to build west of the 100th meridian. It is not necessary, therefore, to consider the special features of the acts upon which petitioners rest their contention that the Kansas Pacific had no such right. The basic one, however, we will mention, lest it be thought that we have overlooked it or have not properly estimated its force. It is that the acts of 1862 and 1864 should not be considered and construed as one act; that though their provisions had relation in some instances, in others they had independent effect. Section 9, it is contended, is of the latter character, and is given a specific application by the proviso, which is in the following words: "And provided further, that any company authorized by *this act* [italics ours] to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point." It is contended that these words exclude the Kansas Pacific Railway Company because the only two railroads authorized by "this act" to be constructed were the Sioux City Railroad (§ 17) and the Burlington & Missouri River Railroad (§ 18). But that the words "this act" should have such limited application was necessarily involved in the other cases and was adversely decided.

We have seen that the act of July 3, 1866, extended the time of the Union Pacific Railroad Company, Eastern Division (now the Kansas Pacific), to file its map of general route, and provided for a reservation of land all along the route; but it also provided that the company should be entitled only to the same amount of bonds as it would have been entitled to if it had connected its line "with the Union Pacific Railroad on the 100th degree of longitude,

*as now required by law.*" (Italics ours.) It is insisted by petitioners that this pro-
351]vision is a legislative construction *of the act of 1864, and "conclusive upon the point that it was defendant's [Kansas Pacific Railway, then Union Pacific Railroad, Eastern Division] duty, at the date of said act, to unite with the U. P. R. R. at the 100th meridian, and has the same effect as a special enactment of that date to that effect." The circuit court of appeals rejected this contention, and construed the provision not as requiring the connection of the road to be at the given meridian, but as declaring that there should not be issued to the company bonds for a greater amount than if there had been a union with the Union Pacific at that point. And this necessarily must have been determined to be the true construction in the cited cases. We have said, perhaps with unnecessary repetition, that all the acts were under consideration in those cases and their true relation and meaning decided.

There are specific contentions addressed to the grant of the right of way. Some of them involved the element that the acts of Congress granted no right to the Kansas Pacific Railway Company to build west of the 100th meridian. That we have disposed of. Some of them are based on the following propositions: (1) that a grant of the right of way cannot be implied; it must actually exist in express words; (2) it cannot be implied from the use of the word "'benefits,'" as there are many other benefits in the same act to which that word more aptly applies; (3) it is shown by the act that it never was intended to apply to the right of way. The last two contentions may be immediately rejected. The act manifestly applies to a right of way, and there is no distinction made between "benefits," for the language is "shall be entitled to all the benefits," save that of receiving bonds. A right of way is a substantial and obvious benefit. St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 430, 26 L. ed. 578, 579.

There are two other contentions which deserve more extended comment. They are,
352](a) "that the act of 1864, *being simply an option offered to certain roads to build westwardly," etc., it must be shown that they accepted said option by filing maps thereunder, changing the old route, and designating the new one. (b) "That the grant of a right of way is necessarily in the nature of a float, although a grant *in præsenti*, like a military land warrant. It becomes fixed only by filing a map of definite location or by actual construction."

In reply to these contentions the respondent company insists *that neither* a map of general location nor of general route was necessary to the acquisition of a right of way; that actual construction would secure it. The evidence as to filing maps is somewhat uncertain. The circuit court of appeals in its opinion says: "There was some evidence indicating that a map, showing the general route of the railroad westwardly to the eastern Colorado line, was filed with the Secretary of the Interior prior to November 30, 1866, the date not being more definitely stated; that a map showing the general route from the eastern Colorado line to Denver was accepted by that officer November 30, 1866, and that a map showing the definite location of the railroad to Denver was filed in the land office of Denver September 24, 1870; but none of these maps, nor any better statement of what was shown thereon, was offered in evidence."

It is, however, admitted by petitioners, that a right of way could be acquired by actual construction of the road, and the railroad company finally rests its title on actual construction of the road under the granting acts. It admits that "the line of railroad was not definitely located until the actual construction thereof." But it is contended that upon its construction "the right of way attached to the line as so constructed, but took effect as of the date of the act of 1864." In other words, it is contended that the right of way granted by the acts is given definite location and precision by the construction of the road, and *extends to the width of 200 feet[353 from the center line of the track. This contention is supported by the decisions of this court. Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794. See also Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup Ct. Rep. 671. The road was actually constructed through Denver and to a connection with the Union Pacific at Cheyenne and over the lands in controversy in 1870, and has been in operation ever since. But the right of way to its full width has not been occupied and used. This, however, makes no difference. See cases cited immediately above, and Northern P. R. Co. v. Hasse, 197 U. S. 9, 49 L. ed. 642, 25 Sup. Ct. Rep. 305; Missouri, K. & T. R. Co. v. Cook, 163 U. S. 491, 497, 41 L. ed. 239, 241, 16 Sup. Ct. Rep. 1093.

In this connection it is to be remembered that the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in præsenti*, the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that

it should not include any lands which, although public at the date of the grant, were sold, reserved, or otherwise disposed of by the United States, or to which a preemption or homestead claim had attached, at the date of definite location. Of such a difference between an unconditional grant of a right of way and a qualified grant of alternate odd-numbered sections this court said, in St. Joseph & D. C. R. Co. v. Baldwin, supra: "The uncertainty as to the ultimate location of the line of the road is recognized throughout the act; and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. We see no reason, therefore, for not giving to the words of 354] present grant with respect to the *right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

Petitioners rely upon adverse possession, established, as it is contended, under the statute of Colorado by the payment of taxes, and invoke in connection with such adverse possession the act of June 24, 1912, entitled, "An Act to Legalize Certain Conveyances Heretofore Made by the Union Pacific Railroad Company." [37 Stat. at L. 138, chap. 181.]

Section 1 of the act legalizes all conveyances made by the railroad and railway companies to which grants of a right of way have been made, as we have stated, to the extent that the conveyances "would have been legal or valid if the land involved therein had been held by the corporation making such conveyance or agreement under absolute or fee-simple title." It is further provided that where adverse possession is claimed of any part of such right of way under the laws of the state where the land is situated, such adverse possession shall have the same effect as though the right of way had been granted absolutely or in fee simple, instead of being granted as a right of way. Of the effect of this act we are not called upon to express an opinion other than to say that it cannot avail petitioners, for the record shows that the re-*spondent company* also returned the right *of way for taxation and paid the taxes* thereon. In that respect the parties are on an equal footing.

Decree affirmed.

Mr. Justice Holmes and Mr. Justice Pitney took no part in the decision.

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*NORTHERN PACIFIC RAILWAY [355
COMPANY, Mercantile Trust Company, Henry Yeackel and Flora Yeackel, His Wife; Wilbur S. Badley and Florence Badley, His Wife; C. D. Wise and —— Wise, His Wife; and R. D. McCully, Appts.,

v.

UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 355-367.)

**Boundaries — of Indian reservation — locative calls — mountain range.**

1. The conspicuousness as a landmark of the main ridge of the Cascade mountains requires, when determining the boundaries of the Yakima Indian Reservation, which are defined in the treaty of June 9, 1855 (12 Stat. at L. 951), as beginning at the junction of the Yakima and Attahnam rivers, and proceeding westerly to the forks of the latter, and along its southern tributary to the Cascade mountains, thence "southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers," thence down said spur, following certain divides, to the Yakima river, thence up that river to the place of beginning, that such main ridge be deemed the western line of the reservation, although this may be inconsistent with some of the calls for less conspicuous landmarks in the northern and southern boundaries.

[For other cases, see Boundaries, IV. d, in Digest Sup. Ct. 1908.]

**Public lands — railroad land grants — bona fide purchasers or settlers.**

2. The Northern Pacific Railroad Company and its successor, or their respective vendees of lands which were patented in the mistaken belief that they were public lands granted to the railroad company by the act of July 2, 1864 (13 Stat. at L. 365, chap. 217), while in fact they formed a part of the Yakima Indian Reservation, under the treaty of June 9, 1855, with the Yakimas, are not entitled to the protection accorded by the act of March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), § 1, or the act of December 21, 1904 (33 Stat. at L. 595, chap. 22), to bona fide purchasers or settlers.

[For other cases, see Public Lands, I. c, 2, 1, in Digest Sup. Ct. 1908.]

**Limitation of actions — public lands — suit to cancel patent.**

3. The defense of the statute of limita-

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NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

tions under the act of March 3, 1891 (26 Stat. at L. 1093, chap. 559, as amended, 26 Stat. at L. 1099, chap. 561, U. S. Comp. Stat. 1901, p. 1531), § 8, is not available in a suit brought by the United States to annul patents issued in the mistaken belief that the lands were granted to the Northern Pacific Railroad Company by the act of July 2, 1864, while in fact they formed part of the Yakima Indian Reservation, under the treaty of June 9, 1855, with the Yakimas.

[For other cases, see Limitation of Actions, I. d, in Digest Sup. Ct. 1908.]

[No. 500.]

Argued January 8 and 9, 1913. Decided February 24, 1913.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Washington, annulling patents issued under the supposed authority of a railroad land grant. Affirmed.

See same case below, 112 C. C. A. 359, 191 Fed. 947.

The facts are stated in the opinion.

Mr. Charles Donnelly argued the cause, and, with Mr. Charles W. Bunn, filed a brief for appellants:

A survey made by the government is absolutely conclusive against collateral attack.

West v. Cochran, 17 How. 403, 15 L. ed. 110; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822.

It is said that this is not a collateral but a direct attack; and this is true. The cases cited may be distinguished upon that ground. We cite them here only as showing the respect with which the courts view a definitive departmental ruling and their reluctance to disturb it. But the Maxwell Land-Grant Case, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015, admits of no such distinction.

See also United States v. San Jacinto Tin Co. 125 U. S. 273, 300, 31 L. ed. 747, 756, 8 Sup. Ct. Rep. 850.

Relief must be denied unless there is a fullness of proof of the fraud or the mistake relied upon, of which the proof in this case falls very far short.

Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; United States v. American Bell Teleph. Co. 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; United States v. Iron Silver Min. Co. 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; United States v. Stinson, 197 U. S. 204, 49 L. ed. 725, 25 Sup. Ct. Rep. 426; United States v. Clark, 200 U. S. 608, 50 L. ed. 616, 26 Sup. Ct. Rep. 340.

Defendants are bona fide purchasers, and as such entitled to protection under the act of March 2, 1896.

Pom. Eq. Jur. §§ 724, 767, 774; United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266.

There can be no question as to the power of Congress to grant a perfect title to lands forming a part of an Indian reservation. Not only may it grant the fee, but it may deprive the Indians of their right to occupy the lands granted.

Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 116, 38 L. ed. 379, 14 Sup. Ct. Rep. 496.

In some of the cases brought to cancel patents issued under a railroad grant (as in United States v. Winona & St. P. R. Co. 165 U. S. 463, 482, 41 L. ed. 789, 797, 17 Sup. Ct. Rep. 368; United States v. Southern P. R. Co. 117 Fed. 557, 66 C. C. A. 581, 133 Fed. 651), this court has adverted to the question whether the grantee company might not make up, by selections within indemnity limits, for any deficiency in the primary limits occasioned by the cancelation of patents to place lands, and has apparently deemed this a consideration of importance. If it is of importance, the court will observe from the report of the Commissioner of the General Land Office to the Secretary of the Interior, dated March 26, 1906, which this court will judicially notice (Heath v. Wallace, 138 U. S. 584, 34 L. ed. 1068, 11 Sup. Ct. Rep. 380), that there is already a deficiency of more than 4,000,000 acres in the grant to the Northern Pacific Railroad Company, and by no possibility can this deficiency be supplied from indemnity limits.

The statute of limitations bars the suit as to all patents issued more than six years prior to its commencement.

United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579.

Assistant Attorney General Knaebel argued the the cause, and, with Mr. S. W. Williams, filed a brief for appellee:

The presumption that the survey was cor

rect was, of course, only prima facie. It was not merely overbalanced; it was actually destroyed by the evidence in the case. As soon as it became apparent that, in violation of their plain duty and of their written instructions, the surveyors had made no inquiry into the basis of the Indians' claim, and that, in gross misconception or disregard of the treaty, they had assumed it was their function at all hazards to avoid crossing the Klickitat river,—as soon as this appeared, the foundation of the presumption collapsed.

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

The defense of bona fide purchase is an affirmative defense which must be strictly alleged. And the burden rests upon those who allege it to substantiate every allegation by strict proof.

Boone v. Chiles, 10 Pet. 177, 211, 9 L. ed. 388, 400.

The equity of a bona fide purchaser for value without notice will not prevail against a prior equal equity unless supported by the legal title. In this case the legal title is still held by the United States in trust for the Indians. The land had been set aside for the Indians by the supreme law of the land. The Land Department, therefore, was impotent to convey any part of it, and the issuance of the patents did not disturb the title. The patents were not merely voidable; they were absolutely void.

United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662; Mullan v. United States, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451.

None of the defendants can even plausibly pretend to be a bona fide purchaser in the peculiar sense of the congressional enactments.

Gertgens v. O'Connor, 191 U. S. 237, 242, 48 L. ed. 163, 167, 24 Sup. Ct. Rep. 94; United States v. Southern P. R. Co. 184 U. S. 49, 52, 46 L. ed. 425, 426, 22 Sup. Ct. Rep. 285.

The Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as shall be agreed upon.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 742, 23 L. ed. 634, 638; Minnesota v. Hitchcock, 185 U. S. 373, 389, 46 L. ed. 954, 963, 22 Sup. Ct. Rep. 650.

Mr. W. V. Tanner, Attorney General of Washington, and Mr. R. E. Campbell, Assistant Attorney General, filed a brief for the state of Washington.

Mr. Justice McKenna delivered the opinion of the court:

Bill in equity by the United States to annul patents issued May 10, 1895, and January 6, 1896, to the Northern Pacific Railroad Company, and March 5, 1901, and January 4, 1904, to its successor, the Northern Pacific Railway Company, for certain described lands. The foundation of the bill is that the patents were issued by mistake as public lands granted to the railroad company under the act of Congress dated July 2, 1864 (13 Stat. at L. 365, chap. 217), the lands actually being, it is alleged by the government, part of the Yakima Indian Reservation under a treaty with the Yakimas of June 9, 1855 (12 Stat. at L. 951), ratified March 8, 1859, and proclaimed by the President April 18, 1859.

There is no question made of the title of the railroad and railway companies, or of their respective vendees, other than as the lands fall within or without the reservation. If they were within the boundaries of the reservation, they were lands of the Indians; otherwise, public lands of the United States, and passed to the companies, respectively, under the act of Congress and the patents issued in pursuance thereof.

The question then is, What were the boundaries of the reservation? or—to use the present tense as the more convenient—what are the boundaries of the reservation?

By article 1 of the treaty the Indians ceded, relinquished, and conveyed to the United States a tract of land which was explicitly described, reserving by article 2, from the tract, the land included within the following boundaries:

*Commencing on the Yakima river, at[357 the mouth of the Attahnam river; thence westerly along said Attahnam river to the forks; thence along the southern tributary to the Cascade mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass river from those flowing into the Columbia river; thence along said divide to the main Yakima, 8 miles below the mouth of the Satass river; and thence up the Yakima river to the place of beginning.

All of this tract, it is provided, "shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive

use and benefit" of the Indians, as an Indian reservation.

It will be observed that the calls in the description of the tract reserved are very confident, and seem to assure certainty by prominent and unmistakable natural monuments. Controversies, however, almost immediately arose, the Indians contending for one location of the calls and enterprising settlers contending for another. The Interior Department ordered a survey, which was made. and which is known in this record as the Schwartz survey. Upon this the title of appellants depends. The discontent of the Indians continued and another survey was ordered by the Interior Department to be made by E. C. Barnard. This survey is the foundation of the bill and of the contention of the government. It was made and reported to the Interior Department with a map delineating the exterior boundaries of the reservation. This report was transmitted to the Speaker of the House of Representatives with a draft of a bill granting authority for the detail by the Secretary of the Interior of an Indian inspector to negotiate an agreement with 358]the Indians for the adjustment *of their claim for the lands embraced in the tract claimed by them, containing 293,837 acres, as shown by the Barnard report; that is, for lands without the Schwartz, but within the Barnard, survey.

In pursuance of the recommendation of the Secretary of the Interior, Congress, on December 21, 1904, enacted the statute quoted in the margin.†

After the passage of the act the government demanded a reconveyance of the lands, which was refused. This suit was then brought.

The controversy in the case, therefore, turns upon which of the surveys, Schwartz's or Barnard's, correctly marks the boundaries of the reservation. The difference in the surveys amounts to 293,837 acres. The and entered a decree canceling the patents. circuit court accepted the Barnard survey The decree was affirmed by the circuit court of appeals. 112 C. C. A. 359, 191 Fed. 947.

*The special controversy in the case is[359 the location of the western boundary of the reservation. But, as partly determinative of that, the western point of the northern boundary must be considered. The northern boundary of the reservation commences at the junction of the Yakima and Attahnam rivers and proceeds to the forks of the latter, and along its southern tributary to the "Cascade mountains." What constitutes the Cascade mountains is the first serious dispute in the case. The appellants contend that the mountains are given location by the termination of the southern tributary of the Attahnam river. In other words, the headwaters of that tributary mark the Cascade mountains. But the next call is to be considered. By that call the line is to run "southerly along the main ridge of said mountains;" and, as said by the circuit court, the line must reach the main ridge to run southerly along it. The court erred, appellants contend, by assuming that the treaty makers meant to designate the *main ridge* of the mountains instead of *a ridge* of the mountains. We cannot, of course, reproduce all of the argument of counsel. It is, in effect, that the treaty makers meant what they said, that their knowledge was not imperfect, that they knew where the waters of the Attahnam river terminated, and they turned south from there along "that ridge of those mountains" in which they found themselves. Assuming this, it is said, "every difficulty in following the calls of the treaty at once disappears." But the difficulties do not disappear; they multiply, and mountains and rivers appear to conflict in their testimony. The next call must be changed to be accommodated to counsels' view. That call, in full, is this: "Thence southerly along the main ridge of said mountains [Cascade mountains], passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers."

†Sec. 1. That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper, in the state of Washington, set aside and established by treaty with the Yakima Nation of Indians, dated June nine, eighteen hundred and fifty-five: Provided, That the claim of said Indians to the tract of land adjoining their present reservation on the west, excluded by erroneous boundary survey, and containing approximately two hundred and ninety-three thousand, eight hundred and thirty-seven acres, according to the findings, after examination of Mr. E. C. Barnard, topographer of the Geological Survey, approved by the Secretary of the Interior April seventh, nineteen hundred, is hereby recognized, and the said tract shall be regarded as a part of the Yakima Indian Reservation for the purposes of this act: Provided further, That where valid rights have been acquired prior to March fifth, nineteen hundred and four, to lands within said tract by bona fide settlers or purchasers under the public land laws, such rights shall not be abridged, and any claim of said Indians to these lands is hereby declared to be fully compensated for by the expenditure of money heretofore made for their benefit, and in the construction of irrigation works on the Yakima Indian Reservation. [33 Stat. at L. 595, chap. 22.]

Counsel would strike out the comma after 360]the word "mountains" and the *comma after the word "Adams," asserting then the main ridge to be that which passes (passing) south and east of Mount Adams to the spur whence flows the waters of the Klickitat and Pisco rivers. In other words, the call primarily locates and defines the ridge, and not the boundary line. And so change the call, it is further said, and there is intelligible continuity between it and the next call, which reads, "thence down said spur (whence flow the waters of the Klickitat and Pisco rivers) to the divide between the waters of said rivers." Punctuation, it may be admitted, is a fallible standard of the meaning of a statute (Ewing v. Burnet, 11 Pet. 41, 54, 9 L. ed. 624, 630; Hammock v. Farmers' Loan & T. Co. 105 U. S. 77, 84, 85, 26 L. ed. 1111, 1113, 1114). It is, however, not without force, and in the present case the location of the commas is consistent with the purpose of simply marking the course of the boundary line. But even without changing the punctuation, counsel contend "that the words 'passing south and east of Mount Adams' qualify the word 'mountains,' and indicate which ridge was intended; namely, *a* main ridge (as distinguished from spurs or 'subdivides') which should pass south and east of Mount Adams." We cannot assume a plurality of main ridges, and that the treaty meant to distinguish one from the others. The main ridge necessarily had a definite and conspicuous individuality and needed no identification. It is used in article 1 of the treaty to mark the course of the boundary line of the tract ceded by the Indians to the United States. The Indians always claimed it as the western boundary of the reservation, and the earliest maps confirmed the claim. Schwartz had no difficulty in determining it. He did not run his line to it because he considered other calls were more controlling. He was in no uncertainty as to its location. It was and is a natural and conspicuous landmark, and was selected to define the immense area of land ceded by the Indians to the United States, and the lesser though extensive tract 361] *reserved by them for their own use. We must keep in mind their situation,—what they gave and what they reserved. They were not deeding, as the government forcibly says, acres or even townships. They gave up a principality. They reserved, it is true, a much lesser tract, but it was natural and inevitable that "the greater boundaries of nature" should be selected to define both. These the Indians could understand and estimate. "The inferior *ridges or spurs,* connected with, but leading *away from, the main ridge,*" could not be so definitely intelligible. The Indians had to be satisfied. They entered into negotiations with the representative of the government reluctantly, their chief testified. They feared the encroachments of the white man. Their fears were allayed by adapting the treaty to their understanding, by delineating the land they conveyed and the land they reserved by great and commanding objects. They have never indicated by word or act that the main ridge was not single and distinct in their minds, or that it was at any time confounded by them with lesser ridges. They never have wavered in the expression of their understanding and their insistence that it constituted the western boundary of the reservation, and that it extended to the base of Mount Adams on the south. They always had, as we shall see, an intelligible conception of the western boundary and its definition by natural objects. It is only by regarding this understanding and the more prominent natural objects that the calls of the treaty can be accommodated to the topography of the country.

Some of the natural objects, considered by themselves, it may be admitted support the contention of appellants. The most important of these is that mentioned in the 5th call of the treaty. According to the 4th call the line runs southerly along the main ridge to the spur whence flow the waters of the Klickitat and Pisco rivers, and (5th) "thence down said spur *to the divide between the waters *of said rivers.*"[362 (Italics ours.) It was this call which determined Schwartz's survey. He knew that the main ridge of the Cascades is west of the tributary of the Attahnam river, but he put it out of consideration or effect. He regarded what he conceived to be the divide between the waters of the Klickitat and Pisco rivers as dominating all other calls, although he was directed to confer with the agent at the Yakima Agency, with other white persons, and with Indians familiar with the country, and obtain all the information possible and that would tend to a proper location and establishment, according to the provisions of the treaty, of the section of the boundary line he was directed to survey. He did not run his line to the main ridge of the mountains, because, as he said, he "could not do it without crossing the Klickitat river, and the treaty did not call for that." This was his error. He gave too much strength to some of the calls of the treaty and against other calls, without attempting to give them all effect from a consideration of the topography of the country and the testimony he was directed to take. In this attitude of

mind he made his survey and seems to have rejected everything which would disturb it.

We realize that there is confusion in the calls, irreconcilability, it may be, from some points of view; but our effort must be to ascertain and execute the intention of the treaty makers; and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties. United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662. The present case invokes in special degree the principle.

As we have seen, there were certain conspicuous landmarks which would attract the attention and be intelligible to the understanding of the Indians. Lesser marks would be given no significance. We have already observed the importance in this regard 363]of the main ridge of the *mountains, and it was given emphasis besides by such a conspicuous object as Mount Adams. Mr. Barnard testified that Goat rocks are prominent points on the main ridge, and that Indian Chief Spencer told him that the northern line extended westward from the head of the Attahnam river to a sharp point east of Goat rocks, which point was plainly visible and a well-marked feature in the landscape, and that the boundary line extended to a conical hump on the southeast slope of Mount Adams, which is well defined and plainly visible. The map made by the direction of Governor Stevens in 1857, to show the Indian reservations in Washington territory at that time, and also the White Swan map, show that the northern boundary runs to the main ridge of the mountains.

The Stevens map, though vouched for by him to be accurate, has many inaccuracies, as now demonstrated by a better knowledge of the country, and adds to the confusion if we seek to extend its testimony beyond a confirmation of the Indians' claim that the main ridge of the mountains is the western line of the reservation. By it the south fork of the Attahnam river is made to reach the summit of the Cascade far west of Mount Adams, and the line is run thence for some distance south on the ridge; thence southeasterly to the divide between the Satass and Columbia rivers. The tract delineated is relatively narrow from north to south, due probably, as the government says, to a misunderstanding of the true situation of the Satass-Columbia divide, and a failure to bring the west line down the main ridge to the southeasterly slope of Mount Adams, as required by the treaty. There is another inaccuracy. The map shows the Klickitat river as heading west of the spur upon which Mount Adams is represented as rising. The mistake, now known to be such, shows how imperfect knowledge of the country was, and the importance of giving effect to the more commanding features of the landscape.

*Schwartz turned from the 51st mile[364 post sharply north, deeming, as we have seen, the divide between the waters of the Klickitat and Pisco rivers as controlling. But to the west of the 51st mile post there is a mountain called Grayback, which the Indians claim was on the boundary line of the reservation. Schwartz disregarded it, although he testified that there was a ridge running westerly from a point a little south of the 51st mile post, terminating in the Grayback mountain. He did not follow that ridge, he says, because it formed the divide between the waters of the Klickitat and Columbia rivers and did not form the watershed of the waters flowing into the Satass river. And yet Barnard, considering the calls of the treaty, and in adaptation of them to the topography of the country, followed that ridge as part of the southern boundary, and in 1861 it was surveyed as part of the southern boundary. The survey is called the Berry & Lodge survey, and was made by the direction of the superintendent of Indian affairs for the territory of Washington. He directed them to proceed from the Yakima river westerly along the divide between the Satass and Columbia rivers and along the divide between the Klickitat and Pisco rivers until they arrived at the source of either the latter or the former, where they should terminate the survey. He added: "Should you find before arriving at the source of either of these rivers that the 'divide' has assumed the character of a perfect natural boundary, you will terminate your survey at the point where this description of boundary is attained." The plat of the survey indicates that the south boundary was run to a point on or near the Klickitat river, and marks that stream as originating on the south slope of Mount Adams, and flowing thence southwesterly. It also shows a tributary of the Pisco river as headed near the east side of the mountain, and a spur of hills projecting between them southeasterly to meet the ridge constituting the Satass-Columbia divide. The field notes of the survey *are attached to the government's brief[365 and have this note: "South boundary only was surveyed, in accordance with the instructions of the superintendent. The other boundaries are defined naturally." Some of the marks and posts of this survey were found by Barnard.

One other piece of evidence needs only to be adduced. Two Indians, one of them

Chief Spencer, told him that in 1860 they accompanied certain government agents of Governor Stevens along the southern boundary of the reservation, proceeding along a well-defined ridge to Grayback peak, upon the summit of which a marked wooden post was found set in the ground. From there, the agents told them, after sighting through an instrument pointed at a conical hump on the southeast slope of Mount Adams, that the line went straight to that point. This account was subsequently repeated. Chief Spencer (it was to this chief that Governor Stevens addressed himself in regard to the Indians removing to the reservation) testified that Governor Stevens promised to stake out the reservation, and that some government men, while standing with him at the junction of an Indian trail on a road called the Goldendale road, and which is marked on the Barnard map as being between Mount Adams and Grayback, told him that the line ran from one to the other, and that Goat rocks would be the northwest corner. He further testified that at the forks of the road and the trail there was a blazed tree on one side and a pile of rocks on the other. The statement received corroboration from Barnard, who testified that he discovered a blaze forty years old upon one of two large pine trees at the place indicated, both of which had been anciently blazed.

There is evidence which may be adduced in corroboration of the testimony of the respective witnesses, but we have referred to enough to indicate the character and relative strength of that which makes for or against the contentions of the parties, and, 366]considerately weighing *it, we think it establishes the correctness of the Barnard survey. And we have arrived at and announce this conclusion with full sense of the weight which should be given to the action of the Land Department in approving the Schwartz survey and the issue of the patents. The action of the Land Department is necessarily a strong consideration. But it is opposed by later action and also by congressional action. At any rate, the action of the Department has been brought in controversy, and because it may be supported by plausible or even strong arguments, it does not follow that the opposing claim becomes immediately so doubtful as to determine judgment against it. On the contrary, the question must be examined and decided with due regard to the entire situation, keeping in mind the action of the Department as an element to be considered, and applying the rule of the cases that it should not be disturbed except for reasons *that are clear* and convincing; assuming, *without deciding, that the rule* applies to a case in which the government is proceeding in the right of the Indians.

The court of appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such case, citing Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Stewart v. United States, 206 U. S. 185, 51 L. ed. 1017, 27 Sup. Ct. Rep. 631; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650. Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the government has are derived through the cession from the Indians. If the government may control the cession and control the survey, and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter, but as effectual, as fraud. We should hesitate to put the government in that attitude. It rejects that attitude and accepts a greater responsibility. It yields to the rule which this court has declared—that it "will *construe a treaty with the In-[367 dians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules,' Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1." United States v. Winans, supra.

It is contended that the Northern Pacific Railway Company and the individual appellants are bona fide purchasers, and, as such, entitled to protection under the act of March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603). Section 1 of that act provides that suits brought by the United States to vacate and annul any patent to lands theretofore erroneously issued under a railroad or wagon road grant should only be brought within five years from the passage of the act, and suits brought to annul patents issued after the passage of the act should be brought within six years. And it is provided "that no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right of such purchaser is hereby confirmed." The act was one of a series of acts, and manifestly applies only to the public lands of the United States subject to acquisition under the laws enacted for the disposition of the public domain.

We have seen that the act of December 21, 1904, protects rights acquired prior to

March 5, 1904, to lands within the Barnard survey "by bona fide settlers or purchasers under the public-land laws."

The appellants are not within that class, nor for the reasons we have stated can they avail themselves of the defense of the statute of limitations under § 8 of the act of March 3, 1891, 26 Stat. at L. 1093, chap. 559, as amended, 26 Stat. at L. 1099, chap. 561, U. S. Comp. Stat. 1901, p. 1531.

Decree affirmed.

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368] *WILLIAM H. WADKINS, Natural Tutor of Effie Bell Wadkins, Minor, Plff. in Err.,

v.

PRODUCERS OIL COMPANY and Atlanta & Shreveport Oil & Gas Company.

(See S. C. Reporter's ed. 368–375.)

**Error to state court — land titles — decision of Federal question.**

1. The Federal Supreme Court has jurisdiction of a writ of error to a state court to review a decision in a suit in which both plaintiff and defendant assert rights under a homestead entry, and the Federal question was passed upon by the state court and made an element in its decision.

[For other cases, see Appeal and Error, 1398–1401, 1458–1460, in Digest Sup. Ct. 1908.]

**Public lands — homestead — rights of widow.**

2. The death of the homestead entryman before perfecting his entry is essential to give his widow the right under U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, p. 1390, of residence, cultivation, and patent.

[For other cases, see Public Lands, I. e, 8, in Digest Sup. Ct. 1908.]

**Public lands — homestead — community property — what law governs.**

3. Land acquired under the Federal homestead laws upon a settlement made before the settler's marriage does not fall into the community, where his wife died before final proof, upon the theory that his inchoate right vested in him by his preliminary entry, which was made during coverture, but under the act of May 14, 1880 (21 Stat. at L. 140, chap. 89, U. S. Comp. Stat. 1901, p. 1392), § 3, his rights were initiated by the settlement, and though, under that statute, as between him and any intervening claimant, his perfected right evidenced by the patent related back to the time of settlement, he did not acquire any vested interest until final proof, prior to which his rights were essentially inchoate and exclusively within the operation of U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, p. 1390, designating the beneficiaries, which confers no rights upon the wife unless the entryman dies before perfecting his entry, when the widow has the right of residence, cultivation, and patent.

[For other cases, see Public Lands, I. e, 8, in Digest Sup. Ct. 1908.]

[No. 638.]

Argued January 31, 1913. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which reversed a judgment of the District Court for the Parish of Caddo, in that state, in favor of plaintiff in a petitory action. Affirmed.

See same case below, 130 La. 308, 57 So. 937.

The facts are stated in the opinion.

Mr. S. L. Herold argued the cause, and, with Messrs. J. A. Thigpen and W. P. Hall, filed a brief for plaintiff in error:

Whatever interest arose in the head of the community by virtue of his entry depended upon the laws of the United States.

McCune v. Essig, 199 U. S. 388, 50 L. ed. 240, 26 Sup. Ct. Rep. 78; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 365, 14 Sup. Ct. Rep. 504; Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905.

Where the plaintiff claims title under one construction of an act of Congress, and defendant under another construction of the same act, and the decision of the highest court of the state is against such right and title, claimed by either, a case is presented within the jurisdiction of this court.

Matthews v. Zane, 4 Cranch, 382, 2 L. ed. 654; Ross v. Doe, 1 Pet. 664, 7 L. ed. 306; Mobile v. Eslava, 16 Pet. 249, 10 L. ed. 953.

That the final decision of the case, in its last analysis, may involve a question of state law, does not prevent such a Federal

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, *62 L.R.A. 513.*

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On error to state courts in questions involving land titles—see note to O'Conor v. Texas, 50 L. ed. U. S. 1120.

question being presented as will sustain the jurisdiction of this court.

Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; French-Glenn Live Stock Co. v. Springer, 185 U. S. 54, 46 L. ed. 803, 22 Sup. Ct. Rep. 563.

The identical question which it is sought here to review was in fact distinctly urged and set up in the lower court, and in the supreme court of the state, in a manner proper under the Louisiana practice.

Stewart v. Kahn, 11 Wall. 493, 20 L. ed. 176.

The Federal question was timely raised.

Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 534, 46 L. ed. 676, 22 Sup. Ct. Rep. 446; Leigh v. Green, 193 U. S. 85, 48 L. ed. 626, 24 Sup. Ct. Rep. 390; McKay v. Kalyton, 204 U. S. 463, 51 L. ed. 569, 27 Sup. Ct. Rep. 346; Kentucky Union Co. v. Kentucky, 219 U. S. 158, 55 L. ed. 156, 31 Sup. Ct. Rep. 171.

It is a sufficient compliance with the words of the judiciary act, "especially set up or claimed," that the question was fully considered in the opinion of the court below, and ruled against plaintiff in error.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 487; Montana ex rel. Haire v. Rice, 204 U. S. 299, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; Hammond v. Whittredge, 204 U. S. 547, 51 L. ed. 611, 27 Sup. Ct. Rep. 396; Lavagnino v. Uhlig, 198 U. S. 451, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; Missouri K. & T. R. Co. v. Elliott, 184 U. S. 534, 46 L. ed. 676, 22 Sup. Ct. Rep. 446.

The occupant under the pre-emption laws had no rights, even inchoate, partaking of the nature of ownership; his right being limited to a mere preference in the purchase for a limited term, which was conditional upon his compliance also with the other provisions of the statute. But when his title was fully earned, by compliance with the provisions of the pre-emption laws and purchase thereunder, it served then to cut off the rights of all parties whose adverse claims originated between the date of settlement and of patent.

Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Yosemite Valley Case (Hutchins v. Low) 15 Wall. 77, 21 L. ed. 82.

While the settlement preceding the entry confers no rights in the land as against the United States, or impairs in any respect the power of Congress to dispose of the land in any way it may deem proper, the homestead *entry vests in the entryman* an inchoate title *to the land.*

Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; Crochet v. McCamant, 116 La. 6, 114 Am. St. Rep. 538, 40 So. 474; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; 17 Ops. Atty. Gen. p. 160.

The sole question in this case is: When was the purchase contracted? It would be absurd to say that it was contracted before it was contracted; that is, that it began before the entry.

United States v. Bagnell Timber Co. 102 C. C. A. 243, 178 Fed. 798.

Under the terms of the act of 1880, when Wadkins did enter the land and perfected his title by compliance with the homestead laws, the doctrine of relation would have applied to cut off any intervening rights that might have been initiated by third persons between the date of his settlement and the securing of his patent. But by no construction of the statutes can it be gathered that any vested right was acquired in the land or any inchoate title secured merely by settlement.

Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty, 208 U. S. 257, 52 L. ed. 477, 28 Sup. Ct. Rep. 291; Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636; Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300.

The entry is an essential condition to the acquisition of the homestead. There can be no earning of the homestead without an entry. It is the purchase; the further compliance with the statute, the payment. By the entry, for the first time the proprietary right of the homesteader attaches to the land.

Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566.

The doctrine of relation has nothing whatever to do with this case. That doctrine, as applied by the courts, is simply this: That as between two conflicting titles, that will be preferred which was first in time in the commencement of proceedings for the acquisition of title.

Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300.

It is established jurisprudence of the Louisiana courts that in the term "estates" is comprised every form of inchoate title under which a vested right is acquired to property, and which is capable of ripening into a perfect title.

Crochet v. McCamant, 116 La. 1, 114 Am. St. Rep. 538, 40 So. 474.

It has always been the law as to cases

coming here on writ of error to the supreme court of Louisiana that jurisdiction may be made to appear solely from the statement of facts and the decision made by that court.

Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965; Walker v. Villavaso, 6 Wall. 124, 18 L. ed. 853; Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 493, 20 L. ed. 176.

But it is now the established jurisprudence of the court that, in any case, no particular form of raising the Federal question is necessary, but that wherever the same is raised in accordance with the state practice, and in such manner as to bring the claim to the attention of the state court, it is sufficient.

Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 487.

And where the decision brought up for review clearly shows that the highest court of the state assumed the Federal question to be an issue, and actually decided against such claim, this court has jurisdiction to reexamine that question if its decision was essential to the judgment below.

Montana ex rel Haire v. Rice, 204 U. S. 299, 51 L. ed. 490, 27 Sup. Ct. Rep. 281.

The entryman first acquired a property right in the homestead by the entry and during the marriage.

United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35; Kansas, P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; Hafemann v. Gross, 199 U. S. 342, 50 L. ed. 220, 26 Sup. Ct. Rep. 80.

The concluding words of the statute, "the same as if he settled under the pre-emption law," construed, as they must be, in the light of the jurisprudence under that law, show that settlement was never intended to vest an interest in the land, such as that acquired by the entryman.

Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. ed. 82; 17 Ops. Atty. Gen. 160; United States v. Bagnell Timber Co. 102 C. C. A. 243, 178 Fed. 798; Maynard v. Hill, 125 U. S. 215, 31 L. ed. 660, 8 Sup. Ct. Rep. 723.

Mr. Amos L. Beaty argued the cause and filed a brief for defendants in error:

Only to the extent that the patent passed the title out of the Federal government did the plaintiff claim under a Federal law or authority, and there was no decision against him on that point.

Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Avery v. Popper, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94; Kennard v. Nebraska, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879; Baker v. Baldwin, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19; Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

Under the homestead act there cannot be a present grantee, and there is under the law really no grantee, until the five years' occupancy has been completed. Every time a homesteader dies prior to the completion of the claim, the homestead law points out a new beneficiary, and said homestead law controls until the title has been earned. And under the said law it is utterly impossible, prior to the completion of the occupancy, for anyone to acquire an interest in the land by the law of descent and distribution of the state where the land is situated.

Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; McCune v. Essig, 59 C. C. A. 429, 122 Fed. 588, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78.

After the entryman has completed the full term of his occupancy, then he has an equitable title, whether the patent has issued or not.

Brazee v. Schofield, 124 U. S. 495, 31 L. ed. 484, 8 Sup. Ct. Rep. 604; Hays v. Wyatt, 19 Idaho, 544, 34 L.R.A.(N.S.) 397, 115 Pac. 13.

It has long been the law of Louisiana that where one spouse initiates the title to land before marriage, the property, when the title is perfected, belongs to the spouse initiating the same.

Barbet v. Langlois, 5 La. Ann. 212; Morgan's Succession, 12 La. Ann. 153.

Since the act of May 14th, 1880, this court has uniformly held that the homestead right is initiated and arises from the act of settlement, and not from the record of the claim made in the land office.

St. Paul, M. & M. R. Co. v. Donohue, 210 U. S. 21, 52 L. ed. 941, 28 Sup. Ct. Rep. 600; Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154; Osborn v. Froyseth, 216 U. S. 570, 54 L. ed. 619, 30 Sup. Ct. Rep. 420.

Mr. Justice McKenna delivered the opinion of the court:

Action brought in the first judicial district court of Louisiana, in and for the parish of Caddo, by plaintiff in error (and as he was plaintiff below, we shall so call him), against the defendants in error (hereinafter referred to as defendants), for the recog-

nition of Effie Bell Wadkins, represented by him as her natural tutor, as owner of an undivided one-half interest in and to the S. E. ¼ of section 3, township 20 north, range 16 west, Caddo parish, Louisiana, and to put her in possession thereof, and to require the defendants to pay for all the oil and others minerals extracted therefrom; and, as tutor of said minor, to have judgment against them *in solido* for the market value of one half of all the oil, gas, and other minerals that have been produced up to date, and which may be produced.

Judgment was entered recognizing the minor as the owner of an undivided one-half interest in the land, as prayed, and for $86,328.24, the value of the oil extracted therefrom, with interest and costs. The right of the minor to a further accounting was also reserved. The judgment was reversed by the supreme court of the state. 130 La. 308, 57 So. 937.

The question in the case is whether a homestead entry made by the father of the minor is community property, her mother having died before the perfection of the entry.

The facts, as taken from the opinion of the supreme court, are as follows: In June, 1893, W. H. Wadkins, father of Effie, the minor, settled on the land with the view of acquiring it as a homestead. On February 25, 1895, he made application for and obtained a preliminary homestead entry at the proper local land office. At the end of five years, to wit, on September 8, 1898, he made final proof and secured a final homestead entry, upon which he subsequently obtained a patent.

370] *Wadkins married the mother of the minor on June 24, 1894; she died December 5, 1896. Two children were born of this marriage, one of whom died at the age of two years; the other is the plaintiff.

The defendants are oil and gas companies operating in the Caddo oil and gas fields, the Producers Oil Company operating under a lease from the other company. The property has produced and is still producing a large amount of oil.

A motion is made to dismiss. As pertinent to the motion, the answer of the Producers Oil Company must be considered. It alleges that Wadkins actually settled upon the land on or before December 12, 1893, under the homestead laws of the United States, the land then being public land of the United States, and subject to settlement and entry under those laws, and did not marry the mother of plaintiff until several months later; that the patent was *issued as* early as December 12, 1898, there*by fixing and determining the date of set*-

*554

tlement as being at least five years prior thereto; that defendant is the lessee of its codefendant, who claims to own and does own the land in fee simple by regular conveyance from Wadkins, and that defendant, therefore, claims a right, title, privilege, and immunity under the statutes of the United States, and particularly under the acts of Congress governing homestead entries on the public lands of the United States, and that, under those statutes, plaintiff has no right, title, or interest in the lands.

The answer of the Atlanta & Shreveport Oil & Gas Company alleges substantially the same facts, and that "all allegations of its codefendant as to Federal questions are adopted and made part" of defendant's answer.

It will appear in our discussion of the case that the Federal right thus invoked was passed on by the supreme court of the state, and was an element in its decision against plaintiff. The motion to dismiss is therefore overruled.

*Under the laws of the United States[371 every person who is the head of a family, and having certain other qualifications not necessary to mention, shall be entitled to enter a quarter section or less of the public lands.

By §§ 2291 and 2292 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1390, 1394) it is provided as follows:

"Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisee; or, in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law. . . .

"Sec. 2292. In case of the death of both father and mother leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children. . . ."

In McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78, we decided

that the beneficiaries of the statute were (1) the entryman, (2) his widow, she performing and proving he performance of the conditions, to wit, residence and cultivation of the land for the time prescribed; and (3)—§ 2292—a child or children under twenty-one years of age. And the rights are independent; or, in other words and in illustration, as we said in McCune v. Essig, the homestead claimant "may reside upon and 372]cultivate the land, and by doing so *is entitled to a patent. If he die, his widow is given the right of residence and cultivation, and 'shall be entitled to a patent as in other cases.' He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he."

Her rights, therefore, are derived from the statute, but necessarily depend upon the contingency mentioned; that is, his death before perfecting his entry. If she die before then, if she does not become a widow before then, necessarily no right vests in her under the statute. And such was the fact in the case at bar. The mother of the minor died before any right could accrue to her. To express it another way, the entry of Wadkins was perfected in his own right.

But it is said that his right has relation to the date of his entry, and must be considered as having vested then. A like contention was rejected in McCune v. Essig. A title derived from a widow was there sustained against the contention that, by the entry of her husband, the land involved had become community property under the state law, and an undivided one half thereof passed at his death to his daughter. The ruling is directly in point.

It appears that Wadkins settled on the land before his marriage, but did not make a formal homestead entry of it until after his marriage; and it is hence argued that an inchoate right vested in him by his entry only; and that the entry having been made "during the *régime* of the community of *acquêts* and gains incidental to the marriage," the patent, under the jurisprudence of Louisiana, conveyed the "full title of the government to the community." And this, it is contended, the supreme court decided to be the law of the state, but considered that it could not be applied in the case at bar because the court erroneously decided that Wadkins's settlement, which occurred before his marriage, was the commencement 373]of *his right, and not the entry at the land office, which occurred after his marriage.

The court did decide that the right of Wadkins *began with his settlement*, and not by his entry, and applied the law of the state in accordance with that view, yielding to it, as the court said, "as an effect of the act of Congress of 1880" and of the codal provisions of the state "touching the retrospective operation of the accomplishment of suspensive conditions."

The provision of the act of 1880 referred to is as follows: "Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record. *And his right shall relate back to the date of settlement the same as if he settled under the pre-emption laws.*" (Italics ours.) 21 Stat at L. 140, chap. 89, U. S. Comp. Stat. 1901, p. 1392.

The supreme court, to sustain its view cited Maddox v. Burnham, 156 U. S. 546, 39 L. ed. 527, 15 Sup. Ct. Rep. 448; St. Paul, M. & M. R. Co. v. Donohue, 210 U. S. 21, 52 L. ed. 941; 28 Sup. Ct. Rep. 600.

In Sturr v. Beck, 133 U. S. 541, 547, 33 L. ed. 761, 764, 10 Sup. Ct. Rep. 350, the court said, through Chief Justice Fuller, that "the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof, his five years of residence and cultivation will commence from the date of actual settlement."

In Maddox v. Burnham, the act of 1880 was commented on, and it was decided that by that act "for the first time the right of a party entering land under the *home-[374 stead law was made to relate back to the time of settlement."

In St. Paul, M. & M. R. Co. v. Donohue it was held it was not until May 14, 1880 that a homestead entry was permitted to be made upon unsurveyed public lands, and "for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the land office."

There can be no doubt that Wadkins's inchoate right was initiated by his settlement, and that, as between him and any intervening claimant, his perfected right evidenced by the patent related back to the time of his settlement. (Shepley v. Cowan, 91 U. S. 330, 338, 23 L. ed. 424, 427; Wey

haeuser v. Hoyt, 219 U. S. 380, 388–390, 55 L. ed. 258, 261–263, 31 Sup. Ct. Rep. 300); but he did not acquire any vested interest in the land until he had fully complied with the provisions of the homestead law and submitted proof thereof at the local office. Prior to that time his right was essentially inchoate and exclusively within the operation of the laws of the United States, and those laws, as we have seen, fully dealt with the subject of who should be the beneficiary of a compliance with them, thereby excluding state laws from that field. This is a manifest deduction from McCune v. Essig. There might be a curious and confusing result from an opposite ruling, as pointed out by the supreme court of the state in its first opinion. Suppose Wadkins had married again and died before perfecting his claim. Could his widow have continued the required residence upon and cultivation of the land? And if so, in what right—her own, or that of the first wife, or in both rights? Section 2291 precludes such confusion. It is a definite grant of rights, and who shall be its beneficiaries are explicitly designated, and upon what contingencies, and upon the performance of what conditions. Until such contin-
375] gencies happen, and until *such performance, no rights vest. It follows that the mother of Effie Bell Wadkins acquired no interest in the land.

Judgment affirmed.

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EMILIA RIJOS CORDOVA, Appt.,
v.
TERESA FOLGUERAS Y RIJOS et al.
(No. 141.)

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DOMINGO ENRIQUETA DUMEY, Appt.,
v.
ISABEL HERNANDEZ Y BELLO, Nicolas Morell y Hernandez, Tomas Morell y Hernandez, and Maria Morell y Hernandez.
(No. 160.)

(See S. C. Reporter's ed. 375–379.)

**Appeal — from Porto Rican courts — following decision below.**

1. The Federal Supreme Court will not disturb the decision of the supreme court of Porto Rico, construing the fourth transitory provision of the Civil Code of 1889, that "actions and rights arising before this Code became operative, and not exercised, shall continue with the extension and according to the terms recognized by prior legislation, but shall be subject, with regard to the exercise, duration, and proceedings for enforcing them, to the provisions of this Code," as making applicable to an action brought by a natural child seeking filiation and a share of her alleged parent's estate, the provisions of §§ 133, 137, prescribing a limitation for actions to claim filiation, and requiring a preliminary proceeding to prove acts not amounting to a solemn recognition, although the law in force at the time of her alleged parent's death was law 11 of Toro (Novisima Recopilación, Book 10, tit. 5, law 1), under which she acquired rights of inheritance by the informal acts of recognition alleged, without the need of acknowledgment by public document or judicial approval.

[For other cases, see Appeal and Error. VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

**Statutes — construction of Porto Rican laws — Spanish decisions.**

2. Spanish decisions construing the Porto Rico Civil Code, when rendered after Porto Rico had ceased to be subject to Spanish jurisdiction, although entitled to great consideration, do not preclude the Porto Rican courts from exercising an independent judgment.

[Nos. 141 and 160.]

Argued January 23, 1913. Decided February 24, 1913.

APPEAL from the Supreme Court of Porto Rico to review a judgment which affirmed a judgment of the District Court for the Judicial District of San Juan, sustaining a demurrer to and dismissing the complaint in an action to claim filiation and a share of plaintiff's alleged parent's estate. Affirmed. Also an

APPEAL from the District Court of the United States for Porto Rico to review a decree sustaining a demurrer to, and dismissing, a bill in a similar action. Affirmed.

See same case below, No. 141, 16 P. R. R. 593.

The facts are stated in the opinion.

Mr. N. B. K. Pettingill argued the cause and filed a brief for appellants:

Were this statute to be regarded as one enacted by the territorial legislature, we are aware of the weight this court has said it will give to the construction placed upon its statutes by the supreme court of a territory.

Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474–479, 51 L. ed. 1143–1146, 27 Sup. Ct. Rep. 695; Crary v. Dye, 208 U. S. 519, 52 L. ed. 598, 28 Sup. Ct. Rep. 360; Kealoha v. Castle, 210 U. S. 149, 52 L. ed. 998, 28 Sup. Ct. Rep. 684; English v. Arizona, 214 U. S. 359–363, 53 L. ed. 1030–1033, 29 Sup. Ct. Rep. 658; Santa Fe County v. New Mexico, 215 U. S.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rican courts—see note to Garrosi v. Dastas, 51 L. ed. U. S. 269.

296–305, 54 L. ed. 202–207, 30 Sup. Ct. Rep. 111.

The fourth transitory provision is confined in its application to matters purely of procedure; the recognition of a natural child is not matter of procedure, but affects the very existence of the right to claim and receive its legal consequences, hence is substantive in its nature, even in respect to the permanence of the action to obtain it; a construction which would allow such substantive rights, acquired before the existence of the Civil Code, to be subjected to the restriction of its provisions by reason of the fourth transitory provision of the same, would diminish such rights in their necessary extension, and deprive them of their force and efficacy under certain circumstances. Therefore, such construction must be rejected as contrary to its reasonable meaning.

77 Juris. Civil de Esp. p. 880; March 2, 1865, vol. 11, p. 241; January 10, 1874, vol. 29, p. 113; March 26, 1904, vol. 94, p. 695; July 9, 1896, vol. 80, p. 111; Juris. Civil de Esp. vol. 84, pp. 771–773; Juris. Civil de Esp. vol. 104, p. 74; Juris. Civil de Esp. vol. 111, p. 124; Decision of April 2, 1909, Juris. Civil, vol. 114, p. 363.

This conclusion is so logical and clearly correct as to impel this court not to follow its inclination to "lean toward" the contrary conclusions of the Porto Rican court, but to declare that the latter has committed a "manifest error" which must be corrected, even looking at the statute as a territorial enactment; since, under such circumstances, this court cannot refuse to exercise its own judgment.

Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474–479, 51 L. ed. 1143–1146, 27 Sup. Ct. Rep. 695.

The fourth transitory provision, having been derived from the law of Spain, and adopted by Porto Rico after its construction in the respect now under discussion had been settled by the Spanish court, must be considered to have been adopted with that construction as a part of it.

Kealoha v. Castle, 210 U. S. 149–154, 52 L. ed. 998, 1001, 28 Sup. Ct. Rep. 684; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. Rep. 327; Robinson v. Belt, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, supra.

Prior to 1889 the status of natural child under law 11 of Toro could be proved by evidence of acts *in pais* at the trial of the same suit, brought to enforce rights derived from the possession of such status.

Decision of March 2, 1865 (vol. 11, p. 241); Decision of January 10, 1874 (vol. 29, p. 113).

From 1889 until the present day the status of natural child acquired under the law of Toro is recognized as conferring a continuing right to the property interests legally accruing from its possession, enforceable under ordinary rules of evidence and by ordinary procedure, as in case of other property rights.

Decision of June 28, 1895 (vol. 77, p. 880); Decision of July 9, 1896 (vol. 80, p. 111); Decision of September 23, 1898 (vol. 84, p. 771); Decision of November 29, 1899 (vol. 88, p. 430); Decision of March 3, 1904, (vol. 94, p. 520); Decision of April 11, 1906 (vol. 104, p. 74); Decision of April 22, 1908 (vol. 111, p. 124).

No appearance for appellees.

Mr. Justice Holmes delivered the opinion of the court:

The first of these suits was brought by the appellant, in 1908, it would seem, to have herself declared a natural daughter and entitled to a share of the estate of Don Santiago Rijos Correa, who died on April 29, 1869. The appellees demurred to the complaint on the grounds adverted to in Burnet v. Desmornes y Alvarez, 226 U. S. 145, ante, 159, 33 Sup. Ct. Rep. 63. By the Civil Code of 1889, art. 137, actions for the acknowledgment of natural children can be instituted only during the life of the presumed parents; or, if the parent dies during the minority of the child, within the first four years of its majority. If the appellant was not of age at the death of Correa, she reached majority at the latest in 1893, and the action was barred in 1897. (Under the Code of 1902, § 199, the action is allowed only for two years after coming of age.) The supreme court sustained the demurrer and dismissed the complaint.

The second suit, begun in June, 1909, had a similar object. The appellant alleged that she was born on August 4, 1875, and was a natural child of Damian Morell; that he left her mother and married in 1880; in 1889 removed to Mallorca, and died on December 29, 1899. On demurrer the bill was dismissed by the district court, following the authority of the foregoing decision of the supreme court. (We may assume that, as the plaintiff retained her domicil in Porto Rico, and as a considerable part of the estate consisted of land in the same place, the possible bearing on the case of the removal of Morell to Spain need not be considered.)

The appellants say that at the time of their birth the *law in force was Law Eleven [377

of Toro (Law 1, title 5, bk. 10, Novisima Recopilación); that under that law they acquired the status and rights of natural children by the facts alleged in their complaints, without the need of acknowledgment by public document or judicial approval, as required in the Civil Code of 1889, art. 133, and so that they were entitled to sue for their share of the inheritance at once.

So far as the second case goes, perhaps it would be a sufficient answer to say that during the lifetime of an ancestor no heir has a vested right to inherit from him; that the Civil Code of 1889 confines the right of natural children to inherit to those children that are acknowledged (art. 134); that is, presumably, to those that are acknowledged as it provides; and since heirs have only such rights of inheritance as are given to them by the laws in force at their ancestor's death, that there is no reason why the appellant should take greater ones because she had been informally acknowledged before 1889.

But in the first case the alleged parent died before the Civil Code was enacted, and so it would seem that the plaintiff had ground for claiming rights by inheritance vested before that date. But this claim was met by the supreme court by a reference to the statement of motives for the Civil Code, which reads that if it was proper to give effect to rights acquired under prior legislation, no consideration of justice required that the subsequent exercise of them "as well as their duration and the proceedings for enforcing them should be exempted from the provisions of the Code;" and by the interpretation of the fourth transitory provision (following art. 1976). This reads in the official translation: "Actions and rights arising before this Code became operative, and not exercised, shall continue with the extension and according to the terms recognized by prior legislation, but shall be subject, with regard to the exercise, duration, and proceedings 378] *for enforcing them, to the provisions of this Code." The court interpreted these words as meaning that, in order to enforce the rights of a natural child when there was not a solemn recognition, but only acts tending to establish paternity under the Laws of Toro, an action of filiation must be brought, as required by articles 133 and 137 of the Code.

In other words, while, under the Laws of Toro, the acts of recognition alleged, although not amounting to a solemn recognition, may have entitled a natural child to sue for her share of the inheritance and *to prove the* acts in the same suit, the *Code requires a preliminary* proceeding to prove those acts and to declare their effect, and limits the time within which such proceeding can be brought. This hardly can be called an interference with vested rights, when a reasonable time for bringing the preliminary proceeding is allowed. In the present case it does not appear that the plaintiff had not reasonable time for an action after the Code went into effect.

It is objected that the Supreme Court of Spain has construed the fourth transitory provision otherwise, as has been recognized by the supreme court of Porto Rico. Gual v. Bonafoux, 15 P. R. R. 545, 555, referring to a judgment of April 11, 1906, but citing as contradictory one of December 19, 1902, that it deemed correct. The Spanish decisions, however, have not the same effect as do those construing a statute subsequently copied by another state. They were rendered after Porto Rico had ceased to be subject to Spanish jurisdiction, and although entitled to great consideration, which no doubt they received, they do not preclude the local court from exercising an independent judgment. The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the court of the Island is called on constantly to deal, and we are not prepared, as against the weight properly *attributed to the local decision, to say[379 that it is wrong. Gray v. Taylor, Jan. 20, 1913 [227 U. S. 51, ante, 413, 33 Sup. Ct. Rep. 199]. How the first case should have been dealt with if it had appeared in the record that the plaintiff came of age before the Code went into effect we are not called upon to consider. The construction adopted might give trouble unless a right to bring an action of filiation within a reasonable time were implied. But we have to remember that the lawmaking power of Spain was not restricted in the way familiar to us.

141. Judgment affirmed.

160. Decree affirmed.

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FRANK LUKE and John Luke, Appts.,

v.

JESSE HOYT SMITH.

(See S. C. Reporter's ed. 379-382.)

**Appeal — from territorial supreme court — following decision below.**

1. A decision of the territorial supreme court that a purchaser at a sale on execu-

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

tion, who has notice before his purchase of the rights of persons for whom the debtor holds the legal title in trust, because purchased with their funds and for their use, will take subject to their rights, notwithstanding Ariz. Rev. Stat. 1901, ¶ 749, making all conveyances and deeds of trust and mortgages void as against creditors and subsequent purchasers for value without notice unless recorded, and that this principle applies to an equitable lien existing in favor of a partner contributing the entire capital and necessary advances to a land partnership, will be followed by the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, VIII. m. 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

**Real property — recording act — purchaser without notice — putting on inquiry.**

2. The complaint in a suit to enforce a lien in favor of a partner contributing the entire capital and necessary advances to a land partnership, which, though not setting forth the partnership agreement, alleged it to have been made in writing, and averred that it was agreed that the plaintiff should advance all the money necessary for the improvement of the land, and should be repaid all sums advanced for that purpose or for the purchase of the land, with interest, out of the proceeds of the sales of the land, and prayed that plaintiff be declared to have an equitable mortgage lien upon the interest of the other partner, who held the legal title, paramount to any rights of the latter's judgment creditors, who were made parties defendant, was enough to put the latter upon inquiry as to the precise character of the contract that was alleged to lay the foundation for an equitable interest superior to theirs, and to prevent them from claiming the protection of Ariz. Rev. Stat. 1901, ¶ 749, as purchasers for value, without notice.

[For other cases, see Real Property, II. c, in Digest Sup. Ct. 1908.]

[No. 150.]

Argued January 27, 1913. Decided February 24, 1913.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Maricopa County, in that Territory, enforcing an equitable lien of a partner in the partnership assets. Affirmed.

See same case below, 13 Ariz. 155, 108 Pac. 494.

The facts are stated in the opinion.

**Mr. Walter Bennett** argued the cause and filed a brief for appellants:

Real property conveyed to one member of a partnership, and standing of record in his name, in which conveyance and record the other partner *participates* and acquiesces, though purchased with money advanced to the partnership by such participating and acquiescing partner, is subject to attachment and execution by the creditors of the partner holding such record title, who have no notice of such partnership, and the lien of such attaching and execution creditors is prior and superior to the equitable right of such consenting and acquiescing partner to have the partnership property applied to the payment of his advances to the partnership.

Ebbert's Appeal, 70 Pa. 79; Second Nat. Bank's Appeal, 83 Pa. 203; Geddes's Appeal, 84 Pa. 482; Stover v. Stover, 180 Pa. 425, 57 Am. St. Rep. 654, 36 Atl. 921; Cundey v. Hall, 208 Pa. 335, 101 Am. St. Rep. 938, 57 Atl. 761; Blake v. Nutter, 19 Me. 16; Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321; Forde v. Herron, 4 Munf. 316; Buchan v. Sumner, 2 Barb. Ch. 165; First Nat. Bank v. State Sav. Bank, 130 Mich. 332, 89 N. W. 941; Alexander v. Thompson, 101 Minn. 5, 111 N. W. 385.

By participating and acquiescing in the conveyance to Rainey of an undivided one-third interest in the real estate which he advanced the money to purchase, and by participating and acquiescing in placing such title in Rainey of record, and with notice and without protest permitting Rainey to mortgage the property, and otherwise publicly treat it as his own individual property, the plaintiff, Smith, waived all right to claim a lien upon said premises prior and superior to that of the attachment and judgment creditors of Rainey, who became such upon the faith and credit of such record title, and without notice of the fact of the existence of such partnership or the making of such advances.

Forde v. Herron, 4 Munf. 316; Wilhite v. Boulware, 88 Ky. 169, 10 S. W. 629, 30 Cyc. 701.

The lien of the appellants, Frank Luke and John Luke, was fixed by the levy of their attachment, June 11th, 1902, and by the judgment foreclosing that lien, June 11th, 1903.

Hitz v. National Metropolitan Bank, 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613; Stevenson v. Texas & P. R. Co. 105 U. S. 703, 26 L. ed. 1215; Reed v. Munn, 148 Fed. 752; Mansfield v. Johnson, 51 Fla. 239, 120 Am. St. Rep. 159, 40 So. 196; Wahrenberger v. Waid, 8 Colo. App. 200, 45 Pac. 518; Martin v. Dryden, 6 Ill. 187; Alexander v. Thompson, 101 Minn. 5, 111 N. W. 385.

Notice of a secret equity, received after judgment and before sale, does not affect the purchaser, even though such purchaser be the judgment creditor.

Mansfield v. Johnson, 51 Fla. 239, 120 Am. St. Rep. 159, 40 So. 196; Robertson v. McClay, 19 Tex. Civ. App. 513, 48 S. W. 35.

Meek v. Skeen, 8 C. C. A. 641, 23 U. S. App. 232, 60 Fed. 322.

The supreme court of Texas stands alone in its opinion that secret equities are not within the protection afforded to judgment creditors by the recording acts. But even that court only exempts from the operation of the recording acts those secret equities which are of such a nature that the holder cannot spread his title on the record, and which are not in their nature susceptible of registration, and of which the purchaser had notice before the sale.

Parker v. Coop, 60 Tex. 111; Senter & Co. v. Lambeth, 59 Tex. 263; Grace v. Wade, 45 Tex. 522; Whitaker v. Farris, 45 Tex. Civ. App. 378, 101 S. W. 456.

But the Federal courts make no distinction between secret equities and unrecorded deeds, regarding the time of notice of their existence as affecting purchasers at execution sales.

Bayley v. Greenleaf, 7 Wheat. 46, 5 L. ed. 393; Stevenson v. Texas & P. R. Co. 105 U. S. 703, 26 L. ed. 1215; Hitz v. National Metropolitan Bank, 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613; Reed v. Munn, 148 Fed. 752.

Neither the original complaint, filed July 18th, 1903, nor first amended complaint, filed September 23d, 1903, was sufficient to give the Lukes constructive notice of the existence of a partnership between Smith and Rainey in respect to the land in question, or to put them upon inquiry in respect to the contract therein mentioned, because said complaints purport to set out all the material provisions of the contract according to their legal effect, and no mention is therein made of any partnership, or any facts which would constitute the parties to it partners, and the legal presumption arising from such pleading is that the provisions of the contract did not constitute the parties to it partners.

Burlington & M. R. Co. v. Lancaster County, 4 Neb. 307; Burlington & M. River R. Co. v. York County, 7 Neb. 487; McClure v. Warner, 16 Neb. 447, 20 N. W. 387; Chicago R. I. & P. R. Co. v. Shepherd, 39 Neb. 523, 58 N. W. 189; Marsh v. Marshall, 53 Pa. 396.

All proceedings under a judgment relate back to the time of the levy.

Freeman v. Dawson, 110 U. S. 270, 28 L. ed. 143, 4 Sup. Ct. Rep. 94; Rio Grande R. Co. v. Gomila (Rio Grande R. Co. v. Vinet) 132 U. S. 484, 33 L. ed. 402, 10 Sup. Ct. Rep. 155.

Judgment creditors and purchasers for value are equally protected, and the judgment lien attaches to whatever title the debtor had of record. Columbus Buggy Co. v. Graves, 106 Ill. 459.

Mr. Lewis M. Ogden argued the cause and filed a brief for appellee:

By reason of the partnership relation, the legal title to the entire tract was held by Smith and Rainey in trust for the benefit of the partnership and the satisfaction of firm creditors, and all claims between the partners, before any portion of the interest of either partner could be reached by his individual creditors.

Whitney v. Cotton, 53 Miss. 691; Dyer v. Clark, 5 Met. 577; Hodges v. Holeman, 1 Dana, 50; Williams v. Love, 2 Head, 80, 73 Am. Dec. 191; Rainey v. Nance, 54 Ill. 36; Matlock v. Matlock, 5 Ind. 404; Black v. Bush, 7 B. Mon. 210; Buffum v. Seaver, 16 N. H. 160; Betts v. Letcher, 1 S. D. 182, 46 N. W. 193; Boyce v. Coster, 4 Strobh. Eq. 25; Boyers v. Elliott, 7 Humph. 204; Wright v. Wright, 59 How. Pr. 186; Lane v. Jones, 9 Lea, 627; Duryea v. Burt, 28 Cal. 569, 11 Mor. Min. Rep. 395; Dilworth v. Mayfield, 36 Miss. 40; Ives v. Miller, 19 Barb. 200; Pierce v. Wilson, 2 Iowa, 20; Evans v. Hawley, 35 Iowa, 83; Peck v. Fisher, 7 Cush. 387; Lowe v. Alexander, 15 Cal. 296; Dupuy v. Leavenworth, 17 Cal. 268; Shanks v. Klein, 104 U. S. 18–22, 26 L. ed. 635–636; Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 282, 10 Sup. Ct. Rep. 924; Furman v. McMillian, 2 Lea, 121; Stokes v. Stevens, 40 Cal. 394.

The registration act of the territory of Arizona is taken verbatim from the statutes of the state of Texas. Having been adopted from that state, the legislature is presumed to have adopted with it the interpretation of it as given by the supreme court of that state.

Goldman v. Sotelo, 8 Ariz. 92.

This registration act has been repeatedly construed by the supreme court of the state of Texas, and has always been held not to apply to a mere equitable interest.

Blankenship v. Douglas, 26 Tex. 228, 82 Am. Dec. 608; Oberthier v. Stroud, 33 Tex. 524; Price v. Cole, 35 Tex. 470; Calvert v. Roche, 59 Tex. 464; Parker v. Coop, 60 Tex. 116; Senter & Co. v. Lambeth, 59 Tex. 262; Bradley v. Love, 60 Tex. 478.

The appellants are not subsequent purchasers for a valuable consideration. So far as they are purchasers, they are purchasers without valuable consideration.

McKamey v. Thorp, 61 Tex. 651; Allday v. Whitaker, 66 Tex. 673; Orme v. Roberts, 33 Tex. 768; Farley v. McAlister, 39 Tex. 603; Delespine v. Campbell, 52 Tex. 4; Aultman, M. & Co. v. George, 12 Tex. Civ. App. 459, 34 S. W. 652; Cobb v. Trammell, 9 Tex. Civ. App. 527, 30 S. W. 482; Hicks v. Pogue, 33 Tex. Civ. App. 333, 76 S. W. 786.

Where a party has sufficient notice to put him upon inquiry, and he neglects to make

such inquiry, he is chargeable with knowledge of all facts to which that inquiry would have led.

Vredenburgh v. Burnet, 31 N. J. Eq. 229.

380] *Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the appellee to establish and foreclose a lien on certain land, and already has been before this court. Smith v. Rainey, 209 U. S. 53, 52 L. ed. 679, 28 Sup. Ct. Rep. 474. At that hearing the land was decided to be partnership assets as between Smith and Rainey, and, as such, subject to a lien for repayment of advances made to the firm by Smith. The present appellants claim a right in Rainey's interest, paramount to Smith's, by virtue of an execution sale on a judgment against Rainey. The material facts are few. The title to the land by deed on record stood in Smith as to two undivided thirds, and in Rainey as to the other third. About April 29, 1897, Smith and Rainey made the agreement construed in 209 U. S. 53, out of which arose the partnership and the consequent lien before mentioned. On June 11, 1902, the appellants began a suit against Rainey upon an individual debt of his, and attached his interest in the land. On June 11, 1903, they got judgment. On July 18, 1903, Smith began the present action, making Frank Luke a defendant, as claiming some lien alleged by Smith to be subordinate to his own. On August 6, 1903, an order of sale was issued in the suit of the appellants, on September 8 the land was sold to the Lukes for the amount of their judgment, on December 29 the sheriff made return, and on June 20, 1904, there having been no redemption, executed a deed to the Lukes. The Lukes had no notice of Smith's rights earlier or other than that derived from the beginning of the present suit.

The statute of Arizona makes all conveyances of land and all deeds of trust and mortgages void, as against creditors and subsequent purchasers for value without notice, unless recorded, but leaves them valid as against purchasers with notice or without 381]valuable consideration. *Rev. Stat. 1901, ¶ 749. The supreme court of Arizona, starting from the admitted fact that the statute was copied from the laws of Texas, after examining the Texas decisions, concluded that when the debtor holds the legal title in trust for others with those funds and for whose use it was purchased, a purchaser at a sale on execution who has notice of their rights before his purchase will take subject to them notwithstanding the foregoing act. The court thought that the principle applied to such equitable rights as Smith was *decided to* have, in 209 U. S. 53, and hence concluded that if the Lukes had notice before the sale on September 8, 1903, from the original complaint in the present suit, Smith must prevail. On this construction of a local statute as well as on some subordinate matters of construction not so much pressed, we see no reason for not following the local court, in accordance with a leaning many times declared. Jones v. Springer, 226 U. S. 148, 157, ante, 161, 33 Sup. Ct. Rep. 64; Gray v. Taylor, January 20, 1913 [227 U. S. 51, ante, 413, 33 Sup. Ct. Rep. 199]. It is perhaps doubtful whether the instrument creating the partnership and making the land partnership assets could have been recorded; assuming, as the appellants urge, that the test of trusts that are outside of ¶ 749 is that they do not arise from an instrument that might be put on record,—a test not definitely accepted by the Arizona court. Some mention was made of a mortgage executed by Rainey and afterwards discharged, as giving additional color to Rainey's record title. But it is enough to say that the Lukes do not appear to have known of it before the execution sale to them.

Hence, the only question is whether the complaint as originally filed gave notice of Smith's rights. It did not set forth the contract, but alleged it to have been made in writing, and alleged that it was agreed that the plaintiff should advance all the money necessary for the improvement of the land, and should be repaid all sums advanced by him for that purpose or for the purchase of the land, *etc., with inter-[382 est, from sales of the land. It prayed that the plaintiff be declared to have an equitable mortgage lien upon Rainey's interest, paramount to Lukes' title, whatever it might be. This obviously was enough to put the Lukes upon inquiry as to the precise character of a contract that was alleged, and truly alleged as it turns out, to lay the foundation for an equitable interest superior to theirs.

Judgment affirmed.

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PEOPLE OF PORTO RICO, Plff. in Err.,
v.
TITLE GUARANTY & SURETY COMPANY.

(See S. C. Reporter's ed. 382-389.)

Bonds — construction — condition.

1. The result at the end of three years,

NOTE.—As to when performance of contract is excused—see notes to United States v. Peck, 26 L. ed. U. S. 46; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 40 L. ed. U. S. 515, and Stewart v. Stone, 14 L.R.A. 215.

and not the progress of the work at any intermediate period, was what was covered by a bond executed to secure the construction of an electric railway conformably to the ordinance granting the franchise, which called for full completion in three years, with subordinate requirements as to the amount of progress to be made in one and two years, although such bond requires performance within such three-year period of all other terms and conditions in the ordinance required to be performed by the principal within that time, and provides for the cancelation of the bond upon a certificate showing completion of the work, and upon full compliance with the terms of the ordinance, and states that no extension of the time limited for the completion of the work or any part thereof shall discharge the surety.

[For other cases, see Bonds, I., in Digest Sup. Ct. 1908.]

**Bonds — defenses — performance made impossible by obligee.**

2. A recovery upon a bond executed to secure the construction of an electric railway conformably to the ordinance granting the franchise cannot be had for a failure to perform, where, within the time allowed for performance, the franchise was revoked.

[For other cases, see Bonds, I., Contracts, V. b, in Digest Sup. Ct. 1908.]

[No. 154.]

Argued January 30, 1913. Decided February 24, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Middle District of Pennsylvania, granting a nonsuit in an action upon a bond. Affirmed.

See same case below, 103 C. C. A. 607, 180 Fed. 641.

The facts are stated in the opinion.

Mr. William Jessup Hand argued the cause, and, with Messrs. Wolcott H. Pitkin, Jr., and Frank Feuille filed a brief for plaintiff in error.

Messrs. Everett Warren and John G. Johnson argued the cause, and, with Mr. Severo Mallet-Prevost, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit upon a joint and several bond executed by the defendant in error as surety for the Vandegrift Construction Company. In the circuit court a nonsuit was ordered, and the order was affirmed by the circuit court of appeals on the ground that the plaintiff, by its own act, had made performance of the condition impossible. 103 C. C. A. 607, 180 Fed. 641. The facts are these:

By an ordinance of March, 1903, Porto Rico granted to the Vandegrift Company the right to build and operate an electric railway and also a power plant in specified places in the island. Within one year from acceptance of the grant the grantee was to have its roadbed completely graded between the island of San Juan and the urban portion of the municipality of Caguas, and the foundations and approaches of a certain bridge completed. § 15. Within two years it was to have the parts of the railway lying between the urban portion of San Juan and Caguas and certain other points finished and ready for service. § 16. Within three years it was to have the whole line completed and in operation. § 17. It was stated to be expressly understood and agreed that upon the grantee's failure to have the line in full operation within the time limited, *i. e.*, three years, the grantee's right to operate any part of it or to sell electric light and power should cease unless the failure should be declared by the executive council to be due to one of certain excuses, such as the act of God. § 16.

A power dam at Comerio Falls was to be completed in one year and the greater part of the electric apparatus *contracted[384 for the whole power plant and transmission lines necessary for operating the railway to be completed within three years. § 18. The grantee was to pay the government 2 per cent of its gross receipts from the sale of light and power to private consumers (§ 23), was not to charge above certain maxima fixed for passengers and freight (§ 25), and was to carry certain persons, such as prisoners and police on duty, free of charge (§§ 27, 28). The rights, privileges, and concessions granted by the ordinance were expressed to be subject to amendment, alteration, or repeal by the executive council. § 30. Then it was provided that the rights granted "shall be accepted by the grantee in writing and by executing a bond in favor of the People of Porto Rico, in the sum of $100,000, satisfactory, etc., . . . and conditioned upon the full completion of the work herein authorized within three years after such acceptance, and in accordance with the conditions herein contained, and in accordance with the plans and specifications therefor approved as herein provided; and conditioned also upon the payment by the grantee to the People of Porto Rico of any

On the effect of passage before expiration of time for performance of contract of statute rendering performance impossible—see *note to Cowley v. Northern P. R. Co.* 41 *L.R.A. (N.S.) 559.*

loss or damage or costs accruing against the People of Porto Rico, by reason of the construction of the works herein authorized, at any time during the period of construction herein limited," etc. § 34.

Upon presentation of a certificate of completion from the commissioner of the interior, "and upon the full compliance with the terms of this ordinance to the satisfaction of the executive council, and upon the full payment by the grantee of any loss, damage, and costs accruing against the People of Porto Rico, as in said bond provided, the said bond shall be canceled." § 35. Finally, the ordinance is to "take effect immediately upon the acceptance by the grantee of the terms and conditions hereof, as above provided." § 38.

385] *The bond in suit was executed, referring to and annexing the ordinance, and conditioned, among other things, that the principal, within three years from the date of the acceptance by it of the ordinance, should fully complete the work "in accordance with the conditions therein contained;" and again, that it should "duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the principal within the said period."†

386] *The principal failed to do within the year the work required by § 15 to be completed in that time, as has been stated, and a little more than two months after the year elapsed, in July, 1904, the executive council passed an ordinance amending §§ 15, 18, and 30 of the former one, the amendment being approved by the President on August 2. The time allowed in § 15 was extended to January 1, 1905, provided that the number of men employed on or before August 7 should be not less than 250, and that the number should be increased up to 500 or thereabouts, the intent expressed being that as many men should be engaged as was necessary to complete the work, and provided that the men should be paid weekly, and provided further that, upon failure to comply with the terms and conditions of the amendment, the franchise should be subject to immediate forfeiture. The requirement in § 18 as to the power dam at Comerio Falls, etc., also was extended to January 1, 1905. Finally, to the provision in § 30 as to amendment, etc., of the concession, there was added the express requirement of the approval of the governor of Porto Rico and of the President of the United States, and the statement that it was subject to the power of Congress to annul or modify the same. This amendment seems to have been sought and

†The whole condition of the bond was as follows:

"Now, therefore, the condition of this obligation is such that if the said principal shall, within three years from the date of the acceptance by it of said ordinance, fully complete the work therein authorized in accordance with the conditions therein contained, and in accordance with the plans and specifications therefor, approved as therein provided; and within the said period of three (3) years from the date of the acceptance by it of the said ordinance shall build, complete, and have in operation the entire line of railway authorized therein for such terminal in the municipality of San Juan, as may be determined by the said executive council, to its terminal on the playa of Ponce, on a route from Ponce to be determined by the said executive council, in accordance with the conditions in said ordinance contained, and in accordance with the plans and specifications therefor approved, as in said ordinance provided, and within the said period of three (3) years from the date of the acceptance by it of the said ordinance, shall also complete and have in operation the entire power plant and transmission lines necessary for operation the said entire line of railway, in accordance with the conditions therein contained, and in accordance with the plans and specifications therefor, approved as therein provided; and shall duly perform within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the principal within the said period; and shall pay to the obligee any loss or damage accruing against the said obligee by reason of the construction of the works in said ordinance authorized at any time during the period of construction therein limited, and before the completion of said work shall have been certified by the commissioner of the interior, as in § 35 of said ordinance provided,—then this obligation shall be void; otherwise to remain in full force and effect.

"Provided, however, and upon the following express conditions:

"First: That no extension of the time or times limited in said ordinance for the completion of the work therein authorized, or any part thereof, whether granted with or without the knowledge and consent of the sureties, shall in any way discharge the sureties from liability upon this bond; and,

"Second: That no suit, action, or proceeding shall be brought or instituted against the sureties after the period of five (5) years from the date hereof upon or by reason of any default on the part of the principal in the performance of any of the terms, covenants, or conditions of this bond But all extensions of time granted under the term of the franchise shall be added to the term of five (5) years, so that the life of the bond shall be kept in full force for the five (5) years, and so much additional time as shall be covered by the extension granted."

387]accepted *by the principal, but was not known to the defendant surety company, so far as appears.

In February, 1905, a further ordinance was passed, approved by the governor in March and by the President on May 12, which recited a failure by the company to comply with the terms of §§ 15 and 18, either in their original form or as amended; and therefore repealed and revoked the grant, and declared all "sureties or obligations . . . given by the said grantee as a guaranty . . . forfeited to the People of Porto Rico to all and whatsoever extent the same shall be liable under the law." In September, 1906, this suit was begun.

The main question is the scope of the condition of the bond. The plaintiff says that it was for the due performance of all the terms required by the ordinance, and, since the bond was a contract made in Porto Rico, as no doubt it was, at least, as between these parties, that upon any breach of condition the whole penalty became due by the local law. Civil Code, §§ 1120, 1121. The circuit court of appeals, on the other hand, assumed that the bond was only for the result at the end of three years.

After some hesitation we have come to the conclusion that the court was right. It is true that the bond is to be read in connection with the original ordinance, and that the latter contained terms that were not complied with. But the ordinance only required a bond for the full completion of the work within three years, and in accordance with the conditions therein contained and the plans. § 34. In the ordinance the only condition properly so called, the only fact that warranted a revocation of the grant apart from the general power to repeal, was, by § 16, a failure to have the whole railway in operation, as required by § 17. There was no forfeiture for falling short of the requirements in §§ 15 and 16 as to the progress to be made in one and two years. The bond in like manner has for its principal condition the completion of 388]the work within *three years. It is true that the completion was to be in accordance with the terms contained in the ordinance, but this clause cannot mean that if the road and works were in satisfactory operation within three years the obligee could recur to the history of events and, if it found that some item was not finished within the time allowed for it, could set up that fact as a breach, and, by its interpretation of Porto Rican law, recover the whole penalty of the bond. The subordinate requirements were simply means to an end; and if the end was reached, their importance disappeared. The very contentions of the plaintiff as to the liability incurred upon any breach are arguments against supposing that such incidental failures to be on time had such a consequence attached.

There is a further provision for the principal performing, "within the said period of three (3) years, all other terms and conditions in said ordinance required to be performed by the principal within the said period." This, perhaps, affords the plaintiff its strongest argument. But this is a residuary clause to cover matters that may have escaped consideration. The building of the road and works already have been dealt with, and this clause as to "other" terms hardly can be supposed to have reference to them. If it does, however, it would seem to us that the limitation of time should be construed as looking to the end of the three years, and allowing that period, rather than distributively, and as meaning from time to time during three years. The same considerations that apply to the construction of the principal condition apply to this, and it appears to us that the provision for the cancelation of the bond upon certificate showing the completion of the work, "and upon the full compliance with the terms of this ordinance to the satisfaction of the executive council," is not enough to change what we understand to be the import of the instrument upon its face. Finally, the proviso that no extension of the time or times limited for *the completion of the work "or any[389 part thereof" shall discharge the surety at most merely recognizes that the principal, by accepting the ordinance, contracted to do the parts of the work as required, as well as the whole, and with natural caution saves the rights of the obligee against the surety in case of any extension of time,—a matter that obligees have learned to fear.

If our construction of the bond is right, it does not need much argument to show that the plaintiff is not entitled to recover, seeing that within three years it took the franchise back. It was said at the bar, though not admitted, that the principal had given up work. But there had been no repudiation of the contract, and the plaintiff could not accelerate the forfeiture simply on the ground that it was likely to come about. If, within the time allowed for performance, the plaintiff made performance impossible, it is unimaginable that any civilized system of law would allow it to recover upon the bond for a failure to perform. 2 Bl. Com. 340, 341; United States v. Arredondo, 6 Pet. 691, 745, 746, 8 L. ed. 547, 567, 568.

Judgment affirmed.

A. C. CRENSHAW, Plff. in Err.,
v.
STATE OF ARKANSAS. (No. 127.)

E. L. GANNAWAY, Plff. in Err.,
v.
STATE OF ARKANSAS. (No. 128.)

(See S. C. Reporter's ed. 389–401.)

**Commerce — state regulation — peddlers and agents — police power.**

The business of traveling from place to place, taking orders and transmitting them to a nonresident manufacturer for articles to be delivered in fulfilment of such orders, and which are in fact shipped in interstate commerce and delivered to the persons who ordered them, or the business of making such deliveries, cannot, consistently with the commerce clause of the Federal Constitution, be subjected to a license tax, as is attempted by Ark. act April 1, 1909, and such statute cannot be sustained as a valid exercise of the police power of the state to tax the occupation of peddlers, because it defines peddlers in such a way as to include persons engaged in business of this character, and taxes them as such.

[For other cases, see Commerce, IV. b, 4, in Digest Sup. Ct. 1908.]

[Nos. 127 and 128.]

Argued January 20 and 21, 1913. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Arkansas to review judgments which affirmed judgments of the Union Circuit Court, affirming convictions before a justice of the peace of Union county, of violating the peddling statute. Reversed and remanded for further proceedings.

See same case below, 95 Ark. 464, 130 S. W. 569.

The facts are stated in the opinion.

Mr. John Merrick Moore argued the cause and filed a brief for plaintiffs in error:

The act of Arkansas of 1909, in so far as it applies to the business engaged in by plaintiffs in error, is an unauthorized regulation of interstate commerce, and as such is in conflict with article 1, § 8, of the Constitution of the United States.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Caldwell v. North Carolina, 187 U. S. 632, 47 L. ed. 341, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649.

It is immaterial whether the act of Arkansas of 1909 be intended as a regulation of peddling, and not as a regulation or license upon soliciting orders; or whether it be regarded as a police or a revenue measure.

Brown v. Maryland, 12 Wheat. 419, 444, 6 L. ed. 678, 687; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Western U. Teleg. Co. v. State, 82 Ark. 314, 101 S. W. 748, 12 Ann. Cas. 82; Welton v. Missouri, 91 U. S. 275, 23 Sup. Ct. Rep. 347; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

It is immaterial whether the contract of sale of the goods ordered be executed in the state where the purchaser resides, or in the state from which the goods are shipped; and it is immaterial where title to the goods passes.

Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Caldwell v. North Carolina, 187 U. S. 632, 47 L. ed. 341, 23 Sup. Ct. Rep. 229; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

Mr. William H. Rector, Assistant Attorney General of Arkansas, argued the cause, and, with Mr. Hal L. Norwood, Attorney General of Arkansas, and Messrs. T. H. Mehaffy and Charles C. Reid, filed a brief for defendant in error:

The supreme court of Arkansas has construed the act of 1909 as an exercise of the police power inherent in the state. That construction is conclusive upon this court.

Barnhill v. State, 102 Ark. 314, 144 S. W. 211; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Delamater v. South Dakota, 205 U. S.

NOTE.—On peddlers and drummers, as related to interstate commerce—see notes to Stockard v. Morgan, 46 L. ed. U. S. 785; Re Spain, 14 L.R.A. 97; State v. Bayer, 19 L.R.A.(N.S.) 297, and Dozier v. State, 28 L.R.A.(N.S.) 265.

93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

The peddling act of 1909, as applied to the facts in this case, is in no just sense a regulation of interstate commerce, but is a rightful and proper exercise of the police power inherent in the state, and is neither arbitrary, unreasonable, nor contrary to article 1, § 8, of the Constitution of the United States.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 286, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Western U. Teleg. Co. v. Kansas, 216 U. S. 27, 54 L. ed. 366, 30 Sup. Ct. Rep. 190; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Missouri, K. & T. B. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137; Woods v. Karl, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. Rep. 99; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89.

Mr. Justice Day delivered the opinion of the court:

The plaintiffs in error were convicted under a law of the state of Arkansas approved April 1, 1909, undertaking to regulate the sale of lightning rods, steel stove ranges, clocks, pumps, and vehicles in the several counties of the state. The judgment of conviction was affirmed (95 Ark. 464, 130 S. W. 569), and the case is here upon questions arising under the Federal Constitution.

*The act provides: [393

"Section 1. That hereafter, before any person, either as owner, manufacturer, or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage, or other vehicle, or either of said articles, he shall procure a license, as hereinafter provided, from the county clerk of such county, authorizing such person to conduct such business.

"Section 2. That before any person shall travel over or through any county and peddle or sell any of the articles mentioned above, he shall pay into the county treasury of such county the sum of two hundred ($200) dollars, taking the receipt of the treasurer therefor, which receipt shall state for what purpose the money was paid. The county clerk of such county, upon the presentation of such receipt, shall take up the same, and issue to such person a certificate or license, authorizing such person to travel over such county and sell such articles or article for a period of one year from the 1st day of January preceding the date of such license.

"Section 3. Any person who shall travel over or through any county in this state and peddle or sell, or offer to peddle or sell, any of the above enumerated articles without first procuring the license herein provided for, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than two hundred ($200) dollars nor more than five hundred ($500) dollars.

"Section 4. That any person who shall travel over or through any county in this state, and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this act." [Acts 1909, p. 292.]

The case was considered upon an agreed statement of facts, of which the following is an abridgment:

The Range Company, a corporation organized under the laws of Missouri, with its principal offices and factory *at St. [394 Louis, manufactures ranges which are sold by traveling salesmen in the United States, and, among other places, in the counties of Arkansas. The business is conducted in Union and other counties in Arkansas as follows: R. L. Sutton, an employee of the Range Company, and division superintendent, has general supervision of the company's business in that district, with four other employees, two known as sample men or salesmen and two as delivery men, under his direction. The employees are paid stipulated compensation for their services, and none of them have any financial or monetary interest in the property of the com-

pany in Union county, or in the sales or proceeds of sales made by them in that county or elsewhere in Arkansas, other than the compensation above referred to. The salesmen are furnished with a sample range and a wagon and team, and are sent into such territory in Union or other counties of Arkansas as may be designated by Sutton, to solicit orders for ranges. Where orders are taken the purchaser signs a note providing for the payment of the purchase price. The note or order contains a stipulation that it shall be void as against the purchaser in the event the company fails to deliver the range ordered within sixty days from date. All orders so taken are forwarded to Sutton, who investigates the credit of the purchasers, and, if found satisfactory, proceeds to have the orders filled within the sixty days' limit. Deliveries are made through or by the employees of the company known as delivery men, each of whom is furnished with a delivery wagon and team by the company for that purpose. The ranges, wagons, and teams are the property of the company. The sample ranges intrusted to the salesmen by the company are not sold by them. Under no circumstances do the salesmen deliver to the purchasers the ranges for which orders are taken; under no circumstances do the delivery men sell or offer to sell or take orders for ranges, or deliver any ranges other than 395]those *for which orders have previously been taken by the salesmen. All ranges ordered and manufactured are shipped in carload lots to Union and other counties, each car containing sixty separate ranges, and being consigned by the company to itself, in care of Sutton, its employee. At the end of each month Sutton settles with the company's employees, salesmen and delivery men, and sends their reports and his own report to the company, together with all notes taken by the salesmen during the month, and all cash in hand over $500, which amount is retained as expense money.

A carload of ranges was thus shipped from St. Louis to Eldorado, Arkansas, for the purpose of filling orders previously secured by the soliciting agents or traveling salesmen. Upon the arrival of the car at El Dorado the ranges were taken therefrom, loaded on delivery wagons, and delivered by the delivery men to purchasers in the precise shape, form, condition, and packages in which they were delivered to the common carrier at St. Louis.

It was agreed that Gannaway was a salesman of the Range Company, and had exhibited sample ranges and solicited and taken orders and secured notes for them, and that Crenshaw *acted as a delivery man* and delivered ranges to parties in Union county, who had previously given orders to salesmen.

This law is attacked, and the conviction of Crenshaw and Gannaway alleged to be unlawful, because, among other reasons, the law imposes a direct burden upon interstate commerce, exclusively within Federal control, and therefore beyond the power of the state to regulate. Under the facts which we have stated and upon which the court below decided the case, we think the law applicable to the present situation is well settled by previous decisions of this court.

The leading case is Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, in which it was undertaken in the *state of Tennes-[396 see to impose by statute a license tax upon drummers and persons not having a regular, licensed house of business in the taxing district, offering to sell or selling goods, wares, or merchandise by sample. Robbins was a resident of Cincinnati, Ohio, and was convicted of having offered for sale articles of merchandise belonging to a firm in Cincinnati, to be shipped into Tennessee, without having secured the license required by statute. In that case, while this court recognized the power of the state to pass inspection laws to secure the due quality and measure of products and commodities, and laws to regulate or restrict the sale of articles deemed injurious to the health or morals, the principle was laid down that "the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce," and it was held beyond the power of the state to impose a license tax upon the privilege of conducting such business. That case has been strictly adhered to in this court since its decision, and it is only necessary to notice a few of the many cases in which it has been applied.

In Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, an ordinance of the state of Pennsylvania was held invalid as imposing a tax on interstate commerce, where the tax was sought to be imposed upon a manufacturer of pictures residing in Chicago, having his factory and place of business there, whose agents solicited orders in Pennsylvania and other states by going personally from house to house with samples of pictures and frames. Upon the receipt of the orders they were forwarded to Chicago, where the goods were made, and whence they were shipped to the purchasers in Pennsylvania and elsewhere. This court reviewed the previous cases at length, and,

in the course of the discussion, said (p. 302):

"Even if it be that we are concluded by the opinion of the supreme court of the 397]state that this ordinance was *enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the state; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229, a taxing ordinance of the city of Greensboro was held invalid as an unlawful interference with interstate commerce, where a portrait company engaged in making pictures and frames in Chicago sold them upon orders solicited in North Carolina, shipping the pictures and frames in separate packages to its own agent, who placed the pictures in their proper frames and delivered them to the persons ordering them. This was held to be a transaction in interstate commerce and beyond the taxing power of the state, and it was held to make no difference that the pictures and frames were shipped to the company itself at Greensboro, where the agent of the company received them from the railroad at its depot, carried them to his room in Greensboro, opened the packages, took out and assorted them, and put them together, and in this form delivered them to the purchasers in the city of Greensboro, who had previously ordered them. Of this feature of the case, which had been held in the supreme court of North Carolina to differentiate the case from the former cases, this court said (p. 632):

"Nor does the fact that these articles 398]were not shipped *separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation."

In Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159, an ordinance of the borough of Sunbury, in the state of Pennsylvania, was held invalid which undertook to make it unlawful to solicit on the streets or by traveling from house to house, orders for the sale or delivery at retail, of foreign or domestic goods not of the parties' own manufacture or production, without a license, for which a fee was charged. It was undertaken in that case to apply the ordinance to Rearick, who solicited orders for brooms which were shipped from Columbus, Ohio, to fill the orders solicited, the brooms being tagged and marked according to the number ordered, and tied together in bundles of about a dozen for shipment. It was held that the brooms were specifically appropriated to the keeping of contracts the fulfilling of which required the transportation of the brooms for delivery in interstate commerce.

In Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649, where pictures were sold to be transported and delivered in interstate commerce, and at the time they were ordered an option was taken, fixing the specific price of a frame in which the picture was to be delivered, both picture and frame being manufactured in another state, and to remain the property of the vendor until sold, the sale of the frame was held to be part of a transaction protected by the commerce clause of the Constitution, although the purchasers were not bound to take the frames unless they saw fit. Applying the previous cases, this court held the license tax for *soliciting orders for the pic-[399 tures and frames could not be applied to persons taking such orders to be fulfilled by shipments from another state, which constituted interstate commerce, and which could not be taxed under the law of the state.

Nor does the fact that the law now in question was alleged to have been passed in the exercise of the police power of the state make it lawful. In Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473, 24 L. ed. 527, 531, this court said that "the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution." To the same effect, Walling v. Michigan, 116 U. S. 446, 460, 29 L. ed. 691, 695, 6 Sup. Ct. Rep. 454; Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Brennan v. Titusville, 153 U. S. 302, 303,

38 L. ed. 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

In the opinion delivered for the majority of the supreme court of Arkansas, the law in question was upheld, notwithstanding the decisions of this court, which were recognized, because of the distinguishing feature of the ordinance as a valid exercise of the police power of the state in taxing the occupation of peddling, and to sustain that conclusion Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367, was relied upon. In that case a tax upon peddlers within the state of Missouri by a statute of the state by which peddlers of goods, going from place to place in the state, were required to take out a license, was sustained. The cases were fully considered by Mr. Justice Gray, who delivered the opinion of the court, and the right to tax peddlers from early times in England and America was stated, and a history of much of the legislation given. The law was sustained as against the contention that it violated the interstate commerce clause of the Constitution, because it was shown that Emert, who was convicted, carried the machines with 400]him in a wagon, and upon making *a sale delivered the machine to the purchaser. He was not merely soliciting orders for machines, but selling and delivering them. Upon this ground the supreme court of Missouri and this court placed its decision (p. 310), and Mr. Justice Gray said (p. 311):

"The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce."

In the Emert Case, therefore, there was no movement of goods in interstate commerce because of orders taken for their sale, but the specific articles carried about by the peddler, and none other, were sold and delivered by him. In the majority opinion of the supreme court of Arkansas the definition of hawkers and peddlers, as understood at common law, was recognized,—as one who goes from house to house or place to place, carrying his merchandise with him, which he concurrently sells and delivers (2 Bouvier's Law Dict. 642),—but it was said that the legislature of Arkansas might define the word "peddlers" so as to include such as traveled from place to place and took orders for goods from other states, and that such persons, because of the statute declaring them so, were peddlers, and liable to be taxed under the lawful exercise of the police power of the state. We must look, however, to the substance of things, not the names by which they are labeled, particularly in dealing with rights created and conserved by the Federal Constitution, and finding their ultimate protection in the decisions of this court. At common law and under the statutes which have been sustained concerning peddlers, *they are such as travel from place to[401 place, selling the goods carried about with them; not such as take orders for the delivery of goods to be shipped in the course of commerce. Here, as the facts show, the sample ranges carried about from place to place are not sold. Orders are taken and transmitted to the manufacturer in another state for ranges to be delivered in fulfilment of such orders, which are in fact shipped in interstate commerce and delivered to the persons who ordered them. Business of this character, as well settled by the decisions of this court, constitutes interstate commerce, and the privilege of doing it cannot be taxed by the state.

It follows that the judgments of the Supreme Court of Arkansas must be reversed and the cases remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

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P. L. ROGERS, Plff. in Err.,
v.
STATE OF ARKANSAS. (No. 576.)

L. P. BARNHILL, Plff. in Err.,
v.
STATE OF ARKANSAS. (No. 577.)

(See S. C. Reporter's ed. 401–409.)

These cases are governed by the decision in Crenshaw v. Arkansas, ante, 565.

[Nos. 576 and 577.]

Argued January 21, 1913. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Arkansas to review judgments which affirmed convictions of the Greene Circuit Court of violating the peddling statute. Reversed and remanded for further proceedings.

See same case below, 102 Ark. 314, 144 S. W. 211.

The facts are stated in the opinion.

Mr. A. C. Lyon argued the cause and filed a brief for plaintiffs in error:

The Arkansas statute, correctly construed, does not apply to an interstate commerce transaction such as the agreed statement of facts in this case shows. Plaintiffs in error were not engaged in peddling, and their acts do not come within the scope of the Arkansas statute.

Com. v. Farnum, 114 Mass. 267; St. Paul v. Briggs, 85 Minn. 290, 89 Am. St. Rep. 554, 88 N. W. 984; State v. Moorehead, 42 S. C. 211, 26 L.R.A. 585, 46 Am. St. Rep. 719, 20 S. E. 544; Kansas v. Collins, 34 Kan. 434, 8 Pac. 865; Davenport v. Rice, 75 Iowa, 74, 9 Am. St. Rep. 454, 39 N. W. 191; Spencer v. Whiting, 68 Iowa, 678, 28 N. W. 13; Potts v. State, 45 Tex. Crim. Rep. 45, 74 S. W. 31, 2 Ann. Cas. 827; State v. Ivey, 73 S. C. 282, 53 S. E. 428; Kennedy v. People, 9 Colo. App. 490, 49 Pac. 373; Hewson v. Englewood Twp. 55 N. J. L. 522, 21 L.R.A. 736, 27 Atl. 904; State v. Frank, 130 N. C. 724, 89 Am. St. Rep. 885, 41 S. E. 485; Wausau v. Heideman, 119 Wis. 244, 96 N. W. 549; Cerro Gordo v. Rawlings, 135 Ill. 36, 25 N. E. 1006; Stamford v. Fisher, 140 N. Y. 187, 35 N. E. 500; State v. Wells, 69 N. H. 424, 48 L.R.A. 99, 45 Atl. 143; Kimmel v. Americus, 105 Ga. 694, 31 S. E. 623; Clements v. Casper, 4 Wyo. 494, 35 Pac. 472; Brookfield v. Kitchen, 163 Mo. 546, 63 S. W. 825; Pegues v. Ray, 50 La. Ann. 574, 23 So. 904; Hynes v. Briggs, 41 Fed. 468; Re Kimmel, 3 Inters. Com. Rep. 114, 41 Fed. 775; Re Spain, 14 L.R.A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208; Re Houston, 14 L.R.A. 719, 47 Fed. 539; Re Flinn, 57 Fed. 496; Chicago Portrait Co. v. Macon, 147 Fed. 967; State v. Gruber, 116 Minn. 221, 45 L.R.A.(N.S.) 591, 133 N. W. 571; Clark v. State, 4 Ala. App. 202, 59 So. 236.

Plaintiffs in error were engaged in interstate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96; Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 2 Inters Com. Rep. 232, 9 Sup. Ct. Rep. 6; Robbins v. Taxing Dist. 120 U. S. 489, 497, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 367, 10 Sup. Ct. Rep. 681; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. *785, 22 Sup. Ct. Rep. 576; Caldwell* v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649.

The act of Arkansas under consideration in its effect and operation practically applies only to nonresidents of the state of Arkansas, and hence abridges the privileges and immunities of the citizens of the several states, and is therefore invalid. United States Census reports show that none of the articles named are manufactured to any great extent, if at all, in the state of Arkansas. Taxing those who peddle or sell these articles, therefore, imposes a burden upon nonresident manufacturers, who must furnish all the necessary supply, and limits and prescribes the methods by which they can sell their produce in Arkansas. Statutes in which such a discrimination or any discrimination against nonresidents results from express terms are plainly unconstitutional.

Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.

Statutes which have the effect and operation of discriminating against the citizens of outside states are equally as invalid and unconstitutional as those which expressly so discriminate.

State v. Bayer, 34 Utah, 257, 19 L.R.A. (N.S.) 297, 97 Pac. 129; State v. Wright, 53 Or. 344, 21 L.R.A.(N.S.) 349, 100 Pac. 296; Smith v. Farr, 46 Colo. 364, 104 Pac. 401; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Robbins v. Taxing Dist. 120 U. S. 489, 1 Inters. Com. Rep. 45, 30 L. ed. 694, 7 Sup. Ct. Rep. 592.

The act of Arkansas is prohibitive and confiscatory, and deprives persons of life, liberty, and property without due process of law, and hence is unconstitutional and invalid. The statute is intended to destroy and annihilate the business covered by its terms.

Re McCoy, 10 Cal. App. 116, 101 Pac. 419; Laundry License Case, 22 Fed. 701; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Cache County ex rel. Matthews v. Jensen, 21 Utah, 207, 61 Pac. 306; Spaulding v. Evenson, 149 Fed. 913; State v. Bayer, 34 Utah, 257, 19 L.R.A. (N.S.) 297, 97 Pac. 129; Smith v. Farr, 46 Colo. 364, 104 Pac. 401; Iowa City v. Glassman, — Iowa, —, 40 L.R.A.(N.S.) 852, 136

N. W. 899; Carrollton v. Bazzette, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; People ex rel. Moskowitz v. Jenkins, 202 N. Y. 53, 35 L.R.A.(N.S.) 1079, 94 N. E. 1065; 1 Tiedeman, State & Federal Control of Persons & Property, 505.

Chapter 97 of the 1909 Laws of Arkansas unreasonably discriminates between persons who are substantially in the same position, and creates an arbitrary classification, and therefore denies the equal protection of the laws to those against whom it discriminates, and is in contravention of the 14th Amendment to the U. S. Constitution, and therefore void.

State v. Wright, 53 Or. 344, 21 L.R.A. (N.S.) 349, 100 Pac. 296; State v. Bayer, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129; Smith v. Farr, 46 Colo. 364, 104 Pac. 401; Ex parte Jones, 38 Tex. Crim. Rep. 482, 43 S. W. 513; State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; Spokane v. Macho, 51 Wash. 322, 21 L.R.A.(N.S.) 263, 103 Am. St. Rep. 1100, 98 Pac. 755; Jackson v. State, 55 Tex. Crim. Rep. 557, 117 S. W. 818; State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 40 Ohio L. J. 119, 65 Am. St. Rep. 785, 51 N. E. 136; State ex rel. Chapel v. Justus, 90 Minn. 474, 97 N. W. 124; State ex rel. Richey v. Smith, 42 Wash. 237, 5 L.R.A. (N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 Ann. Cas. 577; Henry v. Campbell, 133 Ga. 882, 27 L.R.A.(N.S.) 283, 67 S. E. 390, 18 Ann. Cas. 178; State v. Miksicek, 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507; People ex rel. Duryea v. Wilber, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626; Re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986; Tacoma v. Krech, 15 Wash. 296, 34 L.R.A. 68, 46 Pac. 255; Denver v. Bach, 26 Colo. 530, 46 L.R.A. 848, 58 Pac. 1089; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 20 L.R.A.(N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Re Grice, 79 Fed. 627; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

Act 97 of the 1909 Laws of Arkansas is a type of similar laws enacted previously in Arkansas and in many other states. All of these laws of this type, including the Arkansas law under consideration, are trade laws, pure and simple. They are not passed in a bona fide attempt to exert the police power of the state to remedy a public evil. As a matter of common knowledge, they are passed at the instance and request of a certain kind or class of dealers or traders in order to build up and strengthen their own business, and to keep out the competition of those whose business would interfere with their own.

People v. Ringe, 197 N. Y. 143, 27 L.R.A. (N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; State v. Rice, 115 Md. 317, 36 L.R.A.(N.S.) 344, 80 Atl. 1026; Wyeth v. Board of Health, 200 Mass. 474, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925; Great Atlantic & P. Tea Co. v. Tippecanoe, 85 Ohio St. 120, 96 N. E. 1092; People ex rel. Moskowitz v. Jenkins, 202 N. Y. 53, 35 L.R.A. (N.S.) 1079, 94 N. E. 1065; Jewel Tea Co. v. Lee's Summit, 189 Fed. 280; State ex rel. Richey v. Smith, 42 Wash. 237, 5 L.R.A. (N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 Ann. Cas. 577; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Denver Jobbers' Asso. v. People, — Colo. App. —, 122 Pac. 404; State v. Wright, 53 Or. 344, 21 L.R.A.(N.S.) 349, 100 Pac. 296; Smith v. Farr, 46 Colo. 364, 104 Pac. 401; State v. Bayer, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129; Ex parte Deeds, 75 Ark. 542, 87 S. W. 1030; Ex parte Eaglesfield, 180 Fed. 558; Potts v. State, 45 Tex. Crim. Rep. 45, 74 S. W. 31, 2 Ann. Cas. 827; Spaulding v. Evenson, 149 Fed. 913; Re Kinyon, 9 Idaho, 642, 75 Pac. 268, 2 Ann. Cas. 699; Re Jarvis, 66 Kan. 329, 71 Pac. 576, 15 Am. Crim. Rep. 391; State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; State ex rel. Mudeking v. Parr, 109 Minn. 147, 134 Am. St. Rep. 759, 123 N. W. 408; Bacon v. Locke, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; Stratton v. State, 91 Neb. 780, 137 N. W. 903; State v. Garbroski, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. E. 959.

Mr. Charles C. Reid argued the cause, and, with Mr. Hal L. Norwood, Attorney General of Arkansas, Mr. William H. Rector, Assistant Attorney General, and Mr. T. M. Mehaffy, filed a brief for defendant in error:

The act, neither in terms nor by fair implication, can be confined to nonresidents of the state of Arkansas, but is applicable to all who engage in the occupation of peddling, regardless of whether they are resi-

dents of the state or nonresidents thereof. The statute does not have the effect of discriminating against the citizens outside of the state.

Ex parte Byles, 93 Ark. 620, 37 L.R.A. (N.S.) 774, 126 S. W. 94; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; State v. Webber, 214 Mo. 272, 113 S. W. 1054, 15 Ann. Cas. 983; Singer Mfg. Co. v. Wright, 97 Ga. 114, 35 L.R.A. 497, 25 S. E. 249; State v. Montgomery, 92 Me. 433, 43 Atl. 13; Hays v. Com. 107 Ky. 655, 55 S. W. 425; People v. Smith, 147 Mich. 391, 110 N. W. 1102; State v. Stevenson, 109 N. C. 730, 26 Am. St. Rep. 595, 14 S. E. 385; Ex parte Heylman, 92 Cal. 492, 28 Pac. 675; Brown-Forman Co. v. Kentucky, 217 U. S. 571, 573, 54 L. ed. 886, 887, 30 Sup. Ct. Rep. 578; Southwestern Oil Co. v. Texas, 217 U. S. 126, 127, 54 L. ed. 694, 695, 30 Sup. Ct. Rep. 496.

Whether the enactment of a statute is really adapted to bring about the result desired from its passage, and calculated to promote the general welfare, are all matters with which the state court is familiar, but a like familiarity cannot be ascribed to this court.

Welsh v. Swasey, 214 U. S. 105, 53 L. ed. 929, 29 Sup. Ct. Rep. 567; McLean v. Arkansas, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 U. S. 90, 54 L. ed. 677, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.

Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232-237, 33 L. ed. 892-895, 10 Sup. Ct. Rep. 533; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Connolly v. Union Sewer Pipe Co. *184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Kentucky Railroad Tax* Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Cook v. Marshall County, 196 U. S. 268, 49 L. ed. 473, 25 Sup. Ct. Rep. 233; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 237; State v. Webber, 214 Mo. 272, 113 S. W. 1055, 15 Ann. Cas. 983; Atty. Gen. v. Tongue, 12 Price, 51; Graffty v. Rushville, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; South Bend v. Martin, 142 Ind. 31, 29 L.R.A. 531, 41 N. E. 315, 21 Am. & Eng. Enc. Law, 2d ed. 791.

*Mr. Justice Day delivered the[408 opinion of the court:

The plaintiffs in error were convicted of peddling buggies in Greene county, Arkansas, without having paid the license or privilege tax required by an act of the Arkansas legislature approved April 1, 1909, regulating the sale of lightning rods, steel stove ranges, clocks, pumps, and vehicles in the counties of that state. (The provisions of such statute are set out in the case just decided, Crenshaw v. Arkansas [227 U. S. 389, ante, 565, 33 Sup. Ct. Rep. 294]). The supreme court of Arkansas affirmed the judgments upon the authority of Crenshaw v. State, 95 Ark. 464, 130 S. W. 569 (102 Ark. 314, 144 S. W. 211), and the cases are here upon writ of error.

The cases were submitted upon an agreed statement of facts, the gist of which is that the Spaulding Manufacturing Company, a partnership, with its principal place of business and factory at Grinnell, Iowa, manufactures buggies and automobiles which are sold directly to the consumers throughout the United States. It has no permanent place of business in Arkansas, but sends a force of salesmen or canvassers, in charge of a superintendent, into Greene and other counties of Arkansas, who travel about exhibiting their sample buggies and taking orders for future delivery. Where orders are taken, a memorandum is signed by the purchaser, stipulating for the delivery of the vehicle within a certain time, and a note for the purchase price is secured. The orders are turned over to the superintendent, who, if he finds the financial responsibility of the customers satisfactory, transmits the orders to an agent of the company at Memphis, Tennessee, where vehicles of the company of various grades and kinds are stored. Vehicles to fill the orders are selected, tagged with the name of the purchaser, and shipped in carload lots to a

place near where they are to be delivered, consigned to the company. An employee 409]of the company, usually *a different person from the salesman, called a delivery man, receives the vehicles and delivers them to the respective purchasers, no storage house being maintained at that point. It was further agreed that no vehicles, save the samples, which are never sold, are brought into or stored in Arkansas, except for the purpose of delivery upon orders previously taken; and no vehicles are sold other than upon orders taken before they are brought into the state. The plaintiffs in error were salesmen and transacted the business above described.

The manner in which the business of soliciting orders for and delivering vehicles was done by the Spaulding Manufacturing Company differs in no practical or material particular from that employed by the Wrought Iron Range Company in the case just decided (Crenshaw v. Arkansas). In fact, the only difference is that the ranges were shipped to the company, bearing no marks to identify the purchasers, and were delivered to the purchasers by the delivery men without distinction, while the vehicles were tagged at Memphis, and upon arrival in Arkansas were delivered by the delivery men to the purchasers whose names appeared upon the tags attached to the vehicles. This is merely a matter of detail in the manner in which the business is conducted, and does not affect its character. The decision in Crenshaw v. Arkansas, supra, has dealt with precisely the same statute and substantially the same facts, and controls the present cases.

The judgments of the Supreme Court of Arkansas must therefore be reversed, and the cases remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

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410] *JOHN L. JAMES, Bankrupt, Appt.,
v.
STONE & COMPANY, Creditor, and A. G. Ricaud, Trustee in Bankruptcy of John L. James, Bankrupt.

(See S. C. Reporter's ed. 410-412.)

**Appeal — from circuit court of appeals — bankruptcy cases.**

An appeal will not lie to the Federal Supreme Court from a judgment of a circuit court of appeals, which affirmed a judgment of the bankruptcy court, refusing to grant a discharge in bankruptcy, but the only appeal contemplated by the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, pp. 3431, 3432), §§ 24, 25, is from the bankruptcy court to the circuit court of appeals.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

[No. 142.]

Submitted January 23, 1913. Decided February 24, 1913.

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of North Carolina, refusing to grant a discharge in bankruptcy. Dismissed for want of jurisdiction.

See same case below, 104 C. C. A. 224, 181 Fed. 476.

The facts are stated in the opinion.

Mr. H. L. Stevens submitted the cause for appellant. Mr. Henry R. Miller was on the brief.

No appearance for appellees.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of appeals for the fourth circuit, affirming the judgment of the district court of the United States for the eastern district of North Carolina, refusing to grant a discharge in bankruptcy to John L. James, bankrupt.

So much of § 14 of the bankruptcy act, which provides for the granting of discharges in bankruptcy, as is applicable to this case, reads as follows:

"The judge shall hear the application for a discharge, . . . and discharge the applicant unless he has . . . at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed . . . *any of his prop-[411 erty with intent to hinder, delay, or defraud his creditors." [30 Stat. at L. 550, chap. 541, as amended, 32 Stat. at L. 797, chap. 487, § 4, U. S. Comp. Stat. Supp. 1911, p. 1496.]

The district court held that the bankrupt had concealed property with intent to hinder and delay his creditors subsequently to the

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NOTE.—Appellate jurisdiction of Federal Supreme Court in bankruptcy cases.

The Federal Supreme Court is, by § 24a of the bankrupt act, given appellate jurisdiction of "*controversies arising* in bankruptcy proceedings" from the courts of bankruptcy from which it has appellate jurisdiction in other cases. Hence, where the proceeding is a controversy in bankruptcy, as the term is therein used, the Supreme Court may review the judgment of a circuit court

first day of the four months immediately preceding the filing of the petition, and entered an order refusing to grant the discharge. 175 Fed. 894. Upon appeal, the circuit court of appeals affirmed that order. 104 C. C. A. 224, 181 Fed. 476. The case was then brought to this court by appeal.

We are unable to discover anything in the bankruptcy act which permits an appeal in such a case from the circuit court of appeals to this court. Under § 24*a* this court is given appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which there is appellate jurisdiction in other cases. This section has been the subject of adjudication in this court in a number of cases, and it is held that controversies in bankruptcy proceedings, as the terms are therein used, do not mean mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, although arising in the course of proceedings in bankruptcy. Hewit v. Berlin Mach. Works, 194 U. S. 296, 300, 48 L. ed. 986, 987, 24 Sup. Ct. Rep. 690; Coder v. Arts, 213 U. S. 223, 234, 53 L. ed. 772, 777, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 118, 56 L. ed. 118, 119, 32 Sup. Ct. Rep. 67.

Subdivision *b* of § 24 gives the circuit courts of appeal jurisdiction to superintend and revise in matters of law the proceedings of courts of bankruptcy within their jurisdiction. Section 25 concerns appeals in bankruptcy proceedings of which an ap-

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of appeals under the circuit courts of appeals act of March 3, 1891, giving an appeal to the Supreme Court from the circuit courts of appeals in cases not made final by that section.

Such a controversy is presented by an appeal to the circuit court of appeals from a judgment of a court of bankruptcy sustaining a title to property in the possession of a trustee in bankruptcy, asserted by intervention raising a distinct and separable issue. Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L ed. 986, 24 Sup. Ct. Rep. 690.

An appeal lies to the Federal Supreme Court from a judgment of a circuit court of appeals, entered on an appeal from a court of bankruptcy, sustaining the contention asserted by a petition in intervention, that advances made by a railway company to enable a coal company, under contract to supply the railway company with coal, to meet its pay rolls, amount to a pledge enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued performance of the contract, of such a quantity of coal when mined as the moneys so advanced would pay for according to the terms of the original contract. Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466.

But an order of a court of bankruptcy in a proceeding in which there was a controversy between the creditors and one of the members of a bankrupt partnership as to whether he was liable as a general or limited partner cannot be regarded as rendered in a controversy arising in bankruptcy proceedings, for the purpose of sustaining an appeal to the Federal Supreme Court under the bankrupt act of July 1, 1898, § 24a, where such appeal was specifically taken from the order as one disallowing the claim of the appellants of an alleged indebtedness to them from the bankrupt firm, and such was the character necessarily attributed to the order by the judge when he entered it, and which was affixed to it by the assignments of error filed at the time the appeal was taken. Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118, 32 Sup. Ct. Rep. 67.

And the petition in an action by a trustee in bankruptcy upon a bond which was given so that certain property might be removed out of the jurisdiction does not disclose, as a ground of Federal jurisdiction, in addition to that shown by averments of diverse citizenship, that the case arose under the laws of the United States, so as to permit a writ of error from the Federal Supreme Court to review the judgment of the circuit court of appeals, where the trustee does not rely upon any right specially conferred upon him by any Federal statute, but rests his right to recover solely upon the ownership of the property by the bankrupts as their own before the bankruptcy proceedings. Lovell v. Newman, 227 U. S. 412, post, 577, 33 Sup. Ct. Rep. 375.

The right to a review in the Federal Supreme Court of a decision of a circuit court of appeals which affirmed the ruling of the bankruptcy court, made in the course of the determination of an issue as to the alleged bankruptcy, upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, must be found in the bankrupt act, and no such right is given by the provisions of the act of March 3, 1891, § 6, governing the general appellate jurisdiction of the Federal Supreme Court over the circuit courts of appeals. J. W. Calnan Co. v. Doherty, 224 U. S. 145, 56 L. ed. 702, 32 Sup. Ct. Rep. 460.

Appeals to the Federal Supreme Court from the circuit courts of appeals may, by § 25b of the bankruptcy act of July 1, 1898, be taken from the final decisions allowing or rejecting a claim under the act (1) where the amount in controversy exceeds $2,000, and the question involved is one which would sustain a writ of error to a state court; (2) where the justice of the Supreme Court shall certify that, in his opinion, the determination of the question involved in the allowance or rejection of the claim is essential to a uniform construction of the act

A judgment of a circuit court of appeals affirming, on the appeal of a trustee in

plication for discharge is one. By the terms of subdivision *a* of that section an appeal is given to the circuit court of appeals, first, from a judgment adjudging or refusing to adjudge the defendant a bankrupt; second, from a judgment granting or denying a discharge; and third, from a judgment allowing 412 ]or *rejecting a claim of $500 or over. Subdivision *b* of § 25 regulates appeals from the circuit court of appeals to this court, and is confined to decisions of the circuit courts of appeals allowing or rejecting a claim under the act, first, where the amount in controversy exceeds the sum of $2,000 and the question involved is one which might have been taken on appeal or error to this court from the highest court of a state; or, second, where a justice of this court shall certify that, in his opinion, the determination of the question involved in the allowance or rejection of the claim is essential to a uniform construction of the act. Section 25 further provides that controversies may be certified to the Supreme Court from other courts of the United States, and that the Supreme Court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the laws of the United States.

It will be noticed that the only appeal in bankruptcy proceedings from a judgment granting or refusing a discharge is from the bankruptcy court to the circuit court of appeals. The present appeal must therefore be dismissed.

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bankruptcy, the judgment of the bankruptcy court on a claim upon notes of the bankrupt, joined with the statement that the claimant had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets, is such a "final decision" "allowing or rejecting a claim," within the meaning of this section, although the trustee made no objection to the amount found due upon the notes, and only sought by his appeal to contest further the right to security. Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

A decision of a circuit court of appeals which affirmed a ruling of the bankruptcy court, made in the course of the determination of an issue as to the alleged bankruptcy, upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, is not a final decision allowing or rejecting a claim within the meaning of this section. J. W. Calnan Co. v. Doherty, supra.

The question whether an order of the bankruptcy court from which no appeal was taken, postponing a part of the claim of an officer of a bankrupt corporation to the claim of an intervener, was correctly interpreted by the referee and court in the distribution directed by a subsequent administrative order, is not one concerning the allowance or rejection of a claim within the meaning of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 25b, governing appeals from the circuit courts of appeals to the Federal Supreme Court, but is a matter arising in the administration of the bankrupt estate, which the Supreme Court is not empowered to review. Wynkoop, H. C. Co. v. Gaines, 227 U. S. 4, ante, 391, 33 Sup. Ct. Rep. 214.

The question involved in allowing or rejecting a claim is one which, within the meaning of this section, would have sustained a writ of error from that court had the case been decided by the highest court of the state, where, in determining the validity of a lien asserted to secure a claim against the bankrupt's estate, a construction of the bankrupt act is directly involved, one party asserting a construction which would defeat the lien, and the other party one which would give it validity. Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

The same is true of the decision of a circuit court of appeals denying an asserted right of set-off in a proceeding in bankruptcy, which right is controlled by the provisions of the bankrupt act of July 1, 1898, § 68, governing set-offs and counterclaims. Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339.

But the bare denial by a trustee in bankruptcy of a claim of a creditor, asserted under the bankruptcy act of July 1, 1898, is not the assertion by the trustee of a right under such statute, so as to give him the right to appeal to the Federal Supreme Court from a decision of a circuit court of appeals in favor of the creditor, under this section. Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

And a decision of a circuit court of appeals that a creditor is entitled to have his claim allowed against the estate of the bankrupt partnership, which proceeds upon a well-settled principle of general law, broad enough to sustain it without reference to the provisions of the bankruptcy act of July 1, 1898, is not reviewable in the Federal Supreme Court under this section, as involving a question which would sustain a writ of error to a state court. Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

A decision of a circuit court of appeals that certain creditors from whom a bankrupt obtained goods by fraud were entitled to preferential payment of their claim, presented by an intervening petition after their further prosecution of an action of replevin against a receiver appointed by a state court had been enjoined by the bankruptcy court, is not reviewable in the Federal Supreme Court, as involving a question which would sustain a writ of error to a state court, because the replevin suit in the state court was considered by the circuit court of appeals as showing the purpose of the creditors to

rescind the sale of the goods replevied, and as a means of identifying what part of the goods sued for was in the possession of the state court, and, afterwards, what proceeds of sales went into the possession of the bankruptcy court under an order of the state court for the delivery of the property to the receiver in bankruptcy, upon the condition that the latter should assume and pay the liabilities incurred in the state court. Blake v. Openhym, 216 U. S. 322, 54 L. ed. 498, 30 Sup. Ct. Rep. 309.

The revising order of a circuit court of appeals, made in the exercise of its jurisdiction under the bankrupt act of July 1, 1898, § 24b, to review, by original petition, proceedings of inferior courts of bankruptcy, which revised an order of the district court allowing an exemption, is not a "final decision . . . allowing or rejecting a claim," within the meaning of § 25b, and is reviewable only by certiorari. Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

The Federal Supreme Court has no jurisdiction of an appeal from a decree of a circuit court of appeals, dismissing, for want of jurisdiction, an appeal from an order of a circuit court, entered upon a revisory petition filed under the bankruptcy act of March 2, 1867. The decree of the circuit court is final. Kyle v. Hammond, 225 U. S. 692, 56 L. ed. 1260, 32 Sup. Ct. Rep. 406.

The revisory order of a Federal circuit court of appeals in the proceedings authorized by the bankrupt act of July 1, 1898, § 24b, which reversed a decree of the bankruptcy court, confirming the order of the referee, refusing to allow a certain claim to be filed for the purpose of voting at the election of the trustee, and directed that court to allow the claim to be proved, is not reviewable in the Federal Supreme Court, even if the circuit court of appeals treated the proceeding as an appeal. Duryea Power Co. v. Sternbergh, 218 U. S. 299, 54 L. ed. 1047, 31 Sup. Ct. Rep. 25.

See, on the general question of the appellate jurisdiction of the Federal Supreme Court over the circuit courts of appeals, note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

The appellate jurisdiction of the Federal Supreme Court over the district courts in bankruptcy cases is measured by the provisions of § 24a of the bankrupt act, cited above, and of § 5 of the circuit courts of appeals act of March 3, 1891, governing the direct review in the Supreme Court of the judgments of the district courts.

The question of the jurisdiction of a Federal district court is not involved so as to require the appeal to be taken to the Supreme Court of the United States rather than to the circuit court of appeals, in the determination that a corporation is principally engaged in such a business that it can be adjudged a bankrupt. Columbia Ironworks v. National Lead Co. 64 L.R.A. 645, *62 C. C. A. 99, 127 Fed. 99.*

*A direct appeal to the Supreme Court* of the United States from a judgment of a district court dismissing a petition in involuntary bankruptcy, entered after directing the jury to find that the alleged bankrupt was engaged chiefly in farming, and was therefore, by the express terms of the bankruptcy act, not subject to its provisions, cannot be maintained on the theory that the jurisdiction of the district court was drawn in issue, within the meaning of the act of March 3, 1891, § 5,—especially where no question of jurisdiction was certified by the district court, as required by that section. First Nat. Bank v. Klug, 186 U. S. 203, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899.

A decision of a court of bankruptcy, upholding its jurisdiction to adjudicate the validity of an alleged equitable lien upon property which it decided to be an asset of the estate in bankruptcy, and not exempt property of the bankrupt, does not create a question of jurisdiction which will sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891, since, by the express terms of the bankruptcy act of July 1, 1898, § 2, subdiv. 11, jurisdiction is conferred upon courts of bankruptcy to determine all claims of bankrupts to their exemptions. Lucius v. Cawthon-Coleman Co. 196 U. S. 149, 49 L. ed. 425, 25 Sup. Ct. Rep. 214.

A decision of a circuit court of appeals, affirming, on the revisory proceeding authorized by the bankrupt act of July 1, 1898, § 24b, an interlocutory order of the court of bankruptcy which overruled a motion to dismiss the proceedings, cannot preclude a writ of error from the Federal Supreme Court to the bankruptcy court, to review the final decision, bringing up the question of the jurisdiction of that court to make an adjudication of bankruptcy on a claim for unliquidated damages. Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332.

The use of a certificate to present to the Supreme Court a question of the jurisdiction of a district court in an action arising under the bankruptcy act of July 1, 1898, is subject to the general limitations of the act of Congress of March 3, 1891, under which the trial court cannot, by certificate, send up a question as to its own jurisdiction until after final judgment. Bardes v. First Nat. Bank, 175 U. S. 526, 44 L. ed. 261, 20 Sup. Ct. Rep. 196.

Generally on the question of the direct review by the Federal Supreme Court of circuit or district court judgments or decrees—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

No support can be found in the provisions of the bankrupt act of July 1, 1898, § 24b, authorizing a petition to superintend and revise in matters of law the proceedings of courts of bankruptcy, for an attempt to have reviewed in the Federal Supreme Court an order of the district court of the United States for Porto Rico, sitting as a court of

bankruptcy, holding a member of a bankrupt partnership to be a general partner and generally liable for the firm debts. Munsuri v. Fricker, 222 U. S. 121, 56 L. ed. 121, 32 Sup. Ct. Rep. 70.

The thirty days' limitation for appeals in bankruptcy cases, made by general orders in bankruptcy, rule 36, does not apply to a writ of error from the Federal Supreme Court, to a court of bankruptcy, presenting the question of the jurisdiction to make an adjudication of bankruptcy on a claim for unliquidated damages, but such proceeding is governed by the two years' limitation fixed by U. S. Rev. Stat. § 1008, U. S. Comp. Stat. 1901, p. 715, and the act of March 3, 1891, §§ 4, 5. Frederic L. Grant Shoe Co. v. W. M. Laird Co. supra.

An appeal to the Federal Supreme Court under the bankrupt act of July 1, 1898, § 24a, from a decree of the circuit court of appeals in a controversy arising in a bankruptcy proceeding, opens up the whole case, as in other equity cases, general orders in bankruptcy, No. 36, issued under § 25b of that act, requiring a finding of facts, having no application. Houghton v. Burden, 228 U. S. 161, post, 780, 33 Sup. Ct. Rep. 491.

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WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey, & Company, Plff. in Err.,

v.

ISIDORE NEWMAN & SON et al.

(See S. C. Reporter's ed. 412–426.)

**Appeal — from circuit court of appeals — bankruptcy case.**

1. The petition in an action by a trustee in bankruptcy upon a bond which was given so that certain property might be removed out of the jurisdiction does not disclose, as a ground of Federal jurisdiction, in addition to that shown by averments of diverse citizenship, that the case arose under the laws of the United States, so as to permit a writ of error from the Federal Supreme Court to review the judgment of the circuit court of appeals, where the trustee does not rely upon any right specially conferred upon him by any Federal statute, but rests his right to recover solely upon the ownership of the property by the bankrupts as their own before the bankruptcy proceedings.

[For other cases, see Appeal and Error, III. d, 2, e, in Digest Sup. Ct. 1908.]

**Bankruptcy — Federal jurisdiction — suit by trustee — consent of defendant.**

2. The consent of the defendant provided for by the bankrupt act of July 1, 1898 (30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431), § 23b, governing the jurisdiction of suits by a trustee in bankruptcy, was not intended to enlarge the jurisdiction of the Federal circuit courts so as to confer a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy, or by reason of a cause of action arising under the Constitution or laws of the United States.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 593.]

Submitted January 13, 1913. Decided February 24, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Louisiana in favor of defendants in a suit by a trustee in bankruptcy. Dismissed for want of jurisdiction.

See same case below, 113 C. C. A. 39, 192 Fed. 753.

The facts are stated in the opinion.

Messrs. W. A. Blount, H. Generes Dufour, and Walker Percy submitted the cause for plaintiff in error:

It is not necessary, in order that the circuit court should have jurisdiction of a suit brought by a trustee in bankruptcy by consent, that diversity of citizenship should exist.

Burbank v. Bigelow, 92 U. S. 179, 23 L. ed. 542; Byers v. McAuley, 149 U. S. 608–618, 37 L. ed. 867–871, 13 Sup. Ct. Rep. 906; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379–382, 28 L. ed. 462–463, 4 Sup. Ct. Rep. 510; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449–453, 44 L. ed. 842–843, 20 Sup. Ct. Rep. 690; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173.

The provisions for jurisdiction by consent, contained in § 23b of the bankrupt act, relate to jurisdiction both in the district and circuit courts.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114, 26 Sup. Ct. Rep. 668; Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

The suit on the bond involved Federal questions.

Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; Williams v. Heard, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; Eau Claire

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NOTE.—On appellate jurisdiction of Federal Supreme Court in bankruptcy cases—see note to James v. Stone & Co. ante, 573.

On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

Nat. Bank v. Jackman, 204 U. S. 522, 51 L. ed. 596, 27 Sup. Ct. Rep. 391; Coder v. Arts, 213 U. S. 223–238, 53 L. ed. 772–779, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96; Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677; Stanley v. Schwalby, 162 U. S. 255–279, 40 L. ed. 960–968, 16 Sup. Ct. Rep. 754; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Leslie v. Brown, 32 C. C. A. 556, 61 U. S. App. 727, 90 Fed. 171; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Files v. Davis, 118 Fed. 465; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789.

Messrs. John W. Griffin and Everett P. Wheeler submitted the cause for defendants in error:

The fact that the plaintiff is a trustee in bankruptcy does not give jurisdiction to the Federal courts.

Spencer v. Duplan Silk Co. 191 U. S. 526, 531, 48 L. ed. 287, 290, 24 Sup. Ct. Rep. 174; Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

No Federal question was alleged or was involved in the circuit court.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 143, 37 L. ed. 1032, 14 Sup. Ct. Rep. 35; Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; Press Pub. Co. v. Monroe, 164 U. S. 105–110, 41 L. ed. 367–368, 17 Sup. Ct. Rep. 40; Ex parte Jones, 164 U. S. 691–694, 41 L. ed. 601, 602, 17 Sup. Ct. Rep. 222; Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; Cramer v. Wilson, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94; Scott v. Kelly, 22 Wall. 57, 22 L. ed. 729; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 579, 43 L. ed. 814, 817, 19 Sup. Ct. Rep. 500; Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32; Avery v. Popper, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94; Frank v. Vollkommer, 205 U. S. 521, 51 L. ed. 911, 27 Sup. Ct. Rep. 596; Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; Metcalf v. Watertown, 128 U. S. 586, 588, 32 L. ed. 543, 544, 9 Sup. Ct. Rep. 173; Gill v. Oliver, 11 How. 529, 545, 13 L. ed. 799, 806; Blake v. Openhym, 216 U. S. 322, 54 L. ed. 499, 30 Sup. Ct. Rep. 302.

The provision of § 23b of the bankrupt act regarding consent, properly construed, applies only to the district courts, and is inapplicable to the circuit courts.

Jaquith v. Rowley, 188 U. S. 620, 47 L. ed. 620, 23 Sup. Ct. Rep. 369; Re Durham, 114 Fed. 750; Collier, Bankr. 8th ed. pp. 402, 403; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; Bardes v. First Nat. Bank, 178 U. S. 524, 537, 44 L. ed. 1175, 1181, 20 Sup. Ct. Rep. 1000; Loveland, Bankr. 3d ed. p. 97; 1 Remington, Bankr. p. 1046 note.

Mr. Justice Day delivered the opinion of the court:

This case is submitted upon motion to dismiss or affirm. The action was brought by William S. Lovell, trustee of Knight, Yancey, & Company, against Isidore Newman & Son and others, in the United States circuit court for the eastern district of Louisiana, to recover stipulated damages in the sum of $98,500 on a certain bond. Issues were joined and the case was tried and a judgment rendered in favor of the defendants. 188 Fed. 534. On writ of error, the circuit court of appeals affirmed that judgment. 113 C. C. A. 39, 192 Fed. 753.

A writ of certiorari to the judgment of the circuit court of appeals was prayed and denied. (December 23, 1912.)

The question of jurisdiction presented is, Was the judgment of the circuit court of appeals final, or is it subject to review by writ of error in this court? As the present suit was upon a bond, and concerns the right of the trustee to recover thereon, it presents a controversy arising in a bankruptcy proceeding, the finality of which in the circuit court of appeals depends upon the application of the circuit court of appeals act to the case. Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Coder v. Arts, 213 U. S. 223, 233, 53 L. ed. 772, 777, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 553, 54 L. ed. 610, 613, 30 Sup. Ct. Rep. 412; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 118, 56 L. ed. 118, 119, 32 Sup. Ct. Rep. 67. If the jurisdiction in the present case rests alone upon diverse citizenship, then, under the circuit court of appeals act, the judgment of the circuit court of appeals is final; if, as contended by the plaintiff in error, the petition *in the case discloses,[415 as a ground of jurisdiction in addition to that of diverse citizenship, that the case arises under the laws of the United States, then the judgment of the circuit court of appeals is not final, and the case can come here from that court. And it is well settled that this question must be decided, not be-

cause of questions which may have arisen or which might arise in the subsequent progress of the case, but upon the grounds of jurisdiction asserted in the petition. Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

Turning, then, to the petition for the assertion of the cause of action upon which this suit was brought, we find from its averments that Knight, Yancey, & Company, partners, doing business in Decatur, Alabama, were adjudicated bankrupts by the district court of the United States for the northern district of Alabama on the 20th of April, 1910; that Lovell, the trustee in bankruptcy, is a citizen of the state of Alabama, and also that the members of the partnership and each of them are citizens of other states than Louisiana. It appears in the petition that on the 3d of May, 1910, C E. Frost and Lovell, who were then receivers in bankruptcy of Knight, Yancey, & Company, filed, as such receivers, in the United States district court for the eastern district of Louisiana, their petition, which is attached to and made part of the petition in this case, setting forth that certain cotton was in the possession of the master of the Steamer Ingelfingen at the port of New Orleans, and would, unless restrained, be shipped beyond the jurisdiction of the court; that certain persons in Italy held spurious bills of lading upon which they would seek to obtain possession of such cotton; that the original bills of lading had been destroyed or made away with, and were not in the hands of bona fide holders; that therefore the legal title to the cotton was in the petitioners, and that any attempt to ship the cotton to a foreign country would 416] result in depriving the *bankrupt estate of that asset, and would subject it to the claims of foreign creditors, and would constitute an unlawful preference within the meaning and intendment of the bankruptcy act in favor of the foreign holders of the spurious bills of lading; and they prayed for an injunction, or that, in the alternative, the court would order the United States marshal to seize and take possession of the cotton, and prayed for an order upon the master of the Steamer Ingelfingen, its owners and agents, to show cause, if any they could, why the relief prayed for should not be granted. A restraining order was issued by the district court, the master of the Ingelfingen appeared, excepted to the petition, alleging that the receivers had no right or capacity to institute suit and that the court was without jurisdiction, and afterwards filed an answer in which he set up that the partnership had sold cotton to various Italian purchasers under contracts in *the usual mercantile course*, that is, it had shipped the cotton to Italy to its order, upon through bills of lading, and drafts for the price of the cotton, with the bills of lading attached, had been discounted, the Italian purchasers finally taking up the drafts and securing the cotton covered by the bills of lading; that in February, 1910, the partnership discounted, and the Italian purchasers subsequently paid, certain drafts with bills of lading attached, alleged in the petition to be forged, covering 1,400 bales of cotton bearing certain marks, and they acquired the bills of lading in the regular course of business, prior to the filing of the petition in bankruptcy, for value and in ignorance of the forgery; that in March and April of that year the partnership shipped the cotton called for by the bills of lading, the cotton bearing the same marks and the bills of lading being substantially identical with the alleged forged bills of lading, and being the bills of lading alleged in the petition to have been made away with, and that 89 bales of the cotton were previously exported and the 1,311 remaining *bales were on 417] board the Ingelfingen. The master further alleged that the cotton was the property of the Italian purchasers, and rightfully in his possession as bailee, and that the bankrupt estate had no interest in the cotton; that if the bills of lading in the hands of the purchasers were spurious, they were forged by the partnership, and that the cotton was shipped under genuine bills of lading which were not now outstanding, but of which the alleged forged bills of lading were duplicates; that the partnership was paid for the cotton, which was apportioned to cover the bills of lading held by the purchasers in good faith and at a time when the partnership was not known to be insolvent; that the purchasers and their agents were ignorant of the forgery or that the shipment was other than in regular course, and that no preference was given them. The master also alleged that the partnership had for some time been following this practice, and that the purchasers had been securing their cotton under forged bills of lading, of which practice they were ignorant until after the filing of the petition in bankruptcy. The master further alleged that he was the bailee under regular bills of lading, and bound to deliver to the true owners, for whom he was obliged to protect the cotton for which he had issued receipt, and was entitled to earn his freight, for which and other charges he had a lien on the cotton, and that the charges would be increased by further delay. He denied the inadequacy of a remedy at law. The agent of the steamer also appeared and adopted the answer of the mas

ter of the Ingelfingen as its own. The court, upon a hearing, ordered a temporary injunction upon the receivers giving bond in the sum of $10,000, and thereupon, the bond having been given and the temporary injunction awarded, the bond now in suit was executed and delivered, running to the receivers and such trustee as might be elected or appointed, which after reciting the order of injunction, provided:

418] *"Whereas, it was further provided in said order or injunction that said cotton might be removed out of said jurisdiction upon the filing by the respondents in said proceeding, or either of them, of a bond for the value of said cotton, which has been fixed by agreement for purposes of bonding at the sum above mentioned.

"Now, therefore, the condition of this obligation is such that if said Th. Ruhne and Isidore Newman & Son, New Orleans, Louisiana, above mentioned, shall well and truly pay to said obligees the said sum of ninety-eight thousand, five hundred ($98,500) dollars, or such part thereof as the court may direct, if, in a suit or action at law or in equity that may or shall hereafter be brought on this bond by said receivers, or by said trustee or trustees, or by said estate in bankruptcy against the obligors herein, or either of them, in the circuit or district court of the United States for the eastern district of Louisiana, it shall be adjudged that said receivers, or said trustee or trustees of said Knight, Yancey, & Company, or the bankrupt estate of said Knight, Yancey, & Company, have the right, title, or interest in or to said cotton, or any part thereof, then and in such case this obligation shall be null, void, and of no effect; otherwise the same shall remain in full force and effect."

From this recital it is apparent that the proceeding in the United States district court for the eastern district of Louisiana was ancillary to the original proceeding in the court of bankruptcy in Alabama, where the adjudication was had. It was long in doubt whether, under the act of 1898 [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418], such ancillary proceeding would lie in another district court, but the matter was settled in favor of such jurisdiction in aid of the original jurisdiction by the decisions of this court in Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969, and in Re Elkus, 216 U. S. 115, 54 L. ed. 407, 30 Sup. Ct. Rep. 377. Later, after this ancillary suit was brought, the Congress removed all doubt concerning the matter by passing 419]an act of June 25, 1910 (36 *Stat. at L. 838, chap. 412, U. S. Comp. Stat. Supp. 1911, p. 1493), expressly conferring such ancillary jurisdiction in aid of the jurisdiction of the bankruptcy court which had appointed the receiver or trustee.

The present action was brought upon the bond in the United States circuit court, and was taken by writ of error to the circuit court of appeals, and the appellate jurisdiction to review that court is the one now in question. Section 23 of the bankruptcy act must be consulted to determine the jurisdiction of the circuit court. That section provides:

"Sec. 23a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e" [the exception being added by the amendment of February 5, 1903 (32 Stat. at L. 798, chap. 487, § 8, U. S. Comp. Stat. Supp. 1911, p. 1499)].

That section gives jurisdiction to the circuit courts of the United States of controversies at law or in equity, as distinguished from bankruptcy proceedings, between the trustee and adverse claimants in the same manner and to the same extent as though bankruptcy proceedings had not been instituted. It is also provided that suits by the trustee can only be brought in courts where the bankrupt might have brought them, if proceedings in bankruptcy *had not[420 been instituted, unless by consent of the proposed defendant. Later, when Congress enlarged the jurisdiction of the district court by the act of February 5, 1903, exception was made in favor of certain suits for the recovery of property in fraud of the act, but this did not affect suits of the present character. The cases in this court which have considered this section have determined that it was not intended to increase the jurisdiction of the United States circuit courts in bankruptcy matters, but rather to limit it to such suits and controversies as are within the jurisdiction given such courts by the acts creating them; that is, controversies in law and in

equity with adverse claimants, where the amount involved is in excess of $2,000, where diverse citizenship exists (the citizenship test being, because of the bankruptcy act, that of the bankrupt, and not that of the trustee), or there is a cause of action arising under the Constitution or laws of the United States. Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114, 26 Sup. Ct. Rep. 668; 1 Loveland, Bankr. 4th ed. §§ 74 et seq.; 1 Remington, Bankr. § 1686.

The present suit, so far as the ground of diverse citizenship is concerned, conforms to the requirement of the bankruptcy act as construed in Bush v. Elliott, supra, for the citizenship of the bankrupts is other than that of Louisiana, and the amount in controversy exceeds the sum of $2,000. But it is contended that the petition also discloses a ground of jurisdiction other than diverse citizenship, and upon the solution of that question the present jurisdiction depends. This court had recent occasion to summarize the principles upon which such jurisdiction rests in Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704, and we can do no better than to recur to that summary for a statement of the principles which must control in deciding the present case (p. 569):

"1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the com-421]plainant's statement of his own *cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Tennessee v. Union & Planters' Bank, 152 U. S 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; Devine v. Los Angeles, 202 U. S. 313, 333, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652.

"2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth. Hanford v. Davies, 163 U. S. 273, 279, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 1051; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 383, 385, 48 L. ed. 484, 489, 490, 24 Sup. Ct. Rep. 325.

"3. A suit to enforce a right which takes its origin in the laws of the United States is not *necessarily, or for that reason* alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

Does it, then, appear in the petition in the present case, in addition to averments of diverse citizenship, that the petitioner has asserted a ground of jurisdiction which "really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of the United States, and upon which his right to recover depends?" Such a cause of action was not asserted simply because the action was brought by an assignee in bankruptcy. Mr. Justice Gray, speaking for the court, said, in Bardes v. First Nat. Bank, 178 U. S. 524, 536, 44 L. ed. 1175, 1181, 20 Sup. Ct. Rep. 1000:

"The first clause provides that 'the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential *difference between proceed-[422 ings in bankruptcy, on the one hand, and suits at law or in equity, on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees;' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.' This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

This was also held in Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174, in which the assignee brought an action in the state court in trover for the conversion of goods alleged to belong to the estate. Diversity of citizenship was shown, and upon that ground the case was removed to the circuit court of the United States. It went to the circuit court of appeals, and it was then contended that it might be reviewed here, but the writ of error was dismissed for lack of ju-

risdiction, Mr. Chief Justice Fuller saying (p. 530):

"But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading. . . .

"Plaintiff's declaration set forth no mat-[423]ter raising any *controversy under the Constitution, laws, or treaties of the United States. It is true that if the lumber and materials belonged to Bennett and Rothrock on January 13, 1900, plaintiff in error succeeded to the title of the firm on the adjudication, but the question of Bennett and Rothrock's ownership on that day in itself involved no Federal controversy, and the mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction. Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000. Indeed, if the case had not been removed, and had gone to judgment in the court of common pleas, and that judgment had been affirmed by the supreme court of Pennsylvania on the same grounds as those on which the circuit court of appeals proceeded, a writ of error could not have been brought under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), for the case would not have fallen within either of the classes enumerated in that section as the basis of our jurisdiction. The validity of the bankruptcy act was conceded, and no right specially set up or claimed under it was denied."

That case has frequently been cited approvingly since. Warder v. Loomis, 197 U. S. 619, 49 L. ed. 909, 25 Sup. Ct. Rep. 799; Watkins v. American Nat. Bank, 199 U. S. 599, 50 L. ed. 327, 26 Sup. Ct. Rep. 746; Mobile Transp. Co. v. Mobile, 199 U. S. 604, 50 L. ed. 330, 26 Sup. Ct. Rep. 751; Montana Catholic Missions v. Missoula County, 200 U. S. 118, 126, 50 L. ed. 398, 402, 26 Sup. Ct. Rep. 197; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 200 U. S. 613, 50 L. ed. 620, 26 Sup. Ct. Rep. 754; Russell v. Russell, 200 U. S. 613, 50 L. ed. 620, 26 Sup. Ct. Rep. 755; Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114, 26 Sup. Ct. Rep. 668; Warder v. Cotton, 207 U. S. 582, 52 L. ed. 350, 28 Sup. Ct. Rep. 259; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

The trustee, for his recovery upon the bond, did not rely upon any right specially conferred upon him under the Federal statute which was the subject of controversy, and therefore a ground of jurisdiction. He sued to recover upon the bond solely because of his claim that the 1,311 bales of cotton were at the time of the bankruptcy proceeding, the property of Knight, Yancey, & Company. He alleged in the petition that:

*"Your petitioner further avers that[424] the said 1,311 bales of cotton were, at the time of the bankruptcy proceedings, and have ever since been, the property of Knight, Yancey, & Company, and that, as trustee in bankruptcy of the said Knight, Yancey, & Company, your petitioner as aforesaid is the owner of and has the right, title, and interest in and to the said 1,311 bales of cotton, and that your petitioner is therefore entitled to proceed against and to demand, collect, and receive the principal sum of the bond filed by the said Th. Ruhne with the said Isidore Newman & Son as surety. . . ."

And in the amended petition he again averred:

"Your petitioner further avers that the statements in said petition contained with reference to said bills of lading are not true in point of fact, and that the bills of lading for all of said cotton described in the original petition herein, and in the petition in said suit No. 14,129, were in the possession and under the control of the receivers of Knight, Yancey, & Company, bankrupt, and have since come into the possession and are now under the control of your petitioner as trustee of Knight, Yancey, & Company, bankrupt, and your petitioner reiterates that the title to all of the cotton described in said original petition was in said Knight, Yancey, & Company, bankrupt, and is in said bankrupt estate and in your petitioner as the trustee in bankruptcy of Knight, Yancey, & Company, bankrupt."

And the circuit court, in determining the character of the action, said:

"As this case stood on the original petition, in view of some of the allegations of the petition in the district court referred to, there might have been some doubts as to plaintiff's right to proceed at law; but, considering the supplemental petition whereby the plaintiff has eliminated those pleadings from the instant case and stands solely on his claim of absolute ownership of the cotton, it is clear *the action is[425] properly at law. If anything were needed to strengthen this, the statement of plaintiff's counsel in open court that he disavows any intention of claiming a voidable preference against anyone, in regard to the shipment of the cotton, is sufficient."

It therefore appears that the action, as outlined in the petition, made the plaintiff's right to recover depend upon the ownership

of the property by the bankrupt as its own before the bankruptcy proceeding. The investigation of this question involved only matters of general law, and did not depend upon any right conferred by the banpruptcy act upon the trustee.

The cases cited by the plaintiff to the effect that actions upon marshal's bonds, etc., under statutes of the United States, gives jurisdiction to the circuit court because they arise under the laws of the United States, are not in point; no more are cases in which this court has held that the decision of a state court might be reviewed when the construction of the bankruptcy act, claimed by a party in interest as a Federal right, has been denied. The bond here was not required by any law of the United States. It was permitted to be given that the property might be removed upon the steamer upon which it was about to be carried abroad. Under the allegations of his complaint the trustee could recover if he could show that the bankrupt owned this property before the bankruptcy proceedings. It is said that this bond could not be recovered upon unless the trustee could show that the property was such as had passed to the trustee, and was liable to execution at the suit of his creditors. But there is nothing in the petition to show any lien upon the property, or any averments which would have prevented its being made the subject of levy by creditors if it was owned by the bankrupt. The fact that such matters might have been brought up by the defendants, or that questions may arise in the subsequent progress of the 426]action which involve laws of *the United States, it has frequently been held, does not give jurisdiction. The petition must assert grounds of recovery which involve a controversy concerning such laws.

It is also asserted that this case shows not only diversity of citizenship, giving jurisdiction to the circuit court under § 23 of the bankruptcy act, but the bond itself gives consent that the suit may be brought in the circuit court, and that this is an independent ground of jurisdiction. But in this case diversity of citizenship between the bankrupt and the defendants existed, and no consent was required to enable the plaintiff to sue in the circuit court. Furthermore, the consent provided for in § 23b certainly was not intended to enlarge the jurisdiction of the circuit courts of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy, or by reason of a cause of action arising under the Constitution or laws of the United States. 1 Remington, Bankr. § 1686. Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114, 26 Sup. Ct. Rep. 668.

We reach the conclusion that the jurisdiction of the Circuit Court asserted in the petition in this case rested alone upon diverse citizenship, and therefore, under the Circuit Court of Appeals act, the case is one of those made final in the Circuit Court of Appeals.

Writ of error dismissed.

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*LESTER P. BARTELL, Plff. in Err., [427
v.
UNITED STATES.

(See S. C. Reporter's ed. 427–434.)

**Indictment — sufficiency — nonmailable matter.**

1. An indictment specifically charging that the accused had knowingly violated the laws of the United States by depositing upon a day named, in a postoffice specifically named, a letter of such indecent character as to render it unfit to be set forth in detail, inclosed in an envelop bearing a definite specified address, must be deemed, in the absence of a demand for a bill of particulars, to advise the accused sufficiently of the nature and cause of the accusation against him, so that he may meet such accusation and prepare for trial.

[For other cases, see Indictment, II. e, 1; II. e, 3, d, in Digest Sup. Ct. 1908.]

**Indictment — sufficiency — nonmailable matter.**

2. The charge in an indictment specifically alleging that the accused knowingly violated the laws of the United States by depositing upon a day named, in a postoffice specifically named, a letter of such indecent character as to render it unfit to be set forth in detail, inclosed in an envelop bearing a definite specified address, cannot be said, in the absence of a demand for a bill of particulars, to be so indefinite that the accused could not plead the record and conviction in bar of another prosecution, since in such case it is the right of the accused to resort to parol testimony to show the subject-matter of the former conviction.

[For other cases, see Indictment, II. e, 1; II. e, 3, d, in Digest Sup. Ct. 1908.]

[No. 691.]

Argued and submitted January 14, 1913.
Decided February 24, 1913.

IN ERROR to the District Court of the United States for the District of South Dakota to review a conviction of mailing an indecent letter. Affirmed.

The facts are stated in the opinion.

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NOTE.—As to unlawfulness of obscene and indecent publications—see note to Ex Worthington Co. 24 L.R.A. 110.

Mr. **Joe Kirby** submitted the cause for plaintiff in error:

The defendant must be tried, if at all, for the same specific offense that the grand jury had in mind when they returned the indictment; and this must appear from the record, and cannot be left to the sense of honesty of the prosecution, or the honor of any court official.

Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122.

The indictment must inform him "of the nature and cause of the accusation," and this information must be so definite as to contain every ingredient of which the crime is composed, so that he may be able, with his witness, to combat the prosecution at every point, and, when the case is concluded, to invoke the protection against being again placed in jeopardy for the same offense.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588. See also State v. Terry, 109 Mo. 601, 19 S. W. 206.

The necessities which gave birth to the Constitution, the controversies which preceded its foundation, and the conflicts of opinion which were settled by its adoption, properly may be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled correctly to interpret its meaning.

Knowlton v. Moore, 178 U. S. 95, 44 L. ed. 991, 20 Sup. Ct. Rep. 747.

It will not be urged that the date of the alleged offense, as set forth in the indictment, is in any manner an identification of the objectionable document which was presented to the grand jury.

United States v. Potter, 56 Fed. 95.

It is not sufficient for the grand jury to allege that the contents of the paper are too obscene to be spread upon their records, and omit every means of identification.

United States v. Reid, 73 Fed. 289; United States v. Harmon, 34 Fed. 872.

Solicitor General **Bullitt** argued the cause and filed a brief for defendant in error:

It is unnecessary to set forth the obscene matter.

Rosen v. United States, 161 U. S. 29, 34, 40, 40 L. ed. 606, 607, 609, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251.

Identification by the date of mailing and the address upon the envelop is sufficient.

Tubbs v. United States, 44 C. C. A. 357, 105 Fed. 60.

There is no danger of a second jeopardy, as it can always be established by parol evidence what letter was the subject of the prior conviction or acquittal.

There was no difficulty in demurring to the indictment.

United States v. Bennett, 16 Blatchf. 351, Fed. Cas. No. 14,571.

The letter was sufficiently identified, and the suggestion that a defendant might be indicted on one indictment and tried on another is without merit.

Price v. United States, 165 U. S. 311, 315, 41 L. ed. 727, 729, 17 Sup. Ct. Rep. 366; Bowers v. United States, 78 C. C. A. 193, 148 Fed. 379; Dunbar v. United States, 156 U. S. 185, 191, 39 L. ed. 390, 392, 15 Sup. Ct. Rep. 325; Durland v. United States, 161 U. S. 315, 40 L. ed. 712, 16 Sup. Ct. Rep. 508; Tubbs v. United States, 44 C. C. A. 357, 105 Fed. 59.

The defendant failed to demand a bill of particulars, which would have cleared up any uncertainty as to what letter was the subject of the indictment.

Durland v. United States, 161 U. S. 306, 315, 40 L. ed. 709, 712, 16 Sup. Ct. Rep. 508; Rosen v. United States, 161 U. S. 29, 35, 41, 40 L. ed. 606, 608, 610, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251; Shaw v. United States, 103 C. C. A. 494, 180 Fed. 352.

Mr. Justice **Day** delivered the opinion of the court:

The plaintiff in error was indicted under § 3893 of the Revised Statutes, (U. S. Comp. Stat. 1901, p. 2658), which declares certain matter unmailable, for depositing a letter alleged to be obscene, in a postoffice of the United States. Upon trial he was convicted, and was sentenced to a term in the penitentiary. The case is brought here to review alleged errors in failing to sustain objections made to the indictment in the court below.

The indictment charged that Bartell did on the 24th of November, 1911, at Sioux Falls, in the county of Minnehaha, state of South Dakota, unlawfully, wilfully, knowingly, and feloniously deposit in the United States postoffice at Sioux Falls aforesaid, for mailing and delivery by the postoffice establishment of the United States, certain nonmailable matter, to wit: "A letter inclosed in an envelop, which said letter was then and there filthy, obscene, lewd, lascivious, and of an indecent character, and is too filthy, obscene, lewd, offensive, and of such indecent character as to be unfit to be set forth in this indictment and to be spread at length upon the records of this honorable court. Therefore the grand jurors, aforesaid, do not set forth the same in this indictment; and which said envelop containing said letter was then and there directed to and addressed as follows: Miss Zella Delleree, Stevens Point, Wisconsin,

431]he, the said Lester P. *Bartell, then and there well knowing the contents of said letter and the character thereof, and well knowing the same to be filthy, obscene, lewd, and lascivious, and of an indecent character."

The plaintiff in error appeared and demurred to this indictment for the reasons following:

"I. That the facts stated in said indictment are not sufficient to and do not constitute a crime.

"II. That no facts are stated sufficient to notify this defendant of the nature and cause of the accusation for which he is now placed on trial, as required by article 6 of the Amendments to the Constitution of the United States."

The court overruled the demurrer. The same objection, in substance, was taken by motion in arrest of judgment after conviction, and the question presented here is the alleged insufficiency of the indictment.

It is elementary that an indictment, in order to be good under the Federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him, in order that he may meet the accusation and prepare for his trial, and that, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense.

While it is true that ordinarily a document or writing essential to the charge of crime must be sufficiently described to make known its contents or the substance thereof, there is a well-recognized exception in the pleading of printed or written matter which is alleged to be too obscene or indecent to be spread upon the records of the court. It is well settled that such matter may be identified by a reference sufficient to advise the accused of the letter or document intended without setting forth its contents. United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14,571; Rosen v. United States, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251.

432] *The cases were fully reviewed by Mr. Justice Harlan, speaking for the court, in the Rosen Case, and after stating the right of the accused to be advised of the nature and cause of the accusation against him with such reasonable certainty that he can make his defense and protect himself against further prosecution, the doctrine was thus summarized (p. 40):

"This right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and . . . in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice."

We find, upon applying this doctrine to the instant case, that it was specifically charged that the letter was mailed by the accused in violation of the statute, upon a day named, at the postoffice, in a town and county named and within the district; that its contents were well known to the accused, and were so filthy, obscene, lewd, and offensive, and of such indecent character, as to be unfit to be spread upon the record of the court, and that the letter was inclosed in an envelop which was addressed to the person and place specified in the indictment. There was no attempt on the part of the accused to require a bill of particulars, giving a more specific description of the letter, or any further identification of it, if that was necessary to his defense. Under the Federal practice he had a right to apply for such bill of particulars, and it was within the judicial discretion of the court to grant such order, if *necessary[433 for the protection of the rights of the accused, and to order that the contents of the letter be more fully brought to the attention of the court, with a view to ascertaining whether a verdict upon such matter as obscene would be set aside by the court. United States v. Bennett and Rosen v. United States, supra. In Durland v. United States, 161 U. S. 306, 315, 40 L. ed. 709, 712, 16 Sup. Ct. Rep. 508, it was held that a general description of a letter, identified by the time and place of mailing, when it was mailed in pursuance of a scheme to defraud, was sufficient, in the absence of a demand for a bill of particulars.

As to the objection that the charge was so indefinite that the accused could not plead the record and conviction in bar of another prosecution, it is sufficient to say that in such cases it is the right of the accused to resort to parol testimony to show the subject-matter of the former conviction, and such practice is not infrequently necessary. United States v. Claflin, 13 Blatchf. 178, Fed. Cas. No. 14,798; Dunbar v. United States, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325; Tubbs v. United States, 44 C. C. A. 357, 105 Fed. 59. In the Dunbar Case it was stated that other proof beside the record might be required to identify the subject-matter of two in-

dictments, and the rule was laid down as follows (p. 191):

"The rule is that, if the description brings the property in respect to which the offense is charged clearly within the scope of the statute creating the offense, and at the same time so identifies it as to enable the defendant to fully prepare his defense, it is sufficient."

The present indictment specifically charged that the accused had knowingly violated the laws of the United States by depositing on a day named, in the postoffice specifically named, a letter of such indecent character as to render it unfit to be set forth in detail, inclosed in an envelop bearing a definite address. In the absence of a demand for a bill of particulars we think this description sufficiently advised the ac-434]cused of the nature and cause of *the accusation against him. This fact is made more evident when it is found that this record shows no surprise to the accused in the production of the letter at the trial, and no exception to its introduction in evidence, and there is no indication that the contents of the letter, when it was produced, did not warrant the description of it given in the indictment.

Judgment affirmed.

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LIZZIE M. TROXELL, Administratrix of the Estate of Joseph Daniel Troxell, Deceased, Plff. in Err.,

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY.

(See S. C. Reporter's ed. 434–445.)

**Judgment — estoppel — identity of action and parties.**

1. The judgment in an action brought by a widow in her individual capacity, for herself and children, to recover damages from an interstate carrier for the death of her husband while in its employ, which was prosecuted and tried on the theory that it involved a cause of action under the state law, under which there could be no recovery for the negligence of the fellow servants of the deceased, is not a bar to a subsequent action by the widow as administratrix, brought against the carrier under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324), in which recovery was asked because of the negligence of such fellow servants.

[For other cases, see Judgment, III. j; III. k, in Digest Sup. Ct. 1908.]

**Appeal — review of facts — conflicting testimony.**

2. Conflicting testimony will not be considered and weighed in the Federal Supreme Court, but that court will only consider whether there is testimony in the record adequate to sustain the verdict and judgment of the court below.

[For other cases, see Appeal and Error, VIII. l, in Digest Sup. Ct. 1908.]

**Appeal — scope of review — question not raised below.**

3. The objection that the case was not triable when tried, because of a failure of the plaintiff to file a replication after the court had decided that a plea of *res judicata* was a correct plea under the local practice cannot be first urged in the Federal Supreme Court, where the case was in fact at issue, and the plea of *res judicata* was considered and decided by both courts below.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

[No. 854.]

Argued January 14, 1913. Decided February 24, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of Pennsylvania, in favor of plaintiff in an action for death, brought under the Federal employers' liability act. Reversed, and judgment of District Court affirmed.

See same case below, 200 Fed. 44.

The facts are stated in the opinion.

Mr. **George Demming** argued the cause and filed a brief for plaintiff in error.

The case is not *res judicata* because the parties, the cause of action, and the essential questions of the two actions, are different.

23 Cyc. 1215; Grier v. Northern Assur. Co. 183 Pa. 343, 39 Atl. 10; Stradley v. Bath Portland Cement Co. 228 Pa. 113, 139 Am. St. Rep. 993, 77 Atl. 242; Murphy v. Matthews, 43 Pa. Super. Ct. 289; Lander v. Mercantile Nat. Bank. 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908.

A widow as administratrix is a different party from the same widow suing individually.

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NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverley, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429, and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

23 Cyc. 1243; Brown v. Fletcher, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702; Ingersoll v. Coram, 211 U. S. 336, 53 L. ed. 209, 29 Sup. Ct. Rep. 92; Yates v. Utica Bank, 206 U. S. 181, 51 L. ed. 1015, 27 Sup. Ct. Rep. 646; Garman v. Glass, 197 Pa. 101, 46 Atl. 923; Wildermuth v. Long, 196 Pa. 541, 46 Atl. 927; Pennsylvania R. Co. v. Spicker, 105 Pa. 142; Pennsylvania R. Co. v. Eby, 107 Pa. 166; Re Lightner, 187 Pa. 237, 41 Atl. 46; Walker v. Philadelphia, 195 Pa. 168, 78 Am. St. Rep. 801, 45 Atl. 657; Riley v. Prudential Ins. Co. 12 Pa. Super. Ct. 565; La Bar v. New York, S. & W. R. Co. 218 Pa. 263, 67 Atl. 413; Hoodmacher v. Lehigh Valley R. Co. 218 Pa. 21, 66 Atl. 975; Bender v. Penfield, 235 Pa. 58, 83 Atl. 585; Clarke's Appeal, 70 Conn. 195, 39 Atl. 155; Hukm Chand, Res Judicata, 158, 179; Gibson v. Willis, — Tenn. —, 36 S W. 154; 2 Black, Judgm. 2d ed. § 536; Hammel v. First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72; Bigelow, Estoppel, § 111, pp. 146–148.

The subject-matter and the cause of action of the two suits are entirely different and in nowise the same.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Northern P. R. Co. v. Slaght, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 257, 54 L. ed. 184, 30 Sup. Ct. Rep. 78; 23 Cyc. 1302, 1304.

The estoppel of a judgment covers only the points which were actually litigated, and which actually determined the verdict or finding.

23 Cyc. 1304; 1 Herman, Estoppel, § 105; 2 Black, Judgm. § 733; 23 Cyc. 2d ed. 1158–1161; Bigelow, Estoppel, 5th ed. § 111, p. 182; 1 Greenl. Ev. 16th ed. § 532; Davis v. Brown, 94 U. S. 423, 24 L. ed. 204; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. ed. 550.

The true test seems to be: "Would the same evidence support and establish both the present and former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action."

2 Black, Judgm. 2d ed. § 726; 1 Herman, Estoppel, § 96.

Where, in a former suit between the parties, in which the declaration consisted of a special count and the common money counts, and where there was a general verdict on the entire declaration, the record cannot be given in evidence as an estoppel in a second suit founded on the special count, for the verdict may have been rendered on the common counts. And this rule is not varied because of the circumstance that, after the verdict was rendered, the court directed judgment to be entered for the plaintiffs on the first count in the declaration, being the special count.

Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650; Martin v. Pittsburgh R. Co. 227 Pa. 18, 26 L.R.A. (N.S.) 1221, 75 Atl. 837, 19 Ann. Cas. 818; Philadelphia v. Ridge Ave. R. Co. 142 Pa. 484, 24 Am. St. Rep. 512, 21 Atl. 982; Com. v. Monongahela Bridge Co. 216 Pa. 115, 64 Atl. 909, 8 Ann. Cas. 1073; Moser v. Philadelphia, H. & P. R. Co. 233 Pa. 259, 40 L.R.A.(N.S.) 519, 82 Atl. 362; Russell v. Place, 94 U. S. 608, 24 L. ed. 215.

Expert testimony was properly admitted at the trial.

Struthers v. Philadelphia & D. C. R. Co. 174 Pa. 291, 34 Atl. 443; Com. v. Farrell, 187 Pa. 408, 41 Atl. 382, 11 Am. Crim. Rep. 468; Ardesco Oil Co. v. Gilson, 63 Pa. 146, 10 Mor. Min. Rep. 669; Delaware & C. Steam Towboat Co. v. Starrs, 69 Pa. 36; Stevenson v. Ebervale Coal Co. 203 Pa. 331, 52 Atl. 201; Ryder v. Jacobs, 182 Pa. 624, 38 Atl. 471; Graham v. Pennsylvania Co. 139 Pa. 149, 12 L.R.A. 293, 21 Atl. 151, 6 Am. Neg. Cas. 329; Canfield v. Johnson, 144 Pa. 61, 22 Atl. 974; Whitaker v. Campbell, 187 Pa. 113, 41 Atl. 38; Bardsley v. Gill, 218 Pa. 56, 66 Atl. 1112; Chicago, R. I. & P. R. R. Co. v. Hale, 99 C. C. A. 379, 176 Fed. 71; American Car & Foundry Co v. Thornton, 105 C. C. A. 33, 183 Fed. 114; Woburn v. Adams, 109 C. C. A. 629, 187 Fed. 781; Turner v. American Surety & Trust Co. 213 U. S. 261, 53 L. ed. 789, 29 Sup. Ct. Rep. 420.

The case was properly at issue.

Chestnut Hill, & S. H. Turnp. Co. v. Piper, 77 Pa. 437; Baltimore & O. R. Co. v. Sulphur Springs Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529; Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 29 Atl. 854; Helbling v. Allegheny Cemetery Co. 201 Pa. 171, 50 Atl. 970; Edwards v. Woodruff, 25 Pa. Super. Ct. 575; Bruner v. Gregg, 4 W. N. C. 368; Wilkinson v. Evans, 34 Pa. Super. Ct. 475; Zion Church v. Light, 7 Pa. Super. Ct. 223; Peterson v. Wiggins, 230 Pa. 631, 79 Atl. 767.

Mr. James F. Campbell argued the cause, and, with Messrs. J. Hayden Oliver, Daniel R. Reese, and William S. Jenney, filed a brief for defendant in error:

There was no evidence from which the jury could find negligence.

Patton v. Texas & P. R. Co. 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275; Marsh v. Lehigh Valley R. Co. 206 Pa. 558, 56 Atl. 52; 2 Labatt, Mast. & S. p. 2315; Reilly v. Campbell, 8 C. C. A. 438, 25 [illegible]

U. S. App. 334, 59 Fed. 990; The Columbia, 106 Fed. 745; Norfolk & W. R. Co. v. Cromer, 101 Va. 667, 44 S. E. 898; Grand Trunk Western R. Co. v. Melrose, 166 Ind. 658, 78 N. E. 190, 20 Am. Neg. Rep. 517.

Expert testimony is irrelevant and incompetent when based on suppositions contrary to or not shown by the evidence, and it should have been excluded.

North American Acci. Asso. v. Woodson, 12 C. C. A. 392, 24 U. S. App. 364, 64 Fed. 689; Mountain Copper Co. v. VanBuren, 66 C. C. A. 151, 133 Fed. 1; Hitchner Wall Paper Co. v. Pennsylvania R. Co. 158 Fed. 1011; Lineoski v. Susquehanna Coal Co. 157 Pa. 153, 27 Atl. 577; Palmer's Estate, 5 W. N. C. 542; First Nat. Bank v. Wirebach, 106 Pa. 37; Porter v. Buckley, 78 C. C. A. 138, 147 Fed. 140; Hull v. St. Louis, 42 L.R.A. 761, note.

It would not be enough for the plaintiff to prove that a defect existed and that it caused the accident, unless she proved that the defendant knew, or should have known, of the existence of such a defect.

26 Cyc. 1142; Davidson v. Southern P. Co. 44 Fed. 476; Erskine v. Chino Valley Beet-Sugar Co. 71 Fed. 270; Palmer v. Denver & R. G. R. Co. 3 McCrary, 635, 12 Fed. 392; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Great Northern R. Co. v. McLaughlin, 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669; Texas & P. R. Co. v. Elliott, 18 C. C. A. 139, 30 U. S. App. 606, 71 Fed. 378; Johnson v. Armour, 5 McCrary 629, 18 Fed. 490; Bean v. Oceanic Steam Nav. Co. 24 Fed. 124; Hudson v. Charleston, C. & C. R. Co. 55 Fed. 248.

The circuit court of appeals had a perfect right to consider the printed record on the former appeal because it was not only offered in evidence at the trial, and copies furnished at the argument, but was part of the records of that court, and was a proper subject for judicial notice of the court.

3 Cyc. 179; Schneider v. Hesse, 9 Ky. L. Rep. 814; Thornton v. Webb, 13 Minn. 498, Gil. 457; Butler v. Eaton, 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Craemer v. Washington, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1; Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121; Re Boardman, 169 U. S. 39, 42 L. ed. 653, 18 Sup. Ct. Rep. 291; Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 217, 46 L. ed. 1132, 1134, 22 Sup. Ct. Rep. 820; Dimmick v. Tompkins, 194 U. S. 540, 548, 48 L. ed. 1110, *1113, 24 Sup. Ct. Rep.* 780.

*Plaintiff in error must have tried the* former action under the Federal employers' liability act, and as the administratrix was a mere formal party, she could have been substituted at any time as nominal plaintiff, by amendment.

St. Louis & S. F. R. Co. v. Herr, 113 C. C. A. 578, 193 Fed. 950; Reardon v. Balaklala Consol. Copper Co. 193 Fed. 189.

The parties were indentical or in privity.

Philadelphia, W. & B. R. Co. v. Conway, 112 Pa. 511, 4 Atl. 362; Butler v. Eaton, 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985.

If the matter was adjudicated as to part, it was adjudicated entirely.

MacDonald v. Grand Trunk R. Co. 71 N. H. 448, 59 L.R.A. 448, 93 Am. St. Rep. 550, 52 Atl. 982; Columb v. Webster Mfg. Co. 43 L.R.A. 195, 28 C. C. A. 225, 50 U. S. App. 264, 84 Fed. 592; Marshall v. Bryant Electric Co. 107 C. C. A. 599, 185 Fed. 499; Hein v. Westinghouse Air Brake Co. 172 Fed. 524; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Clare v. New York & N. E. R. Co. 172 Mass. 211, 51 N. E. 1083; The New Brunswick, 125 Fed. 567; Hubbell v. United States, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828.

The question of the negligence of a fellow workman was adjudicated in the prior case, because, even under the Pennsylvania statute, recovery is permitted against the common employer whose alleged negligence (in the present instance in not furnishing a derailing switch) concurred with the negligence of a fellow servant to cause harm to the plaintiff.

Kaiser v. Flaccus, 138 Pa. 332, 22 Atl. 88; Wallace v. Henderson, 211 Pa. 142, 60 Atl. 574; Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; Choctaw, O. & G. R. Co. v. Holloway, 52 C. C. A. 260, 114 Fed. 458; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; Mercantile Trust Co. v. Pittsburgh & W. R. Co. 53 C. C. A. 207, 115 Fed. 475; Dailey v. New York, N. H. & H. R. Co. 167 Fed. 592.

The fact as to whether or not the cars were left properly on the siding was directly in issue as a defense in the former suit, and was directly decided therein so as to be *res judicata.*

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; 23 Cyc. 1215, 1216; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; MacDonald v. Grand Trunk R. Co. 71 N. H. 448, 59 L.R.A. 448, 93 Am. St. Rep. 550, 52 Atl. 982; Columb v. Webster Mfg. Co. 43 L.R.A. 195, 28 C. C. A. 225, 50 U. S. App. 264, 84 Fed. 592.

The Federal employers' liability act is not exclusive in the case at bar.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

The case was not properly at issue and could not be tried.

Amheim v. Dye Works, 36 W. N. C. 32; Daily v. Iselin, 200 Pa. 200, 49 Atl. 893; 31 Cyc. 128; International Coal Min. Co. v. Pennsylvania R. Co. 15 Pa. Dist. R. 225; Singer Sewing Mach. Co. v. Yaduskie, 26 Pa. Co. Ct. 298; Rudolph v. Sturgis, 25 Pa. Co. Ct. 577; Daly v. Iselin, 10 Pa. Dist. R. 193.

Mr. Justice Day delivered the opinion of the court:

This case was brought in the circuit court of the United States for the eastern district of Pennsylvania under the Federal employers' liability act, as amended (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322; 36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324), by Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, against the Delaware, Lackawanna, & Western Railroad Company, to recover for the alleged wrongful death of decedent. A verdict was rendered by the district court, which had succeeded the circuit court, in favor of the plaintiff, and judgment entered accordingly, which, on writ of error, was reversed by the circuit court of appeals for the third circuit. 200 Fed. 44. The case was then brought here upon writ of error.

It appears from the record that the defendant railroad company operates a line of road running from Nazareth to Portland, Pennsylvania, and that a branch road, known as the Pen Argyl Branch, puts off in a northeasterly direction from Pen Argyl Junction, a point on the defendant's line. Between 100 and 150 yards northeast of Pen Argyl Junction there is a switch running off the Pen Argyl Branch, called Albion Siding No. 2, which extends to certain quarries in that vicinity. The switch track is level, or practically so, for the first 100 feet, and then rises towards the northeast with a grade of 1 foot in 100 feet. From the place where the Albion switch connects with the Pen Argyl Branch down to the main track, and then westward on the main track, there is a down grade. Six gondola cars, each about 36 feet in length, loaded with ashes, had been placed on the Albion spur 439]by the *train crew of which Troxell was the fireman, he at that particular time acting as engineer, two days before the happening of the injury hereinafter described. The night before the injury the yard shifter and crew had moved the cars a considerable distance further on the spur from the junction of the siding with the branch and on the up grade. The next morning, at about half-past 7 o'clock, these cars were seen to be running rapidly down grade toward the point where the collision occurred. The decedent, Troxell, then engaged as fireman in propelling a train eastwardly, consisting in part of interstate cars and freight, was, at the time, working on the tender of the engine, and when the runaway cars, going at great speed, collided with the locomotive, he was buried under the wreck and killed.

Lizzie M. Troxell (now the administratrix of his estate) brought a previous action, suing as surviving widow, and joining the two living children, against the defendant railroad company for damages, stating that at the time of the injury, July 21, 1909, the deceased was engaged in the capacity of fireman on a locomotive hauling one of the defendant's trains in interstate and foreign commerce, and that while so engaged, without fault on his part, and because of the negligence of defendant, and its failure to supply and keep in good condition proper and safe devices, instruments, and apparatus, the locomotive and train came into violent collision with several runaway cars, resulting in the death of Troxell, and she prayed damages on account of herself and the children. She recovered a verdict, and judgment was rendered in her favor, which, upon writ of error, was reversed by the circuit court of appeals for the third circuit. 105 C. C. A. 593, 183 Fed. 373.

Thereafter, having been appointed administratrix of the estate of her husband, Lizzie M. Troxell began the present action in the circuit court of the United States. *This action was specifically brought[440 under the Federal employers' liability act. The petition charged that the defendant was a common carrier engaged in interstate transportation; that Troxell, deceased, was a fireman, engaged in that capacity upon a locomotive and train engaged in carrying interstate and foreign commerce, and charged that because of the negligence, carelessness, and oversight of the defendant, and its failure to supply and keep in good condition proper, necessary, and safe devices, instruments, and appliances, the locomotive and train came into violent collision with several loose and runaway cars, causing Troxell's death; and the plaintiff, administratrix, as aforesaid, prayed damages, setting forth that she was the widow of the decedent, and that there were two minor children of the parties. The case was tried to a jury, and again resulted in a verdict and judgment in the district

court, successor to the circuit court, in favor of the administratrix. Upon writ of error the circuit court of appeals for the third circuit reversed the judgment, holding that the first proceeding and judgment was a bar to a recovery in the second action.

Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; but, where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. Cromwell v. Sac County, 94 U. S. 351-353, 24 L. ed. 195, 197, 198; Southern P. R. Co. v. United States, 168 U. S. 1, 50, 42 L. ed. 355, 377, 18 Sup. Ct. Rep. 18; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 257, 54 L. ed. 179, 184, 30 Sup. Ct. Rep. 78.

An inspection of the record shows that upon the trial of the first action the judge of the district court held that the employers' liability act prevented Lizzie M. Troxell 441] *from maintaining the suit in her individual capacity for herself and children, and that the Federal act should not be considered in determining the case, and that it was brought under the statutes of the state of Pennsylvania, authorizing a widow to bring suit for herself and children, not as administratrix, but in her individual capacity, to recover damages for the death of the decedent. In such an action there could be no recovery because of the negligence of the fellow workmen of Troxell. The record shows that in the first action the trial court held that no question of the negligence of the fellow servants was submitted, and the jury was confined to the question of responsibility for failing to provide proper safety appliances to prevent the cars from running down the grade in the manner in which they did, if left unbraked, or on becoming unbraked on the siding. The circuit court of appeals, in reversing the case, distinctly stated that, in its view, the case might be brought under the state act, notwithstanding the employers' liability act, and reached the conclusion that the judgment below should be reversed.

The second action was brought under the Federal liability act, under which there might be a recovery for the negligence of the fellow servants of the deceased, and the judgment of the district court, holding that the former case had adjudicated matters as to defects in cars, engines, and rails, submitted to the jury only the question of the negligence of fellow servants in failing to properly brake and block the cars on the siding. Upon the issue thus submitted a verdict was rendered and recovery had in the trial court, as we have already said.

In the circuit court of appeals, however, it was held that the judgment in the first case was a bar to the second proceeding, because, in view of the decision of this court in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, an action of this kind for injury to one engaged in interstate commerce could only be maintained under the Federal employers' *liability act;[442 and that, although the plaintiff undertook in the first action to abandon the charge as to the negligence of fellow servants, and relied only on the want of a proper derailing switch on Albion Siding No. 2, nevertheless the first judgment was a bar because, in the second action, she was merely offering to prove additional facts which might have been proved in the first trial.

We think it is apparent from what we have said that the first case was prosecuted and tried upon the theory that it involved a cause of action under the state law of Pennsylvania. It was so submitted to the jury, and they were told that they were not to consider the Federal law, but recovery should be based upon the right under the state act. If the circuit court of appeals was right in its second decision that no action could have been maintained under the state law, in view of the employers' liability act, the fact that the plaintiff attempted to recover under that law, and pursued the supposed remedy until the court adjudged that it never had existed, would not, of itself, preclude the subsequent pursuit of a remedy for relief to which in law she is entitled. William W. Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524; Snow v. Alley, 156 Mass. 193, 195, 30 N. E. 691; Water, Light & Gas Co. v. Hutchinson, 19 L.R.A.(N.S.) 219, 90 C. C. A. 547, 551, 160 Fed. 41. Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one, because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow servants of the

deceased. This was the issue upon which the case was submitted at the second trial 443] *and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury by the negligence of the fellow servants was not involved in or concluded by the first suit.

Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. Brown v. Fletcher, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92. The circuit court of appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentially the same in both actions (the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children); and held that, except in mere form, the actions were for the benefit of the same persons, and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical, and would have been curable by amendment. This conclusion was reached before this court announced its decision in American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603. That action was brought under the Federal employers' liability act by the widow and son of the decedent, and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the circuit court of appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention, and held that Congress, doubtless for good 444]reasons, had specifically provided *that an action under the employers' liability act could be brought only by the personal representative; and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the Birch Case there was not that identity of parties in the former action by the widow and the present case, properly brought by the administrator under the employers' liability act, which renders the former suit and judgment a bar to the present action.

It is further urged that even if this court should hold that the sole ground upon which the circuit court of appeals proceeded, namely, that the former judgment is a bar to this action, was untenable, nevertheless the judgment of the district court ought not to be affirmed, because there is no testimony in the record adequate to sustain the verdict and judgment of that court. The case in the appellate court must be determined, not by considering and weighing conflicting testimony, but upon a decision of the question as to the presence of testimony in the record fairly tending to sustain the verdict. An examination of the record satisfies us that the district judge in his charge fairly stated the conflicting testimony adduced as to the negligence of the fellow servants in securing and blocking the cars on the siding, and that there was testimony to sustain the verdict of the jury adverse to the defendant. It is also contended that certain testimony was inadmissible. We have examined this assignment, and, without going into detail, find that it, too, must be denied. It is also urged that the record shows that the case when tried was not at issue; at least, under the rules of the lower court, was not triable until after issue joined, and this objection is set up because of the failure of the plaintiff to file a replication after the court had decided that the plea of *res judicata* was a correct plea under the local practice. The case was at issue, and the plea of *res judicata* was considered and decided in both *courts, and it is too late to[445 make a technical objection of that character in this court.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed, and the case remanded to the District Court.

Upon the issue of *res judicata*, Mr. Justice Lurton concurs solely because of the lack of identity of the parties in the two actions.

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UNITED STATES OF AMERICA EX REL. CHAMPION LUMBER COMPANY, a Corporation, Petitioner,

v.

WALTER L. FISHER, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office.

(See S. C. Reporter's ed. 445–452.)

**Appeal — from District of Columbia court of appeals — Federal authority.**

The validity of an authority exercised under the United States, or the existence or scope of any power or duty of an officer

of the United States, was not "drawn in question," within the meaning of the Judicial Code of March 3, 1911 (36 Stat. at L. 1159, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 231), § 250, governing the appellate jurisdiction of the Federal Supreme Court over the court of appeals of the District of Columbia, in a case involving the validity of the action of the Land Department in withholding a patent under the act of March 3, 1891 (26 Stat. at L. 1095, 1098, chap. 561, U. S. Comp. Stat. 1901, pp. 1521, 1535), § 7, on the ground that a protest had been filed within two years from the date of issuance of the receiver's certificate, where the real issue is whether the facts shown warranted the exercise of the power given by law, the statute under which the officers acted concededly being valid, and the authority exerted lawful and within their powers if the facts justified their action.

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

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Submitted January 27, 1913. Decided February 24, 1913.

ON PETITION for a Writ of Error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing a petition for a writ of mandamus to compel the issuance of a patent by the Land Department. Denied.

See same case below, 39 App. D. C. 158.

The facts are stated in the opinion.

Mr. Patrick H. Loughran submitted the cause for petitioner.

Solicitor General Bullitt submitted the cause for respondents. Mr. Charles W. Cobb, Assistant Attorney General, was on the brief.

Mr. Justice Day delivered the opinion of the court:

This is a petition for the allowance of a writ of error to the court of appeals of the District of Columbia to review the judgment of that court, affirming the judgment of the supreme court of the District of Columbia, dismissing the petition of the Champion Lumber Company against the Secretary of the Interior and the Commissioner of the General Land Office.

It appears that on April, 26, 1910, a petition was filed by the petitioner in the supreme court of the District of Columbia, praying for a writ of mandamus against the Secretary of the Interior and the Commissioner of the General Land Office to issue a patent for the land hereinafter referred to. The grounds of the petition were that the lumber company was the owner of certain lands which had been finally entered under the homestead laws by one Lucy Johns, from whom the petitioner derived title; that the only authority left in the Land Department on the facts set forth was to issue a patent for the land; *and further, that the ruling of the[447 Secretary of the Interior and the Commissioner of the General Land Office that a protest, made within two years from the date of the issuance of the receiver's receipt, was pending, whereby the patent was withheld in accordance with the provisions of § 7 of the act of March 3, 1891 (26 Stat. at L. 1095, 1098, chap. 561, U. S. Comp. Stat. 1901, pp. 1521, 1535), was an arbitrary and capricious ruling, made without legal authority. The respondents answered and denied the allegations of the petition in this respect, and averred the pendency of a protest which justified the holding up of the patent under the provisions of the statute. The case was tried upon an agreed statement of facts, of which the following is an abridgment:

On September 17, 1897, Lucy Johns made entry under the homestead laws at Jackson, Mississippi, of certain land subject to entry, the papers showing that she was qualified to make the entry, which showing has not been questioned; on September 24, 1902, she having made prima facie proof of compliance with the requirements of the homestead laws, final certificate and receipt were issued to her, and the proof was forwarded to the Commissioner of the General Land Office at Washington during October of that year. On January 15, 1903, she conveyed all her interest in the entry to the petitioner, which subsequently conveyed it to one Hines, who later conveyed it back to the petitioner. On November 19, 1902, a special agent of the General Land Office, named Hammer, wrote the Commissioner that he had reason to believe that 90 per cent of the proofs in the territory where petitioner's land is situated were fraudulent, and that he had under investigation certain entries, including the one in question, and requested that all patents be withheld until a full report was made; on November 28, 1902, Hammer informed the Commissioner that the investigation so far made had disclosed flagrant frauds, and renewed his request to withhold patents to such lands, and on *December 13th of[448 that year the Commissioner directed the register and receiver at Jackson to suspend action on commutations and proofs until

NOTE—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

Hammer had reported; and on June 24, 1904, Hammer, in response to a letter from the Commissioner inquiring as to the necessity of an investigation, replied in the affirmative. On May 12, 1906, another special agent reported that the entry of Lucy Johns "was made for speculative purposes, with no attempt to comply with the requirements of the law, and recommended that the entry be canceled on the ground of nonresidence, noncultivation, nonimprovement, and abandonment." Thereupon the Commissioner directed that a hearing be had. The petitioner moved for a stay of proceedings, claimed that under § 7, supra, the entry should be patented without further proceedings. The motion was denied by the Commissioner, and this denial affirmed by the Secretary of the Interior, who later denied a motion to review his decision, finding that a protest had been filed against the patent of Lucy Johns' homestead entry within two years from the issuance of the receiver's receipt, and holding that the case should proceed to hearing on the special agent's charge.

The supreme court of the District of Columbia dismissed the petition. Upon appeal to the court of appeals, that court affirmed the judgment of the supreme court. 39 App. D. C. 158. In the course of the opinion the court of appeals said:

"Every point advanced by appellant in this case is, in our view, settled by the following very recent decisions: Fisher v. United States, 37 App. D. C. 436; United States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356; United States ex rel. McKenzie v. Fisher, 39 App. D. C. 7. In Fisher v. United States, which involved the interpretation of the very statute upon which appellant here relies, this court, speaking through Mr. Justice Van Orsdel, said: 'While it is true that arbi-449]trary *power resides nowhere in our system of government, and while the supervisory authority vested in the Secretary of the Interior and the Commissioner of the General Land Office over the disposition of the public lands is neither unlimited nor arbitrary, yet the question here presented as to whether or not the communication and order amounted to a protest, which we regard as exceedingly close, was one clearly within the power of the Commissioner to decide. To say that he was mistaken would require us to review a matter exclusively confided by law to his discretion and judgment. This proceeding will not admit of such a review.'

"The communications of Special Agent Hammer respecting this entry were made within the two years contemplated by said act of March 3, 1891, as was the communication of June 18, 1904, from the Commissioner to said agent. It is apparent that these communications resulted in the withholding of a patent; in other words, that the Commissioner regarded the right to that patent as dependent upon the outcome of the investigation which was to ensue. The subsequent decision of the Secretary that what was done within the two-year period constituted a protest against the patenting of the entry was not arbitrary or capricious, but was based upon evidence; and the sufficiency of that evidence was for his, and not our, determination."

The writ of error is asked for under § 250 of the Judicial Code, which provides:

"Sec. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

. . . . . .

"Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or *scope of any[450 power or duty of an officer of the United States, is drawn in question." [36 Stat. at L. 1159, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 231.]

The case, therefore, to be appealable to this court from the court of appeals of the District of Columbia, must be one in which the validity of the authority exercised or the existence or scope of the authority of the officer named is drawn in question.

"Drawn in question" is a phrase long used in other statutes of the United States regulating appellate jurisdiction. It is found in § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), governing appeals from state courts to this court. It is in the 5th section of the circuit court of appeals act of March 3, 1891 (26 Stat. at L. 826, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 488, 549). It is in the statute regulating territorial appeals (23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572). The meaning of this phrase has been the subject of frequent consideration in this court, and it is unnecessary to review the numerous cases in which it has been interpreted.

As we have said, it is in the circuit court of appeals act, which provides that cases may be brought directly to this court from the circuit court, in which, among other things, the validity or construction of any treaty made under the authority of the United States is drawn in question. In Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109, in considering whether the provisions of a certain treaty were drawn in question, so far as the

validity or construction thereof was concerned, with a view to the exercise of the appellate jurisdiction of this court, Mr. Chief Justice Fuller, delivering the opinion of the court, reviewed the cases in this court, and stated as the conclusion of the matter that, in order to involve the validity or construction of a treaty, "some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted." In Pettit v. Walshe, 194 U. S. 205, 216, 48 L. ed. 938, 942, 24 Sup. Ct. Rep. 657, the con-451]struction of a *treaty was held to be drawn in question where the petition for a writ of habeas corpus and the warrant under which the accused was arrested referred to the treaty, and the court below proceeded on the ground that the determination of the questions involved in the case depended in part upon the meaning of certain provisions of that treaty, these provisions having been duly brought to the attention of the court. It has also been held that the validity of a statute of the United States or authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such law is denied and the denial forms the subject of direct inquiry in the case. United States v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; Linford v. Ellison, 155 U. S. 503, 39 L. ed. 239, 15 Sup. Ct. Rep. 179; Snow v. United States, 118 U. S. 346, 353, 30 L. ed. 207, 209, 6 Sup. Ct. Rep. 1059; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1.

In clause 5 of § 250, under consideration, the added ground of appeals is given if the existence or scope of any power or duty of an officer of the United States is drawn in question. Within the meaning of this statute, was any such validity or existence or scope of authority drawn in question? It appears that the petitioner contended that no protest was pending in the Department which could rightfully justify the withholding of the patent. The officers of the United States took issue upon this allegation, and the court of appeals decided that there was testimony before the Secretary authorizing the exercise of the discretion conferred by law to withhold the patent, and upon that ground affirmed the decision, refusing the writ. The case was therefore submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record. The petitioner did not challenge, nor did the court pass upon, the validity of any authority exercised under the United States, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is *used in the[452 statute; that is, brought forward and made a ground of decision. The statutes under which the officers of the United States acted were concededly valid, and the authority exerted was lawful and within the powers of the officers, if the facts justified their action. The petitioner's real attack upon the action of the Secretary and Commissioner was because the facts shown did not warrant the exercise of the power given by law. The decision of that issue, upon which it is clear the case turned, neither involved nor decided the questions which make the case appealable to this court under the 5th clause of § 250 of the Judicial Code.

It follows that the petition for writ of error must be denied.

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UNITED STATES OF AMERICA EX REL. GEORGE L. FOREMAN, Petitioner,
v.
GEORGE VON L. MEYER, Secretary of the Navy.

(See S. C. Reporter's ed. 452-455.)

**Appeal — from District of Columbia court of appeals — Federal authority.**

A case in which the decision refusing mandamus to compel the Secretary of the Navy to record the petitioner's name upon the register of retired officers of the Navy as a paymaster's clerk was based upon the ground that petitioner was not a paymaster's clerk, and hence was not entitled, under the Federal statutes, to be entered as such upon the retired list, is not one in which the validity of an authority exercised under the United States, or the existence or scope of the power or duty of an officer of the United States, was drawn in question, within the meaning of the Judicial Code of March 3, 1911 (36 Stat. at L. 1159, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 231), § 250, governing the appellate jurisdiction of the Federal Supreme Court over the court of appeals of the District of Columbia.

[For other cases, see Appeal and Error, III d, 6, in Digest Sup. Ct. 1908.]

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Submitted January 27, 1913. Decided February 24, 1913.

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NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

ON PETITION for Writ of Error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, denying mandamus to compel the Secretary of the Navy to record petitioner's name upon the retired list. Denied.

See same case below, 38 App. D. C. 472.

The facts are stated in the opinion.

Mr. **Patrick H. Loughran** submitted the cause for petitioner.

Solicitor General **Bullitt**, and Messrs. Clarence R. Wilson and Reginald S. Huidekoper submitted the cause for respondent.

Mr. Justice **Day** delivered the opinion of the court:

Foreman filed a petition in the supreme court of the District of Columbia for a writ of mandamus to compel the Secretary of the Navy to record his name upon the register of retired officers of the Navy as a paymaster's clerk from the 27th of June, 1910. An answer having been filed, to which the petitioner interposed a demurrer, the supreme court, upon the petitioner electing to stand on his demurrer, entered an order of dismissal, which was affirmed by the court of appeals (38 App. D. C. 472). A writ of error to this court having been refused by the court of appeals, this petition was filed here.

The petitioner claimed that he was an officer below the rank of vice admiral, sixty-two years old, and entitled, under § 1444 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1020), to be retired from active service, and also claimed that he was entitled to the benefits of the act of June 24, 1910 (36 Stat. at L. 605, 606, chap. 378, U. S. Comp. Stat. Supp. 1911, p. 379), providing that all paymasters' clerks shall, while holding appointment in accordance with law, receive pay and allowance and have the same rights of retirement as warrant officers of like length of service in the Navy.

It appears that the petitioner was appointed paymaster's clerk in 1893, for duty at 454]the Navy pay office at *San Francisco, California, which was and is a purchasing paymaster's office, where he continued until November 20, 1908, receiving an annual compensation of $2,000, which was paid from the appropriation entitled "Pay, Miscellaneous," when he was notified by the Acting Secretary of the Navy of his promotion to chief clerk in the same pay office, which position the petitioner accepted and in which he served until April 17, 1909, when he filed his application for retirement as an officer of the Navy *under § 1444*, having attained the age of sixty-two years on July 1, 1906. This application was denied. On November 14, 1910, he petitioned for retirement under the act of June 24, 1910. This petition also was denied. On December 14, 1910, the petitioner's request for leave without pay was approved by the Department, and he was notified that if he was unable to report for duty by December 31, 1910, his resignation would be accepted, otherwise he would be discharged. On January 7, 1911, petitioner tendered his resignation, under protest, which was accepted.

After considering the various statutes, the court of appeals reached the conclusion that the petitioner was not a paymaster's clerk within the meaning of the law, and said:

"Appellant was appointed 'for duty at the Navy pay office' at San Francisco,—a purchasing paymaster's office. He received an annual salary of $2,000 from 1893 to 1908, instead of $1,300 to which he would have been entitled had be been appointed under the provisions of § 1386 [which provides for the appointment of regular paymaster's clerks]. His promotion in 1908 did not affect his status, since he was at no time a paymaster's clerk in the technical sense, but at all times attached to the particular office. He was no more an officer of the Navy than any one of the many employees of the Navy Department at Washington.

*"We rule, therefore, that he never[455 possessed any right to retirement. Upon the other questions suggested, it is unnecessary to express an opinion."

The decision, therefore, rested upon the denial of the contention that petitioner was a paymaster's clerk, and entitled to the benefit of the statutes governing such cases.

This case, like the one just decided (United States ex rel. Champion Lumber Co. v. Fisher, 227 U. S. 445, ante, 591, 33 Sup. Ct. Rep. 329), is sought to be brought here under § 250 of the Judicial Code [36 Stat. at L. 1159, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 231], because it is said to be a case in which the validity of an authority exercised under the United States or the existence or scope of the power or duty of an officer of the United States is drawn in question. From what we have said of the character of the case made and decided, we think it is apparent that no such validity was drawn in question, nor was the existence or the extent or scope of the power or duty of an officer of the United States challenged or decided.

The case was made and a decision was had in the court of appeals upon the issue whether, under the statutes invoked by the petitioner as the ground of his right to the relief sought, he was or was not a paymas

ter's clerk, entitled to be entered upon the register of retired officers of the Navy. Applying the principles just announced in deciding the case of United States ex rel. Champion Lumber Co. v. Fisher, the petition for writ of error in this case must be denied.

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456] *JOHN E. HAMPTON et al., Appts.,
v.
ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 456-469.)

**Statutes — who may assail validity.**

An interstate railway carrier which has refused to furnish cars for intrastate transportation, as required by Ark. act of April 19, 1907, §§ 1, 17, cannot test the constitutionality of such statute, as affecting interstate commerce, in a suit in equity to enjoin the bringing of actions at law to recover the penalties prescribed for violations of its provisions, where, as construed by the highest state court, the provisions of the statute which affect interstate commerce are separable from the remaining provisions, and it permits any reasonable excuse for a failure to furnish cars on demand to be interposed in the actions at law.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

[No. 3.]

Argued and submitted October 29 and 30, 1912. Decided February 24, 1913.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas to review a decree enjoining the bringing of actions against an interstate railway carrier for the penalties incurred for a refusal to furnish cars for intrastate transportation, as required by a state statute. Reversed and remanded, with directions to dismiss the bill.

See same case below, 162 Fed. 693.

Statement by Mr. Justice Lurton:

This bill was filed for the purpose of enjoining the bringing of actions in the state courts, in the name of the state, to recover penalties declared by the railroad commission *of the state for the violation of a[457 statute requiring railroads to furnish cars upon the application of shippers, and forbidding discrimination between shippers in furnishing such cars.

The facts necessary to be stated are these:

Upon a complaint duly filed, and after a full hearing, the railroad commission of the state found that the railroad company had, during every day between September 20th and September 30th, 1907, inclusive, refused to furnish cars upon statutory notice and request of the operators of several coal companies operating along the line of its railroad in the state of Arkansas, and had also, during the same period, discriminated in favor of a coal company which it controlled, by furnishing it with an adequate supply of cars, although part of the coal so carried was for sale upon the market. The requests for cars so refused were for shipments from the mines within the state to destinations in the same state, and were not for the purpose of interstate transportation.

The bill charged that the railroad commission was about to transmit a transcript of its proceedings to the several state prosecuting attorneys in counties where the railroad was situated, with an order that action should be brought in the name of the state for the enforcement of the penalties, as provided by §§ 11 and 18 of an act of the Arkansas legislature of March 11, 1899, being § 6804, Kirby's Digest.

The bill alleges that, although engaged in operating a railroad within the state of Arkansas, the company's lines extended into adjacent states, and that it is therefore an interstate carrier, subject to the act of Congress of February 4, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284], and its amendments. It charges that by an act of the legislature of the state of Arkansas passed April 19, 1907, the railroad commission of the state is vested with authority to regulate railroads within the state, in respect to the duty of *furnishing cars to shippers, and[458 that it has, under that authority, promulgated order No. 346, which follows in phraseology the provisions of § 1 of the act referred to. It is then contended that this act of April 19, 1907, and the order of the commission in pursuance of said 1st section, constitute an exertion of the power of the state over interstate commerce, and as such are invalid. It was averred that if the bringing of the threatened suits was not enjoined, complainant would be subjected to a multitude of actions and to a liability for the excessive penalties imposed by the 18th section of the act of 1899, being a

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NOTE.—On state regulations requiring carrier to furnish cars to shipper as interference with interstate commerce—see notes to St. Louis Southwestern R. Co. v. Arkansas, 54 L. ed. U. S. 699; Southern R. Co. v. Com. 17 L.R.A.(N.S.) 364, and Chicago, R. I. & P. R. Co. v. Beatty, 42 L.R.A.(N.S.) 984.

As to the duty of a railroad company to furnish cars to shippers—see note to Houston, E. & W. T. R. Co. v. Campbell, 43 L.R.A. 225.

minimum of not less than $500 for each offense, and a maximum of as much as $3,000.

The bill denied any liability under the act, even if valid, and presented various reasons why it had not supplied the cars requested.

Answer was filed and issue taken upon every material defense set up upon the merits. The cause was heard upon bill and answer, there being no evidence upon the matters of defense touching the merits of the case.

The circuit court held the entire act of April 19, 1907 to be null and void as an invalid invasion of the field of interstate commerce, and accordingly enjoined its enforcement and the bringing of the actions which the commission had ordered.

Mr. Hal L. Norwood, Attorney General of Arkansas, and Mr. Morris M. Cohn submitted the cause for appellants:

Appellee is entitled only to raise the question of unconstitutionality of the act of April 19th, 1907, so far as that is material to its case.

Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co. 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577; Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341; Smith v. Condry, 1 How. 28, 11 L. ed. 35; The Apollon, 9 Wheat. 362, 6 L. ed. 111.

Imaginary evils will not be considered in the determination of causes.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Calder v. Bull, 3 Dall, 386, 1 L. ed. 648.

Mr. Lovick P. Miles argued the cause, and, with Mr. Martin L. Clardy, filed a brief for appellee:

The act of the Arkansas legislature and the rules of the Arkansas Railroad Commission, which are assailed in this litigation, come within the class of state statutes and commission rules that must be declared void as unduly interfering with and burdening, through their necessary effect, interstate commerce.

Shepard v. Northern P. R. Co. 184 Fed. 770.

Mr. Justice Lurton, after making the above statement, delivered the opinion of the court:

The single purpose of this case is to prevent the bringing of actions at law in the name of the state, and by order of the state railroad commission, to recover penalties prescribed by the Arkansas act of March 11, 1899, §§ 11 and 18, for the violation of the provisions of § 11 of the act referred to, and of § 1 of the act of April 19, 1907. The case turned below upon the single question of the constitutionality of the act of April 19, 1907, being an act entitled, "An Act to Regulate Freight Transportation by Railroad Companies Doing Business in the State of Arkansas." The only parts of that act here in any way involved are the first paragraph of the 1st section, and the last clause in the 17th section. The paragraph of the 1st section is the legislative authority under which the commission finds power to make its order No. 346, concerning the duty of carriers to furnish cars upon the demand of shippers, its said order being in the very words of that paragraph, as follows:

*"That when a shipper makes a[463 written application to the station agent of a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same at the place of shipment within six days from 7 o'clock A. M. the day following such application."

The clause concluding the 17th section of the act is in these words:

"Interstate railroads shall furnish cars on application for interstate shipments, the same in all respects as other cars to be furnished by intrastate railroads under the provisions of this act." [Acts 1907, pp. 454, 463.]

The order of the commission directed the bringing of actions against the appellee for the wilful violation of the provisions of § 1, set out above, and also for an illegal discrimination under § 11 of the act of March 11, 1899, referred to above. That section forbids any discrimination or preference in furnishing cars, and requires equal facilities to all under like circumstances and conditions.

By agreement of the parties, recited in the decree below, and repeated in the memorandum opinion filed by the circuit judge,

every question was eliminated from the case except the constitutionality of the act of 1907. The issue for our consideration by this action of the parties is very succinctly stated by Judge Treiber, who presided in the circuit court, in these words:

"In the argument counsel agreed that the only question necessary for a final determination of this cause is the constitutionality of the act of the general assembly of the state of Arkansas, No. 193, approved April 19th, 1907, entitled, 'An Act to Regulate Freight Transportation by Railroad Companies Doing Business in the State of Arkansas,' . . . and, if unconstitutional, that the injunction may be made perpetual."

464] *The court then adds:

"The court holds that the act is unconstitutional upon two grounds: 1. By the last sentence of § 17 it is clearly shown that the intention of the legislature was to apply its provisions to interstate shipments as fully as to intrastate shipments; and there is nothing in the act to indicate that the act would have been passed unless it could thus be made applicable. This is clearly an interference with interstate commerce, and as this provision cannot be disregarded without defeating one of the main objects of the act, it is unconstitutional. 2. The requirement to furnish the cars is absolute, and makes no exceptions for cases of a sudden congestion of traffic, actual inability to furnish cars by reason of their temporary detention in other states or in other places within the same state; none for interference of traffic, occasioned by wrecks, accidents, or strikes. Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, is conclusive.

"For these reasons the temporary injunction heretofore granted will be made perpetual as to proceedings by defendants under the act of April 19th, 1907, but the injunction is not to apply to any acts by defendants under any other statutes of the state. Let there be a decree accordingly." [162 Fed. 694.]

Neither have counsel for appellee in this court presented any question other than that of the unconstitutionality of the act of 1907. We shall, therefore, for the purposes of this case, assume that the railroad company did fail and refuse to furnish cars as requested, and that it also favored a coal company in which it was interested, and that it rests its defense upon the invalidity of the act of 1907.

The attack upon that act turned upon two propositions.

*a. That the clause of the 17th section, set out above, manifests an intention that* the act shall apply as well to interstate shipments as to intrastate shipments, and that this purpose invalidates the whole act, as there *is nothing to justify the court[465 in saying that the valid parts of the act would have been passed without the invalid parts.

b. That the requirement to furnish cars, found in the 1st section, is absolute, and that no excuse arising from the detention of the company's cars upon other and connecting lines of railroad in and out of the state, nor for delays due to sudden emergencies, unusual congestion of traffic, catastrophes, or other unavoidable and unusual conditions without fault, is a defense against the penalty imposed for failure to supply cars as required.

Coming first to the clause in the 17th section, which the court below held invalidated the whole act:

That clause probably means no more than that there shall be no discrimination against demands for cars for interstate shipments. If, however, it be construed as extending the act so as to regulate the furnishing of cars for interstate shipments, it would be invalid by reason of the provisions of the Hepburn amendment to the act to regulate commerce of June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288]. Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, ante, 284, 33 Sup. Ct. Rep. 174.

The effect of this upon the remainder of the act has not been considered in the briefs of appellee, further than to say that in Oliver v. Chicago, R. I. & P. R. Co. 89 Ark. 466, 117 S. W. 238, decided pending this appeal, the supreme court of the state has held the act valid as including an elaborate and workable scheme for the regulation of intrastate railroad traffic, irrespective of the invalidity of the clause referred to. We shall therefore assume the remainder of the act to be valid, although the clause in question be regarded as invalid.

Neither is the requirement of the act as to the duty of furnishing cars absolute, as held by the court below. That the act upon its face includes no exceptions or excuses is not conclusive of its meaning and intent. The case of Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, is not *controlling. The dereliction[466 there involved was in the failure to furnish cars for an interstate shipment, under a Texas statute which required the carrier to furnish cars upon six days' notice, with a provision that the law should not "apply in cases of strikes or other calamity." This court concluded that the inclusion of a par-

ticular exception excluded all others, and that an absolute requirement that a railroad shall furnish a certain number of cars at a specific day, regardless of every other consideration "except strikes and other public calamities," amounted to a burden upon interstate commerce. The court added: "It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state," etc.

But the penalties imposed by the act here involved are enforceable only in an action at law, and in such an action the supreme court of the state has held that such a statutory provision is but declarative of the common law, and that any reasonable excuse for a failure to furnish cars upon the requirement of a shipper may be interposed. St. Louis Southwestern R. Co. v. Clay County Gin Co. 77 Ark. 357, 92 S. W. 531; St. Louis Southwestern R. Co. v. State, 85 Ark. 311, 122 Am. St. Rep. 33, 107 S. W. 1180; Oliver v. Chicago, R. I. & P. R. Co. 89 Ark. 466, 470, 117 S. W. 238. In the case last cited the Arkansas court said of this provision of the act of 1907, that "the failure to furnish cars under the terms of the act under investigation will establish prima facie a breach of duty on the part of the railroad companies. This will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it impossible to answer all demands made for cars for intrastate business would apparently be within the limit of proper defenses in cases of demands too unusual to be foreseen; and, 467 ]viewed in this *way, the act is relieved of the imputation of burdening interstate commerce."

In the case of St. Louis Southwestern R. Co. v. State, cited above, the excuse for failure to furnish cars upon the requirement of a shipper was that it was unable to do so because, while its car equipment was ample for all the demands of its traffic, it had, at the time when it made default, lost control of a majority of its cars through the fact that they had been sent beyond its own line in interstate commerce, and it had been unable to secure their prompt return through the inefficiency of the rules and regulations of the American Railway Association, of which it was a member. Although it appeared that 90 per cent of all the railroad companies in the United States were members of that association and permitted interchange of cars with connecting railroads, and the company was powerless *to correct the rules* and regulations of that association or supervise their enforcement, the Arkansas court held that the detention of its cars upon other lines of railroad in the course of its interstate business afforded no reason for its failure to supply cars in the particular case under consideration. The case was reversed by this court (217 U. S. 136, 147, 54 L. ed. 698, 704, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476), when the court, among other things, said:

"As the penalty, which the court sustained, was enforced solely because of its conclusion as to the inefficiency of the rules and regulations of the American Railway Association, which governed 90 per cent of the railroads in the United States, the court was evidently not unmindful that the carrier before it was powerless of its own motion to change the rules thus generally prevailing, and therefore was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalties which the state statute provided for."

*And the court further said: [468

"That the ruling of the court below involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right."

The cases referred to make it clear that the statutory duty of furnishing cars upon the reasonable notice of a shipper is not absolute, and that the legislature did not intend to impose upon railroad companies the duty of furnishing cars to a particular shipper, regardless of its equal duty to other shippers, state and interstate, or to a situation due to some unusual and unavoidable condition which made it unreasonable that it should be penalized for noncompliance; and also that if, in the administration of the statute, a ruling is made by the state court in respect to an excuse for noncompliance which operates as a restraint upon interstate commerce, a Federal question arises which may be reviewed by this court.

The conclusion we reach is that the railroad company, as the case is presented by the pleadings, the agreement of the parties, and the ruling of the court below, is making an effort to test the constitutionality of the act of 1907, without showing that in the operation of the act interstate commerce has been illegally restrained or bur

dened, or that any defense which it may have for the neglect to comply with the provisions of the act as to furnishing cars has been or will be denied by virtue of its obligation as an interstate railroad. The objections which are suggested in the bill are conjectural and academic. The excuse made by the bill for its refusal to furnish the cars requested and for its illegal discrimination were put in issue by the answer and not proved. In New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736, it is said:

469] *"That unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. Albany County v. Stanley, 105 U. S. 305, 311, 26 L. ed. 1044, 1049; Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; Lampasas v. Bell, 180 U. S. 276, 283, 284, 45 L. ed. 527, 530, 531, 21 Sup. Ct. Rep. 368; Cronin v. Adams, 192 U. S. 108, 114, 48 L. ed. 365, 368, 24 Sup. Ct. Rep. 219. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails."

This principle has been applied in many cases, among them: Turpin v. Lemon, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; The Winnebago, 205 U. S. 354, 360, 51 L. ed. 836, 839, 27 Sup. Ct. Rep. 509; Citizens' Nat. Bank v. Kentucky, 217 U. S. 453, 54 L. ed. 836, 30 Sup. Ct. Rep. 532; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Rosenthal v. New York, 226 U. S. 260, 271, ante, 212, 33 Sup. Ct. Rep. 27.

The result is that the decree must be reversed and the case remanded, with direction to dismiss the bill.

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WELLS, FARGO, & COMPANY et al., Plffs. in Err.,

v.

NEIMAN-MARCUS COMPANY.

(See S. C. Reporter's ed. 469–477.)

*Error to state court — questions reviewable — concession in argument.*

*1. The concession in counsel's brief in the state court that a stipulation in an express company's receipt, limiting its liability to an agreed or declared value, made to adjust the rate, was void both under the state law and under the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1304), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), § 20, does not show the lack of any Federal question based upon the validity of such shipping contract which may be reviewed in the Federal Supreme Court, but must, at most, be regarded as a concession for purposes of argument as to a matter of law which could conclude no one, since it did not operate to withdraw the shipping contract from the case, nor its validity from the court's consideration.*

[For other cases, see Appeal and Error, 2164–2174, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — declared value.**

2. The shipper's acceptance of an express company's receipt containing a recital that the company "is not to be held liable beyond the sum of $50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated," is.

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Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

For state statutes regulating the liability of carriers with respect to shipments over connecting lines as interference with interstate commerce—see note to Shipper v. Seaboard Air Line R. Co. 7 L.R.A.(N.S.) 388.

As to limitation of carrier's liability for loss to agreed valuation—see note to Everett v. Norfolk & S. R. Co. 1 L.R.A.(N.S.) 985.

As to carrier's power to limit amount of liability in case of negligence generally—see note to Ballou v. Earle, 14 L.R.A. 433.

As to right to limit liability by contract in the absence of negligence—see note to Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527.

And, generally, as to liability of connecting carrier for loss beyond its own line—see note to Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1.

where no different value was declared, as much a declaration that the value did not exceed that sum as though so stated upon inquiry, as contemplated by the express company's rules, and is sufficient to justify the application of the doctrine that such a company, when its rates are graduated by value, may, under the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, limit its liability for the loss of an interstate shipment to the agreed or declared value.

[For other cases, see Carriers, III. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 29.]

Argued and submitted November 5, 1912.
Decided February 24, 1913.

IN ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the County Court of Dallas County, in that state, against a carrier for the full value of an undelivered interstate shipment, notwithstanding a stipulation limiting the carrier's liability to a declared value. Reversed and remanded for further proceedings.

See same case below, — Tex. Civ. App. —, 125 S. W. 614.

The facts are stated in the opinion.

Mr. Charles W. Pierson argued the cause, and, with Mr. William W. Green, filed a brief for plaintiffs in error:

The contract upon which plaintiff sued and was permitted to recover involved a violation of the Elkins act. The contract therefore was invalid, and no action can be maintained for a breach thereof.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648; Ellison v. Adams Exp. Co. 245 Ill. 410, — L.R.A.(N.S.) —, 92 N. E. 277.

There is nothing in the case of Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, inconsistent with the position above taken.

Mr. Rhodes S. Baker submitted the cause for defendant in error:

It being conceded that the limitation of liability contained in the receipt is void as such, and it appearing that no contract violative of the interstate commerce act was ever made, the shipper's right to compensation for the value of the lost merchandise is unobstructed.

Wells, F. & Co. v. Neiman-Marcus Co. — Tex. Civ. App. —, 125 S. W. 614.

The enforcement of the judgment of the state court would not compel the defendant in error to violate any acts of Congress regulating interstate commerce. The judgment *does not, either directly* or indirectly, compel a departure from the tariff rates, or a discrimination in the matter of valuation. On the contrary, it enforces the statutory duty of the carrier to make settlement with the shipper upon a basis of actual values, without discount or immunity under the void and illegal exemptions in the receipt given to the shipper.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Kissenger v. Fitzgerald, 152 N. C. 247, 67 S. E. 588; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628.

The issue of fraud does not present a Federal question, and, moreover, as a debatable issue here, has been foreclosed by the decision adverse to it in the state courts empowered to resolve issues of facts. Abundant justification exists under the applicable authorities.

Southern P. Co. v. Anderson, 26 Tex. Civ. App. 518, 63 S. W. 1023; International & G. N. R. Co. v. Vandeventer, 48 Tex. Civ. App. 366, 107 S. W. 560; Pacific Exp. Co. v. Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795; Head v. Pacific Exp. Co. — Tex. Civ. App. —, 126 S. W. 683; Bynum v. Preston, 69 Tex. 291, 5 Am. St. Rep. 49, 6 S. W. 428; St. Louis Southwestern R. Co. v. McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346.

Where the state court determined a case involving railroad rates on the hypothesis conceded by the counsel on both sides, that the rate was one of a lawful schedule, duly filed and published, etc., the contention that the rate was not so filed and published, and therefore was not a legal rate, is not open in this court.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

Mr. Justice Lurton delivered the opinion of the court:

Action by a shipper against an express company to recover for the loss of a package of furs shipped from New York to Dallas, Texas, and never delivered.

The receipt executed by the express company contained a clause exempting it from loss or damage not due to its fraud or negligence, and providing that it should in no event be held liable "beyond the sum of $50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated." No different value was declared. The package weighed 7 pounds. It contained furs inclosed in a paper box which was securely wrapped and tied with cord.

The defendants in error were permitted to prove that the actual value of the furs was $400. That the consignors kept in

their shipping office an express book containing blank express receipts. One of these was filled out in their office by their shipping clerk. When the wagon of the express company called at the office, the agent signed the receipt, and the package was delivered to him by a boy assistant to the shipping clerk. No questions wereasked as to the value, and no value declared other than as shown in the receipt. It was also shown 474] *that the clerk who wrapped and marked the package did not know the value, and had no actual knowledge of the graduated rates of the express company, and that he had had nothing to do with the selling or buying of the furs. One of the consignors, Abraham Jacobson, sold the furs personally and testified as to their value. He testified that he knew that if the value had been declared to be $400, the express rate would have been higher, and that if no value was especially declared, they would be carried under the express rate applying to a package valued at not in excess of $50.

There was put in evidence the table of graduated rate sheets on file with the Interstate Commerce Commission. These showed that the rates were graduated by weight and value. The rate from New York to Dallas upon a package weighing between 5 and 7 pounds, and valued at not over $50, was $1, which was the rate applicable to and charged upon the package in question. If the value had been declared at $400, the rate would have been increased 15 cents for each additional $100 of value.

One of the provisions of the filed tariff sheets contained this direction: "Always ask shipper to declare the value, and when given insert it in the receipt, mark it on the package, and enter amount on waybill. If shipper refuses to state value, write or stamp on the receipt, 'Value asked and not given.'"

A jury was waived, and there was a judgment for the plaintiff below for the full value of the package.

The contract of shipment, including the clause for the limitation of any recovery in case of loss or negligence, is substantially like the contract upheld in Adams Exp. Co. v. Croninger, 226 U. S. 491, ante, 314, 33 Sup. Ct. Rep. 148. To take this case without the controlling influence of that case, counsel say that no Federal question based upon the validity of the shipping contract 475]was raised in the state court, and *for this they rely upon a paragraph in the brief of one of the counsel for the express company, filed in the court below, in which it is said: "For the purpose of this case, we are willing to concede that said provision, in so *far as it limits the liabilities* of the company *for $50, is void both under a statute* of the state of Texas," and under the provisions of the Carmack amendment of § 20 of the act to regulate commerce of June 29, 1906 [34 Stat. at L. 593, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1304].

That such a clause may be void under the legislation of Texas may be true. But that it is valid, if fairly made for the purpose of applying to the shipment the lower of the two rates based upon valuation, is not now an open question. Adams Exp. Co. v. Croninger, cited above.

That case had not been decided when this case was heard in the state court, and there was much diversity of opinion as to the meaning of that section when counsel made the concession. At most it was a concession for purposes of argument as to a matter of law, and could not conclude anyone, since it did not operate to withdraw the shipping contract from the case, nor its validity from the court's consideration.

It is undoubtedly true that the principal defense upon which the defendants seem to have relied in the state court was, that by intentional misrepresentation the plaintiff had obtained a rate based upon a valuation of $50, and that they had thereby secured transportation of the property for which they sue at a less rate than that named in the tariffs published and filed by the carrier, as required by the acts of Congress regulating commerce, and thus obtained an illegal advantage and caused an illegal discrimination forbidden by the acts referred to. But this defense rested upon the misrepresentation as to real value declared only in the carrier's receipt, and therefore involved the consequence of the undervaluation by which an unlawful rate had been obtained. The question at last would be, Shall the shipper or owner recover nothing *because of that misrepresentation, or[476 only the valuation declared to obtain the rate upon which the goods were carried? The latter would seem to be the more reasonable and just consequence of the estoppel. The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel.

But it is a mistake to assume that the company did not rely upon the stipulation limiting a recovery in case of loss or damage to the value agreed upon or declared. In the 12th paragraph of its answer it asserted that, if liable at all, its liability "should be limited to $50, as provided in said contract of shipment, which $50 has heretofore been tendered to plaintiff." By its 8th and 9th assignments of error in the court of civil appeals, error was assigned upon the refusal of the trial court to hold that the defendants in error were estopped, by the valuation declared, to recover any

amount in excess of $50. The court of civil appeals, while not in express terms denying the validity of such a stipulation limiting recovery, did so in effect, for it seems to have placed its judgment of affirmance upon the rule requiring the company's agents to ask the shipper to declare the value, and if no value is stated, that the package should be stamped, "Value asked and not given." This was not done. Therefore, said the court, "the company's agent failed to perform a plain duty . . . and it is in no attitude to complain that the shipper did not state the value."

But the shipper, in accepting the receipt reciting that the company "is not to be held liable beyond the sum of $50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated," did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial dis-
477]tinction between *a value stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis. Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151.

Judgment reversed, and remanded for further proceedings not inconsistent with this opinion.

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F. S. BRADLEY, Trading as Bradley & Co., Plff. in Err.,
v.
CITY OF RICHMOND.

(See S. C. Reporter's ed. 477–486.)

**Constitutional law — delegation of power — local authorities.**

1. A state is not forbidden by U. S. Const., 14th Amend., to delegate either to a municipal council, or to a board appointed for that purpose, the power to divide businesses or occupations carried on in the city into classes or subclasses, and prescribe the tax to be paid by the members of each class.

[For other cases, see Constitutional Law, III. b, 3, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — equal protection of the laws — municipal license tax.**

2. There is no want of due process of law, nor any denial of the equal protection of the laws, in the scheme of a municipal ordinance for licensing occupations, which defines the occupations to be subjected to the tax, and prescribes a maximum and minimum limitation as to the amount of the tax, dependent upon the classification into thirteen classes, which is primarily to be made by the finance committee of the common council after notice and hearing, an appeal to the full council from the final action of the committee being permissible.

[For other cases, see Constitutional Law, IV. a, 5, e; IV. b, 7, in Digest Sup. Ct. 1908.]

**Error to state court — who may raise Federal question.**

3. One who has not availed himself of the opportunity to appear and be heard upon the question of classification which is afforded by a municipal ordinance providing for the licensing of occupations is not in a position to urge upon the Federal Supreme Court, upon writ of error to a state court, that he has been unjustly and illegally discriminated against in the actual operation of the ordinance, in that he has been classified in such a manner as to subject him and his business to a higher tax as a condition of issuing to him a license than that required of many others in the same business.

[For other cases, see Appeal and Error, III. d, 9, i, in Digest Sup. Ct. 1908.]

[No. 38.]

Submitted November 6, 1912. Decided February 24, 1913.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a conviction in the Hustings Court of the City of Richmond for the violation of an ordinance forbidding the carrying on of the business of a private banker without a license. Affirmed.

See same case below, 110 Va. 521, 66 S. E. 872.

The facts are stated in the opinion.

Mr. I. Henry Harris submitted the cause for plaintiff in error:

The guaranty of the Constitution prohibits laws which are capable of being exercised arbitrarily and with discrimination and unjustly, and without regard to legal discretion.

Yick Ho v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L.

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NOTE.—As to the limit of license fees—see note to State ex rel. Toi v. French, 30 L.R.A. 415.

As to gradation of license fees according to extent of business—see note to Clark v. Titusville, 46 L. ed. U. S. 569.

On the *right to grade license taxes according to volume of business or the amount of capital involved*—see note to Salt Lake City v. Christensen Co. 17 L.R.A.(N.S.) 898.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

ed. 679, 22 Sup. Ct. Rep. 431; Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Morton v. Macon, 111 Ga. 162, 50 L.R.A. 485, 36 S. E. 627; Richmond v. Model Steam Laundry, 111 Va. 758, 69 S. E. 932; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

Mr. H. R. Pollard submitted the cause for defendant in error:

Where the soundness of a Federal question so clearly appears from previous decisions as to foreclose the subject and leave no room for controversy, a writ of error awarded from a court of last resort of a state to this court will be dismissed for want of jurisdiction.

Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 288, 54 L. ed. 482, 483, 30 Sup. Ct. Rep. 326.

Similar provisions in state statutes imposing taxes and in ordinances of municipalities imposing municipal taxes have been repeatedly under review in this honorable court on substantially the same charge of unconstitutionality as that preferred and urged here and now.

Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 296, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; Gundling v. Chicago, 177 U. S. 183, 185, 44 L. ed. 725, 727, 20 Sup. Ct. Rep. 633; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Brown-Forman v. Kentucky, 217 U. S. 563, 573, 54 L. ed. 883, 887, 30 Sup. Ct. Rep. 578; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 354, 52 L. ed. 236, 243, 28 Sup. Ct. Rep. 114; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 561, 50 L. ed. 305, 310, 26 Sup. Ct. Rep. 144; Brodnax v. Missouri, 219 U. S. 285, 294, 55 L. ed. 219, 224, 31 Sup. Ct. Rep. 238; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; Ould v. Richmond, 23 Gratt. 464, 14 Am. Rep. 139; Norfolk & W. R. Co. v. Suffolk, 103 Va. 499, 49 S. E. 658.

The contentions now advanced are wholly without merit and therefore do not require further argument.

*Ould v. Richmond, 23 Gratt. 464,* 14 Am. Rep. 139; Western U. Teleg. Co. v. Goddin, 94 Va. 515, 27 S. E. 429; Wright v. Sill, 2 Black, 544, 545, 17 L. ed. 333; Minnesota Min. Co. v. National Min. Co. 3 Wall. 332, 334, 18 L. ed. 42, 43; King v. Portland, 184 U. S. 64, 70, 46 L. ed. 434, 436, 22 Sup. Ct. Rep. 290; Home Teleg. & Teleph. Co. v. Los Angeles, 211 U. S. 265, 281, 53 L. ed. 176, 186, 29 Sup. Ct. Rep. 50; Illinois C. R. Co. v. Kentucky, 218 U. S. 551, 561, 54 L. ed. 1147, 1150, 31 Sup. Ct. Rep. 95; King v. West Virginia, 216 U. S. 92, 100, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225; Iowa v. Rood, 187 U. S. 87, 92, 47 L. ed. 86, 89, 23 Sup. Ct. Rep. 49; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Gring v. Ives, 222 U. S. 365, 56 L. ed. 235, 32 Sup. Ct. Rep. 167; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676.

The ordinance of the city of Richmond, imposing a license tax upon the plaintiff in error, is not void as in violation of the 14th Amendment to the Constitution of the United States.

State v. Griffith, 83 Conn. 1, 74 Atl. 1068; Gundling v. Chicago, 177 U. S. 183, 186, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 318, 55 L. ed. 229, 236, 31 Sup. Ct. Rep. 246; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 563, 50 L. ed. 305, 311, 26 Sup. Ct. Rep. 144; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496.

*Mr. Justice Lurton delivered the [480 opinion of the court:

Plaintiff in error was convicted in the hustings court of Richmond for the violation of an ordinance forbidding the carrying on of the business of a "private banker" without a license. This judgment was affirmed by the supreme court of the state.

Numerous objections to the ordinance and to the tax, arising under the law and Constitution of the state, were decided adversely to the plaintiff in error. With these we have no concern. The case comes here upon the claim made in the state court, and denied, that the ordinance denies both the equal protection of the law and due process as guaranteed by the 14th Amendment.

The ordinance in question requires all persons desiring to pursue certain businesses and occupations to pay a special license tax for the privilege of prosecuting such business. Many pursuits are named, among them real estate agents, commission merchants, brokers, auctioneers, private bank-

ers, etc. The persons required to pay such special license tax are to be divided by the finance committee of the city council into thirteen classes. The amount required to be paid by each class is as follows: First class, $800; second class, $600; third class, $400; fourth class, $300; fifth class, $250; and so on in decreasing amounts to the thirteenth class, which is required to pay only $10. This classification by the finance committee is to be made with the advice and assistance of "the commissioner of revenue, the city tax collector, or any city officer."

The tax imposed is not merely an exercise of the police power regulating a business, but is a tax assessed as a condition upon which the license issues. Though it fulfils the double function of both regulating the business and producing revenue, it was fully authorized by the law of the state, as adjudged by the very judgment under 481]review. *Gundling v. Chicago, 177 U. S. 183, 189, 44 L. ed. 725, 729, 20 Sup. Ct. Rep. 633. Since the purpose of the statute is double, it is plain that to exact the same amount from each person or firm subject to the tax might result in inequality of burden under like circumstances and conditions. Therefore it was that the ordinance provided for a division into classes, those in each class paying the same tax.

The objection to the ordinance does not grow out of any contention that there may not exist just and reasonable distinctions justifying a greater tax upon some of these persons or firms engaged in doing what is called a "private banking" business than upon others engaged in the same general business; but arises from the fact that the law provides no rule by which some are to be placed in one class and some in another. An ordinance which commits to a board, committee, or single official the power to make an *arbitrary* classification for purposes of taxation would meet neither the requirement of due process, nor that of the equal protection of the law.

But this ordinance does not authorize any arbitrary classification, nor could the state or the council legally confer or exercise arbitrary power in classifying for the purpose of either regulating or licensing or taxing. The guaranty of the 14th Amendment would forbid.

But whether the power of classifying be exercised by the state directly or by a city council authorized to require the payment of such a tax as a condition to the issuance of a license, it is at last the exercise of legislative discretion, and is subject, in either case, to the guaranty referred to.

But when the matter concerns the determination of the business or occupation which may be required to take out a license and pay a tax as a condition of obtaining such a license, the power of the state is subject to no limitations, save those found in the guaranty of due process and the equal protection of the law. In the present instance, the state has delegated this power of selecting the businesses *and occu-[482 pations carried on within the city of Richmond, and of dividing them into classes and determining the amount of the tax to be paid by the members of each class. The state supreme court has decided that there can be no objection under the Constitution of the state to such delegation. Neither do we see any reason under the 14th Amendment why the state may not delegate to either the council of the city or to a board appointed for that purpose the power to divide such occupations or privileges into classes or subclasses, and prescribe the tax to be paid by the members of each such class. Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Fischer v. St. Louis, 194 U. S. 361, 372, 48 L. ed. 1018, 1024, 24 Sup. Ct. Rep. 673; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 560, 50 L. ed. 305, 310, 26 Sup. Ct. Rep. 144. In the case last cited, this court said:

"That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt."

That this ordinance does not contemplate any arbitrary discrimination between the persons or firms subject to the license tax is evident from the direction that they shall be divided into thirteen classes, the members of each class to pay the particular amount named as a condition to the issuance of a license. It is also evident from the provisions in respect of notice, right to be heard, and a right to a review by the council itself. These are obvious guards against unjust and capricious inequalities.

The authority to classify is given to the finance committee of the city council. That was a committee of eleven members of a city council composed of forty members. The ordinance required this committee to make a tentative classification with the advice and assistance of certain city officials supposed to be acquainted with the general *subject. When made, the classification[483 is required to be filed in the office of the city auditor for public inspection. The auditor is then required to give notice through two city newspapers that the tentative assess-

ment is so filed in his office for examination, and that all persons affected may be heard by the finance committee at times and places specified. From the final classification made by the committee the ordinance permits any aggrieved person to appeal to the full city council and there obtain a review.

But it is said that, after all, there is no security that the city council will not, in the end, approve of a scheme of classification operating most unjustly. The same objection might be made with reference to any tribunal required to determine such a matter. The presumptions which must be indulged run counter to the suggestion made.

If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review, if the result should violate either a right secured under the law of the state or that of the United States. This is the right which plaintiff in error has in this very case asserted. Kentucky Railroad Tax Cases, 115 U. S. 321, 335, 336, 29 L. ed. 414, 418, 419, 6 Sup. Ct. Rep. 57.

There was obviously no want of due process of law in the imposition of the tax.

Finally, the plaintiff in error says that the actual operation of the ordinance has brought about an unjust and illegal discrimination in that he has been classified in such manner as to subject him and his business to a higher tax, as a condition of issuing to him a license, than that required of many other private bankers. This was a defense made in the state court. But that court, after saying that it was competent for the council to assign private bankers to different classes, and that the plain-484]tiff in error *had been required to pay no greater license tax than all others in the same class, said:

"In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored. Norfolk, P. & N. News Co. v. Norfolk, 105 Va. 139, 52 S. E. 851. This has not been shown in the present case. On the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private bankers who are put in a different class and assessed with a less license tax." [110 Va. 526, 66 S. E. 872.]

That some private bankers were put into classes which subjected them to less taxation than the class into which the plaintiff *in error was* placed is the only allegation *which would tend to show discrimination.* But there was evidence tending to show that the business done by the plaintiff in error and ten other persons or firms was that of lending money at high rates upon salaries and household furniture, while the kind of business done by others in the same general business was the lending of money upon commercial securities. Obviously the burden was upon the plaintiff in error to show an illegal and capricious classification. The state court said that he had failed to show that these private bankers favored in the classification were doing the same business.

In Home Teleph. Co. v. Los Angeles, 211 U. S. 265, 280, 281, 53 L. ed. 176, 185, 186, 29 Sup. Ct. Rep. 50, the complaint was that the city, under an authority to regulate the charges for telephone service, had given a more favorable rate to a rival company, and had thereby illegally discriminated. After saying that the allegation of such difference was "too vague to pass upon," this court said:

"Whether the two companies operated in the same territory, or afforded equal facilities for communication, or rendered the same services, does not appear. For aught that appears, the other company may have brought its *patrons into communica-[485 tion with a very much larger number of persons, dwelling in a much more widely extended territory, and rendered very much more valuable services. In other words, a just ground for classification may have existed. Every presumption should be indulged in favor of the constitutionality of the legislation."

See also Sweet v. Rechel, 159 U. S. 380, 392, 40 L. ed. 188, 193, 16 Sup. Ct. Rep. 43.

But it is not necessary to rest our judgment upon the question as to whether the plaintiff in error was rightly or erroneously classified, because we are of opinion that he is not in a situation to complain. There was obviously no want of due process of law in the scheme of the ordinance. The occupations to be subjected to the tax were defined. There was a maximum and minimum limitation as to the amount of the tax, dependent upon the classification. The classification was to be made after notice and a hearing and an appeal from the final action of the committee was permissible. The plaintiff in error might have appeared and shown the character and extent of the business he was doing, and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is oth-

erwise. The authority to classify was committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under the circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council. Gundling v. Chicago, 177 U. S. 183, 186, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598, 51 L. ed. 636, 640, 27 Sup. Ct. Rep. 326.

486] *It is true that, in the opinion of the hustings court, it is inadvertently said that of the opportunities afforded by the act for curing any wrong he had "availed himself." It is likely that the word "not" has been accidentally omitted. This we say because the brief of the defendant in error says that he did not appeal to the city council, and in the brief of the plaintiff in error this is admitted. In addition, we add that there is no evidence that he in any way appeared or pointed out any injustice done him.

Judgment affirmed.

Mr. Justice Lamar concurs in the result.

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UNITED STATES, Appt.,
v.
CHARLES B. MASON, Executor, etc.

(See S. C. Reporter's ed. 486–488.)

**Revenue-cutter service — pay of retired officer.**

The grade which the officer had when he was retired, and not the grade to which he had afterwards, but before the passage of the act of April 16, 1908 (35 Stat. at L. 61, chap. 145, U. S. Comp. Stat. Supp. 1911, p. 884), been advanced without additional pay, is the basis upon which the advance in grade and pay is to be made, under § 5 of that act, providing that "any officer of the revenue-cutter service with a creditable record, who served during the Civil War in the land or naval forces of the United States, shall, when retired, have the rank and receive three fourths of the duty pay and increase of the next higher grade; and the provisions of this section shall apply to officers now on the retired list."

[Pay of retired Army or Navy Officers, see Army and Navy, VI. b, 1, in Digest Sup. Ct. 1908.]

[No. 537.]

Submitted December 20, 1912. Decided February 24, 1913.

APPEAL from the Court of Claims to review an award of additional pay to the executor of a retired officer in the revenue-cutter service. Reversed and remanded, with direction to dismiss the petition.

See same case below, 47 Ct. Cl. 31.

Assistant Attorney General Thompson and Mr. George M. Anderson submitted the cause for appellant.

Mr. Francis P. B. Sands submitted the cause for appellee.

*Memorandum opinion, by direction[487 of the court, by Mr. Justice Lurton:

This is an appeal from a judgment of the court of claims, allowing the executor of the late Captain Thomas Mason the difference between his pay as retired junior captain in the revenue-cutter service and the pay of a senior captain in the same service, for the time between the passage of the act of April 16, 1908 (35 Stat. at L. 61, chap. 145, U. S. Comp. Stat. Supp. 1911, p. 884), and his death, September 10, 1910.

The provision of the 5th section of the act referred to is in these words:

"That any officer of the revenue-cutter service with a creditable record, who served during the Civil War in the land or naval forces of the United States, shall, when retired, have the rank and receive three fourths of the duty pay and increase of the next higher grade; and the provisions of this section shall apply to officers of the said service now on the retired list."

Mason had served with credit during the Civil War in the naval service of the United States. He was therefore within the provision of the section set out, and the only question is whether, under that provision, his advance in grade and in pay is to be made upon the grade he held when he was retired, or upon the grade and pay he had when this act was approved.

He had been retired as of May 3, 1895, while holding the rank of first lieutenant in the revenue-cutter service, with one half of the pay of a first lieutenant on the active list, under the act of March 2, 1895 (28 Stat. at L. 920, chap. 189, U. S. Comp. Stat. 1901, p. 1853). By the act of April 12, 1902, § 9 (32 Stat. at L. 101, chap. 501, U. S. Comp. Stat. Supp. 1911, p. 879), he and all other officers upon the retired or permanent waiting list were given 75 per cent of the duty pay of the rank they had when retired. By a special act of February 25, 1905 (33 Stat. at L. 813, chap. 796), he was advanced "one grade from first lieutenant *to that of captain," for merito-[488 rious acts while in the service of the Navy and of the revenue-cutter service of the

United States, but with no increase in pay by the advance in grade thereby authorized.

The only trouble about the meaning of the act arises out of the exceptional fact that the decedent had, after his retirement, been advanced one grade in rank, but without any advance in pay by reason of that advancement. The act obviously meant to provide that every revenue-cutter officer then on the active list should, upon retirement, advance one step in grade, with three fourths of the duty pay of the advanced grade. The same benefit was also extended to officers already on the retired list. But in both cases the advance in grade is to be based upon that held at the date of retirement, with three fourths of the pay of the advanced grade.

The claim that the decedent's advance in grade and pay is to be upon the grade to which he had been advanced without additional pay is without merit. To concede it would be to conclude that Congress intended to advance him not upon the grade he had at retirement, but upon the gratuitous advancement; and that Congress purposed to advance him one other step over that which he had at retirement, and two steps in pay. The basis of the gratuity of Congress was the grade and pay at retirement. This was the construction placed upon the act by the Auditor of the Treasury Department and the Comptroller of the Treasury.

Judgment reversed and case remanded, with direction to dismiss the petition.

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489] *AMY B. ZIMMERMAN, Appt.,
v.
FRANK F. HARDING. (No. 771.)

FRANK F. HARDING, Appt.,
v.
AMY B. ZIMMERMAN. (No. 894.)

(See S. C. Reporter's ed. 489–496.)

**Partnership — duration.**

1. A partnership formed to operate a hotel which was thereafter leased to the partnership for a specified term, with an option to purchase during the term, by implication is to continue during the term of the lease, where there is no express stipulation as to the duration of the partnership agreement.

**Partnership — dissolution at will.**

2. The mandate of Porto Rico Civil Code, § 1607, that a dissolution of a partnership shall occur at the will or withdrawal of one partner only where the duration of the partnership is not fixed, is not confined in its application to a case where one partner desires to turn over the business and responsibility to the other.

[For other cases, see Partnership, VI. a, in Digest Sup. Ct. 1908.]

**Partnership — accounting — profits pendente lite.**

3. A partner permitted by the court to continue the business during a dissolution suit after refusing to appoint a receiver *pendente lite* upon the application of the other partner when his bill was filed is justly held accountable for the latter's share in the profits made up to the time of the decree of dissolution.

[For other cases, see Partnership, V. c, in Digest Sup. Ct. 1908.]

**Partnership — accounting — misconduct.**

4. A partner who assumes the right to take possession for herself and to carry on the business with the partnership property may be called to account by the other partner for his share in all the joint property, and at his election may be required to account for the profits by way of damages or otherwise which he had been prevented from making by his wrongful exclusion from the business.

[For other cases, see Partnership, V. c, in Digest Sup. Ct. 1908.]

**Election of remedies — law and equity.**

5. The bringing of an action at law by one partner against the other, to recover damages for the latter's breach of the partnership contract by a declaration of dissolution, followed by a complete exclusion of the former from all possession or control of the joint property, is not such an election as will bar the former's right to sue in equity to obtain a decree of dissolution and an accounting of the partnership affairs.

[For other cases, see Election of Remedies, III., in Digest Sup. Ct. 1908.]

**Appeal — presumptions — evidence.**

6. The decree below, so far as it stands upon questions of fact, will be presumed, on appeal to the Federal Supreme Court, to be supported by evidence not objected to, where the record does not contain all the evidence.

[For other cases, see Appeal and Error, VIII. d, 4, in Digest Sup. Ct. 1908.]

[Nos. 771 and 894.]

Submitted January 10, 1913. Decided February 24, 1913.

CROSS APPEALS from the District Court of the United States for Porto Rico to review a decree dissolving a partnership, and apportioning the assets between the partners. Affirmed.

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NOTE.—On dissolution of partnership by assignment or bankruptcy of one partner, or at his will—see note to Riddle v. Whitehill, 34 L. ed. U. S. 282.

On the effect of dissolution as between partners—see notes to Mason v. Pewabic Min. Co. 33 L. ed. U. S. 524, and Karrick v. Hannaman, 42 L. ed. U. S. 484.

Statement by Mr. Justice Lurton:

The case in substance is this:

The appellee, Harding, undertook to obtain a lease from the owner of a hotel property situated in a suburb of San Juan, Porto Rico, and an option of purchase. The parties agreed upon the rental, term of the lease, and upon an option of purchase during the term of the lease, but the owners required Harding to associate himself with another person, as colessee, satisfactory to them. After some negotiations Harding arranged with the appellant, Mrs. Zimmerman, to join him in the lease and option, and to form a partnership to operate the hotel. Each agreed to contribute one half of an agreed capital, their personal services, and to share in the profits and losses, equally. The agreement of partnership was never reduced to writing, and there was no express stipulation as to its duration.

Under date of February 1, 1911, the owners of the hotel property executed a lease to the partnership for the term of two years, with right of renewal for another term of two years at an advanced rental. This lease included an option of purchase during the term at a price named. Thereupon the partnership took possession of the property and its operation as a hotel. Harding undertook the office side of affairs and Mrs. Zimmerman the other departments. The business seems to have run along smoothly and with profit until about August 9, 1911, when Mrs. Zimmerman, who was in sole charge by reason of the temporary absence of Harding upon a vacation in the United States, assumed of her own motion to dissolve the partnership. To this end she notified Harding by letter that she had dissolved the relation, and published a card in the local papers that the partnership had [491] been *dissolved, and that she would thenceforth conduct the business for her own benefit. From that moment she assumed the entire ownership and possession of the partnership business and property. Harding was excluded from all possession, control, or voice, and all benefits which had accrued, she claiming that he had drawn more than his share upon an accounting.

When Harding returned to San Juan, he at once brought an action at law against Mrs. Zimmerman to recover damages for the breach of the partnership contract. This suit was removed by Mrs. Zimmerman to the district court of the United States for the district of Porto Rico. Thereupon Harding obtained leave to dismiss his action at law, without prejudice, and filed this bill. Its object was to obtain a decree of dissolution and an accounting of the partnership affairs. The appointment of a receiver to manage the business pending the litigation was at once sought by Harding under the averments of the bill. This was resisted, and denied by the court. Upon the coming in of her answer, an auditor was appointed to report upon the partnership accounts. Mrs. Zimmerman remained in full control of the hotel business down to the date of final decree, May 18, 1912, by which the partnership was dissolved. At that date a special master was put in charge of the business to conduct it until a sale of the assets should be had and distribution made. The partnership property, including the unexpired term of the lease, was sold and the auditor's and master's reports confirmed. The final result was that the share of Harding in the proceeds of the business, including profits realized to date of sale, was fixed at $3,008.02, and that of Mrs. Zimmerman, $4,878.22. From this decree both parties have appealed.

Mr. N. B. K. Pettingill submitted the cause for Amy B. Zimmerman:

The defense based upon election of remedies should have been sustained.

Pierce v. Tennessee Coal, Iron & R. Co. 173 U. S. 1-16, 43 L. ed. 591-597, 19 Sup. Ct. Rep. 335, 5 Am. Neg. Rep. 747; Schell v. Plumb, 55 N. Y. 597; Robb v. Vos, 155 U. S. 13-43, 39 L. ed. 52-63, 15 Sup. Ct. Rep. 4; William W. Bierce v. Hutchins, 205 U. S. 340, 346, 51 L. ed. 828, 833, 27 Sup. Ct. Rep. 524; Pence v. Langdon, 99 U. S. 578-582, 25 L. ed. 420, 421, 13 Mor. Min. Rep. 32; Frisch v. Wells, 200 Mass. 429, 23 L.R.A.(N.S.) 144, 86 N. E. 775; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135.

In interpreting the statutes of Porto Rico, the tendency should be, wherever practicable, to harmonize their construction with the principles of American law.

Chevremont v. People, 3 P. R. R. 245; Diaz v. San Juan Light & Transit Co. 17 P. R. R. 69.

Messrs. Hector H. Scoville and Willis Sweet submitted the cause for Frank P. Harding.

*Mr. Justice Lurton, after mak-[492] ing the foregoing statement, delivered the opinion of the court:

We agree with the court below that although there was no express stipulation as to the duration of the partnership agreement, it was by implication to continue during the term of the lease of the hotel property. The term had therefore not expired when, on August 9, 1911, Mrs. Zimmerman, of her own motion, declared it at an end. Her right to withdraw or termi-

nate the agreement at her own will, the agreement being for the term of the lease, depends primarily upon the law of Porto Rico, rather than the general law applicable elsewhere. The matter is regulated by §§ 1607 and 1609 of the Civil Code of Porto Rico. These sections are set out in the margin.†

The suggestion is that § 1607 applies only to a case where one partner desires to turn over the business and responsibility to the other. This is too narrow. The plain mandate is that a dissolution shall occur at the will or withdrawal of one partner only when the duration of the partnership has not been fixed. Section 1609 obviously deals with a dissolution upon application to a court, for sufficient reason shown. But whether a dissolution declared on the motion of one of the members might be justified when later challenged, if sufficient reason 493]for the *act was shown, is academic, so far as this appeal is affected, because the court below, upon oral evidence, including that of both parties, found that no good reason in law or fact existed for the dissolution declared on August 9, 1911, by Mrs. Zimmerman. The oral evidence heard by the court in relation to the matter has not been sent up, and we must presume the conclusion sound. We shall therefore assume that the partnership continued in law, until dissolved by decree for sufficient reason on May 18, 1912. As the court refused to appoint a receiver *pendente lite* upon Harding's application when his bill was filed, and permitted Mrs. Zimmerman to continue to conduct the partnership business, she was justly held accountable for Harding's share in the profits made during that time.

The principal argument has turned upon the consequence to be attached to the action at law brought by Harding. The claim made by the appellant, Mrs. Zimmerman, is that the bringing of that action was a conclusive election between two inconsistent remedies, and that it operated as a bar to any remedy under the present bill. If this is the case the result must be deplored, for the dismissal of this bill would leave Mrs. Zimmerman in full possession of the fruits of her lawless conduct in excluding Harding from all interest and control of the joint business, with only the right to begin over again an action at law to recover his damages.

But we think the doctrine of the election of remedies has no proper application here. The essential element of that rule is that there must have been a right of choice between two remedies which are inconsistent with each other. William W. Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524. The argument is that the bringing of the suit at law was an election to treat the contract of partnership as at an end, and to recover damages for the breach, including profits prevented, while the bill in equity was based upon the theory that the partnership was continuing.

*But that is a misconception of the[494 bill. It states the same facts stated in the suit at law, and alleges the illegality of the defendant's declaration of dissolution, and the plaintiff's illegal exclusion from the control and possession of the joint property. But the bill does not seek a restoration of the partnership relation, nor a restoration to the joint possession or management of the partnership business. Upon the contrary, it states that a continuance of such relation is impossible. It therefore asked to have the business placed at once in the hands of a receiver, and the partnership affairs liquidated and the partnership dissolved. This latter relief is but an incident to the liquidation sought of a precautionary character.

Whether the partnership had been effectually dissolved by the declaration of Mrs. Zimmerman on August 9, 1911, or not, her action in excluding Harding from joint possession and control until the affairs had been wound up was, upon either hypothesis, wholly indefensible. The partnership property continued to be partnership property after as well as before dissolution.

When she assumed the right to take possession for herself, and to carry on the business with the partnership property, Harding had a clear right to call her to account for his share in all of the joint property, and at his election to require her to account for the profits, by way of damages or otherwise, which he had been prevented from making by his wrongful exclusion from the business. Ambler v. Whipple, 20 Wall. 546, 22 L. ed. 403; Pearce v. Ham, 113 U. S. 585, 593, 28 L. ed. 1067, 1070, 5 Sup. Ct.

†Section 1607. The dissolution of the partnership by the will or withdrawal of one of the partners shall only take place when a term for its duration has not been fixed, or if this term does not appear from the nature of the business. In order that the withdrawal may be of effect, it must be made in good faith, at the proper time; notice thereof shall also be given to the other partners.

Section 1609. No partner can demand the dissolution of a partnership which, either by a provision of the articles or by the nature of the business, has been constituted for a specified time, unless there should exist sufficient reason, such as when one of the partners fails to comply with his obligations, or when he becomes incapacitated for the partnership business, or any other similar cause, in the judgment of the courts.

Rep. 676; Karrick v. Hannaman, 168 U. S. 328, 337, 42 L. ed. 484, 490, 18 Sup. Ct. Rep. 135; Holmes v. Gilman, 138 N. Y. 369, 20 L.R.A. 566, 34 Am. St. Rep. 463, 34 N. E. 205.

Neither is the remedy in equity for a breach of a partnership agreement exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution. Thus, if one member assumes to dissolve a partnership before the end of the term, the other may bring an action for 495] *damages for the breach, and recover not only his interest, but also his share of the profits which might have been made during the term. He need not wait until the expiration of the period, and need not go into equity for an accounting, but may at law show the probable profits which he has been deprived of. Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756; Dennis v. Maxfield, 10 Allen, 138; Karrick v. Hannaman, 168 U. S. 328, 337, 42 L. ed. 484, 490, 18 Sup. Ct. Rep. 135.

The remedy at law was in every substantial feature consistent with that sought by his bill in equity, and no other form of suit was admissible in the local court. Both suits were pecuniary. Both sought compensation upon the same facts. In one Harding sought a judgment for damages which would include all that he could have in equity as the result of an accounting. The jurisdiction in equity in suits for winding up partnerships is based upon its jurisdiction in matters of complicated accounts. A dissolution or a receivership are mere incidents to its principal ground of jurisdiction. That in his equity suit Harding sought relief in respect to some matters not involved in or beyond the jurisdiction of the law court does not affect the question of election. That he asked to have the partnership formally declared dissolved by reason of the conduct of Mrs. Zimmerman was not antagonistic to any position he assumed in his suit at law. It was a mere incident to his right to hold her to an accounting for his share in the business. He sought to have the business wound up by a receiver. This Mrs. Zimmerman prevented and she was suffered to remain in sole possession. If she has been held to account for the profits made during that time, she cannot complain.

It has been assigned as error that Mrs. Zimmerman was allowed salary for her service in the management of the business after she assumed to be managing for herself. The partnership contract made no provision for the allowance of salaries to either 496]partner. In the view *of the court below, *the exclusion of Harding from joint* possession and management was without authority. In such circumstances it seems inconsistent that Mrs. Zimmerman should be allowed for services which she wrongfully took upon herself because she had unlawfully excluded Harding from participation. Probably upon the theory that her management had resulted in profit in which Harding was permitted to share, it was thought equitable that she should be compensated. However this may be, and reluctant as we are to its allowance (Karrick v. Hannaman, cited above), we are unable to find that any exception was filed to the allowance in the auditor's report. It does appear that the court directed the auditor to reduce the amount, which was done. But whether that was done upon an exception to the amount as excessive, or to any allowance at all, we have no information.

There is also an objection to a charge against Harding of $618 on account of some trouble with his accounts for bar receipts. The credit was made by order of the court in the final decree. There is no trace of the item in either the auditor's or master's reports. This would be ordinarily enough to justify us in shutting the item out. But this case seems to have been proceeded with in a most irregular way. There are references in the opinion and in the auditor's report to oral evidence and oral statements which have not been made a part of the transcript. If the parties elect to try a case in such an irregular way, we must presume that the decree, so far as it stands upon questions of fact, was supported by evidence not objected to.

All of the assignments must be overruled and the decree affirmed.

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*SUPREME RULING OF THE FRA-[497
TERNAL MYSTIC CIRCLE, Plff. in Err.,

v.

ANNIE SNYDER.

(See S. C. Reporter's ed. 497-504.)

**Constitutional law — impairing contract obligations — penalizing failure to pay claim.**

The obligation of an existing insurance

NOTE.—As to the validity and effect of statutes imposing penalties for failure of a railroad company to pay claims—see note to St. Louis, I. M. & S. R. Co. v. Wynne, 42 L.R.A.(N.S.) 102.

As to the constitutionality of statute imposing penalty or added liability for failure of carrier to pay claim—see notes to Mobile & O. R. Co. v. Brandon, 42 L.R.A.(N.S.) 106, and Morris v. Southern Exp. Co. 15 L.R.A. (N.S.) 983.

contract was not unconstitutionally impaired by applying to it the provisions of Tenn. Laws 1901, chap. 141, subsequently enacted, under which, in case the refusal of the insurance company to pay a loss is found not to have been in good faith, such additional recovery as shall be determined to be reasonable compensation for the resulting damage, if any, may be allowed, not exceeding 25 per cent of the liability under the policy.

[For other cases, see Constitutional Law, IV. g, 4, in Digest Sup. Ct. 1908.]

[No. 34.]

Submitted December 16, 1912. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which affirmed a judgment of the Chancery Court of Hamilton County, in that state, awarding a penalty against an insurance company for failure to pay a loss. Affirmed.

See same case below, 122 Tenn. 248, 40 L.R.A.(N.S.) 209, 122 S. W. 981.

The facts are stated in the opinion.

Mr. F. Zimmerman submitted the cause for plaintiff in error:

The contract involved here was entered into in 1887. In 1901, the state of Tennessee passed an act imposing an "added liability" up to 25 per cent on contracts of this nature, on which suit is defended unsuccessfully. The state had no power to pass a law affecting pre-existing contracts, under article 1, § 10, of the Constitution of the United States. Hence the act was invalid as to the contract involved here.

Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

This question has been before the court repeatedly on attacks based on the "due process of law" and "the equal protection of the law" clauses of the 14th Amendment. Such cases are no precedent here. Nor can the same reasoning be applied. Many of these cases arose out of tort, and not out of contract.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

In all cases upheld against attack based on the 14th Amendment it appeared that the statute was in existence at the time the contract was made. Hence the statute was impliedly written into the contract, and that was the paramount reason why the statute was upheld.

Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 409, 43 L. ed. 748, 19 Sup. Ct. Rep. 419; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Iowa L. Ins. Co. v. Lewis, 187 U. S. 344, 47 L. ed. 209, 23 Sup. Ct. Rep. 126; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

In the case at bar, there was no statute imposing added liability to be written into the contract, but only the constitutional provision of Tennessee that the court should be open to every man, without sale, denial, or delay.

Nor is compelling the payment of debts a police regulation.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

Hence the statute of Tennessee, if applied to the case at bar, could not be sustained under the 14th Amendment.

When the statute of 1901 was passed, adding $750 to the obligation of the contract, defendant had a right to withdraw from the state and refuse to make new contracts. But it could not withdraw from contracts then in existence. As to these contracts, the imposition of added liability was an impairment of the contract.

Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

Defendant does not claim a vested right in any particular remedy or mode of procedure, but a right to an existing defense is property in the sense that it is incompetent for the legislature to take it away.

Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102.

If the legislature can arbitrarily add 25 per cent to the obligation of an existing contract, at what point must it stop? It may, under the same authority, add 500 per cent.

Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

The power to tax involves the power to destroy. The power to modify at discretion the remedial part of a contract is the same thing.

Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

Defendant does not deny that the legislature may change remedies. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that is produced, it is immaterial whether it is done by acting on the remedy, or directly on the con-

tract itself. In either case, it is prohibited by the Constitution.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Howard v. Bugbee, 24 How. 461, 16 L. ed. 753; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Shapleigh v. San Angelo, 167 U. S. 657, 42 L. ed. 314, 17 Sup. Ct. Rep. 957; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Ex parte City Bank, 3 How. 292, 11 L. ed. 603; Commissioners Ct. v. Rather, 48 Ala. 447; Columbia County v. King, 13 Fla. 476; Robinson v. Magee, 9 Cal. 85, 70 Am. Dec. 638; Wilder v. Lumpkin, 4 Ga. 220; Temple v. Hays, Morris (Iowa) 12; Long v. Walker, 105 N. C. 98, 10 S. E. 858; State ex rel. Brown v. McPeak, 31 Neb. 143, 47 N. W. 691; Folts v. Huntley, 7 Wend. 210; Bank of the Old Dominion v. McVeigh, 20 Gratt. 466; Roberts v. Cocke, 28 Gratt. 215; Mundy v. Monroe, 1 Mich. 71; Swinburne v. Mills, 17 Wash. 619, 61 Am. St. Rep. 932, 50 Pac. 489; Goggans v. Turnipseed, 1 S. C. 82, 98 Am. Dec. 397, 7 Am. Rep. 231; Jacoway v. Denton, 25 Ark. 641; Homestead Cases, 22 Gratt. 287, 12 Am. Rep. 507.

The fact that the act tends to enforce the contract is immaterial if thereby the contract is impaired. Both parties have fixed rights under a contract, and the rights of neither party can be impaired.

McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; Wade, Retroactive Laws, § 115.

It is one of the highest duties of the Supreme Court to take care that the constitutional prohibition against states impairing the obligations of contracts shall neither be evaded nor frittered away.

Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 31, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; Spencer v. Merchant, 125 U. S. 352, 31 L. ed. 766, 8 Sup. Ct. Rep. 921.

A law given a retroactive effect is unconstitutional if it so changes the existing remedies as materially to impair the rights and interests of a party to a contract.

Ex parte City Bank, 3 How. 292, 11 L. ed. 603; Auffmordt v. Rasin, 102 U. S. 620, 26 L. ed. 262.

The court will look beyond the wording of a statute, apparently fair upon its face, and consider the effect. The result of the present statute is that all insurance companies who defend a suit unsuccessfully are mulcted, *while plaintiff is not.*

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

An additional remedy can be given only where it does not impair any substantial right of the other party.

New Orleans City & Lake R. Co. v. Louisiana, 157 U. S. 219, 39 L. ed. 679, 15 Sup. Ct. Rep. 581.

Mr. J. B. Sizer submitted the cause for defendant in error. Mr. Robert Pritchard was on the brief:

Where the principles to be applied in the exercise of the jurisdiction of this court are so well settled that further argument is not needed, the jurisdiction rests on so narrow a foundation as to give color to the motion to dismiss, and justify the disposal of the case on the motion to affirm.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 566, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691.

The fact that a statute affects a contract retrospectively does not necessarily impair the obligation of the contract. The statute may, without violating the constitutional provision in question, enhance the difficulty of performance to one party, or diminish the value of performance to the other, provided it leaves the obligation of performance in full force.

Curtis v. Whitney, 13 Wall. 68, 20 L. ed. 513; Satterlee v. Matthewson, 2 Pet. 380, 407, 7 L. ed. 458, 467.

And so a law which either takes away an existing remedy, or adds a new one, cannot be said to impair the obligation of an existing contract; provided, of course, the parties are not deprived of all remedies for the enforcement of the contract obligations.

Sturges v. Crowninshield, 4 Wheat. 122, 200, 4 L. ed. 529, 549; Antoni v. Greenhow, 107 U. S. 769, 781, 782, 27 L. ed. 468, 474, 2 Sup. Ct. Rep. 91; Sampeyreac v. United States, 7 Pet. 222, 238, 8 L. ed. 665, 671; New Orleans City & Lake R. Co. v. Louisiana, 157 U. S. 219, 39 L. ed. 679, 15 Sup. Ct. Rep. 581; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475.

The same question has also come before many of the state courts of last resort, on facts still more nearly parallel to those involved in the case at bar.

American F. Ins. Co. v. Landfare, 56 Neb. 495, 76 N. W. 1068; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Rader v. Southeasterly Road Dist. 36 N. J. L. 273; Chamberlain v. New Hampshire F. Ins. Co. 55 N. H. 249; Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; Bryson v. McCreary, 102 Ind. 1, 1 N. E. 55; Blann v. State,

39 Ala. 353, 84 Am. Dec. 788; Tarpley v. Hamer, 9 Smedes & M. 313; Scott v. District Ct. 15 N. D. 259, 107 N. W. 61; Heineman v. Schloss, 83 Mich. 153, 47 N. W. 107; Brubaker v. Poage, 1 T. B. Mon. 123; Kossuth County v. Wallace, 60 Iowa, 508, 15 N. W. 305; Dowell v. Talbot Paving Co. 138 Ind. 675, 38 N. E. 389; Mobile & M. R. Co. v. Steiner, 61 Ala. 559; Vanzant v. Waddel, 2 Yerg. 260; New Era Life Asso. v. Musser, 120 Pa. 384, 14 Atl. 155; Webb v. Moore, 25 Ind. 4; Ewell v. Daggs, 108 U. S. 143, 151, 27 L. ed. 682, 685, 2 Sup. Ct. Rep. 408; Brearly School v. Ward, 201 N. Y. 358, 40 L.R.A.(N.S.) 1215, 94 N. E. 1001, Ann. Cas. 1912 B, 251; Curtis v. Whitney, 13 Wall. 68, 20 L. ed. 513; Reitler v. Harris, 223 U. S. 437, 56 L. ed. 497, 32 Sup. Ct. Rep. 248.

Mr. Justice Hughes delivered the opinion of the court:

In 1887, the plaintiff in error issued a certificate or policy of insurance for $3,000 upon the life of Charles C. Snyder. His wife, the defendant in error, was the beneficiary. He died in 1908, and liability upon the policy having been denied by the company, this suit was brought by Mrs. Snyder in the chancery court of Tennessee to compel 501]payment. The court gave judgment *in her favor, and finding that the refusal to pay was not in good faith, added to the recovery 25 per cent of the principal, or $750, which was adjudged to be "reasonable compensation and reimbursement to the complainant" for the "additional loss, expense, and injury" which had been inflicted upon her as the holder of the policy by the refusal. This addition was made pursuant to an act passed by the legislature of Tennessee in 1901 (chap. 141). The supreme court of the state, sustaining the statute, affirmed the judgment, and the insurance company has sued out this writ of error. 122 Tenn. 248, 45 L.R.A.(N.S.) 209, 122 S. W. 981.

The sole Federal question for decision is whether the above-mentioned statute, as applied, impaired the obligation of the contract in suit, and thus violated article I, § 10 of the Constitution of the United States.

The act in question provides:

"Section 1. . . . That the several insurance companies of this state, and foreign insurance companies and other corporations, firms, or persons doing an insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding 25 per cent on the liability for said loss; Provided, that it shall be made to appear to the court or jury trying the case, that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; and provided, further, that such additional liability within the limit prescribed shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed.

"Sec. 2. . . . That in the event it shall be made *to appear to the court[502 or jury trying the cause that the action of said policy holder in bringing said suit was not in good faith, and recovery under said policy shall not be had, said policy holder shall be liable to such insurance companies, corporations, firms, or persons in a sum not exceeding 25 per cent of the amount of the loss claimed under said policy; Provided, that such liability, within the limits prescribed, shall, in the discretion of the court or jury trying the cause, be measured by the additional expense, loss, or injury inflicted upon said insurance companies, corporations, firms, or persons by reason of said suit."

The contention is that the provision for added liability placed a burden upon the assertion of the rights which the contract secured, and thus in effect changed the contract by allowing a recovery to which the parties had not agreed, and which was not sanctioned by the law as it existed at the time the contract was made. Bronson v. Kinzie, 1 How. 311, 317, 11 L. ed. 143, 145; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 439, 47 L. ed. 249, 250, 23 Sup. Ct. Rep. 234. It is pointed out that in the cases in which statutes have been sustained providing for the addition to the recovery of attorneys' fees or damages, or penalties, the question arose under the 14th Amendment; and that, so far as they applied to suits upon contracts, the latter had been made after the enactments. Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 322, 46 L. ed. 922, 931, 22 Sup. Ct. Rep. 662; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 355, 47 L. ed. 204, 213, 23 Sup. Ct. Rep. 126; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 304, 305, 47 L. ed. 825, 826, 23 Sup. Ct. Rep. 565; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Yazoo

& M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, ante, 193, 33 Sup. Ct. Rep. 40.

What, then, is the effect of the statute with respect to pre-existing contracts? It is at once apparent that it does not purport to affect the obligation of the contract 503] in *any way. It does not attempt to change or to render nugatory any of the terms or conditions of the policy of insurance, or to relieve the insured from compliance with any stipulation it contained. It does not seek to give a right of action where none would otherwise exist, or to deprive the company of any defense it might have. If the company is not liable according to its contract, it is not required to pay. Nor does the statute permit a recovery of expenses or added damages as a mere consequence of success in the suit. The question whether the state may so provide as to prior contracts is not before us, and we express no opinion upon it.

The statute is aimed not at the rights secured by the contract, but at dishonest methods employed to defeat them. The additional liability is attached to bad faith alone. This is the necessary effect of the proviso. It is only when it is "made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith" that the added recovery may be had. It must also appear that such refusal inflicted "additional expense, loss, or injury" upon the policy holder, and it is this further expense, loss, or injury that measures the amount to be allowed, which is not to exceed 25 per cent of the liability on the policy.

It cannot be said that this effort to give indemnity for the injuries which would be sustained through perverse methods and through an abuse of the privileges accorded to honest litigants imposed a burden upon the enforcement of the contract. Neither the contract nor the existing law which entered into it contemplated contests promoted in bad faith, or justified the infliction of loss by such means. The state was entitled at all times to take proper measures to prevent the perversion of its legal machinery, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be availed of bona fide. 504] *But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the absence of bad faith. That is, we are to take the statute as including what it expressly excludes,—as allowing what it explicitly denies. The act does not make the mere refusal to pay sufficient evidence of bad faith, so as to justify the added recovery; *it requires that the bad faith be* shown, and that the consequent additional loss be shown. And the state court so construed the statute in the application that was made of it in the present case.

The trial court adjudged that the refusal of the company to pay the amount of the policy was not in good faith, and the amount allowed was determined to be a reasonable compensation for the resulting damage. The evidence before the court—save a small portion of it—is not in the record. The fact must be taken to be as found. The statute, judged by its provisions as they have been construed and applied, cannot be regarded as an impairment of the obligation of the contract.

Judgment affirmed.

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E. R. BACON, Doing Business as Wabash Elevator, Plff. in Err.,
v.
PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 504-517.)

**Commerce — state taxation — property in transit.**

1. Personal property in transit in interstate commerce may not be subjected to local taxation because the owner is a resident of the state, and the property is within the limits of the county where the assessment is made.

[For other cases, see Commerce, V., in Digest Sup. Ct. 1908.]

**Commerce — state taxation — property in transit.**

2. Grain shipped from southern and western states under contracts for its transportation to eastern cities, but afterwards purchased while in transit by a resident of Illinois, with the intent to forward it promptly according to the shipping contracts, after exercising the privilege reserved therein of removing it from the cars at Chicago for inspection, weighing, etc., may be assessed for local taxation while actually in his private grain elevator at Chicago, to which it had been removed for the aforesaid purposes.

[For other cases, see Commerce, V., in Digest Sup. Ct. 1908.]

[No. 76.]

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NOTE.—On local transportation of goods as part of an interstate or foreign shipment—see notes to Gulf, C. & S. F. R. Co. v. Texas, 51 L. ed. U. S. 540, and Missouri P. R. Co. v. Sherwood, T. & Co. 17 L.R.A. 643.

As to when the transit of goods, commenced in another state, may be deemed to have terminated, or to have been definitely interrupted, so as to subject the goods to local taxation—see notes to General Oil Co. v. Crain, 52 L. ed. U. S. 755, and Merchants' Transfer Co. v. Board of Review, 2 L.R.A. (N.S.) 662.

Argued and submitted December 6, 1912.
Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Municipal Court of the City of Chicago for the recovery of a tax. Affirmed.

See same case below, 243 Ill. 313, 44 L.R.A. (N.S.) 586, 90 N. E. 686.

Statement by Mr. Justice Hughes:

This is a writ of error to review a judgment of the supreme court of the state of Illinois, which affirmed a judgment for the amount of a tax assessed against the plaintiff in error for personal property in the year 1907. The contention that the assessment was in violation of article I., § 8, clause 3, of the Federal Constitution, in that it was laid upon a subject of interstate commerce, was overruled by the state court. 243 Ill. 313, 44 L.R.A. (N.S.) 586, 90 N. E. 686.

The facts were agreed to, as follows:

"That the defendant, E. R. Bacon, had, on the 1st day of April, 1907, and for many years prior to said date, his residence and domicil in the town of Lake View, in the county of Cook, and state of Illinois; that the defendant, E. R. Bacon, on the 1st day of April, 1907, and prior thereto, occupied and controlled a certain private grain elevator known as Wabash Elevator, and that the said grain elevator was located at 33d and Waterville streets in the town of South Town, in the city of Chicago, county of Cook, and state of Illinois; that the only personal property in the town of South Town owned by the defendant on the 1st day of April, 1907, was certain grain stored in the said elevator above mentioned, and certain personal property used by him in his business office located at 234 La Salle [506] street, in the city of Chicago, *Illinois, and that the said business office and the said personal property used by said defendant therein was not then a part of or in any way connected with said grain elevator; that the said defendant, E. R. Bacon, has paid the tax assessed on April 1st, 1907, on all the personal property used by him in his said business office located at 234 La Salle street, in the city of Chicago, Illinois; that the said defendant, E. R. Bacon, has paid the tax assessed on April 1st, 1907, on all his personal property located in the town of South Town, except the tax assessed on the grain which was stored in the said Wabash Elevator on the 1st day of April, 1907; that all of said grain stored *in the said* Wabash Elevator on the 1st of *April, 1907, was sold to the defendant, E. R. Bacon, by various persons domiciled in* and residents of various states in the southern and western portions of the United States, and that the said persons who sold the said grain to the said defendant, E. R. Bacon, did, prior to the said sale, and the shipment of said grain, as hereinafter mentioned, enter into certain contracts with certain railroad companies for the transportation of said grain to the cities of New York and Philadelphia and various other cities in the eastern portions of the United States, all of said cities being outside of the state of Illinois, in and by which said contracts the said persons reserved the right to the owners of the said grain to remove said grain from the cars of the said railroad companies at the city of Chicago, Illinois, for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading, or mixing, or changing the ownership, consignee, or destination of said grain; that after the making of the said contracts by the original vendors of the said grain and the said railroad companies, the said original vendors delivered to the said railroad companies, under and in accordance with the said contracts, the said grain for transportation to said cities of New York, Philadelphia and the said *divers other [507] cities specified in the said contracts of shipment.

"That the said E. R. Bacon was, prior to and on April 1st, 1907, represented in the cities of New York, Philadelphia, and the said divers other cities in the said eastern portions of the United States by various agents, by and through whom he disposed of grain and other commodities on the eastern markets, and that all of the said grain above mentioned was purchased by him as aforesaid for the sole and only purpose of being sold and disposed of by and through his said agents in the aforesaid eastern cities, and that the said grain or any portion thereof was not at any time intended, by said original owners nor by said E. R. Bacon, for use, sale, or disposition in the state of Illinois.

"That at the time the said grain was sold to the said defendant, E. R. Bacon, by the said original vendors thereof, domiciled in and residents of said southern and western portions of the United States, his sole and only intention regarding the said grain was that all of the said grain should be transported and carried from the place of its said original consignment to said railroad companies to the said points of destination named in the said contracts of shipment entered into between the said original vendors of said grain and the said railroad companies, as hereinbefore mentioned.

"That the said grain was sold to the defendant, E. R. Bacon, by the original vend-

ers of said grain, along with the existing contracts of shipment between the said original vendors and the said railroad companies, and along with the said privilege of removing said grain from the said cars of the said railroad companies, which said privilege was reserved to the owner of the said grain in the manner and for the purposes hereinbefore mentioned; that in pursuance of the privilege which the defendant, E. R. Bacon, was entitled to under said con-
508]tracts of shipment, *as the owner of said grain, he removed said grain from the said railroad cars, and placed the same in his said private Wabash Elevator, for the sole purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading, and mixing, as specified in said contracts of shipment, and not for the purposes of changing the ownership, consignee, or destination of said grain; and that said grain remained in said elevator for only such time as was reasonably necessary for the purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading, and mixing; and that immediately after said grain had been inspected, weighed, cleaned, clipped, dried, sacked, graded, and mixed, it was turned over again to the said railroad companies for shipment to the said eastern cities in accordance with the said provisions of the said original contracts of shipment entered into between the said original vendors of said grain and the said railroad companies, and that the said grain was thereupon forwarded by said railroad companies to its said original points of destination.

"That the said grain so placed and contained in the said elevator was not, nor was any part thereof, at any time on, before, or after the 1st day of April, 1907, sold or disposed of or consumed in the state of Illinois, but that said grain and each and every part thereof was transported out of said state to the points of destination, and in the manner and form aforesaid;

"That on the 1st day of April, 1907, the board of assessors of Cook county, Illinois, assessed a tax against the said E. R. Bacon on the said grain contained in the said Wabash Elevator on the said 1st day of April, 1907, on a valuation of $5,000, which was established by the board of review, and which was equalized by the state board of equalization, and that the tax levied thereon against the defendant, E. R. Bacon, for the year 1907, amounts to $360; which is the tax to recover which the suit is brought; that the defendant owns certain
509]personal *property in the town of Lake View, county of Cook and state of Illinois, and that said personal property is contained in his said domicil and residence, and that the said defendant has heretofore paid all the taxes assessed on the said personal property on the said 1st day of April, 1907, and that the said defendant, E. R. Bacon, owned, on the 1st day of April, 1907, no other personal property taxable by the taxing bodies of the state of Illinois other than that above mentioned."

Mr. Walter Bachrach argued the cause, and, with Messrs. Moritz Rosenthal and Joseph W. Moses, filed a brief for plaintiff in error:

The temporary detention of the grain while in transit, without the intention of abandoning the original movement beyond the limits of the state, which movement was ultimately completed, did not deprive the transportation of the character of interstate commerce.

Coe v. Erroll, 62 N. H. 303, affirmed in 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Kelley v. Rhoades, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Connecticut River Lumber Co. v. Columbia, 62 N. H. 286; Prairie Oil & Gas Co. v. Ehrhardt, 244 Ill. 634, 91 N. E. 680; State, Detmold, Prosecutor, v. Engle, 34 N. J. L. 425; State, Lehigh, & W. Coal Co., Prosecutor, v. Carrigan, 39 N. J. L. 36; Berwind & White Coal Co. v. Jersey City, 75 N. J. L. 76, 67 Atl. 181; Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 254.

The character of a shipment, whether local or interstate, is not affected by a transfer of the title during the transportation.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Connecticut River Lumber Co. v. Columbia, 62 N. H. 286.

Those cases which hold that property which is detained within the state on its interstate journey is taxable are distinguishable from the one at bar, and may be classified as follows:

1. Where the produce was grown in the taxing state, and had never been out of that state, but was intended for exportation by the owner.

Coe v. Errol, 62 N. H. 303, affirmed in 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266.

2. Where the property, though coming from another state, was being held in actual storage, to be removed for use at a more profitable time.

(a) To be held until orders for it were taken.

Susquehanna Coal Co. v. South Amboy, 184 Fed. 941; Lehigh & W. Coal Co. v. Junction, 75 N. J. L. 922, 15 L.R.A.(N.S.) 514, 68 Atl. 806.

(b) Until the owner desired to use it in his own business.

Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 254.

(c) Until customers made their selection from goods being detained.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

3. Where there was not a through shipment, and any further movement required a new specification of the goods and new forwarding orders.

General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475.

4. Where the goods were partially for sale within the taxing state, and the part to be there sold was unascertained.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

5. Where the goods had come to rest in the state of their ultimate destination.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415.

Messrs. **Louis J. Behan** and **Gustavus J. Tatge** submitted the cause for defendants in error. Mr. Francis S. Wilson was on the brief:

Property, even though in transit and the subject of interstate commerce, is subject to general assessment for taxation as other property at the domicil of its owner.

Ayer & L. Tie Co. v. Keown, 122 Ky. 580, 93 S. W. 588; Amory Mfg. Co. v. Gulf, C. & S. F. R. Co. 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 20 L. ed. 370; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Story, Confl. L. § 550.

**Mr. Justice Hughes**, after making the above statement, delivered the opinion of the court:

511] *Did the enforcement of the local tax upon the grain in the elevator of the plaintiff in error amount to an unconstitutional interference with interstate commerce?

The supreme court of Illinois was of the view that if the grain was in transit in interstate commerce it was exempt from local taxation. In its opinion, that court said: "The sole question presented by this record is, was the grain upon which the tax was levied in transit on April 1, 1907? If it was so in transit, it was not liable to be taxed while passing through the state to its destination. On the other hand, if it was not in transit, but had a situs in this state, it was subject to taxation under state authority." In this view of the issue, the court sustained the recovery of the amount of the tax.

It is now contended, however, by the defendant in error, that the question thus defined was an immaterial one; that even if the property was in transit, and was the subject of interstate commerce, it was nevertheless liable to assessment, in common with the other personal property of the plaintiff in error, because he was a resident of the state, and the property was within the limits of the county where the assessment was made.

This argument proceeds upon a misconception of the ground upon which the power to tax articles actually moving in interstate transportation is denied to the states. That denial rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. The fact that such a burden is sought to be imposed by the state of the domicil of the owner, upon property moving in interstate commerce, creates no exception. That state enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens. They, as well as others, are under the shelter of the commerce *clause. The question[512 is determined not by the residence of the owner, but by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority.

This is clearly shown by the reasoning of the decisions which define the limits of the state taxing power with respect to property about to leave the state of its origin, or while it is on its way to its destination in another state. In Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, the question was whether the products of a state (in that case timber cut in the forests of New Hampshire), though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place or port of shipment, was liable to be taxed like other property within the state. The claim

of immunity by reason of the fact that it was owned by nonresidents was at once disposed of. "If not exempt from taxation for other reasons," said the court (Id. p. 524), "it cannot be exempt by reason of being owned by nonresidents of the state. We take it to be a point settled beyond all contradiction or question, that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction." The case was put upon the same basis as though the timber had been owned by residents of New Hampshire, and the question was treated as being one with respect to the point of time at which goods produced within the state, which are the subject of exportation to another state, cease to be liable to state taxation. It was concluded that these articles could be taxed by the state until, but not after, they had been actually started in the course of transportation to another state, or had been committed to a carrier for that purpose.

The court said: "This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other causes of delay, as was the 513]case of the *logs cut in the state of Maine, the tax on which was abated by the supreme court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation." (Id. p. 525.)

After pointing out the importance of clearly defining, so as to avoid all question, the time when state jurisdiction over the commodities of commerce begins and ends, and after commenting on the established rule as to the power of taxation with respect to goods which had come to their place of rest within the state, for disposal and use (Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091), the court thus restated its conclusion, in language applicable generally to the products of the state without distinction with respect to ownership by residents or nonresidents: "But no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on that subject; namely, *that such goods* do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many states there would be nothing but the lands and real *estate to bear the taxes. Some of the[514 Western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state." (Id. pp. 527, 528.)

In General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475, the owner of the property, which was sought to be subjected to an inspection tax in Tennessee, was a Tennessee corporation. The property was oil contained in the company's tanks at Memphis. It was contended that the oil in these tanks was in transit from the place of manufacture in Pennsylvania to the place of sale in Arkansas, and that the holding of it in Memphis was merely for the pupose of separation, distribution, and reshipment, and was for no longer time than required by the nature of the business and the exigencies of transportation. The court considered the question from the standpoint of the general power of the state to tax. The oil was held to be taxable, but not upon the ground that its owner was domiciled in Tennessee. It was recognized that if the oil were actually in transit, it would not be taxable. But it was found not to be in movement through the state; it had reached the destination of its first shipment and was held at Memphis for the business purposes and profits of the company. The principle applied was that announced in American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365. See Kelley v. Rhoads, 188 U. S. 1, 5, 7, 47 L. ed. 359, 360, 362, 23 Sup. Ct. Rep. 259; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 93–96, 47 L. ed. 394, 398–400, 23 Sup. Ct. Rep. 266.

We come, then, to the question whether the grain here involved was moving in interstate commerce, so that the imposition of the local tax may be said to be repugnant to the Federal power.

515] *The following facts are shown by the agreed statement:—The grain had been shipped by the original owners, who were residents of southern and western states, under contracts for its transportation to New York, Philadelphia, and other eastern cities, which reserved to the owners the right to remove it from the cars at Chicago "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading, or mixing, or changing the ownership, consignee, or destination" thereof. While the grain was in transit it was purchased by Bacon, the plaintiff in error, who succeeded to the rights of the vendors under the contracts of shipment. He was represented at the points of destination by agents through whom he disposed of grain and other commodities on the eastern markets, and the grain in question was purchased by him solely for the purpose of being sold in this way, and with the intention to forward it according to the shipping contracts; it was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved and removed it from the cars to his private elevator. This removal, it is said in the agreed statement of facts, was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee, or destination. It is added that the grain remained in the elevator only for such time as was reasonably necessary for the purposes above mentioned, and that immediately after these had been accomplished it was turned over to the railroad companies, and was forwarded by them to the eastern cities, in accordance with the original contracts of transportation. No part of the grain was sold or consumed in Illinois. It was while it was in Bacon's elevator in Chicago that it was included in the assessment as a part of his personal property.

But neither the fact that the grain had come from outside the state, nor the inten-516]tion of the owner to send it to *another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination. Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 93–96, 47 L. ed. 394, 398, 400, 23 Sup. Ct. Rep. 266; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475.

The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority. American Steel & Wire Co. v. Speed, 192 U. S. pp. 521, 522, 48 L. ed. 546, 547, 24 Sup. Ct. Rep. 365. Thus, goods within the state may be made the subject of a *nondiscriminatory[517 tax, though brought from another state, and held by the consignee for sale in the original packages. Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382. In Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, the coal on which the local tax was sustained had not been unloaded, but was lying in the boats in which it had been brought into the state, and from which it was offered for sale. In Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, coal had been shipped from Pittsburg to Baton Rouge in barges which, to accommodate the owner's business, had been moored about 9 miles above the point of destination. The coal, while remaining on the barges under these conditions, was held subject to taxation. In General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475, the oil which had been brought from Pennsylvania to Memphis, a distribut-

ing point, was held in tanks, one of which was kept for oil for which orders had been received from Arkansas, Louisiana, and Mississippi prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked, "Oil Already Sold in Arkansas, Louisiana, and Mississippi." The local tax upon this oil, which remained in Tennessee only long enough (a few days) to be properly distributed according to the orders, was sustained.

In the present case the property was held within the state for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the state, his share of the expenses of the local government.

Judgment affirmed.

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518] *LEWIS E. SMOOT, Appt.,
v.
JULIA TURNER HEYL et al.

(See S. C. Reporter's ed. 518–524.)

**Appeal — from the District of Columbia court of appeals — Federal authority.**

1. A suit to enjoin the maintenance of a party wall upon complainants' land, in which they challenge the validity, if applied to their land, as is insisted by defendant, of a building regulation promulgated by the commissioners of the District of Columbia under the act of June 14, 1878 (20 Stat. at L. 131, chap. 194), is one in which, irrespective of the conclusion reached by the court below, there is drawn in question the validity of an authority exercised under the United States within the meaning of D. C. Code, § 233, governing the appellate jurisdiction of the Federal Supreme Court over the District of Columbia court of appeals.

[For other cases, see Appeal, III. d, 6, in Digest Sup. Ct. 1908.]

**Appeal — from District of Columbia court of appeals — following decision below — party wall.**

2. The decision of the court of appeals of the District of Columbia that the exterior wall of a one-story bay window which is 8 feet long and projects some 3 feet from the main wall of the house, and which the adjoining owners cannot use without expending as much as a new wall of the same dimensions would cost, is not a party wall, within the meaning of the building regulations promulgated by the commissioners of the District of Columbia, under the authority of the act of June 14, 1878, which defined such a wall as one "built upon the dividing line between adjoining premises, for their common use,"—is not so clearly erroneous as to require reversal in the Federal Supreme Court.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII., in Digest Sup. Ct. 1908.]

[No. 85.]

Argued December 13 and 16, 1912. Decided February 24, 1913.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District for the removal of an alleged party wall. Affirmed.

See same case below, 34 App. D. C. 480.

The facts are stated in the opinion.

Mr. **William G. Johnson** argued the cause and filed a brief for appellant:

The validity of a statute of, and an authority exercised under, the United States, was drawn in question.

United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416; South Carolina v. Seymour, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

Mr. **H. Prescott Gatley** argued the cause, and, with Messrs. Samuel Maddox and Barry Mohun, filed a brief for appellees:

The back of the bay window built by appellant, partly on appellees' land, which forms no part of the main wall of appellant's house, and which can never be of any possible benefit or advantage to appellees, is in no sense a party wall.

Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433; Corcoran v. Nailor, 6 Mackey, 580.

Mr. Justice **Hughes** delivered the opinion of the court:

The appellant is the owner of a lot of land on the north side of Wyoming avenue, between Twentieth and Twenty-first streets, northwest, in the District of Columbia. The appellees own the adjoining lot on the west. The appellant *constructed on his[521 lot a brick dwelling, the front of which was placed 40 feet from the avenue. He located the main west wall of the dwelling about 3 feet inside of the line of his lot. This wall was about 40 feet long and three stories high. About 5 feet back of the front end of this wall the appellant projected

*NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

semihexagonal bay window, the west wall of which—about 8 feet long and extending through the height of the first story—was placed upon the line of the lot so that approximately one half the thickness of the wall was put upon the appellees' land. The appellant called this west wall of the bay window a party wall, and claimed the right to construct it in part upon his neighbors' land by virtue of the building regulations of the District of Columbia. The appellees protested against this use of their property, and brought this suit in the supreme court of the District of Columbia to enjoin the maintenance of the wall on their land. The court entered a decree in their favor, requiring its removal. The decree was affirmed by the court of appeals and this appeal is brought. 34 App. D. C. 480.

The act of June 14, 1878, chap. 194, 20 Stat. at L. 131, authorized the commissioners of the District of Columbia to make "such building regulations for the said District as they may deem advisable," and provided that these should have the same force within the District as if enacted by Congress. Among the regulations promulgated by the commissioners was the one approved by President Washington on October 17, 1791, relating to the location of party walls, which was recognized as in force and was "published for the information of builders." (Building Regulations, § 62, set forth in the margin.†) The land in question *lies [522 outside the original limits of the city of Washington, but the appellant contends that, by the above-mentioned act of Congress and the action of the commissioners, this regulation was made applicable throughout the District. The appellees in their bill alleged that the wall built across their line was not a party wall, that the regulation permitting the use of adjoining land for party walls did not extend beyond the bounds of the Federal city as originally laid out, and that, if it was intended to apply in the District beyond these limits, it was "unconstitutional and void, because its effect is to deprive your complainants of their property without due process of law and just compensation."

1. This court has jurisdiction. District Code, § 233, act of March 3, 1901, chap. 854, 31 Stat. at L. 1189, 1227; United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 556, 48 L. ed. 555, 560, 24 Sup. Ct. Rep. 416; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 47, 48, 51 L. ed. 78, 84, 85, 27 Sup. Ct. Rep. 1. As the appellees challenged the validity of the regulation if it applied to their property, as was insisted by the appellant, the case was one in which there was drawn in question the validity of an authority exercised under the United States. The question was a substantial one, and was directly presented, its determination being required unless the appellees succeeded upon one of the other issues. To justify a review of the decision under the act governing this appeal *it is [523 sufficient if the validity of the authority is drawn in question, irrespective of the conclusion reached by the court below. Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 222, 32 L. ed. 908, 912, 9 Sup. Ct. Rep. 503. The appeal brings the entire case here. See Horner v. United States, 143 U. S. 570, 577, 36 L. ed. 266, 269, 12 Sup. Ct. Rep. 522; Penn Mut. L. Ins. Co. v. Clustin, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223. In this view, it is unnecessary to pass upon the conflicting contentions with respect to the amount involved.

2. Upon the merits, we need not go beyond the point on which the court of appeals rested its decision. The court held that the wall placed on the appellees' land was not a party wall. In the building regulations a party wall is defined as "a wall built upon the dividing line between adjoining premises, for their common use." The fundamental idea is that of mutual benefit. It is manifest that not every sort of construction projecting over the boundary, although it may form part of the exterior wall of a building, can be called a party wall. Instead of being for the common use, it may be merely an injurious protuberance. And whether or not a particular structure comes within the District rules is a question the decision of which by the court of appeals should be accepted un-

†Sec. 62. The 4th section of the building regulations, No. 1, approved by President Washington, October 17, 1791, quoted below, is recognized as in force, and is published for the information of builders. The inspector of buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between parties:

"That the person or persons appointed by the commissioners to superintend buildings may enter upon the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of such party wall, or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall, the charge of value thereof to be set by the person or persons so appointed by the commissioners."

less there is plain error. Here we have the wall of a bay window 8 feet long projecting from the main wall of the house. Save for this short projection the main wall is set back 3 feet within the building line. The ends of the bay window wall are splayed as is usual in such cases, and while it appeared that they could be chiseled out in order to make right angles, the testimony was that if the adjoining owners desired to build in connection with the wall it would cost as much as to erect a new wall of the same dimensions. Taking the entire construction into consideration, it would seem to be merely the case of an encroachment on the adjoining property rather than that of a wall built on the dividing line, for mutual advantage. After reviewing the facts, the 524]court of appeals *summed up the matter by saying: "It could serve no such purpose to appellees as is contemplated by the regulations of the District authorizing the construction of party walls. . . . Appellees can derive no such benefit from it as the servient owner is entitled to receive as compensation for the taking and occupation of his land. It constitutes a nuisance rather than a benefit."

We find no reason for disturbing the decree.

Affirmed.

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RASMUS K. SVOR, Plff. in Err.,
v.
CATHERINE M. MORRIS.

(See S. C. Reporter's ed. 524–530.)

**Public lands — railroad land grants — indemnity lands — homestead settlement.**

1. Residence and occupancy by a homestead claimant during the interim between the rejection, because not accompanied by a designation of the loss in the place limits, of a selection within the indemnity limits of the railroad land grant of July 4, 1866 (14 Stat. at L. 87, chap. 168), and a second approved indemnity selection of the same tract, initiated a homestead right superior to the indemnity selection.

[For other cases, see Public Lands, 253–256, in Digest Sup. Ct. 1908.]

**Public lands — railroad land grants — indemnity selection — homestead settlement — delay in asserting claim.**

2. The failure of a homestead settler to assert his claim at the local land office within three months from the date of settlement, as required by the act of May 14, 1880 (21 Stat. at L. 140, chap. 89, U. S. Comp. Stat. 1901, p. 1392), § 3, and U. S. Rev. Stat. § 2265, failing which, the land shall be awarded to the next settler in order of time, is not a matter of which advantage can be taken by a railway company, or one standing in its shoes, in connection with an indemnity railroad selection.

[For other cases, see Public Lands, 253–256, in Digest Sup. Ct. 1908.]

**Public lands — railroad land grant — charging patentee as trustee for equitable owner.**

3. The title acquired under an indemnity railroad selection approved by the Secretary of the Interior in an essentially *ex parte* proceeding, without knowledge of the fact that during the interim between the filing of this selection and the rejection of a prior indemnity selection a homestead right had been initiated by occupancy and residence, will be deemed to be held in trust for the homestead claimant by a purchaser with full knowledge and notice of such occupancy and claim.

[For other cases, see Public Lands, 1065–1074, in Digest Sup. Ct. 1908.]

[No. 756.]

Submitted January 6, 1913. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Chippewa County, in that state, in favor of plaintiff in a controversy over land within the indemnity limits of a railroad land grant. Reversed and remanded for further proceedings.

See same case below, 118 Minn. 344, 136 N. W. 852.

The facts are stated in the opinion.

Mr. C. A. Fosnes submitted the cause for plaintiff in error:

The one controlling feature in all the grants is that the selection of indemnity land must be made with the acquiescence and approval of the Secretary of the interior.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Barney v. Winona & St. P. R. Co. 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; Kansas & P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; Southern P. R. Co. v. Bell, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232.

The Secretary of the Interior has the power, virtute officii, to make withdrawals of

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

of the public lands, and the power to make carries with it the power to revoke withdrawals at his will, when no statute is in the way.

Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915; O'Connor v. Gertgens, 85 Minn. 483, 89 N. W. 866.

There is not a question that is or can be raised in this action that was not decided in Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420.

Occupancy of this land prior to the selection of October 29th, 1891, by bona fide settlers who had made application for said land either as timber claim, pre-emption, or homestead, either verbally or by written application, whose applications were refused by the local land officers, excepted said land from the operation of the grant, and the making of the pretended selection of October 29th, 1891, and complying with the rules of the Department, was a waiver and abandonment of all former selections, and under the laws of the United States should be and must be confined to lands to which no rights or interests had attached.

Northern P. R. Co. v. Anrys, 8 Land Dec. 362; Bogan v. Edinburgh American Land Mortg. Co. 11 C. C. A. 128, 27 U. S. App. 346, 63 Fed. 192.

A claim resting on settlement, residence, and improvement existing when the grant becomes effective is within the excepting phrase, "occupied by homestead settlers."

Northern P. R. Co. v. Anrys, 8 Land Dec. 362.

The exception in the 3d section of the grant to the N. P. R. R. Company applies not only to settlers who have made entry, but also to those who are entitled to make entry.

Northern P. R. Co. v. Roberts, 10 Land Dec. 427.

A valid settlement claim existing when the grant becomes effective excepts the land thereform, and the failure of the settler to place his claim of record could not be called in question by the company.

Wilder v. Parker, 11 Land Dec. 274.

**Mr. Owen Morris** submitted the cause for defendant in error:

The selection of this land by the company on October 29th, 1891, had the effect of withdrawing the land from the market until that selection should be finally passed upon by the Department; and, if approved, the title of the company to the land selected passed as of the date of the selection.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300.

Leniently as the conduct of a settler is always regarded by the courts, it cannot be that such leniency will tolerate the omission by him of any of the substantial requirements of the statutes in respect to the creation of rights in the public lands.

Maddox v. Burnham, 156 U. S. 544, 39 L. ed. 527, 15 Sup. Ct. Rep. 448.

When the officers of the Land Department of the United States decide controverted questions of fact, in the absence of fraud, imposition, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that Department.

Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485.

The findings of fact of the Secretary must be taken as conclusive in the absence of any fraud or imposition.

Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Gonzales v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102.

Undoubtedly the company acquired an absolute right to the lands actually earned as the construction of the road progressed.

State v. Hastings & D. R. Co. 36 Minn. 263, 30 N. W. 816.

A settler who enters upon a part of the lands granted to a railroad company after they have been withdrawn from settlement, and after the lands have been earned by the completion of the road, is not in position to attack the company's title.

Sage v. Crowley, 83 Minn. 314, 86 N. W. 409.

**Mr. Justice Van Devanter** delivered the opinion of the court:

This case presents a controversy over one of the quarters of an odd-numbered section within the indemnity limits of the railroad land grant of July 4, 1866, to the state of Minnesota, which the state transferred to the Hastings & Dakota Railway Company. 14 Stat. at L. 87, chap. 168. The trial court gave judgment for the plaintiff, which was affirmed by the supreme court of the state (118 Minn. 344, 136 N. W. 852), and the defendant prosecutes this writ of error.

The facts material to the controversy are these: In 1883, after the completion of the road, the railway company filed in the local land office an indemnity selection of the tract in controversy, but neglected to comply with an existing regulation requiring that the selection be accompanied by a designation of the loss in the place limits in lieu of which the selection was made. Report Com'r G. L. O. 1879, p. 128, rule V. The selection was rejected by the local officers, but remained pending on successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior until October 23, 1891, when it was finally rejected by the matter *be- [526 cause of that irregularity. Six days later

Russell Sage, trustee, to whom the rights of the railway company under the land grant had then been assigned, filed another indemnity selection of the same tract, accompanied by a proper designation of the loss in lieu of which the selection was made, and in that connection claimed and alleged that the tract was then vacant and unappropriated. March 29, 1897, this selection was approved by the Secretary of the Interior, and the tract was certified under the grant, the certification being treated as the equivalent of a patent. 14 Stat. at L. 97, chap. 183. The plaintiff subsequently acquired the right and title of Sage, trustee, to the tract, but did so with full notice and knowledge of the occupancy and claim of the defendant.

In 1885 the defendant applied at the local land office to make a homestead entry of the tract, and the application was denied, the circumstances being such that it could not be allowed. In 1888, while the selection of 1883 was pending, he settled upon the tract with the purpose of acquiring the title by compliance with the homestead law, and continuously thereafter resided upon the tract, occupied, improved, and cultivated it, all the time asserting a claim under that law. The improvements which he made exceeded $2,000 in value, and the area which he reduced to cultivation exceeded 100 acres. Being continuous, his occupancy and claim covered the interim between the final rejection of the first indemnity selection and the filing of the second one, but he did not again apply at the local office to make a homestead entry until 1904, which was after the tract had passed beyond the jurisdiction of the Land Department by the certification under the land grant. At the time of his settlement, and continuously thereafter, he possessed all the qualifications requisite to acquire the title as a homestead claimant.

The plaintiff's title receives no support from the indemnity selection of 1883, for, as [527] has been seen, it did not *conform to the existing regulations in an essential particular, and was finally rejected, October 23, 1891, for that reason And to avoid an extended statement and discussion respecting an indemnity withdrawal made in 1868 and still another claim to the tract, both of which were terminated on or shortly before October 23, 1891 (see H. R. Ex. Doc. 246, 50th Cong., 1st Sess.; 26 Stat. at L. 496, chap. 1040, § 4, U. S. Comp. Stat. 1901, p. 1598; Re St. Paul & S. C. R. Co. 12 Land Dec. 541; St. Paul M. & M. R. Co. v. Hastings & D. R. Co. 13 Land Dec. 440), it will be assumed, without so deciding, that the defendant's claim receives no support from what he did anterior to that date.

Following the final rejection of the first selection there was an interval of six days in which the land was not only free from any claim under the land grant, but open to settlement under the homestead law. So, apart from the defendant's earlier efforts, there can be no doubt that by his residence and occupancy during that interval he initiated and acquired a homestead right. He was not disqualified by reason of what he had done before, and, of course, it was not necessary that he should go through the idle ceremony of vacating the land and then settling upon it anew. This is the view uniformly applied in the Land Department. Central P. R. Co. v. Doll, 8 Land Dec. 355; La Bar v. Northern P. R. Co. 17 Land Dec. 406; Vanderberg v. Hastings & D. R. Co. 26 Land Dec. 390. See also Moss v. Dowman, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429. The second selection came after this homestead right had attached, and therefore was subordinate to it. In its facts the case is like Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154, and Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420, and unlike Weyerhaeuser v. Hoyt, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300, and Northern P. R. Co. v. Wass, 219 U. S. 426, 55 L. ed. 280, 31 Sup. Ct. Rep. 321, and yet is within the principle recognized and enforced in each; *viz.*, that, as between conflicting claims to public lands, the one whose initiation is first in time, if adequately followed up, is to be deemed first in right. The Sjoli and Osborn Cases involved conflicts *between claims initi-[528] ated by homestead settlement and claims resting upon railroad indemnity selections subsequently filed, and because the former were first in time they were held to be superior in right. The Weyerhaeuser and Wass Cases presented conflicts between railroad indemnity selections and claims initiated, one by an application to purchase under the timber and stone act, and the other by a homestead settlement, while the selections were pending, and it was held that the selections gave the better right because they were first in time.

That in point of residence, improvements, and cultivation the defendant fully complied with the homestead law is not questioned; but it is contended that he lost his claim by not asserting it in due time at the local land office. It is true that the act of May 14, 1880 (21 Stat. at L. 140, chap. 89, § 3, U. S. Comp. Stat. 1901, p. 1392), in connection with Rev. Stat. § 2265, fixed three months from the date of settlement as the time within which the claim should be asserted at the local land office, and that the defendant did not conform to this requirement; but that is not a matter of which

advantage can be taken by one who stands in the shoes of the railway company, as does the plaintiff. The statute does not contemplate that such a default shall inexorably extinguish the settler's claim, but only that the land shall be "awarded to the next *settler* in the order of time" who does so assert his claim and otherwise complies with the law. As was said by this court in Johnson v. Towsley, 13 Wall. 72, 90, 20 L. ed. 485, 489: "We think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months, anyone else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right." The question has been repeatedly considered by the Secretary of the Interior in connection with railroad indemnity selections of lands covered by existing homestead settlements 529] *which had not been asserted at the local office within the time prescribed, and his ruling has been that "a failure to file an application to enter lands within three months after settlement forfeits the claim to the next settler in order of time, but such default is not one that can be taken advantage of by a railway company." Hastings & D. R. Co. v. Arnold , 26 Land Dec. 538, 540; Missouri, K. & T. R. Co. v. Troxel, 17 Land Dec. 122, 124. We regard that ruling as resting upon a proper conception of the statute.

Had the real facts been disclosed to the Land Department, *viz.*, that the defendant was residing upon and occupying the land in virtue of a lawful homestead settlement antedating the second indemnity selection, it would have been the duty of the secretary of the Interior to disapprove the selection, and no doubt he would have done so. But the real facts were not disclosed. On the contrary, it was claimed and alleged by the agent who acted for Sage, trustee, in making the selection, that the land was then vacant and unappropriated, and on that representation the Secretary's approval was given. Thus, the title was wrongfully obtained by one who was not entitled to it, and another who had earned the right to receive it was prevented from obtaining it when subsequently he came to assert his right before the Land Department. Whatever may have been the cause of the defendant's delay in so asserting his right, there is no suggestion that he either knew of or acquiesced in the representation that the land was vacant and unappropriated, or *that he* was in any wise apprised of the *filing, pendency, or approval of the* second selection until after the land had passed out of the jurisdiction of the Land Department by the certification under the land grant. In short, the proceeding was essentially *ex parte*, and he was neither heard nor given an opportunity to be heard.

In these circumstances we think it is a necessary conclusion *that the title ac-[530 quired by Sage, trustee, was held by him in trust for the defendant, and that it is now held upon a like trust by the plaintiff, who took with full notice and knowledge of the defendant's occupancy and claim. Rector v. Gibbon, 111 U. S. 276, 291, 28 L. ed. 427, 432, 4 Sup. Ct. Rep. 605; Widdicombe v. Childers, 124 U. S. 400, 405, 31 L. ed. 427, 430, 8 Sup. Ct. Rep. 517; Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549.

As the state courts proceeded upon the theory that the second selection gave the better right notwithstanding the defendant's claim was first in time, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

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CHARLES L. ROSS, Plff. in Err.,
v.
MINERVA STEWART.

(See S. C. Reporter's ed. 530-540.)

**Public lands — town site in Cherokee Nation — power of commission — contest.**

1. The town site commission for a town in the Cherokee Nation must be deemed to have been given jurisdiction to entertain and pass upon a contest resulting from conflicting applications to purchase by the acts of June 28, 1898 (30 Stat. at L. 495, chap. 517), May 31, 1900 (31 Stat. at L. 221, chap. 598), and July 1, 1902 (32 Stat. at L. 716, chap. 1375), the contrary view finding no support in any statutory provision, being opposed to the plain implication of this legislation, and ignoring the settled practice of Congress to commit such questions to the determination of administrative officers.

[For other cases, see Public Lands, I. d; Indians, VIII., in Digest Sup. Ct. 1908.]

**Public lands — judicial review of decision of town site commission.**

2. Relief will not be given in the courts from the decision of a town site commission for a town in the Cherokee Nation in a contest arising on conflicting applications to purchase, or from the resulting patent, unless it clearly appears that the commissioners committed some material error of law, or that misrepresentation and fraud were practised upon them, or that they themselves were chargeable with fraudulent

practices, and that as a result the patent was issued to the wrong party.

[For other cases, see Public Lands, I. h, 2; Courts, I. e, 6, in Digest Sup. Ct. 1908.]

**Evidence — presumption from official action.**

3. The presumption that a contest before the town site commision for a town in the Cherokee Nation, resulting from conflicting applications to purchase, was begun within the prescribed time after notice of the refusal of the contestant's application, will be indulged in a suit in equity to have the holder of the patent declared the trustee for the adverse claimant, where the petition in such suit, though showing when the contestant's application was presented and when the contest was begun, does not show when her application was refused or when she was notified.

[Presumptions generally, see Evidence, II., in Digest Sup. Ct. 1908.]

**Public lands — judicial review of decision — misleading attorney for contestee.**

4. The attorney for the contestee in a contest before the town site commission for a town in the Cherokee Nation, resulting from conflicting applications to purchase, cannot claim to have been misled into believing that an answer had been filed by the statement of the Indian inspector who then was completing the work of the commission, which in the meantime had been abolished, that the land in question was in litigation, and that the attorney would be advised as soon as action was taken, since such statement was equally true whether the contestee had answered or was in default.

[For other cases, see Public Lands, I. h, 2, in Digest Sup. Ct. 1908.]

**Public lands — judicial review of decision — default.**

5. The failure of the attorney for the contestee to file an answer in a contest before the town site commission for a town in the Cherokee Nation, resulting from conflicting applications to purchase, furnishes no ground for avoiding the decision, where there is no suggestion that such failure was in anywise attributable to the contestant or the commission, and where such failure was called to the attention of the contestee while it was still within the power of the commission to relieve him from the default, but no effort was made by him to secure such relief.

[For other cases, see Public Lands, I. h, 2, in Digest Sup. Ct. 1908.]

**Public lands — judicial review of decision — notice and hearing.**

6. A decision adverse to the contestee in a contest before the town site commission for a town in the Cherokee Nation, resulting from conflicting applications to purchase, because of his failure to file an answer, cannot be said to have been made without affording him a hearing or an opportunity to be heard, where he was notified of the contest, was served with a copy of the complaint, and was cited to answer in accordance with the regulations promulgated by the Secretary of the Interior for the guidance of the commission in the discharge of its duties.

[For other cases, see Public Lands, I. h, 2, in Digest Sup. Ct. 1908.]

**Public lands — judicial review of decision — misrepresentation and fraud.**

7. The misrepresentation and fraud which will entitle the unsuccessful claimant in a contest before the town site commission for a town in the Cherokee Nation to relief against the decision and resulting patent must be such as prevented him from fully presenting his side of the controversy, or the commissioners from fully considering it, and it is not enough that there may have been false allegations in the pleadings, or that some witness may have sworn falsely.

[For other cases, see Public Lands, I. h, 2, in Digest Sup. Ct. 1908.]

[No. 140.]

Submitted January 23, 1913. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Sequoyah County, in that state, in favor of defendant in a suit to have the patentee of a town site lot declared a trustee for the plaintiff. Affirmed.

See same case below, 25 Okla. 611, 106 Pac. 870.

The facts are stated in the opinion.

Mr. W. H. Kornegay submitted the cause for plaintiff in error.

Messrs. Joseph C. Stone, Charles G. Watts, and Jess W. Watts filed a brief for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

A lot in the town site of Sallisaw, in the Cherokee Nation, is here in dispute. The conflicting claims are both founded upon the legislation of Congress providing for the designation, survey, and platting of town sites in the Cherokee lands, and the appraisal and disposal of the lots. Acts June 28, 1898, 30 Stat. at L. 495, 500, chap. 517, § 15; May 31, 1900, 31 Stat. at L. 221, 237, 238, chap. 598; July 1, 1902, 32 Stat. at L. 716, 722, chap. 1375, §§ 38–58, 65. After the town site was *designated,[532 surveyed, and platted, the parties here severally sought to purchase lot 7 in block 39, each asserting a preference right by reason, as was alleged, of having a possessory claim and owning the improvements. Ross's application was first in the order of presentation, and the town site commission, which was then charged with the work of appraisal and disposal, scheduled the lot to him. Stewart's application was refused subject to her right to contest Ross's claim

before the commission, the date of the refusal not being shown in this record. She instituted such a contest, due notice being given to Ross, and the lot was ultimately awarded to her by the Indian inspector for the Indian territory, who, in the meantime,† had been charged with the duty of ompleting the work of the town site commission under the direction and subject to the approval of the Secretary of the Interior. Following this award a patent, bearing the Secretary's approval, was issued to Stewart by the principal chief of the Cherokee Nation, conformably to §§ 58 and 59 of the act of 1902. Ross subsequently commenced this suit in a state court in Oklahoma (the newly admitted state including the town of Sallisaw) to have Stewart declared a trustee for him, and to enforce a conveyance. To an amended petition, setting forth the facts just stated, and containing other allegations presently to be mentioned, the defendant interposed a demurrer, which the court sustained. A judgment for the defendant was entered and was affirmed by the supreme court of the state (25 Okla. 611, 106 Pac. 870), whereupon the plaintiff sued out this writ of error.

We are asked to say, as was the state court, that the town site commission was without jurisdiction to entertain or pass upon the contest resulting from the conflicting applications to purchase, and that 533]such a controversy *could be determined only in the courts. But, like the state court, we are unable so to say. No time need be spent in upholding the power of Congress to invest the town site commission with such authority, for our prior decisions leave no doubt upon that subject. It is merely a question of what Congress intended by the legislation adopted. In this connection it is well to remember that no individual, even if an occupant and owning the improvements, had more than a possessory claim to the land to which the legislation was to be applied, and that all possessory claims were held subject to the superior ownership in fee, which was in the Cherokee tribe. Recognizing that this was so, and regarding the possessory claimants as entitled to favorable consideration, Congress made provision for according to them a preference right to purchase the lots covered by their improvements, and for selling such lots at public auction if the preference right was not exercised within a limited period, the sale in either event to be for the benefit of the tribe as owner of the fee. In the act of 1900 the duties and authority of the town site commission were stated as follows: "As soon as the plat of any town site is approved, the proper commission shall . . . proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then-existing act of Congress or agreement with the tribe, approved by Congress, . . ." This provision and the other town site portions of the acts of 1898 and 1900 became, by express reference, a part of the act of 1902, with qualifications not here material, and that act also declared: "All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the interior." Shortly *following this[534 legislation, the Secretary promulgated regulations for the guidance of the commission in the discharge of its duties, and gave express directions therein for the hearing and determination by the commission of contests between claimants asserting conflicting rights to purchase the same lot. These regulations remained in force until after the act of March 3, 1905 (33 Stat. at L. 1048, 1059, chap. 1479), when, upon the abolition of the commission, they were altered and superseded to the extent that the Indian inspector for the Indian territory was charged with the duty of completing the work of the commission under the direction and subject to the approval of the Secretary of the Interior. It is not suggested that the authority to hear and determine contests was diminished or enlarged by this change, and therefore it will suffice to speak only of the authority of the commission.

The acts of 1898, 1900, and 1902 show very plainly that it was the purpose of Congress to commit to the commission the appraisal and disposal of all lots, whether occupied or vacant, improved or unimproved, save as its work was to be done under the supervision of the Secretary of the Interior. More than this, there was an express command that the commission should proceed "in conformity with any then-existing act of Congress or agreement with the tribe, approved by Congress." This meant that the commission should respect and give effect to the Congressional legislation regulatory of the disposal and sale of the lots. The provisions according preference rights to possessory claimants, and directing sales at auction if those rights were not exercised within the prescribed period, were a part of that legislation, and conformity to them necessarily involved an ascertainment

†See H. R. Doc. No. 5, 59th Cong., 1st Sess., p. 721; Sen. Doc. No. 396, part 4, 59th Cong., 2d Sess., p. 337.

of what lots were held under possessory claims, and of who, in each instance, was the rightful claimant. True, there was no direct provision for such an ascertainment, but by necessary implication the duty of 535] making it was cast upon the *commission to whom the command for conformity was addressed. Plainly, it was not contemplated that every claim of a preference right should be granted without inquiry into its merits, or that, as between conflicting claims seasonably presented, one should be granted and the other rejected without ascertaining which was the rightful one. The suggestion that such controversies were cognizable only in the courts finds no support in any statutory provision, is opposed to the plain implication of this legislation, and ignores the settled practice of Congress to commit such questions to the determination of administrative officers. As has been seen, the Secretary of the Interior, when issuing regulations for the guidance of the commission, took the view that it was to hear and determine such contests, subject to his supervisory authority; and in our opinion that was the correct view.

We come, then, to the further contention that, even conceding the jurisdiction of the administrative officers to entertain and pass upon the contest, the petition discloses a case which entitles the plaintiff to call in question their decision, and to insist that the defendant, who obtained a patent under that decision, be declared a trustee for him, and required to transfer the title to him. The test to which the petition must be subjected is this: All reasonable presumptions must be indulged in support of the action of the officers to whom the law intrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law, or that misrepresentation and fraud were practised upon them, or that they themselves were chargeable with fraudulent practices, and that, as a result, the patent was issued to the defendant when it should have been issued to the plaintiff, their action must stand. Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424, 427; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Quinby v. Conlan, 104 U. S. 420, 426, 26 L. ed. 800, 802; Baldwin v. Stark, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Sanford v. Sanford, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666.

536] *The petition cannot be commended as a model. It is wanting in certainty, and sets forth a good many conclusions which have no support in the facts alleged. It is copied at length in the opinion of the state court, and it will suffice here to state the substance of such parts as have a bearing upon the arguments advanced to sustain the contention last stated.

It now is said that the contest was entertained in violation of the established regulations, in that it was not instituted within the time prescribed. This objection was not made in the petition, and for aught that there appears it may have no basis in fact. The regulations limited the time to ten days after notice of the refusal of the conflicting application to purchase. The petition, although showing when the defendant's application was presented and when the contest was begun, does not show when her application was refused or when she was notified. In this situation the presumption is that the contest was begun in time, else it would not have been entertained.

The contest was begun by filing with the commission a written complaint setting forth the grounds of contest, and the plaintiff was duly served with a copy, and notified that he should file, within ten days, such answer as he desired to make. He was in jail at that time and employed an attorney to represent him. The attorney engaged to do whatever was necessary to protect the plaintiff's rights, and afterwards assured him that an answer had been filed and the hearing would come later. A year and a half thereafter the attorney made inquiry of the Indian inspector who then was completing the work of the commission, which in the meantime had been abolished, concerning the contest, and was informed that the lot was "in litigation," and he would be advised as soon as action was taken; and later in the same month the inspector informed him that the plaintiff had forfeited his right by not filing an answer, and a formal decision to that effect would be rendered after *the first of 537] the succeeding month. Information about the absence of an answer was also given to the plaintiff about that time. But it does not appear that he or his attorney took any action then or thereafter either to show that an answer had been filed, or to correct the omission if none had been filed, although it does appear that more than seven months elapsed before the patent was issued. Whether in fact an answer was filed is left uncertain, for it is alleged that the plaintiff believes one was filed, that the contest record does not show such a filing, that no answer is in the files, and "that plaintiff's attorney either failed to file an answer in the contest proceeding, or that said answer, having been filed, was disregarded." In this situation it is urged (a) that the inspector, by stating that the lot was in litigation, caused the plaintiff's attorney as

to believe that an answer was on file, and thereby misled him; (b) that if no answer was filed, it was an unfortunate omission for which the plaintiff was not responsible; and if one was filed, it was wrongfully disregarded; and (c) that the contest was decided against the plaintiff without a hearing or an opportunity to be heard.

The statement attributed to the inspector, that the lot was in litigation, doubtless meant, and only meant, that the contest was pending and undecided. That was its natural import, and it was equally true whether the plaintiff had answered or was in default. Therefore, the claim that his attorney was misled is not even colorable. If the question whether an answer was filed be an open one, the allegations of the petition bearing thereon are so uncertain that effect must be given to the decision that none was filed. Not only is there a strong presumption that the decision was right, but the admission that no answer is in the files, and that the contest record does not show the filing of one goes far to sustain the decision, independently of the presumption. Thus, the absence of an answer must be regarded as accounted for only on the 538]theory that the *attorney omitted to file one. Of that it is to be observed, first, that the omission was by the plaintiff's chosen representative; second, that there is no suggestion that it was in any wise attributable to the defendant or the administrative officers before whom the contest was pending; and, third, that it was called to the attention of the plaintiff while it was still within the power of the administrative officers to relieve him from the default, if the circumstances justified such action, and to proceed to a hearing and disposition of the contest as if the omission had not occurred, and yet no effort was made by him to secure action of that kind. In these circumstances the failure of the attorney to file an answer furnishes no ground for avoiding the decision. It is idle to say that the plaintiff did not have a hearing or an opportunity to be heard. He was notified of the contest, was served with a copy of the complaint, and was cited to answer, all in conformity with the regulations, and he could not have failed to understand that to make default would be in the nature of a confession of his adversary's claim and an abandonment of his own. Failing, as he did, to answer or interpose any objection to the contest, he raised no issue entitling him to a hearing. His trouble is not that be was not accorded a hearing or an opportunity to be heard, but that he did not avail himself of the opportunities afforded.

In the petition the plaintiff now does what he failed to do in the contest: that is, takes issue with the allegations of the complaint, therein by denying that they were true; and he insists that in this way the petition shows that misrepresentation and fraud were practised upon the administrative officers, whereby the patent was issued to the defendant when it should have been issued to him. The insistence cannot be sustained. The contest was not *ex parte*, as were the proceedings involved in United States v. Minor, 114 U. S. 233, 240-243, 29 L. ed. 110, 112-114, 5 Sup. Ct. Rep. 806; Sanford v. Sanford, 139 U. S. 642, 644, 650, 35 L. ed. 290, 291, 293, 11 Sup. Ct. Rep. 666; and Svor v. Morris, 227 U. S. 524, ante, 623, 33 Sup. Ct. Rep. 385, but *was an adversary proceeding to which[539 the plaintiff was a party, of which he had due notice, and in which he had full opportunity to meet and controvert the very allegations he now says were untrue. The question whether they were true or otherwise is one the decision of which was committed by law to the administrative officers as a special tribunal, and they, as is conceded, decided that the allegations were true, their action being in the nature of a judicial determination. The applicable rule in such a case is, that the misrepresentation and fraud which will entitle the unsuccessful claimant to relief against the decision and resulting patent must be such as have prevented him from fully presenting his side of the controversy, or the officers from fully considering it; and it is not enough that there may have been false allegations in the pleadings, or that some witness may have sworn falsely. Vance v. Burbank, 101 U. S. 514, 519, 25 L. ed. 929, 931; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Estes v. Timmons, 199 U. S. 391, 396, 50 L. ed. 241, 244, 26 Sup. Ct. Rep. 85; Greenameyer v. Coate, 212 U. S. 434, 444, 53 L. ed. 587, 590, 29 Sup. Ct. Rep. 345; Durango Land & Coal Co. v. Evans, 25 C. C. A. 523, 49 U. S. App. 305, 80 Fed. 425, 430.

The petition contains some allegations descriptive of the complaint in the contest and of the matters set forth in it, and it is urged that in this way it appears that, upon her own showing, the defendant did not have such a possessory claim as entitled her to a preference right of purchase, and therefore that the officers committed an error of law in sustaining the contest. Of this it seems enough to say that the petition neither sets forth a copy of the complaint nor purports to give the whole of its substance; and that, upon contrasting what the petition does say of the complaint with the applicable sections of the act of 1902, it does not appear that the contest

was ill founded. For aught that is disclosed, the complaint and the proof in support of it may have fully established the defendant's right to purchase.

Other contentions advanced in the brief 540 of the plaintiff have been considered and found so far untenable that their discussion here would serve no useful purpose.

Judgment affirmed.

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GEORGE MATHESON, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 540–543.)

**Jury — impaneling — district of Alaska.**

1. The judge of the third division of the district court of the United States for the territory of Alaska, who was assigned by the act of March 3, 1909 (35 Stat. at L. 839, chap. 269), to the fourth division provided for by that act, could, after that enactment, but before it went into effect, issue a call for a jury for the first term to be convened thereunder, since that act did not contemplate an interruption of the functions of the judge throughout the entire district, nor destroy the unity of the district court, but merely fixed a new place at which the same district court must be held.

[Impaneling jury generally, see Jury, II., in Digest Sup. Ct. 1908.]

**Appeal — who may complain — instruction given at party's own request.**

2. Plaintiff in error cannot complain of the giving of a charge requested by him.

[For other cases, see Appeal and Error, VIII. b, in Digest Sup. Ct. 1908.]

**Appeal — exceptions — assignments of error.**

3. Rulings as to which no exception was taken at the time, or as to matters not set out in the assignments of error, and requiring a search through the record to determine the subject of the complaint, will not be revised by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, V. t; VI. b, in Digest Sup. Ct. 1908.]

**Appeal — harmless error — excluding evidence.**

4. The erroneous exclusion of testimony as to facts subsequently proved is not ground for reversal.

[For other cases, see Appeal and Error, VIII. m, 3, b, in Digest Sup. Ct. 1908.]

**Appeal — discretionary matters — expert testimony.**

5. The refusal of the trial court to permit nonexperts to express the opinion that the accused was insane until after they had given facts on which it was based is not reviewable unless there has been an abuse of the court's discretion.

[For other cases, see Appeal and Error, VIII. l, 4, in Digest Sup. Ct. 1908.]

**Trial — instructions — burden of proof —insanity — reasonable doubt.**

6. There is no error in instructing the jury in a homicide case that while the burden of proof is upon the accused to establish the fact that he was insane at the time of the killing, they cannot convict if they have a reasonable doubt as to his sanity.

[For other cases, see Trial, VII. c, in Digest Sup. Ct. 1908.]

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NOTE.—On the measure of proof of insanity in criminal cases—see note to Kelch v. State, 39 L.R.A. 737.

On presumption and burden of proof as to sanity—see note to State v. Scott, 36 L.R.A. 721.

[No. 148.]

Submitted January 24, 1913. Decided February 24, 1913.

IN ERROR to the District Court of the United States for the Fourth Division of the Territory of Alaska to review a conviction of murder. Affirmed.

The facts are stated in the opinion.

Mr. James Wickersham submitted the cause for plaintiff in error. Mr. John F. Dillon was on the brief:

Using a jury drawn for another division is not merely an error or mistake in pleading or procedure. Such jury is entirely without jurisdiction or authority beyond the "political division" for which it was drawn, or in any "political division" which had no existence at the time of its drawing.

United States v. Beasly, 2 Alaska, 93.

Where the sanity of an individual is in question, the insanity of his blood relations in the ancestral line may be shown as tending to establish the fact of insanity.

Re Myer, 6 Ann. Cas. 29, note; State v. Shuff, 9 Idaho, 115, 72 Pac. 664, 13 Am. Crim. Rep. 443.

It is always best, in cases of criminal character, particularly where life is involved, that the court should adopt a liberal rather than a rigorous or technical rule in the receipt of evidence for the defense.

State v. O'Neil, 13 Or. 183, 9 Pac. 284.

The burden is upon the state and upon the whole evidence to prove the defendant guilty beyond a reasonable doubt.

Davis v. United States, 160 U. S. 469–485, 40 L. ed. 499–504, 16 Sup. Ct. Rep. 353.

The onus is first on the prisoner to show that the insanity exists; which being done, it immediately shifts upon the prosecution; and it is for it to show that insanity does not exist; or, if it does, that it is not such as would prevent him from knowing and doing right.

State v. Shuff, 9 Idaho, 115, 72 Pac. 669, 13 Am. Crim. Rep. 443; Taylor, Ev. p. 809; People v. McCann, 16 N. Y. 69, 69 Am. Dec. 642; Maas v. Territory, 10 Okla. 714, 53

L.R.A. 814, 63 Pac. 960; Chase v. People, 40 Ill. 358.

A man may be insane and not responsible for a particular act, and yet know the difference between right and wrong.

Hopps v. People, 31 Ill. 391, 83 Am. Dec. 231; Maas v. Territory, 10 Okla. 714, 53 L.R.A. 814, 63 Pac. 960; Stevens v. State, 31 Ind. 488, 99 Am. Dec. 634.

The court committed error in giving an instruction which assumes the facts and instructs the jury in a mandatory way to find the defendant guilty as charged in the indictment, without submitting in the same instruction his defense of insanity.

State v. Bock, 49 Or. 29, 88 Pac. 318; State v. Hatcher, 29 Or. 319, 44 Pac. 584.

Assistant Attorney General Adkins submitted the cause for defendant in error. Mr. Karl W. Kirchwey, Assistant Attorney, was on the brief:

The court's rulings on the evidence were correct.

Thiede v. Utah, 159 U. S. 519, 40 L. ed. 242, 16 Sup. Ct. Rep. 62; Walsh v. People, 88 N. Y. 466; Raub v. Carpenter, 187 U. S. 159, 47 L. ed. 119, 23 Sup. Ct. Rep. 72; Turner v. American Security & T. Co. 213 U. S. 257, 260, 53 L. ed. 788, 789, 29 Sup. Ct. Rep. 420; State v. Crowe, 39 Mont. 179, 102 Pac. 579, 18 Ann. Cas. 643; Lane v. Moore, 151 Mass. 90, 21 Am. St. Rep. 430, 23 N. E. 828; 1 Wigmore, Ev. § 233; People v. Borgetto, 99 Mich. 340, 58 N. W. 328; Ford v. State, 71 Ala. 397; State v. Soper, 148 Mo. 235, 49 S. W. 1007; State v. Lyons, 113 La. 981, 37 So. 890; Re Wilson, 78 Neb. 758, 111 N. W. 788.

The court's instructions were free from error.

Davis v. United States, 165 U. S. 373–378, 41 L. ed. 750–754, 17 Sup. Ct. Rep. 360; Hotema v. United States, 186 U. S. 413, 416, 46 L. ed. 1225, 1227, 22 Sup. Ct. Rep. 895; Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; Spreckels v. Brown, 212 U. S. 208, 53 L. ed. 476, 29 Sup. Ct. Rep. 256; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586–606, 38 L. ed. 279–285, 14 Sup. Ct. Rep. 458; Marrin v. United States, 93 C. C. A. 351, 167 Fed. 951; Davis v. United States, 160 U. S. 469–485, 40 L. ed. 499–504, 16 Sup. Ct. Rep. 353; Davis v. United States, 165 U. S. 373–378, 41 L. ed. 750–754, 17 Sup. Ct. Rep. 360.

The objection to the trial jury is without merit.

Clement v. United States, 79 C. C. A. 243, 149 Fed. 305; Spencer v. United States, 95 C. C. A. 60, 169 Fed. 562; Bird v. United States, 187 U. S. 118, 47 L. ed. 100, 23 Sup. Ct. Rep. 617; Rosencrans v. United States, 165 U. S. 257, 262, 41 L. ed. 708, 710, 17 Sup. Ct. Rep. 302; Agnew v. United States, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235; Breese v. United States, 226 U. S. 1–11, ante, 97, 102, 33 Sup. Ct. Rep. 1; Clinton v. Englebrecht, 13 Wall. 434–441, 20 L. ed. 659–660; Powers v. United States, 223 U. S. 303, 56 L. ed. 448, 32 Sup. Ct. Rep. 281.

Mr. Justice Lamar delivered the opinion of the court:

Congress, by the act of June 6, 1900 (31 Stat. at L. 322, chap. 786), established a district court for Alaska, with general civil and criminal jurisdiction. There were three judges, who, though given jurisdiction over the entire district, were required to reside in that one of the three divisions to which they were respectively assigned by the President. On December 29, 1908, the grand jury of the third division indicted Matheson for murder. On the next day he was arraigned and entered a plea of not guilty. Before his case was called for trial, Congress passed the act of March 3, 1909 (35 Stat. at L. 839, chap. 269), providing for a fourth division, to be held at Fairbanks by the judge of the former third division. This act was not to become effective until July 1, 1909; but in preparation for the first term convened thereunder, the district judge assigned to the fourth division passed an order, under which jurors were drawn and summoned in June to attend at the session of court to be held in July at Fairbanks.

On July 13, during this term, the defendant applied for and obtained an order to have his witnesses subpœnaed at the expense of the government. His case was called for trial in September. He announced ready, and without making any question as to the qualification of the jurors or the method and regularity of their selection, objected to the entire panel on the ground that the judge of the third division was without jurisdiction to issue the call at a time when the fourth division had not come into existence. The objection was overruled. Several of those on the jury which tried his case were taken from this panel. After a verdict of guilty and sentence to imprisonment for life, the case was brought here by writ of *error in[542 which complaint is made of the action of the judge in allowing a jury to be selected from a panel drawn in June, before the act creating the fourth division became effective.

The Alaskan Code (31 Stat. at L. 322, §§ 4 & 5, chap. 786) created one district court with three judges having general civil and criminal jurisdiction over the entire district, and authority to hold regular terms at Juneau, St. Michael's, and Eagle City, and

special terms at such times and places in the district as they or any of them might deem expedient. The act of March 3, 1909 (35 Stat. at L. 839, chap. 269), in providing for a fourth division, did not contemplate an interruption of the functions of the judge throughout the entire district, nor did it destroy the unity of the district court. But while preserving unimpaired the power of the court and judges, it fixed a new place, at which the same district court must be held. It did not create a new tribunal, with new officers, to be organized in a new political division, but it continued the jurisdiction and power of the judge to be exercised anywhere in Alaska. It did not revoke his authority to summon jurors to attend at any session of the district court, whether permitted to be held at Fairbanks, under the act of 1900, or required there to be held after July 1st, under the act of 1909. The principle involved is, in some of its aspects, like that considered in Rosencrans v. United States, 165 U. S. 257, 41 L. ed. 708, 17 Sup. Ct. Rep. 302, where it was said that "jurisdiction is coextensive with district, and no mere multiplication of places at which courts are to be held or mere creation of division nullifies it." Barrett v. United States, 169 U. S. 219, 42 L. ed. 723, 18 Sup. Ct. Rep. 327; Bird v. United States, 187 U. S. 118, 47 L. ed. 100, 23 Sup. Ct. Rep. 42. There was no error in overruling the objection made by the defendant to the panel.

There are 37 assignments of error, none of which presents a ground requiring a reversal. One relates to the giving of a charge requested by the defendant; others 543]to *rulings as to which no exception was taken at the time, or as to matters not set out in the assignments, and requiring a search through the record to determine the subject of the complaint; others, to the exclusion of testimony as to facts subsequently proved.

Those which relate to the refusal of the court to permit nonexperts to express the opinion that the defendant was insane, until after they had given facts on which it was based, are without merit. It was the duty of the judge to determine whether such witnesses had qualified themselves to give opinion evidence, and there was no abuse of the court's discretion in passing on these matters (Turner v. American Security & T. Co. 213 U. S. 260, 53 L. ed. 789, 29 Sup. Ct. Rep. 420), but his rulings were favorable to the defendant.

It would serve no useful purpose to discuss the ruling as to the burden of proof and the definitions of insanity, since they present no new propositions. In both these matters *the court followed cases* in which those subjects have been fully treated. He instructed the jury that while the burden of proof was upon the defendant to establish the fact that he was insane at the time of the killing, yet they could not convict if they had a reasonable doubt as to his sanity. Davis v. United States, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353. His definition of insanity and as to what would relieve the defendant of criminal responsibility was in accord with the principle declared in Davis v. United States, 165 U. S. 378, 41 L. ed. 754, 17 Sup. Ct. Rep. 360; in fact, the court gave the exact charge there held to be correct. The case was one peculiarly for the jury, and finding no error in matter of law, the judgment must be affirmed.

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*GRAND TRUNK WESTERN RAIL- [544
WAY COMPANY, Plff. in Err.,
v.
CITY OF SOUTH BEND et al.

(See S. C. Reporter's ed. 544-559.)

**Error to state court — scope of review — impairing contract obligations.**

1. Whether the repeal of so much of a municipal ordinance granting trackage rights in a city street to a railway company as relates to double tracks was presumptively a reasonable exercise of the police power or a legislative impairment of the contract ordinance is a question which the Federal Supreme Court, on writ of error to a state court, must decide for itself, independently of the decisions of the state court.

[For other cases, see Appeal and Error, 2240-2248, in Digest Sup. Ct. 1908.]

**Highways — use by railroad — power of municipality.**

2. A municipal corporation could, in Indiana, confer by ordinance trackage rights in city streets upon a railway company whose charter provided that the railroad might be built through any city that would give its consent.

[For other cases, see Highways, II. d, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — police power.**

3. Rights acquired by a railway company

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NOTE.—As to the power of a municipality to prevent laying an additional track, under a franchise originally granting the right to lay double tracks—see note to same case below as reported in 36 L.R.A.(N.S.) 850.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

under a valid municipal ordinance conferring trackage rights in the city streets, though subject to the power of the municipality to pass reasonable police regulations, are protected by the contract clause of the Federal Constitution from destruction by a subsequent repeal.

[For other cases, see Constitutional Law, 1068–1074, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — municipal franchise — double railway tracks in street.**

4. The obligations of a contract created by a valid municipal ordinance granting to a railway company the right to lay double tracks in one of the city streets are unconstitutionally impaired by the subsequent repeal of so much of the ordinance as relates to that part of the street upon which a single track only has actually been built, where the franchise granted by such ordinance was single and specific, and was accepted by the company in its entirety, and the company, in reliance thereon, acquired land from the abutting owners with a view to laying a double track as the increase in business demanded, and has actually built the double track for a part of the distance.

[For other cases, see Constitutional Law, 1273–1580, in Digest Sup. Ct. 1908.]

[No. 81.]

Argued December 10 and 11, 1912. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Indiana to review a decree which affirmed a decree of the Laporte Circuit Court, sustaining a demurrer to the bill in a suit to enjoin a municipality from interfering with the construction of railway tracks in a street. Reversed and remanded for further proceedings.

See same case below, 174 Ind. 203, 36 L.R.A.(N.S.) 850, 89 N. E. 885, 91 N. E. 809.

Statement by Mr. Justice Lamar:

In 1866 a charter was granted by the state of Indiana to plaintiff's predecessor in title, whereby it was authorized to build a railroad from the Michigan line west through South Bend to the Illinois line in the direction of Chicago. The city of South Bend was a stockholder in this company, and, in 1868, passed an ordinance granting the company the right to construct its railroad through the streets of the city, no more than one track to be laid, except that the privilege was granted to lay a double track along Division Street, from the bridge over St. Joseph's river to Taylor street. The road was constructed and a single track was built in 1871.

*Thereafter, in 1881,* the company acquired *by condemnation and purchase,* from abutting owners on Division street, the right to use a strip 18 feet in width on which to lay a double track, and soon afterward constructed the same on Division street for about half the permitted distance. This double track was constantly used, and in 1901 the business of the company had so increased that it was necessary to double track the entire line; and the company had so built 157 miles from Port Huron westward, and was preparing to construct the balance of the double track on Division street, when the city, on October 14, 1901, repealed so much of the ordinance of 1868 as gave the right to a second track in Division street. Later, when the work of construction was begun, the mayor ordered the employees to desist, and threatened to arrest any who should undertake to construct such double track.

The company thereupon filed a bill, asking that the city be enjoined from interfering with the building of the *balance of [546 the double track. It alleged that the city was a stockholder in the original company and in one of the successors, and knew of the acquisition of the 18-foot strip in Division street; that at all times it had recognized the validity of the contract as an entirety, and from time to time required the railroad to incur expenses called for thereunder, and was estopped from denying the validity of the double track privilege.

The bill alleges that when the ordinance of 1868 was passed it understood the double track could be laid whenever the business of the company made it necessary; that in consequence of the increase of business it is now essential to the successful operation of plaintiff's freight and passenger business that it should maintain a second track in Division street, as by said ordinance authorized; and that to facilitate and accommodate the present volume of such traffic, said double line "is particularly necessary because of the fact that plaintiff's freight and passenger stations in South Bend are located adjacent to Division street, between St. Joseph's river bridge and General Taylor street, and at said station the trains, both passenger and freight, passing over plaintiff's road, have to stop for train orders. The obstructing of the general public in the use of said street by passing trains will be much less when two tracks are used than it now is, when all trains, both ways, have to pass over a single track; that said street is 82½ feet wide, and that there is ample room thereon for general travel and for said double track."

The plaintiff claims that the "original ordinance of 1866 constituted a contract in its entirety, . . . is irrepealable by said city, either in whole or in part, and

that said ordinance of repeal is void, as violative of said contract and plaintiff's right thereunder, as being in conflict with § 10 of article I. of the Constitution of the United States."

The city demurred. Later it withdrew the 547]demurrer *and filed an answer. Subsequently it withdrew the answer and filed a general demurrer, which was sustained by the circuit court. On appeal the supreme court of Indiana held that there was no charge that the city proposed to remove the double track already laid, and that the pleadings, properly construed, only involved the right to construct the balance of the double track; that even if the ordinance of 1866 was a contract, it did not prevent the city from exercising the police power, and affirmed the judgment. (174 Ind. 203, 36 L.R.A.(N.S.) 850, 89 N. E. 885, 91 N. E. 909.

Mr. G. W. Kretzinger, Jr., argued the cause and filed a brief for plaintiff in error:

The Supreme Court of the United States determines for itself whether there is an existing contract; and where there is diversity of state decisions, the first in time may constitute the obligation of the contract and the measure of rights under it.

McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; Shelby County v. Union & Planters' Bank, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Pleasant Twp. v. Ætna L. Ins. Co. 138 U. S. 67, 72, 34 L. ed. 864, 866, 11 Sup. Ct. Rep. 215; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Newport Light Co. v. Newport, 151 U. S. 527, 536, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429.

The supreme court of Indiana holds with uniformity that under the Indiana statutes cities have general jurisdiction over streets, and that under this general power the right to occupy streets by railroad tracks may be granted.

Tate v. Ohio & M. R. Co. 7 Ind. 482; Indianapolis & C. R. Co. v. State, 37 Ind. 489; Haslett v. New Albany Belt & Terminal R. Co. 7 Ind. App. 608, 34 N. E. 845; Kistner v. Indianapolis, 100 Ind. 218; New Castle v. Lake Erie & W. R. Co. 155 Ind. 18, 57 N. E. 516; Dantzer v. Indianapolis Union R. Co. 141 Ind. 604, 34 L.R.A. 769, 50 Am. St. Rep. 343, 39 N. E. 223; Pittsburgh, C. C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Decker v. Evansville Suburban & N. R. Co. 133 Ind. 493, 33 N. E. 349; Dwenger v. Chicago & G. T. R. Co. 98 Ind. 153.

The decisions of the supreme court of Indiana first in point of time hold that an ordinance making a grant similar to this is a contract which the municipality cannot subsequently impair.

Williams v. Citizens' R. Co. 130 Ind. 71, 15 L.R.A. 64, 30 Am. St. Rep. 201, 29 N. E. 408; Indianapolis v. Indianapolis Gaslight & Coke Co. 66 Ind. 396; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 529, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; Indianapolis v. Consumers Gas Trust Co. 140 Ind. 107, 27 L.R.A. 514, 49 Am. St. Rep. 183, 39 N. E. 433.

No power to repeal, alter, or amend is reserved in the power granted to the city to "consent." In the absence of such power, the consent, once given, is irrevocable.

Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Indianapolis v. Consumers Gas Trust Co. 140 Ind. 116, 27 L.R.A. 514, 49 Am. St. Rep. 183, 39 N. E. 433; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 529, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88.

The interest of the abutting owners cannot be destroyed or impaired under this or any other ordinance without compensation.

Burkam v. Ohio & M. R. Co. 122 Ind. 345, 23 N. E. 799; Porter v. Midland R. Co. 125 Ind. 476, 25 N. E. 556; Chicago, St. L. & P. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 759.

Under this ordinance, containing no ground of forfeiture, a forfeiture cannot be declared or insisted upon for nonuser until such forfeiture has been judicially declared in a suit brought for that purpose.

Logan v. Vernon, G. & R. R. Co. 90 Ind. 556; Brookville & G. Turnp. Co. v. McCarty, 8 Ind. 394, 65 Am. Dec. 768.

The grant having been made and acted on for over twenty years, the franchise cannot be successfully assailed, and viewed as a contract, it cannot be altered or repealed. Therefore the repealing ordinance is void.

New Castle v. Lake Erie & W. R. Co. 155 Ind. 26, 57 N. E. 516; State ex rel. Sleeth v. Gordon, 87 Ind. 171; Angell & A. Priv. Corp. § 743; People ex rel. Platt v. Oakland County Bank, 1 Dougl. (Mich.) 282; State v. Bailey, 19 Ind. 452.

Mere failure to exercise the right to lay down the second track did not extinguish the right to do so. The grant was prospective, and it was made in view of the extension of commerce and increase of business and the better development of the country.

People's Pass. R. Co. v. Baldwin, 14 Phila. 231; Philadelphia, W. & B. R. Co. v. Williams, 54 Pa. 103; Columbus v. Columbus & S. R. Co. 37 Ind. 299; Noblesville v. Lake Erie & W. R. Co. 130 Ind. 4, 29 N. E.

484; White v. Chicago, St. L. & P. R. Co. 122 Ind. 317, 7 L.R.A. 257, 23 N. E. 782; Chicago, St. L. & P. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 759; Africa v. Knoxville, 70 Fed. 731; Brunswick & W. R. Co. v. Waycross, 91 Ga. 573, 17 S. E. 674.

Even if South Bend had granted a license pure and simple to the railway company to occupy the street in question with railroad tracks, it could not be revoked after acceptance and use by the railway company.

Buchanan v. Logansport, C. & S. W. R. Co. 71 Ind. 266; Lane v. Miller, 27 Ind. 534; Newcastle v. Lake Erie & W. R. Co. 155 Ind. 26, 57 N. E. 516; Rio Grande R. Co. v. Brownsville, 45 Tex. 96; People ex rel. Bliss v. Chicago West Div. R. Co. 118 Ill. 113, 7 N. E. 116; State, Hudson Teleph. Co., Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123.

The original ordinance created a property right in the nature of an easement which the city has no power to destroy.

Tate v. Ohio & M. R. Co. 7 Ind. 483; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 246, 77 Fed. 507; Indianapolis & C. R. Co. v. State, 37 Ind. 494.

A presumption of reasonableness will not be indulged where the taking of property, or destroying the use thereof, is effected by an ordinance, and no necessity shown therefor, while, on the other hand, facts are set up by the petition attacking such ordinance, admitted by demurrer, which in themselves are sufficient to overcome even a presumption in favor of regulation.

Hawes v. Chicago, 158 Ill. 657, 30 L.R.A. 225, 42 N. E. 373; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71.

The city is not the sole judge of the reasonableness of an ordinance that affects or destroys the use of property. This is a judicial question within the jurisdiction of the courts.

Freund, Pol. Power, pp. 29, 57.

Consent once given makes operative the franchise, and the revocation of that consent would make the franchise futile.

Clinton v. Clinton & L. Horse R. Co. 37 Iowa, 61; Des Moines City R. Co. v. Des Moines, 151 Fed. 854.

Mr. A. B. Browne also argued the cause for plaintiff in error.

Mr. Harry R. Wair argued the cause, and, with Messrs. Louis T. Michener and *Iden S.* Romig, filed a brief for defendant *in error:*

*It is for the state court to say* whether the particular cause of action has been sufficiently alleged, and also the scope and theory of the pleading, and the meaning to be given its various allegations, as measured by the rules applicable to pleading obtaining in the state.

Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; Newport Light Co. v. Newport, 151 U. S. 529, 536, 38 L. ed. 260, 262, 14 Sup. Ct. Rep. 429; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Northern P. R. Co. v. Paine, 119 U. S. 561, 30 L. ed. 513, 7 Sup. Ct. Rep. 323; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Beaupre v. Noyes, 138 U. S. 397, 401, 34 L. ed. 991, 992, 11 Sup. Ct. Rep. 296; Klinger v. Missouri, 13 Wall. 257, 263, 20 L. ed. 635, 637; Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

The supreme court of Indiana finds that no question is presented by the complaint as to plaintiff in error's double-track rights on Division street, east of Michigan street, and that no question was raised as to such rights until the filing of the railway company's brief in support of its petition for rehearing. That question cannot now be successfully urged under the rule that if the cause of action is founded upon a Federal question, it should have been presented at the earliest opportunity, not only in the supreme court of the state, but before the trial court.

Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40.

All allegations in the pleading which go beyond the statement of a good cause of action on the theory adopted are mere surplusage; and when the statement of the cause of action upon such theory, tested by the rules of pleading, does not disclose that a Federal question is involved, the Federal court has no jurisdiction. On this principle, in the case at bar, as an original matter here, no question is presented here as to the double-track rights of the railroad company on Division street, east of Michigan street.

Fergus Falls v. Fergus Falls Water Co. 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873.

The construction placed upon the pleading and its averment by the supreme court of Indiana was in consonance with the rules of construction applicable to pleadings in that jurisdiction. It is the rule in that jurisdiction:

First, that a pleading must be judged from its general tenor and scope, and when it assumes to proceed upon a distinct theory, it cannot be made good upon some other by casting into it isolated statements which, if fully pleaded in separate paragraphs, might constitute a cause of action.

Western U. Teleg. Co. v. Young, 93 Ind. 118; Western U. Teleg. Co. v. Reed, 96 Ind. 198; Balue v. Taylor, 136 Ind. 368, 36 N. E. 269.

Second, that facts in pleading must be positively averred, and not set out by way of recital, inference, or conclusion, and that no facts will be presumed to exist in favor of a pleading which have not been averred or alleged.

Wabash R. Co. v. Beedle, 173 Ind. 437, 90 N. E. 760; Wabash R. Co. v. Hassett, 170 Ind. 370, 83 N. E. 705; Chicago & E. R. Co. v. Lain, 170 Ind. 90, 83 N. E. 632.

An ordinance enacted in the exercise of police power is presumed to be reasonable and valid until the contrary is made to appear. The presumption is in favor of the reasonableness of the power exercised. Especially strong should this presumption be when the repealing act concerns protection of life. The complaint of plaintiff in error should state facts to show that the city council acted wantonly, or maliciously, or through bribery, or without legislative authority; otherwise the presumption is in favor of the legality of the council's action.

Cleveland, C. C. & I. R. Co. v. Harrington, 131 Ind. 436, 30 N. E. 37; Jamieson v. Indiana Natural Gas. & Oil Co. 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; Peru v. Gleason, 91 Ind. 567; Fry v. State, 63 Ind. 560, 30 Am. Rep. 238; Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; Snouffer v. Cedar Rapids & M. C. R. Co. 118 Iowa, 288, 92 N. W. 79; Paxson v. Sweet, 13 N. J. L. 196; State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076.

The mere fact that plaintiff in error enjoys contract rights in the street is not controlling. It must always be understood that those who enter into such contract relations with the city as render their property reasonably subject to control do so with the knowledge that the police power is an inalienable and continuing authority in the city.

Indiana R. Co. v. Calvert, 168 Ind. 321, 10 L.R.A. (N.S.) 780, 80 N. E. 961, 11 Ann. Cas. 635; Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Vandalia R. Co. v. State, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980.

When a state court has construed a statute, this court will accept that construction; and the power of determining the meaning of a statute carries with it the power to describe its extent and limitation as well as a method by which they shall be determined.

Smiley v. Kansas, 196 U. S. 447–455, 49 L. ed. 546–550, 25 Sup. Ct. Rep. 289; Martin v. West, 222 U. S. 196, 56 L. ed. 161, 36 L.R.A. (N.S.) 592, 32 Sup. Ct. Rep. 42; Chicago v. Sturges, 222 U. S. 321, 56 L. ed. 220, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913 B, 1349; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 73, 55 L. ed. 375, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160; Boston Chamber of Commerce v. Boston, 217 U. S. 194, 54 L. ed. 726, 30 Sup. Ct. Rep. 459; Gatewood v. North Carolina, 203 U. S. 541, 51 L. ed. 309, 17 Sup. Ct. Rep. 167.

The repealing ordinance was a proper exercise of the police power; the power of legislating for the protection of the public in the streets of the city is held by the city council in trust, and cannot be the subject of an irrevocable contract; a city council cannot limit its legislative discretion in the future by contract or grant, so as to deprive itself of its police power; the power of regulation and control of street is a continuing power, to be exercised at all times for the public benefit.

Vandalia R. Co. v. State, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980; Indiana R. Co. v. Calvert, 168 Ind. 321, 10 L.R.A. (N.S.) 780, 80 N. E. 961, 11 Ann. Cas. 635; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301; Peru v. Gleason, 91 Ind. 567; Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510; Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Board of Education v. Phillips, 67 Kan. 549, 100 Am. St. Rep. 475, 73 Pac. 97; Snouffer v. Cedar Rapids & M. C. R. Co. 118 Iowa, 288, 92 N. W. 79; Clarendon v. Rutland R. Co. 75 Vt. 6, 52 Atl. 1057; Thorpe v. Rutland & B. R. Co. 27 Vt. 141, 62 Am. Dec. 625; Binninger v. New York, 177 N. Y. 199, 69 N. E. 390; Presbyterian Church v. New York, 5 Cow. 542.

The police power is but another name for the power of government and legislation, and cannot be judged by theoretical standards, but must be tested by the concrete conditions which induced it; and this court will not oppose to legislation under the police power its notions of the necessity for such legislation in determining whether the legislation is arbitrary and unreasonable, and not designed to accomplish a legitimate public purpose.

Mutual Loan Co. v. Martell, 222 U. S. 232–234, 56 L. ed. 178–179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913 B, 179; Laurel Hill Ceme

tery Co. v. San Francisco, 216 U. S. 358–365, 54 L. ed. 515–518, 30 Sup. Ct. Rep. 301.

It is not important whether we call such an ordinance a license or a contract. The real question is, is it repealable? Where privileges are given to a private corporation and subsequent regulation attempted is purely a matter of private concern, the facts come within the Dartmouth College doctrine; but this doctrine does not apply to the public contracts or charter legislation of municipalities, which are more in the nature of licenses, and not irrepealable contracts. The original ordinance was not in the class of contracts which a municipality makes as a property holder, but was an exercise by the city of its delegated legislative powers.

Vandalia R. Co. v. State, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980; Indiana R. Co. v. Calvert, 168 Ind. 321, 10 L.R.A. (N.S) 780, 80 N. E. 961, 11 Ann. Cas. 635; Indianapolis & C. R. Co. v. State, 37 Ind. 489; Meyer v. Boonville, 162 Ind. 167, 70 N. E. 146; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; Binninger v. New York, 177 N. Y. 199, 69 N. E. 390; Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510; Snouffer v. Cedar Rapids & M. C. R. Co. 118 Iowa, 288, 92 N. W. 83; Logansport R. Co. v. Logansport, 114 Fed. 688; Citizens Street R. Co. v. City R. Co. 56 Fed. 746, 64 Fed. 647.

Neither the condition of the title of the plaintiff in error nor its relations with abutting property owners is important. If the repealing ordinance is a valid exercise of the police power, it matters not whether plaintiff in error is deprived of the benefit of an easement, a privilege, a contract, or a license.

Black, Const. Law, pp. 290, 293, 298; Clarendon v. Rutland R. Co. 75 Vt. 6, 52 Atl. 1057.

It was the repealing ordinance that extinguished the right to lay down the second track on Division street between Michigan and General Taylor streets. The original grant was prospective, and was made in view of the growth of the city and increase of business, and must be interpreted in view of future public needs.

Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80.

The repealing ordinance concerns not only the use of the street for convenience of public travel, but also the protection of human life. Subjects of much less importance have properly been held to be within the scope of the police power.

International Text Book Co. v. Weissinger, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033; Given v. State, 160 Ind. 552, 66 N. E. 750; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; State v. Woodward, 89 Ind. 110, 46 Am. Rep. 160; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Columbus Gaslight & Coke Co. v. Columbus, 50 Ohio St. 65, 19 L.R.A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

The rule is that an estoppel may be raised against a private corporation even when it has not the power to act; but no estoppel can be raised against a public corporation.

State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; Rissing v. Ft. Wayne, 137 Ind. 427, 37 N. E. 328.

Neither the question of estoppel nor the question of laches, when raised in the state court, present or involve a Federal question.

Speed v. McCarthy, 181 U. S. 269, 275, 45 L. ed. 855, 858, 21 Sup. Ct. Rep. 613; Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

This court will take judicial notice that every additional track placed longitudinally along the streets, and crossing intersecting streets, increases the danger to the public and inconvenience to travel.

1 Elliott, Ev. §§ 39, 42, 62.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

In 1868 the city council of South Bend, by ordinance, granted plaintiff's predecessor in title the right to lay a double track over a part of Division street. The company built a single track in 1871, and a double track for part of the way in 1881; but, on attempting in 1902 to extend it, for the balance of the authorized distance, was prevented from doing so because the city had repealed so much of the ordinance of 1868 as related to double tracks. In the record here it appears that, in the litigation which followed, the action of the city was sustained on the ground that the repeal was presumptively a reasonable exercise of the police power, and not a legislative impairment of the contract ordinance.

The assignment of error on this ruling presents a question which this court is bound to decide for itself, independent of decisions of the state court. Northern P. R Co. v. Minnesota, 208 U. S. 590, 52 L. ed 633, 28 Sup. Ct. Rep. 341. In doing so it is necessary first to determine whether the city had legislative authority to pass the ordinance; for, if there was no such power, the grant was void, and the repeal was not so much the impairment of the obligation

of a contract, as the withdrawal of an assent to occupy the streets.

We are, however, relieved of the necessity of making any extended inquiry on this primary question, because the Indiana statute provided that the railroad might be built through any city that would give its consent. In a suit by an abutting owner, the supreme court of the state, construing this 552]very ordinance of 1868, held that *the city had power to pass it, "the laying out and operating of the railway being a new and improved method of using the streets, germane to its principal object." Dwenger v. Chicago & G. T. R. Co. 98 Ind. 153. In other cases that court held that the statute authorized cities to grant franchises to lay tracks in the streets; that such an ordinance created that which is in the nature of a contract "which the municipality itself cannot materially impair." Williams v. Citizens' R. Co. 130 Ind. 73, 15 L.R.A. 64, 30 Am. St. Rep. 201, 29 N. E. 408; New Castle v. Lake Erie & W. R. Co. 155 Ind. 24, 57 N. E. 516. These rulings accord with the decisions in other jurisdictions and by this court in Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572, holding that an ordinance conferring a street franchise, passed by a municipality under legislative authority, created a valid contract, binding and enforceable according to its terms.

2. If, then, the city of South Bend was authorized to pass this ordinance, which granted an easement, the contract cannot be impaired unless, as claimed by the defendant, the railroad took subject to a right to amend or repeal, in the exercise of the police power. And many cases are cited in support of the proposition that the grant of authority to use the streets of a city does not prevent the subsequent passage of ordinances needed for the preservation of the public safety and convenience. Some of the cases turned on the question as to the city's want of legislative power to make the grant in the first instance. Others held that charter grants did not prevent the state from subsequently repealing franchises, which, in their operation, were injurious to the morals or health of the public, as in the lottery, liquor, and fertilizer cases. Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036. Others related to the change of paving, grade, and location of viaducts. All of them recognize the municipality's control of the use of the streets by travelers 553] *on foot or in vehicles, as well as the use by companies which have a franchise to lay tracks over which to haul cars.

Undoubtedly the railroad here took no vested interest in the maintenance of the laws or regulations of force when the ordinance was passed in 1868, but the rights acquired were subject to the power of the municipality to pass reasonable regulations necessary to secure the public safety. Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341. And while the franchise to lay and use a double track was a contract which could not be impaired, yet, as the police power remained efficient and operative, the municipality had ample authority to make regulations necessitating changes of a nature which could not have been compelled if the grant had been from it as a private proprietor. The city could therefore legislate as to crossings, grades, character of rails, rate of speed, giving of signals, and the details of operating track and train, regulating the use of the franchise, and preserving the concurrent rights of the public and the company. And, as in the viaduct cases, it might require these tracks to be lowered or elevated (Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513); or, the franchise, and not the particular location, being the essence of the contract, the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center, of the street. New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Macon Consol. Street R. Co. v. Macon, 112 Ga. 783, 38 S. E. 60; Atlantic & B. R. Co. v. Cordele, 128 Ga. 296, 57 S. E. 493; Snouffer v. Cedar Rapids & M. C. R. Co. 118 Iowa, 288 (5), 92 N. W. 79.

These, however, are examples of the persistence of the power to regulate, and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use, but destructive of the franchise. In every case like this, involving an inquiry as to whether a law is valid, as an exertion of the police power, or void, as impairing *the obligation of a contract, the de-[554 termination must depend on the nature of the contract and the right of government to make it. The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

The state, with its plenary control over the streets, had this governmental power to make the grant. There was nothing contrary to public policy in any of its terms, and being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. Walla Walla v. Walla Walla Water Co. 172 U. S. 17, 43 L. ed. 348, 19 Sup. Ct. Rep. 77. Tracks laid in a street, under legislative authority, become legalized, and, when used in the customary manner, cannot be treated as unlawful, either in maintenance or operation. As said by this court: "A railway over . . . the streets of the city of Washington may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded." Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 331, 27 L. ed. 739, 744, 2 Sup. Ct. Rep. 719. The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted by the state. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure.

555] *The power to regulate implies the existence, and not the destruction, of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated permanent, and not temporary, structures, granted a permanent, and not a revocable, franchise. Both the street and the railroad were arteries of commerce. Both were highways of public utility, and both were laid out subject to the authority of the state, though the power to regulate the use of the streets has been delegated to the municipality. So that, while the company was itself authorized to select the route between the terminal points named in the charter, it could not use streets without the consent of the city through which the line ran. In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconveniences of having trains operated through its streets against the advantage of having the railroad *accessible to its citizens*. It could have *refused its consent, except on terms*; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given, the condition precedent had been performed, and the street franchise was thereafter held, not from the city, but from the state; which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself.

It is said, however, that even if the city could not prevent the use of the rails already laid, it could repeal so much of the ordinance as related to that part of the street on which the double track had not been actually built. But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not *necessarily execute the contract as [556 to others not connected with the main object of the ordinance, and not at the time directly within the contemplation of the parties. Pearsall v. Great Northern R. Co. 161 U. S. 673, 40 L. ed. 847, 16 Sup. Ct. Rep. 705. This franchise was single and specific; and when accepted and acted upon became binding,—not foot by foot, as the rails were laid, but as an entirety. Here the company not only accepted the ordinance and constructed the road, but, relying on the franchise, acquired from the abutters by purchase or condemnation an 18-foot strip with a view of laying thereon a double track as the increase in business made that necessary. Subsequently it built the double track for a part of the distance, and has not abandoned or forfeited the right to use the balance of the easement when needed for the discharge of its public duties as a carrier.

The ordinance passed in pursuance of the Indiana statute was an entirety. When accepted it became binding in its entirety. If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the state's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commerce, similar in their nature to the street itself. Such consequences, though improbable, are rendered impossible by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a

state, whether acting through a general assembly or a municipality exercising delegated legislative power. Mercantile Trust & D. Co. v. Columbus, 203 U. S. 320, 51 L. ed. 202, 27 Sup. Ct. Rep. 83; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. 557]Ct. Rep. 653. *See also Hestonville, M. & F. Pass. R. Co. v. Philadelphia, 89 Pa. 210 (3); Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 520, 28 N. E. 525; Asbury Park & S. G. R. Co. v. Neptune Twp. 73 N. J. Eq. 329-332, 67 Atl. 790; Brunswick & W. R. Co. v. Waycross, 91 Ga. 573, 17 S. E. 674; Workman v. Southern P. R. Co. 129 Cal. 536, 62 Pac. 185, 316; Africa v. Knoxville, 70 Fed. 729; Burlington v. Burlington Street R. Co. 49 Iowa, 144, 31 Am. Rep. 145; Arcata v. Arcata & M. River R. Co. 92 Cal. 639, 28 Pac. 676; Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 147, 5 N. W. 275; Seattle v. Columbia & P. S. R. Co. 6 Wash. 379, 33 Pac. 1048; Noblesville v. Lake Erie & W. R. Co. 130 Ind. 1, 29 N. E. 484. "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside." St. Louis v. Western U. Teleg. Co. 148 U. S. 103, 37 L. ed. 385, 13 Sup. Ct. Rep. 485.

The defendant relies on Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696, where, however, the facts were materially different. For there the company had a sweeping grant to lay double tracks through many miles of the streets. The city repealed the ordinance so far as it related to a short distance in a crowded part of Lexington street, which, as appears in the original record, varied from 48 to 50 feet in width, the sidewalks being about 11 feet in width and the roadway proper being about 29 feet from curb to curb. With double tracks, there was only 7½ feet from the curb to the nearest rail, and, allowing for the overhanging of the car, this space was not wide enough to permit vans and large wagons to pass. At some points buggies and narrow vehicles could only pass by running the wheels on the edge of the sidewalk. These facts are wholly different from the situation disclosed by this record, where the sweeping grant conferred the right to lay a single track, but the specific grant "immediately within the contemplation of the parties" (Pearsall v. Great Northern R. Co. 161 U. S. 673, 40 L. ed. 847, 16 Sup. Ct. Rep. 705) was a defi-558]nite franchise *to construct this particular double track between designated points on Division street, which is 82½ feet wide, or 32 feet wider than Lexington street. It is admitted that a double track has been actually used on it for more than twenty years.

The statuts and the ordinance in the Baltimore Case were also materially different from those here involved. The court declined to decide whether the council had the power to make an irrepealable contract, it being sufficient to hold that the direction to lay but one track for a short distance on Lexington street did not substantially change the terms of the contract, granting such very broad and general right to lay many miles of double track throughout the city. But, regardless of the construction, there was no impairment, because of the important fact that the legislature of Maryland had ratified the street ordinance on condition that it might at any time be amended or repealed by the city council.

That decision, based on such different facts and on such different statuts and ordinance, is not applicable here, where the city of South Bend sought to repeal a part of a street franchise granted in pursuance of a state statute which, while it authorized the city to consent, reserved to it no such power to repeal. As said in Indianapolis v. Indianapolis Gaslight & Coke Co. 66 Ind. 402, such a contract ordinance does not in the least restrict "the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power."

The facts stated in the complaint, and admitted by the demurrer, raise no presumption that the repeal was the reasonable exercise of the police power, but, on the contrary, *show that the contract of 1868[559 was materially impaired by the ordinance of 1901, in violation of the provisions of art. 1, § 10, of the Constitution. The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Day concurs in the result on the ground that the facts stated in the complaint and admitted by the demurrer raise no presumption that the repeal was the reasonable exercise of the police power, and that nothing else is necessary to be decided. Mr. Justice Hughes and Mr. Justice Pitney dissent.

SOUTHERN PACIFIC COMPANY, Appt.,
v.
CITY OF PORTLAND.

(See S. C. Reporter's ed. 559-575.)

**Highways — use by railroad — power of municipality.**

1. A municipal corporation was not limited merely to naming the thoroughfare, or giving or refusing its consent, by Or. Code, §§ 5077, 5078, empowering it to designate the street on which railroad tracks could be located, but could fix conditions and reserve general powers not inconsistent with the grant from the state, and its ordinance containing such conditions and reservations became contractual as well as legislative when accepted by the railway company.

[For other cases, see Highways, II. d, in Digest Sup. Ct. 1908.]

**Highways — use by railroad — power of municipality — prohibiting use of steam.**

2. The power reserved in a municipal ordinance designating, conformably to Or. Code, §§ 5077, 5078, the street on which railway tracks could be located, "to make or alter regulations" and to "restrict or prohibit the running of locomotives at such time and in such manner as they [the common council] may deem necessary," authorized the city subsequently to prohibit the use of steam locomotives,—a prohibition not defeating the grant, because it was permissible and practicable to use other motive power.

[For other cases, see Highways, II. d, in Digest Sup. Ct. 1908.]

**Highways — use by railroad — power of municipality — ordinance invalid in part.**

3. The provisions of a municipal ordinance which relate to the motive power to be used by a railroad company to which the city had previously granted rights in a street are so far separable from provisions which prohibit the hauling of freight cars, and those which declare a forfeiture for a violation of the ordinance, that the regulation against the use of steam locomotives may be enforced without regard to the validity of the prohibition against hauling freight cars.

[For other cases, see Highways, II. d, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — railway franchise — prohibiting hauling freight cars.**

4. A municipal ordinance prohibiting the hauling of freight cars on railway tracks in a city street is not a valid exercise of the right of regulation reserved in the ordinance designating, conformably to Or. Code, §§ 5077, 5078, the street on which the railway tracks could be located, since this would defeat the state franchise and impair the contract under which the tracks were located, and on the faith of which terminals were constructed.

[For other cases, see Constitutional Law, 1273-1580, in Digest Sup. Ct. 1908.]

[No. 122.]

Argued January 6, 1913. Decided February 24, 1913.

APPEAL from the Circuit Court of the United States for the District of Oregon to review a decree refusing to enjoin the enforcement of a municipal ordinance prohibiting a railway company from running steam locomotives or freight cars in a city street. Affirmed so far as the decree affects the running of steam locomotives.

See same case below, 177 Fed. 958.

Statement by Mr. Justice Lamar:

Appeal from a decree refusing to enjoin the city of Portland from enforcing an ordinance prohibiting the Southern Pacific Company from running steam locomotives or freight cars along 4th street.

It appeared that the Oregon Central R. R. was chartered to build a road from Portland to the California line. The company thereupon purchased a block of land in the city on which to locate its terminals, and applied to the council to designate the street on which the track should be laid. The general statute of the state then of force provided (Code of Oregon, 5077, 5078) that whenever a private corporation was authorized to appropriate any part of any public street within the limits of any town, such corporation should locate their road upon such particular street as the local authorities might designate. But if such local authorities refused to *make such des-[561 ignation within a reasonable time when requested, such corporation might make such appropriation without reference thereto.

The bill alleges that on January 6, 1869, "under and by virtue of the laws of the state and its charter then in effect, the city of Portland duly passed ordinance 599, which provided that—

"Sec. 1. The Oregon Central is hereby authorized and permitted to lay a railway track and run cars over the same along 4th street, from the south boundary line of the city to the north side of G street, and as much further north as 4th street may be extended, upon the terms and conditions hereinafter provided."

. . . . . .

"Section 3. That the common council re-

NOTE.—As to use of street by railroad—see note to Hot Springs R. Co. v. Williamson, 34 L. ed. U. S. 355.

On the privilege of using streets as a contract within the constitutional provision *against impairing* the obligation of contracts—*see note to Clarksburg* Electric *Light Co. v. Clarksburg*, 50 L.R.A. 142.

serve the right to make or to alter regulations at any time, as they deem proper, for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary."

. . . . . .

"Section 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereto, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the common council to declare by ordinance the forfeiture of the same, and to cause the said rails to be removed from said street."

The ordinance was accepted and the road was built from the terminals along 4th to Sheridan street, thence south over its private 562 ]property and the right of way *granted by Congress (16 Stat. at L. 94, chap. 69) to McMinnville. From its completion in 1871 to the present time freight and passenger cars drawn by steam locomotives have been constantly operated along 4th street. In 1903 the charter of the city of Portland was amended so as to authorize the granting of street franchises, and it is alleged that the city desired the railroad to take an electric franchise, paying therefor an annual sum. It is further charged that on May 1, 1907, over the protest of the railroad company, the council passed ordinance 16,491, to go into effect eighteen months after date, by which it was made unlawful for the Oregon Central, its assigns, their lessees, or any other person, to run or operate steam locomotives or freight cars along 4th street . . . between Glisan and the southerly limits of the city, excepting freight cars for the repair or maintenance of the railway lawfully and rightfully on said street. Violations were to be punished by fine or imprisonment, and deemed a forfeiture of all rights claimed by the Oregon Central with respect to the operation of the railway on the street. On November 16, 1908, after the expiration of the eighteen months, a proceeding was instituted in the municipal court against the company and one of its agents, charging that he and it "did wilfully and unlawfully run and operate steam railway locomotives along 4th street," contrary to the provisions of ordinance 16,491.

The Southern Pacific, a Kentucky corporation, thereupon filed a bill in the United States circuit court, alleging that the Oregon Central's property had been transferred to the Oregon & California R. R., and tha in 1887 the property and this street righ had been leased to the Southern Pacific which had since continuously operated freight and passenger cars with steam power over 4th street.

It averred that the railroad owned no other terminal *property than that[56 purchased in 1869 and reached by the track on 4th street; that it was impossible to obtain any other terminal within the city accessible to the railroad from the intersection of 4th and Sheridan streets to the south boundary; that cars from Corvallis on its line running south, could not be brought into the city, and its business as a common carrier conducted, if the ordinance was enforced, except by constructing, at an estimated cost of $911,000, about 10 miles of road from Beaverton to Willsburg, thence across a bridge owned by the Oregon R. R. & N. Co., and thence by the southern terminus of said railroad constructed by the Oregon Central. The bill charged that the ordinance imposed excessive penalties and illegal forfeitures; that it was arbitrary, unreasonable, and oppressive; deprived the company of property without due process of law; interfered with interstate commerce and impaired the obligation of the contract under which the track had been laid in 4th street.

The city answered, denying that the Southern Pacific owned the property and franchises of the Oregon Central, on the ground that the latter company had no charter right to sell, and also offered evidence to show that when, in 1869, the tracks were first laid on 4th street, there were very few buildings thereon, while it was now one of the principal thoroughfares upon which many stores, hotels, and public structures have been erected; it proved that the locomotives and cars were much heavier than those in use when Ordinance 599 was passed, and the grade being steep, the puffing, blowing, exhaust, noise, and jar caused by steam locomotives was more disturbing and injurious than where the line is more nearly level. It also proved that the Southern Pacific was then building a cut-off or belt line, by which freight could be carried around the city instead of being hauled over 4th street.

The court held that under the police power, as well as *that reserved in or-[564 dinance 599, the city could prohibit the use of steam and the hauling of freight cars, the ordinance not being arbitrary in view of the results of hauling locomotives and cars along 4th street, which he found was "quite steep, . . . and the noise, vibration, smoke, cinders, and soot from the moving steam locomotives and trains seriously

terfere with the transaction of public and private business, and are a constant source of danger and inconvenience to the public." [177 Fed. 963.] He made no finding as to whether the company had other convenient and accessible means of reaching the terminal, for handling through and local freight. But having held that the city had power to pass ordinance 16,491, he dismissed the bill, and the carrier appealed.

Mr. James E. Fenton argued the cause, and, with Messrs. William D. Fenton, Ben C. Dey, Kenneth L. Fenton, and Maxwell Evarts, filed a brief for appellant:

Statutes holding that legislative grants to telephone and telegraph companies, and other public-service corporations, under general statutes, cannot be impaired or restricted by ordinances of municipal corporations, are analogous to the case at bar.

Abbott v. Duluth, 104 Fed. 833; Omaha Electric Light & P. Co. v. Omaha, 102 C. C. A. 601, 179 Fed. 455; Sunset Teleph. & Teleg. Co. v. Pomona, 97 C. C. A. 251, 172 Fed. 829; Columbus v. Union P. R. Co. 70 C. C. A. 207, 137 Fed. 869; Wichita v. Old Colony Trust Co. 66 C. C. A. 19, 132 Fed. 641; State ex rel. Wisconsin Metropolis Teleph. Co. v. Milwaukee, 132 Wis. 615, 113 N. W. 40; Milliken v. Western U. Teleg. Co. 1 L.R.A. 281 note; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 32, 86 N. W. 657; Summit Twp. v. New York & N. J. Teleph. Co. 57 N. J. Eq. 123, 41 Atl. 146; Chamberlain v. Iowa Teleph. Co. 119 Iowa, 619, 93 N. W. 596; New Hope Teleph. Co. v. Concordia, 81 Kan. 514, 106 Pac. 35; Missouri River Teleph. Co. v. Mitchell, 22 S. D. 191, 116 N. W. 67; Michigan Teleph. Co. v. Benton Harbor, 121 Mich. 512, 47 L.R.A. 104, 80 N. W. 386; Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 47 L.R.A. 87, 80 Am. St. Rep. 520, 80 N. W. 383; Jonesville v. Southern Michigan Teleph. Co. 155 Mich. 86, 130 Am. St. Rep. 562, 118 N. W. 736, 16 Ann. Cas. 439; Carthage v. Central N. Y. Teleph. & Teleg. Co. 185 N. Y. 448, 113 Am. St. Rep. 932, 78 N. E. 165; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; Western U. Teleg. Co. v. Visalia, 149 Cal. 744, 87 Pac. 1023; State ex rel. Crumb v. Helena, 34 Mont. 67, 85 Pac. 744; Wichita v. Missouri & K. Teleph. Co. 70 Kan. 441, 78 Pac. 886; State ex rel. Rocky Mountain Bell Teleph. Co. v. Red Lodge, 30 Mont. 338, 76 Pac. 758; 3 Dill. Mun. Corp. 5th ed. §§ 1122–1130, 1161; Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828.

The charter of the city of Portland in effect when ordinance No. 16,491 was passed, being the act of the legislative assembly of January 23, 1903, did not amend, modify, or repeal the state statute contained in §§ 6841 and 6842, Lord's Oregon Laws.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Wichita v. Missouri & K. Teleph. Co. 70 Kan. 441, 78 Pac. 886; State ex rel. Crumb v. Helena, 34 Mont. 67, 85 Pac. 744; Louisville v. Louisville Water Co. 105 Ky. 754, 49 S. W. 766; 3 Elliott, Railroads, 2d ed. § 1076; Africa v. Knoxville, 70 Fed. 729, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Citizens' Street R. Co. v. City R. Co. 64 Fed. 647; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Dakota Central Teleph. Co. v. Huron, 165 Fed. 226; 1 Dill. Mun. Corp. 5th ed. §§ 235, 236; Wright v. Nagel, 101 U. S. 791, 25 L. ed. 921; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 395, 397, 46 L. ed. 592, 610, 611, 22 Sup. Ct. Rep. 410; Arcata v. Arcata & M. River R. Co. 92 Cal. 645, 28 Pac. 676; Eichels v. Evansville Street R. Co. 78 Ind. 261, 41 Am. Rep. 561; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 26; State, Hudson Teleph. Co., Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; State v. Noyes, 47 Me. 189; McQuaid v. Portland & V. R. Co. 18 Or. 237, 22 Pac. 899; Rio Grande R. Co. v. Brownsville, 45 Tex. 96.

Whether the rights created were granted by the state, or directly by the city, such grant, and the assent of the city evidenced by this ordinance, when accepted by the Oregon Central R. Co., became a perpetual and irrevocable franchise. As a matter of law, the common council has no power to repeal, amend, or modify this ordinance. The rights thereby created constituted a franchise or contract which cannot be altered, impaired, or repealed, and these rights, when accepted by the grantee, became a vested property right which could be assigned, conveyed, mortgaged, sold, leased, or otherwise disposed of, in the same manner and for the same purposes as any other property of this kind. Nor can the company, its successors or assigns or lessee, be devested of its rights thereunder, excepting by alienation, forfeiture, or condemnation, after just compensation therefor.

Des Moines City R. Co. v. Des Moines, 151 Fed. 854; Rushville v. Rushville Natural Gas Co. 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86, note p. 88; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; Western U. Teleg. Co. v. Visalia, 149 Cal. 744, 87 Pac. 1023; People ex rel. Pontiac v. Central U. Teleg. Co. 192 Ill. 307, 85 Am. St. Rep. 338, 61 N. E. 428; Chicago Teleph. Co. v. Northwestern Teleph. Co. 199 Ill. 324, 65 N. E. 329; 3 Dill. Mun. Corp. 5th ed. §§ 1210, 1222, 1242; Knoxville v. Africa, 23

C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Baltimore Trust & G. Co. v. Baltimore, 64 Fed. 153, reversed in 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Citizens' Street R. Co. v. City R. Co. 56 Fed. 746; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Mercantile Trust & D. Co. v. Collins Park & Belt R. Co. 99 Fed. 812; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443; Kansas City v. Corrigan, 86 Mo. 67; Springfield R. Co. v. Springfield, 85 Mo. 674; East Louisiana R. Co. v. New Orleans, 46 La. Ann. 526, 15 So. 157; Burlington v. Burlington Street R. Co. 49 Iowa, 144, 31 Am. Rep. 145; Des Moines v. Chicago, R. I. & P. R. Co. 41 Iowa, 569; Indianapolis v. Consumers Gas Trust Co. 140 Ind. 107, 27 L.R.A. 514, 49 Am. St. Rep. 183, 39 N. E. 433; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; London Mills v. White, 208 Ill. 298, 70 N. E. 313; Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 29, 36 L.R.A. 47, 60 Am. St. Rep. 74, 69 N. W. 791; New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 42, 8 Am. St. Rep. 502, 3 So. 533; Shreveport Traction Co. v. Shreveport, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40; Madison v. Alton, Granite & St. L. Traction Co. 235 Ill. 346, 85 N. E. 596; People ex rel. Shallburg v. Central U. Teleph. Co. 232 Ill. 260, 83 N. E. 829; Mason v. Ohio River R. Co. 51 W. Va. 183, 41 S. E. 418; Commercial Electric Light & P. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572.

Under subdivision 7, of § 5056, Lord's Oregon Laws, the Southern Pacific Company had authority to acquire by lease the property of the Oregon & California Railroad Company, and, under §§ 6735, 6736, Lord's Oregon Laws, was granted authority to operate its railroad and to acquire by way of lease, all the rights evidenced by ordinance No. 599. Under § 227, Lord's Oregon Laws, this property right was subject to sale on execution, and under the power to mortgage, a foreclosure sale under such mortgage would vest in the purchaser title to the rights evidenced by ordinance No. 599, and this, too, without words of assignability expressly contained in the ordinance.

Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Chicago, M. & St. P. R. Co. v. Minnesota C. R. Co. 14 Fed. 525; Coast-Line R. Co. v. Savannah, 30 Fed. 646; Cleveland City R. Co. v. Cleveland, 94 Fed. 385; St. Louis v. Western U. Teleg. Co. 63 Fed. 68; Mercantile Trust & D. Co. v. Collins Park & Belt R. Co. 101 Fed. 347; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Columbia Ave. Sav. Fund S. D. Title & T. Co. v. Dawson, 130 Fed. 152; Mercantile Trust & D. Co. v. Columbus Waterworks Co. 130 Fed. 180; Farmers' Loan & T. Co. v. Meridian Waterworks Co. 139 Fed. 661; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 660, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 395, 397, 46 L. ed. 592, 610, 611, 22 Sup. Ct. Rep. 410; Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300, 67 S. W. 761; Workman v. Southern P. R. Co. 129 Cal. 536, 62 Pac. 185, 316; Chicago Municipal Gas Light & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616; Belleville v. Citizens' Horse R. Co. 152 Ill. 171, 26 L.R.A. 681, 38 N. E. 584; Hovelman v. Kansas City Horse R. Co. 79 Mo. 632; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 507, 29 L. ed. 244, 246, 5 Sup. Ct. Rep. 1009; Chicago v. Sheldon, 9 Wall. 50, 55, 19 L. ed. 594, 597; Harvey v. Aurora & G. R. Co. 186 Ill. 283, 57 N. E. 857; West Chicago Street R. Co. v. Chicago, 178 Ill. 339, 53 N. E. 112; People ex rel. Bliss v. Chicago West Div. R. Co. 118 Ill. 113, 7 N. E. 116; State Hudson Teleph. Co., Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. St. Rep. 619, 8 Atl. 123; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A.(N.S.) 1071, 84 N. E. 1049; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Greenwood v. Union Freight R. Co. 105 U. S. 13, 20, 20 L. ed. 961, 964; Asheville Street R. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316; Hamilton G. & C. Traction Co. v. Hamilton & L. Electric Traction Co. 69 Ohio St. 402, 69 N. E. 991; Houston v. Houston City Street R. Co. 83 Tex. 548, 29 Am. St. Rep. 679, 19 S. W. 127.

Mere private injury, if any exists, is not the subject of legislation under the police power, or under the power to abate a nuisance.

3 Dill. Mun. Corp. §§ 1269, 1270; 3 McQuillin, Mun. Ord. §§ 953–955; Chicago, M. & St. P. R. Co. v. Minnesota C. R. Co. 4 McCrary, 606, 14 Fed. 525; Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 99

106; Grossman v. Oakland, 36 L.R.A. 593, note, 30 Or. 478, 60 Am. St. Rep. 832, 41 Pac. 5; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A.(N.S.) 1071, 84 N. E. 1049; Ex parte Wygant, 39 Or. 429, 54 L.R.A. 636, 87 Am. St. Rep. 673, 64 Pac. 867; 2 Elliott, Roads & Streets, 3 ed. § 1054; 1 Elliott, Roads & Streets, 3d ed. §§ 549, 550.

The city of Portland has ratified the assignment of this franchise, and the rights of complainant thereunder, and is estopped from claiming that such franchise was not assignable, and that complainant has no rights thereunder. Furthermore, by § 106 of the act of January 23, 1903, now in effect, the city of Portland ratified and confirmed ordinance No. 599, and recognized and ratified its continuance in force and effect, as originally granted.

Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; Commercial Electric Light & P. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592; Carter v. Meuli, 122 Cal. 367, 55 Pac. 138; State ex rel. Godard v. Topeka Water Co. 61 Kan. 547, 60 Pac. 337; Louisville v. Cumberland Teleg. & Teleph. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; 3 Dill. Mun. Corp. §§ 1265–1268.

A franchise in perpetuity, when authorized by the legislature, may be granted by a municipality.

Des Moines City R. Co. v. Des Moines, 151 Fed. 855; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 315; 3 Dill. Mun. Corp. 5th ed. §§ 1266–2168; Citizens' Street R. Co. v. City R. Co. 64 Fed. 647, 166 U. S. 557, 566, 41 L. ed. 1114, 1117, 17 Sup. Ct. Rep. 653; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Capdevielle v. New Orleans & S. F. R. Co. 110 La. 904, 34 So. 868; Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 43, 82 N. W. 821; Campbellsville Teleph. Co. v. Lebanon L. & L. Teleph. Co. 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518; Venner v. Chicago City R. Co. 236 Ill. 349, 86 N. E. 266; Snell v. Chicago, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Seattle v. Columbia & P. S. R. Co. 6 Wash. 379, 33 Pac. 1048; New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 42, 8 Am. St. Rep. 502, 3 So. 533; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Phœnix v. Gannon, 123 App. Div. 93, 108 N. Y. Supp. 265; Re Consolidated Gas Co. 56 Misc. 49, 106 N. Y. Supp. 407; People v. O'Brien, 111 N. Y. 38, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

The city of Portland cannot deprive the company of the use of this portion of its line for any railway purposes contemplated by the act of Congress of May 4, 1870, including the use of steam locomotives and freight trains. Such use and operation pursuant to this act of Congress are subject only to reasonable regulation under the police power of the state or city, which does not amount to prohibition of the substantial use of such instrumentalities.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; 3 Dill. Mun. Corp. 5th ed. §§ 1269, 1270.

Even if it be conceded that the city could, under the police power, prohibit the use of steam locomotives on Fourth street, it could not, as it attempted to do under ordinance No. 16,491, deprive the company of its right, under reasonable regulations, to move its freight trains at some time during the twenty-four hours. Such a prohibition is a taking of the property of complainant, under the guise of the exercise of the police power; it is not regulation, it is confiscation.

State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 36, 86 N. W. 657; Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 40, 21 N. W. 828; American Union Teleg. Co. v. Harrison, 31 N. J. Eq. 627; Summit Twp. v. New York & N. J. Teleph Co. 57 N. J. Eq. 127, 41 Atl. 146; New Hope Teleph. Co. v. Concordia, 81 Kan. 514, 106 Pac. 35; Missouri River Teleph. Co. v. Mitchell, 22 S. D. 191, 116 N. W. 67; Michigan Teleph. Co. v. Benton Harbor, 121 Mich. 512, 47 L.R.A. 104, 80 N. W. 386; Michigan Teleph. Co. v. St. Joseph, 121 Mich. 506, 47 L.R.A. 87, 80 Am. St. Rep. 520, 80 N. W. 383; Jonesville v. Southern Michigan Teleph. Co. 155 Mich. 86, 130 Am. St. Rep. 562, 118 N. W. 736, 16 Ann. Cas. 439; Carthage v. Central N. Y. Teleph. & Teleg. Co. 185 N. Y. 448, 113 Am. St. Rep. 932, 78 N. E. 165; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; 3 Dill. Mun. Corp. 5th ed. §§ 1230, 1269, 1270; Asheville Street R. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316; Shreveport Traction Co. v. Shreveport, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40.

It is a fundamental rule that if a part of an ordinance is void, another essential and connected part of the same is also void. Where an ordinance or statute is couched in terms so broad as to exceed the limitation of the powers of the council or legislature to enact the same, the court will not, by construction, limit the statute to the scope which might constitutionally be given by the council or legislature, but will hold the

ipal Paving Co. v. Donovan Co. — Tex. Civ. App. —, 142 S. W. 644; Macomb v. Jones, 158 Ill. App. 271; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Portland R. Light & P. Co. v. Portland, 200 Fed. 891; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Cooley, Const. Lim. 7th ed. p. 400; 9 Enc. U. S. Sup. Ct. Rep. 494; Stone v. Mississippi, 101 U. S. 814, 817, 25 L. ed. 1079; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 748, 28 L. ed. 586, 4 Sup. Ct. Rep. 652; Slaughter-House Cases, 16 Wall. 36, 62, 21 L. ed. 394, 404; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Portland v. Cook, 48 Or. 555, 9 L.R.A. (N.S.) 733, 87 Pac. 772; Portland v. Meyer, 32 Or. 371, 67 Am. St. Rep. 538, 52 Pac. 21; State v. Muller, 48 Or. 255, 120 Am. St. Rep. 805, 85 Pac. 855, 11 Ann. Cas. 88, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Railroad Commission Cases, 116 U. S. 307, 325, 29 L. ed. 636, 642, 6 Sup. Ct. Rep. 344, 388, 1191; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; Freeport Water Co. v. Freeport, 180 U. S. 587, 588, 611, 45 L. ed. 679, 680, 693, 21 Sup. Ct. Rep. 493; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 210, 48 L. ed. 406, 412, 24 Sup. Ct. Rep. 241; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 273, 53 L. ed. 182, 29 Sup. Ct. Rep. 50.

Ordinance No. 16,491, prohibiting the use of steam locomotives on Fourth street, does not deny the appellant the equal protection of the laws, although it alone is named in the ordinance, where no other person or corporation has the right to run engines in that street, as is the case at bar.

Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734.

The appropriate regulation of the use of property is not "taking it" within the meaning of the constitutional prohibition against the deprivation of property without due process of law.

Ibid.; Pittsburg, C. & St. L. R. Co. v. Hood, 36 C. C. A. 423, 94 Fed. 624.

The ordinance complained of, prohibiting the use of steam locomotives on Fourth street, does not impair any vested rights of the appellant under its charter.

Richmond, F. & P. R. Co. v. Richmond, supra.

The charter of the city of Portland in force when ordinance No. 16,491 was passed contains the following provision: "The council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained: (1) To exercise within the limits of the city of Portland all the powers commonly known as the police power to the same extent as the state of Oregon has or could exercise said power within said limits." Under this power the council has authority to regulate the running of railroad cars within the city limits, and to prohibit their propulsion by steam.

Ibid.; Buffalo & N. F. R. Co. v. Buffalo, 5 Hill, 209; Dill. Mun. Corp. 5th ed. § 65.

The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances.

McQuillin, Mun. Ord. 2d ed. § 731, p. 1586; Greensboro v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130, 2 So. 725; Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85; Ex parte Delaney, 43 Cal. 478; Ex parte Smith, 38 Cal. 702; Louisville v. Roupe, 6 B. Mon. 591; Sprigg v. Garrett Park, 89 Md. 406, 43 Atl. 813; Com. v. Patch, 97 Mass. 221; Lamar v. Weidman, 57 Mo. App. 507; Hannibal v. Missouri & K. Tel. Co. 31 Mo. App. 23; Budd v. Camden, 69 N. J. L. 193, 54 Atl. 569; Union Oil Co. v. Portland, 198 Fed. 441; Dobbin v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

The legal presumption is in their favor, unless the contrary appears on their face, or is established by proper evidence.

McQuillin, Mun. Ord. 2d ed. § 731.

1587; Union Oil Co. v. Portland, 198 Fed. 441.

In determining the question, the court will have to regard all the circumstances of the particular city or corporation, the object sought to be obtained, and the necessity which exists for the ordinance.

McQuillin, Mun. Ord. 2d ed. § 732, p. 1588.

When a privilege or a franchise is granted containing the reserved power to alter, amend, or repeal, whenever the public interest may require, no question as to the impairment of the obligation of the contract can arise when additional burdens are imposed.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; 1 Nellis, Street R. Acci. Law, § 46.

A municipal corporation has no power to grant a franchise in perpetuity without express statutory authority from the legislature.

Joseph v. Joseph Waterworks Co. 57 Or. 586, 111 Pac. 864, 112 Pac. 1083; Boisé City Artesian Hot & Cold Water Co. v. Boisé City, 59 C. C. A. 236, 123 Fed. 232, 108 C. C. A. 523, 186 Fed. 705; Logansport R. Co. v. Logansport, 114 Fed. 688; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Nellis, Street R. Acci. Law, § 46; 2 Elliott, Roads & Streets, § 1048; Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510; Belleville v. Citizens' Horse R. Co. 152 Ill. 171, 26 L.R.A. 681, 38 N. E. 584; McQuaid v. Portland & V. R. Co. 18 Or. 237, 22 Pac. 899; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; 28 Cyc. 655, 875; Cooley, Const. Lim. 6th ed. 251; Brenham v. Brenham Water Co. 67 Tex. 542, 4 S. W. 143; Illinois Trust & Sav. Bank v. Arkansas City Water Co. 67 Fed. 196; Birmingham & P. Mines Street R. Co. v. Birmingham Street R. Co. 79 Ala. 472, 58 Am. Rep. 615; Huron Waterworks Co. v. Huron, 7 S. D. 9, 62 N. W. 975; Westminster Water Co. v. Westminster, 98 Md. 551, 64 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990.

A contract beyond the power of the city is void *ab initio*.

State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; Flynn v. Little Falls Electric & Water Co. 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

The city was vested with the right and power, at the time ordinance No. 599 was passed, to designate the street upon which the railroad could locate its road; and this *right carried with it* the power to impose *reasonable conditions to such grant or permission*, which, when accepted by the grantee, became binding on it.

Pittsburg, C. & St. L. R. Co. v. Hood, 36 C. C. A. 423, 94 Fed. 618; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Mercantile Trust & D. Co. v. Collins Park & Belt R. Co. 101 Fed. 347; Pacific R. Co. v. Leavenworth, 1 Dill. 393, Fed. Cas. No. 10,649; Michigan Teleph. Co. v. Charlotte, 93 Fed. 11; Pittsburg, C. & St. L. R. Co. v. Hood, 36 C. C. A. 423, 94 Fed. 618.

Prohibition of steam power, under ordinance No. 16,491, does not prevent employment of electricity as a motive power.

Booth, Street Railways, 2d ed. § 68.

Ordinance No. 16,491 does not constitute an interference with interstate commerce.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances, subject to the supervision of the courts.

2 McQuillin, Mun. Ord. 2d ed. §§ 731, 732; Union Oil Co. v. Portland, 198 Fed. 441; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

Any doubt or ambiguity in ordinances 599 and No. 16,491 must be resolved against appellant.

19 Cyc. 1459; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 26, 32 L. ed. 837, 842, 9 Sup. Ct. Rep. 409; Meridian v. Farmers' Loan & T. Co. 74 C. C. A. 221, 143 Fed. 71, 6 Ann. Cas. 599; Helena v. Helena Waterworks Co. 58 C. C. A. 381, 122 Fed. 14; Oregon v. Portland General Electric Co. 52 Or. 502, 95 Pac. 722, 98 Pac. 160; Joseph v. Joseph Waterworks Co. 57 Or. 586, 111 Pac. 864, 112 Pac. 1083.

A right granted in the nature of a franchise, to be exercised for a public purpose, cannot be assigned or leased without legislative authority.

Oregon v. Portland General Electric Co. 52 Or. 521, 95 Pac. 722, 98 Pac. 160; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409.

Mr. Justice Lamar delivered the opinion of the court:

The bill alleged that, by virtue of the laws of the state and its charter, the city of Portland passed ordinance 599, permitting cars to be run along 4th street. That ordinance reserved the right "to make and alter regulations" and to "prohibit the running of locomotives." And as the court held that this reserve power authorized the

city to prohibit the use of steam, the appellant—though originally contending that ordinance 599 was valid and constituted a contract which could not be impaired—now insists that under the law of force in 1869, the city could only "designate" the street on which tracks could be located, and could not, by reservation, give itself power to prohibit the use of steam or the hauling of freight cars, nor could it provide for municipal forfeiture of a state franchise.

1. Under the Oregon Code (5077, 5078) the power to designate the street on which railroad tracks could be located was equivalent to the power to consent to the use of that street. The city was not limited to merely naming the thoroughfare, or giving 572]or refusing its consent. But—*provided they did not defeat the state franchise —could fix terms and reserve powers beyond those otherwise possessed by it as a municipality. The specific conditions and general powers reserved in § 3 of ordinance 599 were not inconsistent with the grant from the state, and when, with such reservation, it was accepted by the company, it became contractual as well as legislative. The railroad could not rely on it for the purpose of laying the tracks, and then deny the validity of such conditions. The ordinance was proposed and accepted as an entire contract, and, as such, was binding on the railroad as well as on the city. The power therein reserved "to make regulations," coupled with the right "to prohibit the running of locomotives at such time and in such manner as the city might deem necessary," authorized the city to prohibit the use of steam locomotives. This did not defeat the grant, inasmuch as it was permissible and practicable to use electricity, gasolene, or other motive power free from noise and vibration—increased here above the ordinary when steam was used on a grade said to be one of the steepest, if not the steepest, in the state. The case is like Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734, where, under a somewhat similar ordinance, it was held that the city might provide that no car or engine could be drawn or propelled by steam along certain parts of the highway.

2. The appellant insists, however, that even if the city can regulate the motive power, it cannot prohibit the hauling of freight cars, and that the invalidity of this provision and that forfeiting the franchise renders the whole ordinance 16,491 void. In reply it is contended that even if there were no other route than 4th street by which to reach the terminals, it might be necessary for the railroad to establish a freight depot in another part of the city, and make transfers by other vehicles, rather than to continue to haul freight cars through 4th street; *but that, in any[573 event, the "entire ordinance would not be void if that portion relating to freight trains were found to be invalid."

The provisions relating to motive power prohibiting the hauling of freight cars, and declaring a forfeiture for a violation of the ordinance, are so far separable that they do not necessarily stand or fall together and therefore the regulation against the use of steam can be enforced without regard to the validity of the prohibition against hauling freight cars. Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 99, 42 L. ed. 964, 18 Sup. Ct. Rep. 505.

3. Even if the city could have contracted for the right to revoke the state's franchise the council did not attempt to reserve a power to repeal, but only that it might make and alter regulations; and ordinance 16,491, whether treated as an exercise of the general police or special reserve power recognized that the carrier might use electricity to haul passenger cars. There is nothing in that ordinance or in this record which indicates that there is any difference in result in the operation of the two classes of cars, or that the company has less right to haul one than the other. The lessee and its assignors, as common carriers, were charged with the duty of operating both and ordinance 599, in permitting a railway track to be laid in 4th street, expressly authorized cars to be run thereon. Manifestly that gave the right to the company to transport freight as well as passengers. But if the city can prohibit the company from operating one set of cars, it can prevent the use of the other; and under the power to regulate, it could thus defeat the franchise granted by the state of Oregon and impair the contract under which the tracks were located, and on the faith of which the terminals were constructed.

But while the power to regulate does not authorize the city to prohibit the use of the tracks in hauling freight cars, it may legislate in the light of facts and conditions *which would make restrictions rea-[574 sonable and valid regulations. The extent of the power of the city and the rights of the company, however, ought not to be finally adjudicated on this record. For while the ordinance was attacked as a whole, and there was some testimony that it would be possible to reach the terminals over other railways and by means of a belt line then being constructed for handling through freight, but not finished, yet the evidence was directed to the injurious consequences resulting from the use of steam, and not from hauling cars. The bill was filed primarily to enjoin the city from prosecuting

the company for running a steam locomotive. In sustaining the ordinance as a whole, the court called attention to the fact that the street was quite steep throughout the business district, and the noise, vibration, cinders, and soot from the moving steam locomotive and train seriously interfere with the transaction of business, and were a source of danger and inconvenience to the public. But nothing appears to show that the noise or danger would be different in character or result from that caused by the running of other electric cars, or that there was any reason why freight cars should be prohibited when passenger cars were permitted to be run. The city has the undoubted right to make regulations as to cars used in the transportation of local freight to and from the terminal. If, as claimed, the belt line, when completed, will afford convenient and accessible means of handling through cars without the necessity of going through 4th street, that fact may be given the weight to which it is entitled when regulations are made. But those issues were not clearly raised nor specifically ruled on by the lower court, and the city has neither attempted to prosecute for hauling freight cars nor attempted to enforce a forfeiture. These questions ought not to be determined here until such issues have been more definitely considered by the court 575] of original jurisdiction. Without *prejudice to the right of either when such questions arise, the refusal to enjoin the prosecution for running a steam locomotive and the order entering a decree dismissing the bill must be affirmed.

Mr. Justice Hughes and Mr. Justice Pitney concur in the result.

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ROBERT VAN IDERSTINE, Trustee in Bankruptcy of Abraham Fellerman and Isidor J. Fellerman, Individually and as Members of the Firm of A. Fellerman & Son, Appt.,

v.

NATIONAL DISCOUNT COMPANY.

(See S. C. Reporter's ed. 575–583.)

**Trial — verdict — effect.**

1. The general verdict of a jury in favor of the trustee in bankruptcy in a suit to set aside as fraudulent a transfer of book accounts made by the bankrupt to secure a loan cannot be treated as a finding that there was any intent to defraud of which the transferee had notice, where the court charged the jury in effect that the transfer was to be treated as a fraudulent conveyance if the transferee made the loan with knowledge that the money was to be used to pay an existing debt, the fact of which knowledge was admitted.

[For other cases, see Trial, XI., in Digest Sup. Ct. 1908.]

**Bankruptcy — fraudulent transfer — knowledge of transferee.**

2. The mere knowledge that the money loaned to an insolvent firm on the security of its book accounts within four months of the bankruptcy proceedings was to be used to pay an existing debt does not charge the transferee with knowledge of any intent on the part of the borrower to defraud, so as to entitle the trustee in bankruptcy to have the transfer set aside as fraudulent.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

**Appeal — proper judgment — dismissal.**

3. The contention that the circuit court of appeals should not have ordered the dismissal of the complaint in a suit by the trustee in bankruptcy to set aside an alleged fraudulent conveyance when it found that the transferee had no knowledge of any fraudulent intent, since the latter only asked for a new trial, is not well founded, where error was assigned not only on the refusal to set aside the verdict against it, but on the failure to enter a decree in its favor.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

[No. 136.]

Argued January 22 and 23, 1913. Decided February 24, 1913.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which, reversing a decree of the District Court for the Southern District of New York, directed the dismissal of a complaint in a suit by a trustee in bankruptcy to set aside an alleged fraudulent conveyance. Affirmed.

See same case below, 98 C. C. A. 300, 174 Fed. 518.

The facts are stated in the opinion.

Mr. Abram I. Elkus argued the cause, and, with Mr. Garrard Glenn, filed a brief for appellant:

The appellee was not a transferee in good faith.

Singer v. Jacobs, 3 McCrary, 638, 11 Fed. 559; Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67.

If appellee's employee had looked at the books, he would have discovered that the bankrupts were insolvent. The books, of course, showed it; their later destruction by the bankrupts is sufficient evidence of that. But he carefully omitted to do so. He cannot, however, nor can the appellee, escape the knowledge which these books would have afforded, by a refusal to examine them.

Re Pease, 129 Fed. 446; Clements v. Moore (Clements v. Nicholson) 6 Wall. 299, 18 L.

ed. 786; Singer v. Jacobs, 3 McCreary, 638, 11 Fed. 559; Dokken v. Page, 77 C. C. A. 674, 147 Fed. 438.

The least that can be said of this transaction is that it was very much out of the usual course of business. But that, of itself, is a strong badge of fraud.

Kempner v. Churchill, 8 Wall. 362, 19 L. ed. 461; Hyde v. Sontag, 1 Sawy. 249, Fed. Cas. No. 6,974.

All that is required in cases of this sort is such notice as would put a reasonable and honest man on inquiry.

Wright v. Sampter, 152 Fed. 196; Walbrun v. Babbitt, 16 Wall. 577, 582, 21 L. ed. 489, 490; Bartles v. Gibson, 17 Fed. 297.

A transfer is fraudulent as against creditors of its purpose is to use the proceeds in preferring certain of the bankrupt's creditors.

Roberts v. Johnson, 81 C. C. A. 47, 151 Fed. 567; Re Pease, 129 Fed. 446; Re Beerman, 112 Fed. 663; Ex parte Mendell, 1 Low. Dec. 506, 4 Nat. Bankr. Rep. 302, Fed. Cas. No. 9,418; Crafts v. Belden, 99 Mass. 535; Re McLam, 97 Fed. 922; National Bank v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 32 Sup. Ct. Rep. 633.

The appellate court had the power to grant a new trial.

Edwin v. Thomas, 2 Vern. 75; Stace v. Mabbot, 2 Ves. Sr. 553; Faulconberg v. Peirce, 1 Ambl. 210; Cleeve v. Gascoigne, 1 Ambl. 323; Watt v. Starke, 101 U. S. 247, 25 L. ed. 826.

A new trial should have been granted.

Clyde v. Richmond & D. R. Co. 18 C. C. A. 467, 25 U. S. App. 642, 72 Fed. 121; McLaughlin v. Bank of Potomac, 7 How. 220, 12 L. ed. 675; Estho v. Lear, 7 Pet. 130, 8 L. ed. 632; Peoria Gas & Electric Co. v. Peoria, 200 U. S. 48, 54, 50 L. ed. 365, 366, 26 Sup. Ct. Rep. 214; Barber v. Coit, 55 C. C. A. 145, 118 Fed. 272; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Standard Computing Scale Co. v. Computing Scale Co. 76 C. C. A. 384, 145 Fed. 627; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

Mr. Charles H. Fuller argued the cause, and, with Mr. William J. Wallace, filed a brief for appellee:

Undoubtedly the court can, in an equity case, at its discretion, submit the facts to the consideration of the jury; but when this is done the verdict is merely advisory, and it is the duty of the court to give an independent judgment upon its own consideration of the testimony.

Oil Well Supply Co. v. Hall, 63 C. C. A. 343, 128 Fed. 875; Johnson v. Harmon, 94 U. S. 371, 24 L. ed. 271; Watt v. Starke, 101 U. S. 247, 25 L. ed. 826; Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, 1 Mor. Min. Rep. 683.

Fellerman's action in paying legitimate debts was not a fraud.

Re Bloch, 74 C. C. A. 250, 142 Fed. 676; Githens v. Schiffler, 112 Fed. 505; Coder v. Arts, 15 L.R.A.(N.S.) 372, 82 C. C. A. 91, 152 Fed. 943, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Tompkins v. Hunter, 149 N. Y. 117, 43 N. E. 532; Delaney v. Valentine, 154 N. Y. 700, 49 N. E. 65; Shotwell v. Dixon, 163 N. Y. 43, 57 N. E. 178; Ex parte Stubbins, L. R. 17 Ch. Div. 68; Dodge v. McKechnie, 156 N. Y. 520, 51 N. E. 268.

There was no evidence of want of good faith on the part of appellee.

Mr. Justice Lamar delivered the opinion of the court:

Van Iderstine, trustee of Fellerman & Son, brought suit in the United States district court for the southern district of New York to set aside a transfer of accounts made to the National Discount Company as security for a loan, alleging that it was a fraudulent conveyance, and that the lending company was charged with notice of Fellerman's *intent to defraud. It is[580 unnecessary to state the facts further than to say that Fellerman and his firm were insolvent, though rated at $50,000 to $75,000 in the Commercial Reports. Having been recommended by another merchant, he applied to the Discount Company to learn the terms on which he could borrow with book accounts as security. He was informed as to the method of doing business and the terms on which it would lend money, which, besides interest, included its customary charge of 5 per cent of the face of the accounts for services in connection with correspondence, collections, and the like. He returned in a few days with a number of accounts, and applied for a loan of $3,000, stating that he was pressed for funds and needed the money for the purpose of paying a note which matured that day. The accounts were transferred, the money was advanced, and Fellerman used it to take up a note, in bank, which had been indorsed by his son-in-law. Two or three days afterwards another loan of $1,000 on similar security was made, and the parties are at issue as to whether the money was used for paying a debt or went into the general funds of the firm and was checked out for other purposes. The day following the last loan a petition in bankruptcy was filed, and after adjudication a trustee was elected. He then brought this suit to have the transfer set aside and to

compel the Discount Company to account for the collections made by it.

The district judge called in a jury to pass upon the disputed fact. After the introduction of the evidence, which was very conflicting, the court charged the law relating to fraudulent conveyances and the necessity of showing that there had been an intent on the part of Fellerman to defraud, and that the Discount Company had knowledge of such purpose. He, however, refused to charge that it was not fraudulent for the company to advance money to be used by Fellerman in paying legitimate 581]debts, *and instead instructed them that a preference was as much within the terms of the act as though Fellerman had concealed the money from his creditors. The jury made no special finding, but rendered a general verdict in favor of the trustee. It was approved by the district judge, who refused to grant a new trial, and entered a judgment against the company.

The circuit court of appeals ( 98 C. C. A. 300, 174 Fed. 518) made a statement of fact in which it found that it was doubtful if Fellerman intended to defraud; but, if he did, the Discount Company did not know thereof, and was not charged with knowledge by any of the circumstances surrounding the transaction, or by the fact that Fellerman borrowed on hard terms, upon the security of book accounts. It therefore reversed the judgment of the district court, and directed that the complaint be dismissed. The trustee then brought the case here by appeal.

The general verdict of the jury cannot be treated as a finding that there was an intent to defraud of which the Discount Company had knowledge. For whatever view they may have taken on that issue, the verdict in favor of the trustee was practically demanded by the instructions given. For the district court charged in effect that the transfer was to be treated as a fraudulent conveyance if the Discount Company made the loan with the knowledge that the money was to be used in paying an existing debt. The finding can therefore be treated as the jury's observance of the instructions, since it was admitted that Fellerman, in applying for the loan, stated that he needed the money for the purpose of paying a debt due that day in bank. In the absence of any other special finding in the case, and bearing in mind that the verdict of the jury was only advisory, the case being one in equity, we agree with the circuit court of appeals, which held that the Discount Company had no knowledge of any intent on the part of Fellerman to defraud. 582]*If so, its decree* *directing the complaint to be dismissed must be affirmed*, unless, as matter of law, the transfer is to be treated as a fraudulent conveyance, in view of the fact that the company knew that the money was to be used in paying an existing debt.

Conveyances may be fraudulent because the debtor intends to put the property and its proceeds beyond the reach of his creditors; or because he intends to hinder and delay them as a class; or by preferring one who is favored above the others. There is no necessary connection between the intent to defraud and that to prefer, but inasmuch as one of the common incidents of a fraudulent conveyance is the purpose on the part of the grantor to apply the proceeds in such manner as to prefer his family or business connections, the existence of such intent to prefer is an important matter to be considered in determining whether there was also one to defraud. But the two purposes are not of the same quality, either in conscience or in law, and one may exist without the other. The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is *malum per se* and the other *malum prohibitum*,—and then only to the extent that it is forbidden. A fraudulent conveyance is void regardless of its date; a preference is valid unless made within the prohibited period. It is therefore not in itself unlawful to prefer, nor fraudulent for one, though insolvent, to borrow in order to use the money in making a preference. So that, even if the Discount Company knew that Fellerman borrowed the money in order to pay off an honest debt, the transfer would not have been subject of attack by the trustee, except for the fact that a petition in bankruptcy was filed within four months thereafter. But the institution of the *such proceedings did not re-[583 late back and convert a lawful transfer into a fraudulent conveyance.

Cases under the present statute, like Re Beerman, 112 Fed. 663, relied on by the trustee, relate to transactions in which the mortgagee was practically the representative of the preferred creditor, and where, consequently, the conveyance was as much subject to attack as though it had been made directly to him. But here the Discount Company was not a creditor of Fellerman & Son, and had no relation with the persons to whom the money was paid. National Bank v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 32 Sup. Ct. Rep. 633. The transfer, therefore, was not a preference to the Discount Company,

and could not be set aside without proof that it knew that Fellerman not only intended to pay some of his creditors, but to defraud others. The difference between the two classes of cases is authoritatively recognized by Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008, where it was said that "an attempt to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one."

The circuit court of appeals applied this principle in the present case. Having found that the Discount Company had no knowledge of any intent to defraud, and the evidence supporting that finding, the conveyance cannot be set aside, whether the money was used to pay an existing debt, or, as claimed, a part was deposited with the general funds of the firm.

It is contended that even if the finding of the Circuit Court of Appeals was correct, it should not have ordered the complaint to be dismissed, since the company itself only asked for a new trial. But error was assigned not only on the refusal to set aside the verdict, but on the failure to enter a decree in favor of the Discount Company. The facts found by the Circuit Court of Appeals warranted a dismissal of the complaint, and the decree is affirmed.

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584] *MARCELINA ROSALY, Widow of Rabainne, Appt.,
v.
ROBERTO GRAHAM Y FRAZER.

(See S. C. Reporter's ed. 584-591.)

**Appeal — from Porto Rico supreme court —scope of review.**

1. The jurisdiction of the Federal Supreme Court on an appeal from the supreme court of Porto Rico, which was governed by the act of April 12, 1900 (31 Stat. at L. 77, 85 chap. 191), § 35, measuring such jurisdiction by the power conferred upon the former court to review judgments of the territorial supreme courts, is confined to determining whether the facts found by the supreme court of Porto Rico support its judgment, or whether there was material and prejudicial error in the admission or rejection of evidence, manifested by exceptions duly certified.

[For other cases, see Appeal and Error, III. d, 5; 4286-4295, 4879-4888, in Digest Sup. Ct. 1908.]

**Appeal — from Porto Rico supreme court — statement of facts.**

2. The statement of facts contained in the opinion may be accepted in lieu of more formal findings on an appeal to the Federal Supreme Court from the supreme court of Porto Rico, where the judgment record itself discloses that such opinion was made a part of the judgment.

[For other cases, see Appeal and Error, V. o, in Digest Sup. Ct. 1908.]

**Trial — findings — sufficiency to support judgment.**

3. A decree of the supreme court of Porto Rico which affirmed a decree of the district court, dismissing the bill in a suit to establish plaintiff's ownership to an undivided interest in real property in the possession of defendant, and to set aside the registration in the name of defendant, is supported by a finding that the fundamental fact of plaintiff's interest in the property at the time of her action against defendant had not been proved, which is equivalent to a negative finding upon a fact essential to the maintenance of her suit.

[For other cases, see Trial, XI., in Digest Sup. Ct. 1908.]

[No. 64.]

Submitted December 5, 1912. Decided February 24, 1913.

APPEAL from the Supreme Court of Porto Rico to review a decree which affirmed a decree of the District Court for the Judicial District of Ponce, dismissing the bill in a suit to establish plaintiff's ownership of an undivided interest in real property in the possession of the defendant, and to set aside registration in the name of the defendant. Affirmed.

See same case below, 16 P. R. R. 156.

The facts are stated in the opinion.

Mr. **Jacinto Texidor** submitted the cause for appellant.

Messrs. **Manuel Rodriguez Serra** and **Charles Hartzell** submitted the cause for appellee.

Mr. Justice **Pitney** delivered the opinion of the court:

This action was brought in the district court for the judicial district of Ponce, by the appellant, against the respondent, for the purpose of establishing her ownership of an undivided interest in certain real property in Ponce *of which the defendant[585 was in possession, and for setting aside the registration of possession and of ownership of the same property in the name of the defendant, alleged to have been fraudulently procured by him, and to stand as a bar, preventing the registration of the plaintiff's alleged undivided interest.

The action was fully tried before the district court without a jury, upon the issues raised by the plaintiff's amended com-

NOTE.—On the appellate jurisdiction of Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369

plaint and the defendant's answer thereto, and the following decision was rendered:

Ponce, P. R., April 26th, 1909.

The question involved in this suit is to determine the rights of Doña Marcelina Rosaly in a property which she, as a member of a mercantile partnership, gave in lease to the defendant in the year 1880. The other members of said partnership were relatives of the plaintiff herein. It seems that in the year 1886 and following years, the defendant bought the respective interests of the several partners, and it seems, also, that he did not buy the interest belonging to Doña Marcelina, for the reason that she had lost her rights to an interest in the property belonging to said mercantile partnership. More properly speaking, the defendant acquired all the interests belonging to all such persons as he believed to have an interest in the property referred to. Twenty-three years have elapsed since the year 1886. The plaintiff lacks absolutely any means to show what was her interest in the properties of the partnership, and whether or not she had any interest whatever in the year 1886. There is absolute lack of evidence on the part of the plaintiff. This court does not look at old claims with favor, specially when the plaintiff's delay in bringing the action is not explained. Counsel for both parties have entered into a lengthy argument upon the construction of the mortgage law and other points. But the court does not make any decision with 586] regard to *such questions at the present time. The most important matter is the absolute want of evidence on which to base a judgment in favor of the plaintiff. Therefore the action is dismissed, with costs against the plaintiff.

Martin E. Gill,
District Judge.

Judgment having been rendered accordingly, the plaintiff appealed to the supreme court of Porto Rico. Thereafter her attorneys filed in the district court what purports to be a full history of the proceedings at the trial. It is entitled, "Statement of Facts and Bill of Exceptions," and is certified by Hon. Charles E. Foote (who succeeded Judge Gill as judge of the district court) to contain a "true and accurate statement of all the evidence introduced, exceptions taken, and proceedings had, during the trial of this cause in the district court of Ponce."

The supreme court of Porto Rico, affirmed the judgment, Mr. Justice del Toro delivering the opinion (16 P. R. R. 156), *in which*, after stating the issues raised by *the pleadings, he reviews* the evidence and states the conclusions of the court thereon as follows:

"The first question to be considered and decided is the following: Did the plaintiff prove her title? She alleged, as shown by the transcript made above, that she was, and has always been, the owner, in full ownership, of an undivided interest, equivalent to the sum of $6,253.67, in the total value of $27,443.67, which value was given to the estate left at the death of Don Mateo and Don Luis Rabainne in the partition proceedings of the said estate. The defendant denied said allegation. And the evidence shows the following:

"It is true that from the testamentary proceedings of Don Mateo and Don Luis Rabainne, executed before a notary public and recorded in a notarial protocol on the 28th of January, 1870, it appears that the said Messrs. *Rabainne died, respective-[587 ly, on the 23d of April, 1868, and on the 8th of April, 1869; that the former left as heirs his widow, Doña Bernardina Franco, and his children, Luis, represented by his daughter Luisa Rabainne y Rosaly; Ramona, represented by her children, Jacobo, Ofelia, and Herminia Lopez y Rabainne; Josefa; and Hortensia; and the latter, his said daughter Luisa, and his widow, the plaintiff, Marcelina Rosaly; that the properties left at their deaths were constituted by whatever interest might belong to them in the partnership M. Rabainne é Hijos; that such partnership was liquidated by a deed executed on the 19th of January, 1870, by the heirs and representatives of both persons deceased; that among the properties belonging to said partnership there were the lot and building involved in this suit, which were valued at $9,108, and steam engines, etc., valued at $18,335.67, both items aggregating $27,443.67, of which $18,000 belonged to the estate of Don Mateo, and $9,443.67 to that of Don Luis; and that the inheritance left by Don Luis was adjudicated as follows: to his widow, Doña Marcelina Rosaly, the plaintiff, $6,253.67, in partial payment of the properties brought by her into her marriage, which amounted to $19,030.39, and of one half of the conjugal property belonging to her; and to his daughter Luisa, $3,190.

"But the evidence shows that, although the above is true, the plaintiff contributed all the capital adjudicated to her, to the partnership which, under the firm M. Rabainne é Hijos, was constituted by her, together with Doña Bernardina Franco, widow of Rabainne, and Don Jobo Lopez, by a public deed executed on the 8th of February, 1870. Such partnership which was to be engaged in the same line of business followed by the extinguished partnership of

M. Rabainne é Hijo, constituted by Don Mateo and Don Luis, was extended by public deeds executed on the 22d of April, 1873, 588]and the 7th of July, 1875, and no *evidence has been introduced tending to show that the same has been duly and finally liquidated, there being several circumstances showing that said partnership continued, although, perhaps in an irregular manner, for several years longer.

"The plaintiff claims as owner of a certain co-ownership, and the evidence shows that she contributed said co-ownership to a mercantile partnership, to the fate of which said co-ownership was subject from that time. And the evidence shows further that a balance of said partnership having been made on the 30th of November, 1875, it appeared that the contribution of the plaintiff was reduced to $2,478.52, such as is shown by the deed containing the partition proceedings of the properties left at the death of Doña Bernardina Franco, widow of Rabainne, executed before a notary public, on the 6th of May, 1876, by the plaintiff herself and other persons, and that there are circumstances showing that years afterwards the plaintiff was debtor of the partnership, as shown apparently by the books of the latter.

"Such being the case, it follows that the first fact, which is the fundamental fact of the complaint filed in this case, has not been proven, and, consequently, that the judgment rendered by the district court is just and proper."

The numerous exceptions to the rulings of the trial court upon matters of evidence were then reviewed, with the result of determining that there was no legal error therein.

The resulting judgment was expressed as follows:

San Juan, Porto Rico, March 11th 1910.

This court has carefully examined the transcript of record filed in this case, and considered the briefs and arguments of counsel for both sides, and for the reasons given in the opinion filed herewith, the court decides to dismiss the appeal and to 589]affirm the judgment appealed *from, rendered by the district court of Ponce on the 26th of April, 1909.

An appeal having been taken to this court, the following order was made:

San Juan, Porto Rico, 19th of May, 1910.

As the statement of facts and bill of exceptions which was approved by the Hon. Charles E. Foote, District Judge for the Judicial District of Ponce, on the 15th of July, 1909, and which forms a part of the record on the appeal taken in the above-entitled case, was the statement of facts and bill of exceptions considered and acted upon by this court in the discussion and decision of said appeal, it is hereby ordered that the same be used as statement of facts and bil lof exceptions in this case, in the appeal taken by the plaintiff herein to the Supreme Court of the United States from the judgment rendered by the supreme court of Porto Rico.

José C. Hernandez,
Chief Justice of the Supreme Court of Porto Rico.

The cause has been argued here very much at large, and as if it were the duty of this court to review the evidence and reach its own conclusions of fact therefrom. This is a misapprehension of the proper function of this court in the premises. At the time the appeal was taken and the record made up § 35 of the act of April 12, 1900, chap. 191, known as the Foraker act, was in force (31 Stat. at L. 77, 85, since superseded by § 244 of the Judicial Code of March 3, 1911, 36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 229), by which it was enacted "that writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same *regulations and in the same cases as[590 from the supreme courts of the territories of the United States," etc. Writs of error and appeals from the supreme courts of the territories were regulated by act of April 7, 1874, chap. 80, § 2, 18 Stat. at L. 27, 28, by which it was provided: "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Our jurisdiction, therefore, is confined to determining whether the facts found by the supreme court of Porto Rico support its judgment, and whether there was material and prejudicial error in the admission or rejection of evidence, manifested by exceptions duly certified. Gonzales v. Buist, 224 U. S. 126, 130, 56 L. ed. 693, 695, 32 Sup. Ct. Rep. 463; Nielsen v. Steinfeld, 224 U. S. 534, 538, 56 L. ed. 872, 873, 32 Sup. Ct. Rep. 609; Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 515, 54 L. ed. 1131, 1132, 31 Sup. Ct. Rep. 27; String-

fellow v. Cain, 99 U. S. 610, 613, 25 L. ed. 421, 422; Neslin v. Wells, F. & Co. 104 U. S. 428, 429, 26 L. ed. 802, 803; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 313, 40 L. ed. 436, 439, 16 Sup. Ct. Rep. 282; Harrison v. Perea, 168 U. S. 311, 323, 42 L. ed. 478, 482, 18 Sup. Ct. Rep. 129; Young v. Amy, 171 U. S. 179, 183, 43 L. ed. 127, 128, 18 Sup. Ct. Rep. 802.

An examination of the "statement of facts and bill of exceptions" shows that it contains nothing that could, by any stretch of construction, be deemed a finding of facts in the nature of a special verdict. In the absence of such findings there is nothing for us to review except the rulings upon evidence, and, in the absence of error in those rulings, the judgment must be affirmed. Thompson v. Ferry, 180 U. S. 484, 45 L. ed. 633, 21 Sup. Ct. Rep. 453; Gonzales v. Buist, 224 U. S. 126, 130, 56 L. ed. 693, 695, 32 Sup. Ct. Rep. 463; Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 515, 54 L. ed. 1131, 1132, 31 Sup. Ct. Rep. 27.

But since the judgment record itself discloses that the opinion delivered by Mr. Justice del Toro was made a part of the judgment, we may, for present purposes, 591] *accept the statement of facts contained in that opinion in lieu of more formal findings.

The essential facts, as recited in the opinion, may be summarized as follows: That prior to the year 1868, Don Mateo Rabainne and his son, Don Luis Rabainne, as partners in the name of M. Rabainne é Hijos, were the owners of the property in question; that Don Mateo died April 23, 1868, and Don Luis died April 8, 1869; that the partnership was liquidated by deed executed January 29, 1870, by the heirs and representatives of the deceased partners; that in the liquidation a certain part of the interest of Don Luis was found to belong to his widow, the present plaintiff and appellant; that she, together with the widow of Don Mateo, and with Don Jobo Lopez, son-in-law of the latter, entered into a new partnership to continue the former business, under the firm name of M. Rabainne é Hijos, to which partnership the plaintiff contributed all her interest in the property in question; that the plaintiff's interest in the firm was subsequently reduced by withdrawals of capital, and finally extinguished, so that she became a debtor of the partnership. Therefore the supreme court held that the fundamental fact of the plaintiff's interest in the property at the time of her action against the defendant had not been proven. This is equivalent to a negative finding upon a fact essential to the maintenance of her suit, and it, of course, supports the judgment affirming the judgment of the district court that dismissed the action.

There remains only the question whether prejudicial error was committed by the trial court respecting the admission or exclusion of evidence. There are numerous exceptions, with assignments of error based thereon. They have been examined, without finding substantial error in the rulings complained of. They do not merit detailed discussion here.

Judgment affirmed.

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*WILLIAM A. ENSIGN, Plff. in Err., [592

v.

COMMONWEALTH OF PENNSYLVANIA.

(No. 123.)

CHARLES A. ENSIGN, Plff. in Err.,

v.

COMMONWEALTH OF PENNSYLVANIA.

(No. 124.)

(See S. C. Reporter's ed. 592-601.)

**Constitutional law — applicability of Federal Constitution to states — privilege against self-crimination.**

1. The governments of the several states, or their judicial establishments, are not obliged to accord the privilege against self-crimination afforded by U. S. Const., 5th Amend., but this Amendment regulates the procedure of the Federal courts only.

[For other cases, see Constitutional Law, II. b, in Digest Sup. Ct. 1908.]

**Witnesses — privilege — bankrupt's schedule and books.**

2. The protection afforded a bankrupt under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 7, cl. 9, against the offering in evidence against him in any criminal proceeding of any testimony given by him, extends only to the testimony given by the bankrupt upon his examination under that clause of the section, and does not render inadmissible on a

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NOTE.—As to admissibility of schedules filed in a Federal bankruptcy proceeding in a prosecution against a bankrupt for concealment of property—see note to Johnson v. United States, 18 L.R.A.(N.S.) 1194.

On the compulsory deposit of bankrupt's books with receiver or trustee as infringing privilege against self-incrimination—see note to Re Harris, 55 L. ed. U. S. 732.

On statutes prohibiting use of self-incriminating testimony against the witness—see notes to Re Buskett, 14 L.R.A. 407; United States v. James, 26 L.R.A. 418, and Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860.

On the constitutional protection against self-crimination—see note to Levy v. Superior Ct. 29 L.R.A. 811.

criminal prosecution the schedules filed by him in the bankruptcy proceedings, or the testimony of an expert accountant, based upon an examination of his books which he had turned over to the trustee.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[Nos. 123 and 124.]

Argued January 20, 1913. Decided February 24, 1913.

TWO WRITS OF ERROR to the Supreme Court of the State of Pennsylvania to review judgments which affirmed judgments of the Superior Court affirming convictions in the Court of Quarter Sessions of Erie County in that state of the offense of receiving of deposits by insolvent bankers. Affirmed.

See same case below in superior court, 40 Pa. Super Ct. 157, 163; in supreme court, 228 Pa. 400, 77 Atl. 657.

The facts are stated in the opinion.

Mr. John B. Brooks argued the cause, and, with Mr. Charles H. English, filed a brief for plaintiffs in error:

As a matter of justice to the bankrupt, and also for the interests of creditors, he should be encouraged to testify freely in his examination; but he would have no encouragement thereto if, on being prosecuted for an offense, he could not undertake to absolve himself by his own testimony, except at the risk of being tripped or embarrassed by what he had previously sworn to.

Jacobs v. United States, 88 C. C. A. 554, 161 Fed. 694.

Any compulsory discovery extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

Boyd v. United States, 116 U. S. 635, 29 L. ed. 752, 6 Sup. Ct. Rep. 524.

The use before the grand jury of the schedules of an involuntary bankrupt upon the consideration of which an indictment against him under § 29 of the bankrupt act, of fraudulent concealment of property, was found, is an invasion of his constitutional rights.

United States v. Chambers, 135 Fed. 1023, 13 Am. Bankr. Rep. 708.

Congress intended that the bankrupt's schedules and books should not be used against the one filing them in a subsequent criminal prosecution.

United States v. Chambers, 135 Fed. 1023, 13 Am. Bankr. Rep. 708; Johnson v. United States, 18 L.R.A.(N.S.) 1194, 89 C. C. A. 508, 163 Fed. 30; Cohen v. United States, 96 C. C. A. 35, 170 Fed. 715; Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787.

Mr. W. Pitt Gifford argued the cause, and, with Messrs. J. Orin Wait and U. P. Rossiter, filed a brief for defendant in error:

Generally speaking, and in the absence of statutory regulation on the subject, testimony and written statements, voluntarily given or made by a party or witness in a judicial proceeding, are, as admissions and confessions, competent against him on the trial of any issue in a criminal case, to which they are pertinent; and statements made by a party in a judicial inquiry are considered voluntary, if he might have objected to answering on the ground that it would incriminate him, and failed to do so.

Wharton, Crim. Ev. § 664; 1 Roscoe, Crim. Ev. 8th ed. 82, 245; 1 Greenl. Ev. § 225; Williams v. Com. 29 Pa. 102; Hendrickson v. People, 10 N. Y. 13, 61 Am. Dec. 721; Com. v. Reynolds, 122 Mass. 454; Vermont v. Duncan, 4 L.R.A.(N.S.) 1144, note; People v. Wieger, 100 Cal. 352, 34 Pac. 826; People v. Arnold, 40 Mich. 710, 3 Am. Crim. Rep. 73; Abbott v. People, 75 N. Y. 602; Com. v. Doughty, 139 Pa. 383, 21 Atl. 228; Com. v. House, 6 Pa. Super. Ct. 92; Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787.

A written statement of the defendant, when prepared deliberately and seriously, is not only admissible in evidence against him, but is of weight proportioned to its pertinency.

Wharton, Crim. Ev. 8th ed. § 643; 1 Greenl. Ev. Lewis's ed. § 215.

Bankrupts situated as these plaintiffs in error were might have refused to answer, on the ground of self-incrimination.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Re Nachman, 8 Am. Bankr. Rep. 180; Re Feldstein, 4 Am. Bankr. Rep. 321; Re Walsh, 4 Am. Bankr. Rep. 693; Re Henschel, 7 Am. Bankr. Rep. 207; Re Shera, 7 Am. Bankr. Rep. 552; Re Smith, 7 Am. Bankr. Rep. 213; Re Kanter, 9 Am. Bankr. Rep. 104, 117 Fed. 356; United States v. Goldstein, 132 Fed. 789, 12 Am. Bankr. Rep. 755; Re Glassner, S. & Co. 8 Am. Bankr. Rep. 184.

The defendants might have objected to answering the questions before the referee in bankruptcy, on the ground that it would incriminate them, but they did not. They might have refused to file schedules, upon the

ground that information therein contained might be used against them precisely as it has been used in this case, but they did not. They might have refused to give up the custody of their books, on the ground that as bankers they were liable to prosecution under the Pennsylvania act of 1889, P. L. 145, and that the books might incriminate them.

Re Hess, 134 Fed. 109, 14 Am. Bankr. Rep. 559.

While upon an application to compel a bankrupt to produce his books and deliver them to his trustee, the plea of constitutional privilege must prevail, yet he should be required to bring the books and papers which he alleges contained incriminating evidence before either the court or the referee in bankruptcy, and if it appears that his plea is well founded, the court can make such order as will fully protect him from discovery of such evidence, and if possible enable the trustee to obtain such information as is necessary and indispensable in the settlement of the estate.

Re Hark Bros. 136 Fed. 986, 14 Am. Bankr. Rep. 624; Re Harris, 164 Fed. 292, 20 Am. Bankr. Rep. 911.

But they offered no such objection; clearly, therefore, their acts in filing their schedules and delivering the books of account were voluntary; they could not thereafter set up the protection of the Constitution, either Federal or state, which they had so unequivocally waived.

Tucker v. United States, 151 U. S. 164, 38 L. ed. 112, 14 Sup. Ct. Rep. 299.

If freely given once, the evidence may, of course, be used thereafter; for the privilege is purely personal and may be waived.

Re Tracy & Co. 23 Am. Bankr. Rep. 438.

A bankrupt cannot be punished for contempt for refusal to answer incriminating questions, which related to the disposal of property which it was claimed he had concealed in fraud of creditors.

Re George P. Rosser, 2 Am. Bankr. Rep. 746; Re Kanter, 117 Fed. 356, 9 Am. Bankr. Rep. 104.

The time to claim the privilege is when the testimony is offered or book or document is about to be inspected; and if not then claimed, it is waived.

Remington, Bankr. § 1561; Re Tracy & Co. 23 Am. Bankr. Rep. 438; Burrell v. Montana, 194 U. S. 572, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787.

A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he could not have been compelled to give it. The time to avail of a statutory or constitutional protection is when the testimony is offered. The use of statements contained in these schedules, regarding their financial condition, thus voluntarily obtained, is no more of an invasion of their rights than the production of letters which they might have written, or conversations which they had, or testimony which they might have given in a civil suit prior to the criminal prosecution, concerning their financial condition. To exclude one would be as reasonable as to exclude the others.

Kerrch Bros. v. United States, 96 C. C. A. 258, 171 Fed. 366.

On the trial of an involuntary bankrupt for conspiracy to conceal property from his trustee, it is not error to admit in evidence, over defendant's objection and claim of privilege, his books of account, which had been taken possession of by a receiver appointed by the bankruptcy court.

United States v. Halstead, 27 Am. Bankr. Rep. 302.

The use before a grand jury of books, papers, and records of a bankrupt which had been taken charge of by a receiver in bankruptcy pursuant to an order of the bankruptcy court, and which contain the record and accounts with respect to the matters charged in an indictment against the bankrupt, is no violation of the Fifth Amendment to the United States Constitution, providing that no person shall be compelled in any criminal case to be a witness against himself.

Re Tracy & Co. 23 Am. Bankr. Rep. 438.

Where a bankrupt, without protest or claim of constitutional privilege, surrenders his books of account to the receiver in bankruptcy, he waives any privilege against self-incrimination under the Federal Constitution, so far as his books are concerned, and the trustee in bankruptcy may properly permit a state prosecuting officer to make use of the bankrupt's books of account which he had voluntarily surrendered to the receiver, in a criminal prosecution against the bankrupt.

State v. Strait, 94 Minn. 384, 102 N. W. 913; United States v. Chambers, 13 Am. Bankr. Rep. 708, note.

The cases cited by appellants from various Federal courts, as authority for refusal to admit schedules in bankruptcy in a criminal prosecution, have no application here, being founded upon § 860 of the Revised Statutes, and not upon the provisions of the bankruptcy act.

Johnson v. United States, 18 L.R.A.(N.S.) 1194, 163 Fed. 30, 20 Am. Bankr. Rep. 724; United States v. Chambers, 13 Am. Bankr. Rep. 708, and note; Cohen v. United States, 96 C. C. A. 35, 170 Fed. 715; Collier, Bankr. 9th ed. 245.

The authorities confine testimony to oral

evidence, or define it as the statement made by a witness under oath or affirmation.

Bouvier's Law Dict.; 28 Am. & Eng. Enc. Law, 111.

Bankruptcy schedules are pleadings rather than testimony.

Johnson v. United States, 20 Am. Bankr. Rep. 724.

Mr. Justice Pitney delivered the opinion of the court:

There are two writs of error, but a single record. The plaintiffs in error were jointly indicted in the court of quarter sessions of Erie county, Pennsylvania, under an act of May 9, 1889 (P. L. 1889, p. 145), "relating to the receiving of deposits by insolvent bankers, etc., defining the offense, and 597]providing a punishment therefor." *It appears that they were engaged together in business as private bankers in the borough of North East, Pennsylvania, for a long time prior to February 12, 1908; that on that day they received from the prosecuting witness a deposit of $1,000; that on the 15th of February they closed their banking house, and on the 17th made an assignment for the benefit of their creditors; that they were shortly thereafter thrown into involuntary bankruptcy, and schedules were filed by them in the bankruptcy proceeding. The receipt of the deposit of February 12th was made the basis of the indictment.

Upon the trial, the commonwealth offered in evidence, and the court admitted, against the objection of the defendants, the schedules filed by them in the bankruptcy proceeding, and the testimony of an expert accountant, based upon an examination of their banking books, which they had turned over to the trustee. The trial court, and, on successive appeals, the superior court and the supreme court of Pennsylvania (40 Pa. Super. Ct. 157, 163; 228 Pa. 400, 77 Atl. 657), overruled the contentions of the plaintiffs in error that their rights under the Constitution and laws of the United States were infringed by the admission of the evidence referred to, and so they bring the case here.

Article 5 of Amendments to the Federal Constitution is invoked, which provides (*inter alia*)—"No person . . . shall be compelled in any criminal case to be a witness against himself." But, as has been often reiterated, this amendment is not obligatory upon the governments of the several states or their judicial establishments, and regulates the procedure of the Federal courts only. Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Spies v. Illinois, 123 U. S. 131, 166, 31 L. ed. 80, 86, 8 Sup. Ct. Rep. 21, 22; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Barrington v. Missouri, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582; Twining v. New Jersey, 211 U. S. 78, 93, 53 L. ed. 97, 103, 29 Sup. Ct. Rep. 14.

We are referred to a similar prohibition in art. I., § 9, of *the Constitution of Penn-[598 sylvania; but, even if the trial of the plaintiffs in error proceeded in disregard of this provision, no Federal right was thereby infringed.

The only debatable question is that which is based upon the provisions of § 7 of the Federal bankruptcy act of July 1, 1898 (chap. 541, § 7; 30 Stat. at L. 544, 548, U. S. Comp. Stat. 1901, pp. 3418, 3424), which reads as follows:

"Duties of bankrupts.—a. The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in the court within ten days unless further time is granted, after the adjudication, if any involuntary bankrupt, and with the petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known; if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors *and other[599 persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding: Provided, however, that he shall not be re-

quired to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence."

The reliance of the plaintiffs in error, of course, is upon that part of clause 9 of the section which declares—"but no testimony given by him shall be offered in evidence against him in any criminal proceeding." It is insisted that, in accordance with the spirit of the 5th Amendment, this should be construed as applying to the schedule required to be prepared, sworn to, and filed by the bankrupt under the provisions of the 8th clause. But as a matter of mere interpretation, we deem it clear that it is only the testimony given upon the examination of the bankrupt under clause 9 that is prohibited from being offered in evidence against him in a criminal proceeding. The schedule referred to in the 8th clause, and the oath of the bankrupt verifying it, are to be "filed in court," and, therefore, are, of course, to be in writing. The word "testimony" more properly refers to oral evidence. It was reasonable for Congress to make a distinction between the schedule, which may presumably be prepared at leisure and scrutinized by the bankrupt with care before he verifies it, and the testimony that he is to give when he submits to an examination at a meeting of creditors or at other times pursuant to the order of the 600]court,—a proceeding *more or less unfriendly and inquisitorial, as well as summary, and in which it may be presumed that even an honest bankrupt might, through confusion or want of caution, be betrayed into making admissions that he would not deliberately make. Full effect can be given to the clause, "but no testimony given by him shall be offered in evidence against him in any criminal proceeding," by confining it to the testimony given under clause 9, to which the words in question are immediately subjoined. And we think that proper interpretation requires their effect to be thus limited.

We are referred to Johnson v. United States, 18 L.R.A. (N.S.) 1194, 89 C. C. A. 508, 163 Fed. 30, and Cohen v. United States, 96 C. C. A. 35, 170 Fed. 715. But these were both prosecutions in the Federal courts on indictments for fraudulently concealing *property belonging to* the bankrupt's estate; *and the decision in each case* was rested upon § 860, Rev. Stat. (U. S. Comp. Stat. 1901, p. 661), which declares that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." This section (since repealed by act of May 7, 1910, chap. 216, 36 Stat. at L. 352, U. S. Comp. Stat. Supp. 1911, p. 272) was in force at the time of the trial of plaintiffs in error; but by its own terms it is limited to criminal proceedings "in any court of the United States," and constitutes no limitation upon the procedure of the state courts.

For the reasons given, it seems to us clear that the plaintiffs in error were not entitled to have the bankruptcy schedules excluded from evidence, because those schedules *were not within the description[601 of "testimony" in the clause quoted from § 7 of the bankruptcy act.

And for like reasons, the evidence showing the results of an expert examination of the books of the bankers was also admissible.

This conclusion renders it unnecessary for us to consider whether the prohibition with which we have dealt, that "no testimony given by him shall be offered in evidence against him in any criminal proceeding," is not limited to criminal proceedings in the Federal courts; and upon this question we express no opinion.

Judgments affirmed.

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SOUTHERN PACIFIC COMPANY, Plff. in Err.,
v.
MARY R. SCHUYLER and Rhea Schuyler, Edward Schuyler, Vera Schuyler, and Dorothy Schuyler, Infants, by Their Guardian *ad Litem*.

(See S. C. Reporter's ed. 601-613.)

**Error to state court — review of facts.**

1. The evidence in the record on a writ of error bringing up for review a judgment

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NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to review of questions of fact on writ

of a state court in an action against a carrier for the death of an employee in the railway mail service, who was not at the time on duty, in which the carrier claimed the benefit of the prohibitions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1286), against free transportation, will be examined by the Federal Supreme Court to the extent necessary to determine whether there is support for the finding that the decedent was accepted by the carrier as a gratuitous passenger, upon which the state court rested its conclusion that he was entitled to the protection of the local law, irrespective of any Federal question.

[For other cases, see Appeal and Error, 1436–1445, in Digest Sup. Ct. 1908.]

**Carriers — gratuitous passenger — railway mail clerk off duty.**

2. An employee in the railway mail service who, in good faith and with the consent of the carrier, accepts when off duty a free passage in interstate transportation, does not forfeit his right to the benefit of a rule of the local law which charges a carrier with the duty to exercise care for the safety of gratuitous passengers because his gratuitous carriage may have been forbidden by the Hepburn act of June 29, 1906, since that statute itself fixed the penalty for violations of its prohibitions by declaring that the carrier and passenger shall, in such cases, be deemed guilty of a misdemeanor, punishable by fine.

[For other cases, see Carriers, II. a, 2, in Digest Sup. Ct. 1908.]

[No. 143.]

Argued and submitted January 23, 1913. Decided February 24, 1913.

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of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

Liability of carrier to passenger traveling on pass or contract for gratuitous carriage forbidden by law.

So far as the rights of persons receiving free interstate transportation contrary to the provisions of the Federal statutes regulating interstate traffic are concerned, the question seems only to have arisen, aside from SOUTHERN P. Co. v. SCHUYLER, in Duncan v. Maine C. R. Co. 113 Fed. 508, where the court said: "In the present suit the plaintiff could not show that he was legally on the defendant's train, without exhibiting his pass in his pleadings or in his proofs. No exoneration or contribution between joint tort feasors, or between persons who have agreed together in violation of law, can arise out of the joint tort or the subject-matter of the agreement. But the case takes on even a more concrete aspect. Rejecting the pass as void, the plaintiff puts himself in the position of one who was on the train of the defendant without its permission, and without intention of paying the fare which would entitle him to be regarded as a passenger. The consequence, therefore, of the plaintiff putting himself in that position, is to leave him as an unauthorized intruder, and to place him outside of those rules of law which give protection against the mere negligence of the servants of a common carrier."

Decisions under state laws relating to gratuitous carriage are in accord with SOUTHERN P. Co. v. SCHUYLER.

Thus, in Buffalo, P. & W. R. Co. v. O'Hara, 3 Pennyp. 190, the plaintiff was injured while riding on an employee's pass which the carrier contended on the trial was issued in violation of law. The trial court charged the jury *inter alia* as follows: "The defendant claims that the plaintiff cannot maintain the suit because she was not an employee of the defendant and was traveling on a free pass issued in violation of law. . . . We say to you that this is not a defense. Even if we adopt the presumption that Mrs. O'Hara was bound to know the law, she held a free pass, signed by the superintendent of the road, countersigned by the foreman of the track section. The conductor of the train, whose peculiar duty is to determine the right of a passenger on his train, recognized her right to a seat under the pass, and, having done so, it is not for the defendant to urge that the pass was issued in violation of law." In affirming judgment for plaintiff the supreme court of Pennsylvania said: "If the free pass in this case was unlawful, the conductor should have demanded the regular fare; and his not doing so did not make O'Hara or his wife trespassers, or destroy their rights as passengers."

Following this decision, the supreme court of Washington in Bradburn v. Whatcomb County R. & Light Co. 45 Wash. 582, 14 L.R.A.(N.S.) 526, 88 Pac. 1020, held that a carrier cannot escape liability for negligently injuring a policeman whom it had accepted as a passenger, although he claimed transportation under a contract which violated the provision of the state Constitution prohibiting the giving of free transportation to public officers.

To the same effect is Gabbert v. Hackett, 135 Wis. 86, 14 L.R.A.(N.S.) 1070, 115 N. W. 345, where it was held that a police officer was not deprived of his right to the high degree of care due from a carrier to a passenger because he was riding free under a municipal ordinance which the carrier claims was annulled by subsequent laws forbidding free transportation by carriers.

It is immaterial, so far as the carrier's liability for personal injuries occasioned through its negligence is concerned, that the injured person was traveling on a pass issued in violation of the state law. It is sufficient if the injured person was in its care and custody, and being transported by it. John v. Northern P. R. Co. 42 Mont. 18, 32 L.R.A.(N.S.) 85, 111 Pac. 632.

The question occasioned the court of North Carolina much trouble. That court first held, in M'Neill v. Durham & C. R. Co.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which, on rehearing, affirmed a judgment of the District Court of Weber County, in that state, awarding damages against a carrier for the death of an employee in the railway mail service, not at the time on duty. Affirmed.

See same case below, 37 Utah, 581, 595, 612, 109 Pac. 458, 464, 1025.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause, and, with Messrs. P. L. Williams and E. M. Bagley, filed a brief for plaintiff in error:

The record presents Federal questions which are sufficient to warrant a review and reversal of the case.

Briscoe v. Southern Kansas R. Co. 40 Fed. 277; Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 642, 29 L. ed. 264, 5 Sup. Ct. Rep. 1104.

While it may be conceded that this court will not enter upon an inquiry as to whether the judgment of a state court is against the weight of evidence, nevertheless the questions as to the sufficiency, competency, or legal effect of the evidence to establish or deny a right under a Federal statute will be reviewed by this court.

Zeigler v. South & North Ala. R. Co. 58 Ala. 599; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822.

There is not a syllable of evidence to be found in the record justifying the conclusion of the state supreme court that either the conductor, the crew, or the company acquiesced in Schuyler's breaking the law, or knew he was not on duty, or that he was unlawfully using his official commission.

Union P. R. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475; Harmon v. Jensen, 100 C. C. A. 70, 176 Fed. 519, 20 Ann. Cas. 1224.

Inasmuch as he was not on duty, but was attempting to ride in violation of the Federal statute, he was a trespasser. His presence on the train was sounded in fraud and misrepresentation, and no such relation existed between him and the company as to give him the rights of a passenger.

Duncan v. Maine C. R. Co. 113 Fed. 508; Union P. R. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475; Fitzmaurice v. New York, N. H. & H. R. Co. 192 Mass. 159, 6 L.R.A. (N.S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 Ann. Cas. 586, 20 Am. Neg. Rep. 564; Brown v. Missouri, K. & T. R. Co. 64 Mo. 536; Moore v. Ohio River R. Co. 41 W. Va. 160, 23 S. E. 539; Way v. Chicago, R. I. & P. R. Co. 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431; Condran v. Chicago, M. & St. P. R. Co. 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Norfolk & W. R. Co. v. Bondurant, 107 Va. 515, 15 L.R.A.(N.S.) 443, 122 Am. St. Rep. 867, 59 S. E. 1091; Sessions v. Southern P. Co. 159 Cal. 599, 114 Pac. 982.

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132 N. C. 510, 67 L.R.A. 227, 95 Am. St. Rep. 641, 44 S. E. 34, that an editor of a paper who was injured through the negligence of the carrier while traveling on a pass issued to him in violation of a statutory provision of that state was *in pari delicto* with the carrier, and therefore could not base an action for his injuries upon such illegal contract. In making the issuance of such a pass unlawful, no penalty was attached to the holder of the pass; but a penalty was attached to the carrier for violation of the statute prohibiting the issuance of a pass to other than its employees. On the theory that a plea of *in pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the carrier, the court granted a rehearing and reversed its former holding. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765 (containing both original opinion and opinion on rehearing). The reason for the doctrine as enunciated by the court in the majority opinion on the rehearing is that "the contract for transportation was rendered absolutely void by the statute, founded upon public policy, whether based upon no consideration, or upon the inadequate consideration of printing a time-table. The pass issued in pursuance of an alleged contract, and for the purpose of carrying out its unlawful purpose, inherits its invalidity. The defendant was free at all times to decline to carry the plaintiff, except upon the payment of the usual fare, and to eject him from its train upon his refusal to pay. The fact that the pass had expired makes no difference, as in its character as a contract it never had any legal existence. Being without legal existence, it was equally void of legal effect; and, conferring no rights upon the plaintiff, imposed upon him no obligations which the law will enforce. . . . The plaintiff was on the train as a bona fide passenger under an agreement for so-called free transportation, but ready to pay his fare if demanded. The fact that the previous contract was illegal, and no fare was either demanded or paid, can have no further effect than to reduce the plaintiff to the condition of a merely gratuitous passenger, having no binding contract, and therefore subject to no limitations of liability. As such, we now think he was entitled to recover."

As to rights of persons riding on pass or contract for free passage—see note to Muldoon v. Seattle City R. Co. 22 L.R.A. 794.

And as to liability of carrier for injury to mail clerk—see notes to Cleveland, C. C. & St. L. R. Co. v. Ketcham, 19 L.R.A. 339, and Barker v. Chicago, P. & St. L. R. Co. 26 L.R.A.(N.S.) 1058.

Assuming the company could have granted Schuyler a free interstate ride under the Hepburn act, still it was not required by that law to do so.

Illinois C. R. Co. v. Dunnigan, 95 Miss. 749, 24 L.R.A.(N.S.) 503, 50 So. 443, Ann. Cas. 1912 A, 159.

The burden rests on a mail clerk to show that he was rightfully and lawfully on the train.

Hoskins v. Northern P. R. Co. 39 Mont. 394, 102 Pac. 988.

Railway mail service employees are prohibited by the anti-pass clause of the interstate commerce act from using their official commissions to obtain free interstate rides when off duty, or when not in the discharge of their public duties.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Illinois C. R. Co. v. Dunnigan, 95 Miss. 749, 24 L.R.A. (N.S.) 503, 50 So. 443, Ann. Cas. 1912 A, 159; Little Rock R. & Electric Co. v. Dowell, 101 Ark. 223, 142 S. W. 165.

Congress has impliedly sanctioned this interpretation of the act.

United States v. Wells-Fargo Exp. Co. 161 Fed. 607; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337, 339, 50 L. ed. 821, 822, 28 Sup. Ct. Rep. 532.

It was beyond the power of the state court to read into the Hepburn act an exception in favor of "gratuitous" passengers, thereby evading the effect of the law, and attempting to enlarge the class to whom Congress had limited the right of free interstate transportation.

American Exp. Co. v. United States, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315; Armour Packing Co. v. United States, 209 U. S. 56, 82 L. ed. 681, 28 Sup. Ct. Rep. 428; Fulgham v. Midland Valley R. Co. 167 Fed. 662; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 531; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 330, 13 Ann. Cas. 893.

There is no presumption that the railroad company violated the statute and granted Schuyler a free interstate ride; and there is no evidence in the record to support such conclusion.

Creswill v. *Grand Lodge, K. P.* 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; United States v. Williams, 159 Fed. 310; Union P. R. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475.

Schuyler induced his carriage on this interstate trip by fraud and misrepresentation. He was an unauthorized intruder on the train, engaged in the commission of a misdemeanor as defined in the Hepburn act, and had no rights enforceable at law.

Union P. R. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475; Fitzmaurice v. New York, N. H. & H. R. Co. 192 Mass. 159, 6 L.R.A. (N.S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 Ann. Cas. 586, 20 Am. Neg. Rep. 564; Condran v. Chicago, M. & St. P. R. Co. 67 Fed. 522, 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182; Way v. Chicago, R. I. & P. R. Co. 64 Iowa, 51, 52 Am. Rep. 431, 19 N. W. 828; Harmon v. Jensen, 100 C. C. A. 115, 176 Fed. 519, 20 Ann. Cas. 1224; Sessions v. Southern P. Co. 159 Cal. 599, 114 Pac. 982; Norfolk & W. R. Co. v. Bondurant, 107 Va. 515, 15 L.R.A.(N.S.) 443, 122 Am. St. Rep. 867, 59 S. E. 1091; Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Duncan v. Maine C. R. Co. 113 Fed. 508; Brown v. Missouri, K. & T. R. Co. 64 Mo. 536; Moore v. Ohio River R. Co. 41 W. Va. 160, 23 S. E. 539; Clement v. Dwight, 137 App. Div. 389, 121 N. Y. Supp. 788; Crosby v. Buchanan, 23 Wall. 420, 458, 23 L. ed. 138, 143; Gardner v. New Haven & N. Co. 51 Conn. 150, 50 Am. Rep. 12; Ewell v. Daggs, 108 U. S. 143, 149, 27 L. ed. 682, 684, 2 Sup. Ct. Rep. 408; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

Inasmuch as Schuyler was denied by the Federal statute the right to a free ride on an interstate trip,—of which law and denial he is presumed to have had knowledge,—the conductor could not by mere acquiescence confer such a right on him.

Clark v. Colorado & N. W. R. Co. 19 L.R.A.(N.S.) 988, 91 C. C. A. 358, 165 Fed. 408; Purple v. Union P. R. Co. 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123, 11 Am. Neg. Rep. 509; Condran v. Chicago, M. & St. P. R. Co. 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; Grahn v. International & G. N. R. Co. 100 Tex. 27, 5 L.R.A.(N.S.) 1025, 123 Am. St. Rep. 767, 93 S. W. 104; McVeety v. St. Paul, M. & M. R. Co. 45 Minn. 268, 11 L.R.A. 174, 22 Am. St. Rep. 728, 47 N. W. 809.

The verdict of the jury and the judgment of the state supreme court are not supported by evidence and are contrary to law.

Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687; Weber-

bury v. New York C. & H. R. R. Co. 17 Fed. 673, 21 Blatchf. 314, 10 Am. Neg. Cas. 694; Baylis v. Travellers Ins. Co. 113 U. S. 316, 321, 28 L. ed. 989, 990, 991, 5 Sup. Ct. Rep. 494; Domenico v. El Paso Electric R. Co. — Tex. Civ. App. —, 90 S. W. 60; Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 19 Am. St. Rep. 17, 22 N. E. 812; Illinois C. R. Co. v. Dunnigan, 95 Miss. 749, 24 L.R.A. (N.S.) 503, 50 So. 443, Ann. Cas. 1912 A, 159; Central of Georgia R. Co. v. Cannon, 106 Ga. 828, 831, 32 S. E. 874; Hoskins v. Northern P. R. Co. 39 Mont. 394, 102 Pac. 988.

Mr. Edward M. Cleary submitted the cause for defendants in error. Messrs. Bert Schlesinger, Alfred W. Agee, and James B. McCracken were on the brief:

The record shows that this court has no jurisdiction for the reason that no Federal question is involved.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185.

Although a claim of a Federal question has been made plainly in the state court, yet if it clearly appears that the claim lacked color of merit and had no substance or foundation, the fact that it was raised will not afford sufficient ground for a writ of error.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

This court will not review findings of fact by the state supreme court.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 330; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14; Rankin v. Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672; 2 Rose's Code Fed. Proc. § 284, p. 1626; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Eau Claire Nat. Bank v. *Jackman*, 204 U. S. 522, 51 L. ed. 596, 27 *Sup. Ct. Rep. 391.*

*Rulings of the supreme* court on the question of practice under the Utah Code are not reviewable in this court.

Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Stryker v. Crane, 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Turner v. Wilkes County, 173 U. S. 463, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; 1 Rose's Code Fed. Proc. §§ 10, 12, pp. 98, 110.

Though one of the points decided in the supreme court of a state would be sufficient ground to confer jurisdiction on this court, yet, if the judgment is based on another and distinct and sufficient ground over which this court has no jurisdiction, such judgment is not reviewable in this court.

Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733; Kenney v. Craven, 215 U. S. 125, 54 L. ed. 122, 30 Sup. Ct. Rep. 64; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; Rogers v. Jones, 214 U. S. 196, 53 L. ed. 965, 29 Sup. Ct. Rep. 635; Delaware City, S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 643, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290.

A person who travels upon a pass unlawfully issued to him in violation of the law prohibiting the issuing of free passes is not a trespasser, but is entitled to the rights of a passenger.

Moore, Carr. p. 570; 5 Am. & Eng. Enc. Law, 2d ed. 508; Fetter, Carr. § 220; Wharton, Neg. §§ 354, 355; Bradburn v. Whatcom County R. & Light Co. 45 Wash. 583, 14 L.R.A.(N.S.) 526, 88 Pac. 1020; Buffalo, P. & W. R. Co. v. O'Hara, 3 Pennyp. 190; McNeill v. Durham & C. R. Co. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178, 5 Am. Neg. Cas. 21; Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 869; McClain v. Lewiston Interstate Fair & Racing Asso. 17 Idaho, 63, 25 L.R.A.(N.S.) 691, 104 Pac. 115, 20 Ann. Cas. 60; Mohney v. Cook, 26 Pa. 342, 67 Am. Dec. 419; Florida, C. & P. R. Co. v.

Sullivan, 61 L.R.A. 410, 57 C. C. A. 167, 120 Fed. 799; Philadelphia, W. & B. R. Co. v. Philadelphia H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

If we concede that the plaintiff in error in extending, and the deceased in accepting, free transportation, acted in violation of the Hepburn act, and were therefore guilty of a public offense, this would constitute no defense to the action; and hence it was unnecessary to the determination of the cause that the court should construe the Hepburn act or any other law of the United States.

Moore, Carr. pp. 568–570; 5 Am. & Eng. Enc. Law, 2d ed. 508; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178; Bradburn v. Whatcom County R. & Light Co. 45 Wash. 583, 14 L.R.A.(N.S.) 526, 88 Pac. 1020; Buffalo, P. & W. R. Co. v. O'Hara, 3 Pennyp. 190; McNeill v. Durham & C. R. Co. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765; Fetter, Carr. Pass. 220; Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Beach, Contrib. Neg. 2d ed. 175.

Mr. Justice Pitney delivered the opinion of the court:

This is a review, under § 709, Rev. Stat. U. S. Comp. Stat. 1901, p. 575, of a judgment 606] *recovered against the plaintiff in error for damages on account of the death of one Charles Albert Schuyler, occasioned by the derailment of a mail train at Gertney, Utah, January 14, 1907, while the deceased was riding thereon. It appears that he was an assistant chief clerk in the United States railway mail service, and held a commission or certificate signed by the Postmaster General in the following form:

Postoffice Department, Washington, D. C.
To Whom Concerned:

The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk railway mail service, with headquarters Ogden, Utah, and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged, receipt should be given. Valid only when issued through the office of the Second Assistant Postmaster General and countersigned by James E. White.

G. B. Cortelyou.

Countersigned:
James E. White,
General Superintendent.

On opposite page:

"Good between all stations Utah, Idaho, Nevada, California, Montana, and Colorado."

The deceased had been called to go from Ogden, Utah, to Oakland, California, on account of the illness of his child. The child having died, he set out to return from Oakland to Ogden, and took the mail train in question with the knowledge of the train agent and conductor in charge, using as evidence of his right to transportation the commission *above quoted. It was on[607 this interstate journey that the train was derailed and the deceased came to his death, as already mentioned.

The defense (so far as here pertinent) was that the deceased was not traveling upon any official business that entitled him to free transportation under his commission, and that in riding free he was violating the act of Congress of June 29, 1906, commonly called the Hepburn act (34 Stat. at L. 584, 585, chap. 3591, § 1, U. S. Comp. Stat. Supp. 1911, pp. 1286, 1287), which forbids common carriers subject to the provisions of the act, after January 1, 1907, to "directly or indirectly issue or give any interstate free ticket, free pass, or free transportation for passengers, except . . . to railway mail service employees, postoffice inspectors, customs inspectors, and immigration inspectors; . . . and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty." It was therefore contended that the deceased was a trespasser, and that the defendant was under no legal duty to care for his safety.

In the trial court there was a verdict for the plaintiffs, and from the judgment thereon the present plaintiff in error appealed to the Utah supreme court, which at first reversed, and afterwards, on a rehearing, set aside the reversal, and affirmed the judgment below, subsequently denying the company's application for a new trial. 37 Utah, 581, 595, 612, 109 Pac. 458, 464, 1025.

The court held that there was no evidence to support a finding that the deceased was traveling on appellant's train in the discharge, or in pursuance, of duties pertaining to the railway mail service; and that upon the evidence adduced the only permissible inference was that he left Ogden and went to Oakland solely on account of the death of his child, and that he was on the return journey of that mission when the train was derailed.

But the court also found that the existence of the relation *of carrier and passen-[608 ger between the deceased and the railroad

company, and a breach of the duty of care for the passenger's safety, resulting in his death, were so conclusively made to appear as to entitle respondents to a directed verdict on those issues, so that certain errors committed by the trial court in the instructions to the jury became of no consequence. The court said: "That the car was derailed through the negligence of appellant, as alleged in the complaint, and that the deceased was killed by reason of such derailment, is, upon the record, not open to controversy. No substantial conflict is presented by the evidence on that subject."

Upon the question of the relation of carrier and passenger the court reasoned as follows: "When he left Ogden he entered a mail car in appellant's train. The evidence of his right to enter the mail car and be carried by appellant was the commission issued to him, which on its face entitled him to transportation between all stations in Utah, Nevada, and California. The commission, on its face, granted 'the facilities of free transportation on the lines named,' regardless of the question whether he was or was not in the discharge of public duties. It was issued to him before the Hepburn act took effect. The derailment and the deceased's death occurred fourteen days after the act took effect. It was admitted by the parties on the trial that the deceased used the commission on the trip as 'the evidence of his right to ride,—the evidence of his right of transportation,'—and that no question would be raised with respect to the exhibition of the commission to the conductor in charge of the train. The deceased, at Oakland, in the presence of the conductor and train agent, and with their knowledge, entered a mail car in a train about to leave for Ogden, and impliedly with their consent; at least, without their objection. In view of the stipulation, and upon the whole record, we think the only permissible inferences are, that the deceased, 609]both in going *to and in returning from Oakland, rode in the mail car with the knowledge and consent of appellant's conductors in charge of the train; that the appellant, its conductors and agents in charge of the train, and the deceased, in good faith, assumed and believed that the commission entitled him to so ride and to be transported in the mail car, regardless of the fact whether he was or was not on duty, and that the commission was so treated and so recognized by them, and as 'the evidence of his right of transportation.' There is nothing in the record to support the allegations in the answer that the deceased entered the mail car without appellant's knowledge or consent, or against its will, or with the intent, or for the purpose, of deceiving or defrauding the appellant or the government, or that he otherwise entered the car clandestinely or fraudulently, or in bad faith, or with any wrongful design or purpose. The evidence, quite conclusively, shows the contrary. The deceased was therefore not a trespasser."

In dealing with the questions of law arising from this state of facts, the court held, first, that the Hepburn act does not forbid a carrier from giving free interstate transportation to railway mail service employees when not on duty, and when traveling for their own benefit or pleasure, and, secondly. "Though the construction which we have given the Hepburn act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation on his commission when he was not on duty, yet we are also of the opinion that, under all the circumstances of the case, the appellant, having undertaken and assumed to carry and transport the deceased as a passenger by reason of the commission, cannot escape liability for the consequences of its negligence on that ground." And again: "We are of the opinion that when a common carrier accepts a person as a passenger, he is not permitted to deny that he *owes to him the duty of[610 diligence, prudence, and skill which, as carrying on a public employment, he owes to all his passengers, and that he cannot escape liability for a negligent performance of that duty, resulting in injury, by urging that the pass or commission was issued, or the gratuitous carriage permitted by him, in violation of law." As authority for this proposition the court cited Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178; 5 Am. & Eng. Enc. Law, 2d ed. 508, and other authorities.

It is plain that the decision adverse to the plaintiff in error was upon two independent grounds, the second ground being avowedly based upon the hypothesis that the court might be wrong in its decision upon the first.

Whether the Hepburn act prohibits a carrier from giving free interstate transportation to the employees of the railway mail service when they are not on duty, but are traveling for their own benefit or pleasure, is, of course, a Federal question.

But whether—assuming that question to be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case is (in the absence of an act of Congress regulating the matter) a question not of Federal but of state law.

It is settled by numerous decisions of this court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a Federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to circumstances. Murdock v. Memphis, 20 Wall. 590, 635, 636, 22 L. ed. 429, 444; De Saussure v. Gaillard, 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 Sup. Ct. Rep. 1053; Hale v. Akers, 132 U. S. 554, 565, 33 L. ed. 442, 446, 10 Sup. Ct. Rep. 171; Hopkins v. McLure, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Beaupre v. Noyes, 611]138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; Hammond v. Johnston, 142 U. S. 73, 78, 35 L. ed. 941, 942, 12 Sup. Ct. Rep. 141; Giles v. Teasley, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359; Allen v. Arquimbau, 198 U. S. 149, 154, 49 L. ed. 990, 993, 25 Sup. Ct. Rep. 622; Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30. In Murdock v. Memphis and Beaupre v. Noyes this court affirmed the judgments of the state court. In the other cases cited the writs of error were dismissed without considering the Federal questions.

Except for two contentions of the plaintiff in error, now to be mentioned, a dismissal of the writ of error would necessarily follow in the present case, since the second ground of decision adopted in the state court is manifestly independent of the first, and is fully sufficient to support the judgment; and except for what follows it involves no question of Federal right.

It is insisted (a) that there is no presumption that the railroad company violated the prohibition of the Hepburn act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler, as an interstate passenger, is a mixed question of law and fact, so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 668, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822. We also agree there is no presumption that the railroad company gave free transportation, and that this was a fact to be established by evidence. Accepting the duty to review this question of fact, we have examined the evidence in the record and find that it fairly supports the conclusion of the state court that the deceased was accepted by plaintiff in error as a gratuitous passenger.

But, finally, it is argued (b) that it was beyond the power of the state court to "read into the Hepburn act an exception in favor of gratuitous passengers;" thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, but, as we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn act is such as to deprive one who, in good faith and without fraud, and with the consent of the carrier, but in actual, though unintentional, violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition: "Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty." This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn act. It arose from the fact that

he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the state in this regard.

It results that the judgment under review must be affirmed, irrespective of the question whether the Hepburn act forbids the giving of free interstate transportation to the employees of the railway mail service when not on duty.

Judgment affirmed.

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R. W. STARR, Plff. in Err.,
v.
LONG JIM and Annie, His Wife.

(See S. C. Reporter's ed. 613–625.)

**Indians — title of allottees.**

1. The legal title to land in the Columbia Reservation allotted to Indians in severalty under the so-called Moses agreement of July 7, 1883, and the confirmatory act of July 4, 1884 (23 Stat. at L. 79, chap. 180), which provided respectively that the Indians should be guaranteed and protected in their possession and ownership, and that the lands, when selected, shall be held for the exclusive use and occupation of the Indians, and that the remainder of the reservation shall be restored to the public domain and be disposed of to actual settlers, did not vest in the allottees, but remained in the United States until after patent.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

**Estoppel — by covenant of warranty — after-acquired title.**

2. The rule that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title, does not apply to the case of a conveyance made by an Indian allottee while the legal title remained in the United States.

[For other cases, see Estoppel, II. c, in Digest Sup. Ct. 1908.]

[No. 151.]

Argued January 28, 1913. Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Washington to review a decree which, on a second appeal, affirmed a decree of the Superior Court of Chelan County in *favor of defendants* in a suit to quiet title. *Affirmed.*

See same case below on first appeal, 52 Wash. 138, 100 Pac. 194; on second appeal, 59 Wash. 190, 109 Pac. 810.

The facts are stated in the opinion.

Messrs. **R. W. Starr**, *pro se*, and **Frank Reeves** argued the cause and filed a brief for plaintiff in error:

Ownership means the right of control,—the exercise of dominion over the thing owned,—including a right to retain or transfer.

Black's Law Dict. p. 866.

Where the government is dealing with unlettered people like the Indians, the agreement must be construed in the light of their understanding, and never to their prejudice.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 760, 18 L. ed. 667, 674; Choctaw Nation v. United States, 119 U. S. 1, 27, 28, 30 L. ed. 306, 314, 315, 7 Sup. Ct. Rep. 75; United States v. Brooks, 10 How. 442, 13 L. ed. 489.

Language in a treaty or agreement with them such as "there is reserved to their use," "they shall have the right to," and sentences of similar nature and respect, must be construed as granting title in fee, unless there are other apt words of limitation.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Francis v. Francis, 203 U. S. 233, 242, 51 L. ed. 165, 168, 27 Sup. Ct. Rep. 129.

Where language is used which confers only an equitable title, and a further grant or patent is contemplated, an alienable title is acquired which passes to a grantee of the Indian upon issuance of patent, even though deed is made before the patent, unless alienation is prohibited by the treaty, agreement, or act of Congress.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Mullen v. United States, 224 U. S. 448, 557, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91.

Where an alienable title is once conferred on an Indian, neither an act of Congress nor an executive order can recall or restrict it, and all such attempts are void.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Francis v. Francis, 203 U. S. 233, 242, 51 L. ed. 165, 168, 27 Sup. Ct. Rep. 129.

The doctrine of *in pari materia* does not apply at all to private acts except when the legislation is on the same subject-matter

and between the same parties, and then only to a limited extent.

Black, Constr. & Interpretation of Laws, 210.

To allot lands by virtue of agreement or treaty with the Indians has been uniformly held by this court to pass title in fee, in the absence of express or necessarily implied restrictions on alienation.

Best v. Polk, 18 Wall. 112, 21 L. ed. 805; Worcester v. Georgia, 6 Pet. 515, 582, 8 L. ed. 483, 508; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, 70 Fed. 453; Anthony v. American Glucose Co. 146 N. Y. 407, 41 N. E. 23; Fort v. Allen, 110 N. C. 183, 14 S. E. 685.

The Indians were entitled to the fee.

United States v. Moore, 154 Fed. 712; Long Jim v. Robinson, 16 Land Dec. 15; Lac De Flambeau Indians, 9 Land Dec. 392.

Mr. A. G. Avery argued the cause, and, with Mr. F. T. Post, filed a brief for defendants in error:

The Moses agreement of July 7, 1883, confirmed by act of Congress July 4, 1884, passed no title to Indians.

United States v. Moore, 88 C. C. A. 455, 161 Fed. 513; Starr v. Long Jim, 52 Wash. 138, 100 Pac. 194; 10 Ops. Atty. Gen. 511; Coey v. Low, 36 Wash. 10, 77 Pac. 1077; Jackson v. Thompson, 38 Wash. 282, 80 Pac. 454; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Beecher v. Witherby, 95 U. S. 517, 24 L. ed. 440; Hollister v. United States, 76 C. C. A. 337, 145 Fed. 773; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Schrimpscher v. Stockton, 183 U. S. 290, 46 L. ed. 203, 22 Sup. Ct. Rep. 107; McGannon v. Straightlege, 32 Kan. 524, 4 Pac. 1042; Sheldon v. Donohoe, 40 Kan. 346, 19 Pac. 901; Kreuger v. Schultz, 6 N. D. 310, 70 N. W. 269; Nelson v. John, 43 Wash. 483, 86 Pac. 933; United States v. Mullin, 71 Fed. 682.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.

Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; United States v. Freeman, 3 How. 556, 11 L. ed. 548; Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; United States v. Moore, 88 C. C. A. 455, 161 Fed. 513.

The construction placed upon a statute by departmental officers whose duty it was to carry out such law should be considered in the matter of its interpretation.

Eells v. Ross, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 670; Hollister v. United States, 76 C. C. A. 337, 145 Fed. 773; Re Five Civilized Tribes, 199 Fed. 823.

Defendants in error are not estopped.

Banks of America v. Banks, 101 U. S. 240, 25 L. ed. 850; Bigelow, Estoppel, 245; Brewster v. Madden, 15 Kan. 249; Briggs v. Sample, 43 Fed. 102, 10 L.R.A. 132; Coey v. Low, 36 Wash. 10, 77 Pac. 1077; Drury v. Foster, 2 Wall. 24, 17 L. ed. 780; Eells v. Ross, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; Frazee v. Spokane County, 29 Wash. 278, 69 Pac. 779; Harkness v. Underhill, 1 Black, 316, 17 L. ed. 208; Laughton v. Nadeau, 75 Fed. 789; Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045; McCue v. Smith, 9 Minn. 252, Gil. 237, 86 Am. Dec. 100; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; Nelson v. John, 43 Wash. 483, 86 Pac. 933; Page v. Pierce County, 25 Wash. 13, 64 Pac. 801; Reed v. Johnson, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381; Sims v. Everhardt, 102 U. S. 300, 26 L. ed. 87; Smythe v. Henry, 41 Fed. 705; Smith v. Stevens, 10 Wall. 321, 19 L. ed. 933; Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 51 L.R.A. 889, 79 Am. St. Rep. 960, 62 Pac. 145; 16 Cyc. 760.

The Indians' claim is not barred by the statute of limitations.

Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Slaght v. Northern P. R. Co. 39 Wash. 576, 81 Pac. 1062; Schrimpscher v. Stockton, 183 U. S. 290, 46 L. ed. 203, 22 Sup. Ct. Rep. 107; McGannon v. Straightlege, 32 Kan. 524, 4 Pac. 1042; Sheldon v. Donohoe, 40 Kan. 346, 19 Pac. 901; Smith v. Stevens, 10 Wall. 321, 19 L. ed. 933; Kreuger v. Schultz, 6 N. D. 310, 70 N. W. 269; Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; Lindsey v. Miller, 6 Pet. 666, 8 L. ed. 538.

Mr. Justice Pitney delivered the opinion of the court:

The plaintiff in error brought this action against the defendants in error in the superior court of the state of Washington in and for the county of Chelan to establish and quiet his title to certain lands in that county. The answer showed that the plaintiff claimed his title under a deed made by the defendants, and attacked the validity of this instrument on the ground of fraud in its procurement, and on the further ground that, at the time of its execution, *the title to the lands therein [615] described was in the United States, [617]

and the defendants were without power to convey them. The trial court made findings of fact negativing the charges of fraud, and concluded as matter of law that the conveyance made by the defendants to plaintiff was valid, and that the plaintiff was entitled to recover. From the resulting judgment the defendants appealed to the supreme court of the state, which reversed the judgment and remanded the cause, with directions to enter a judgment in favor of the defendants upon terms that they should repay the consideration paid by the plaintiff to them, with certain additional charges. 52 Wash. 138, 100 Pac. 194. After the cause was remanded, a further hearing was had and a second and final judgment entered in accordance with the mandate. From this judgment the plaintiff appealed, and the supreme court of the state affirmed the judgment (59 Wash. 190, 109 Pac. 810) and the case comes here by writ of error.

The facts are as follows:—The defendants are husband and wife and full-blooded Indians, and the lands in question are a part of what was the Columbia Indian Reservation. On July 7th, 1883, in the city of Washington, the Secretary of the Interior and the Commissioner of Indian Affairs, on the part of the United States, and Chief Moses and other Indians of the Columbia and Colville Reservations in the then territory of Washington, entered into a certain agreement, subject to the approval of Congress, the material parts of which are as follows:

"In the conference with Chiefs Moses and Sar-sarp-kin, of the Columbia Reservation, and Tonasket and Lot, of the Colville Reservation, had this day, the following was substantially what was asked for by the Indians:

"Tonasket asked for a saw and gristmill, a boarding school to be established at Bonaparte creek to accommodate one hundred (100) pupils, and physician to reside with them, and $100 (one hundred) to himself each year.

616] *"Sar-sarp-kin asked to be allowed to remain on the Columbia Reservation with his people, where they now live, and to be protected in their rights as settlers, and, in addition to the ground they now have under cultivation within the limit of the 15-mile strip cut off from the northern portion of the Columbia Reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of 4 square miles, being 2,560 acres of land, and each head of a family or male adult 1 square mile, or to remove onto the *Colville Reservation*, if they so desire; and *in case they so remove, and relinquish all* their claims to the Columbia Reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

"All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

"The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling house for himself; also to construct a sawmill and gristmill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

"And, on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000) per annum during his life.

"All this on condition that Chief Moses shall remove to the Colville Reservation and relinquish all claims upon the government for any land situate elsewhere.

*"Further, that the government will[617 secure to Chief Moses and his people, as well as to all other Indians who may go onto the Colville Reservation and engage in farming, equal rights and protection alike with all other Indians now on the Colville Reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people; that until he and his people are located permanently on the Colville Reservation his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or 1 square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected; or, should they move onto the Colville Reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia Reservation.

"All the foregoing is upon the condition that Congress will make an appropriation

of funds necessary to accomplish the foregoing and confirm this agreement, and also, with the understanding that Chief Moses, or any of the Indians, heretofore mentioned, shall not be required to remove to the Colville Reservation until Congress does make such appropriation," etc.

This agreement was ratified and confirmed by act of Congress of July 4, 1884, chap. 180, 23 Stat. at L. 79, which reads as follows:

"For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia 618] *and Colville Reservations, in Washington territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: Provided, that Sarsopkin and the Indians now residing on said Columbia Reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville Reservation: And provided, further, that in case said Indians so elect to remain on said Columbia Reservation, the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

In the above agreement of July 7, 1883 (commonly called the Moses agreement), the following clause is especially pertinent to the present controversy, *viz.:* "All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or 1 square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected."

In the confirmatory act the following proviso is to be noted: "That in case said Indians so elect to remain on said Columbia Reservation, the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use *and occupation of said[619 Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers," etc.

By an executive order made by President Cleveland under date May 1, 1886 (Executive Orders, Indian Reserves, 1890, p. 75), the land in question was restored to the public domain, subject to the limitations as to disposition imposed by the act of July 4, 1884; it being, however, at the same time ordered that certain tracts of land surveyed for and allotted to Sar-sarp-kin and other Indians in accordance with the provisions of that act, and particularly described in the order, should be and the same were thereby set apart for the exclusive use and occupation of said Indians by name. Long Jim was not included.

But by a decision of the General Land Office rendered July 9, 1892, affirmed by the Secretary of the Interior January 6, 1893 (Long Jim v. Robinson, 16 Land Dec. 15), it was held that Long Jim, although not a party to the Moses agreement, was entitled to its benefits by the terms of the act of July 4, 1884, and, because he and other members of a band of which he was the chief were in actual occupancy of the land in question, having lived upon it for many years, cultivated a part of it, raised stock thereon, etc., it was also held, following Mission Indians v. Walsh, 13 Land Dec. 269, that the Executive order of May 1, 1886, did not confer upon white men claiming under the pre-emption and homestead laws any right to settle on, file upon, or enter lands that were in the occupation of the Indians. It was also held that Long Jim was not deprived of his rights under the act of July 4, 1884, by reason of not having elected within one year from its passage whether he would remain upon the Columbia Reservation on the terms therein stipulated, or remove to the Colville Reservation; that limitation in the act being construed to apply only to Sar-sarp-kin and the Indians who were *directly repre-[620 sented by him in the making of the Moses agreement. The conclusion of the matter was that Long Jim and certain other Indian applicants were held entitled to have allotments made to them in severalty, in quantities and manner provided in the agreement of July 7, 1883, and the right of certain white claimants to the same land was held to be subordinate and subject to the prior and superior right of the Indians.

In accordance with this decision and in pursuance of the Moses agreement and the

act of Congress ratifying it, the Secretary of the Interior, in the year 1894, set apart for the exclusive use and occupation of Long Jim a certain allotment on the Columbia Reservation, included in which are the lands involved in the present action.

On March 29, 1900, Long Jim and his wife, by warranty deed, in consideration of the sum of $2,000, assumed to convey the lands in question to the plaintiff. Up to this time no patent had been issued by the government.

In April, 1904, the Secretary of the Interior held (Re Long Jim, 32 Land Dec. 568) that the act of July 4, 1884, had made no provision for issuing a patent; that if the Moses agreement contemplated that patents should be issued, the act of ratification limited it in this respect; and that since there was no general authority of law for issuing patents to Indian allottees, none could be issued to cover Long Jim's allotment. Thereafter Congress, by act of March 3, 1905, chap. 1479, 33 Stat. at L. 1064, 1065, authorized the issuance of such a patent, in the following terms:

"That the Secretary of the Interior be, and hereby is, authorized and directed to issue a patent in fee to Long Jim for the lands heretofore allotted to him by the Secretary of the Interior on April eleventh, eighteen hundred and ninety-four, as modified and changed by Department order of April twentieth, eighteen hundred and 621]*ninety-four, under and by virtue of the agreement concluded July seventh, eighteen hundred and eighty-three, by and between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville Reservations, commonly known as the 'Moses agreement,' accepted, ratified, and confirmed by the act of Congress approved July fourth, eighteen hundred and eighty-four (23 Stat. at L. pp. 79, 80, chap. 180), and under the decision of the General Land Office of July ninth, eighteen hundred and ninety-two, affirmed by the Department of the Interior January sixth, eighteen hundred and ninety-three, to wit: the northeast quarter, northeast quarter of the southeast quarter, and lot one of section eleven, the northwest quarter and southwest quarter of the southwest quarter of section twelve, lot one of section fourteen, and lots one and two of section thirteen, township twenty-seven north, range twenty-two east, Willamette meridian, Washington, free of all restrictions as to sale, encumbrance, or taxation."

And on August 2, 1905, pursuant to this *authority,* a patent was issued to Long Jim *for the lands that had been allotted* to him, including those that were included in his deed to the plaintiff.

By the act of March 8, 1906, chap. 629, 34 Stat. at L. 55, a general provision was made for the issuance of patents for the lands allotted to Indians under the Moses agreement and the act ratifying it, the patents to "be of legal effect and declare that the United States does and will hold the lands thus allotted for the period of ten years from the date of the approval of this act, in trust for the sole use and benefit of the Indian to whom such allotment was made, or, in case of his decease either prior or subsequent to the issuance of such patent, of his heirs, according to the laws of the state of Washington, and that at the expiration of said period the United States will convey the *same by patent to the[622 said Indian, or his heirs, as aforesaid, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever." The same act provided that an allottee holding such a trust patent might sell the lands covered thereby, except 80 acres, under rules and regulations prescribed by the Secretary of the Interior; and provided that any conveyance or contract of sale made within the trust period, except as provided by the act, should be absolutely null and void.

The plaintiff in error contends (1) that the land allotted to Long Jim in the year 1894 passed to him in fee under the terms of the Moses agreement and the act of ratification, and therefore passed to the plaintiff under the deed of 1900; and, failing this, (2) that the deed, having contained covenants of warranty, operated by way of estoppel to pass to the plaintiff the title afterwards acquired by Long Jim by virtue of the patent of August 2, 1905.

In United States v. Moore, 154 Fed. 712, it was held by the United States circuit court for the eastern district of Washington that lands allotted to Indians in severalty under the Moses agreement and the act of confirmation, and the Executive order of May 1, 1886, became vested in the allottees in fee simple. The circuit court of appeals reversed this decision. 88 C. C. A. 455, 161 Fed. 513. The supreme court of Washington, in the present case (52 Wash. 138, 100 Pac. 194), followed the reasoning and opinion of the court of appeals. We concur in the result reached, and have little to add.

As to the principles to be kept in view in construing an agreement with the Indians, we adhere to what was said in Jones v. Meehan, 175 U. S. 1, 10, 11, 44 L. ed. 49, 53, 54, 20 Sup. Ct. Rep. 1:

"In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the

negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of 623]*a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The Moses agreement is quite informal, and it has been and should be construed in such manner as to confer upon the Indians the full measure of benefit that it was intended to secure to them. But it hardly follows that they would be more benefited by having the lands in fee than by having them held in trust for them by the government. That part of the agreement now in question provided that each head of family or male adult on the Columbia Reservation should be entitled to 1 square mile of land—"in the possession and ownership of which they shall be guaranteed and protected." This is, at least, as consistent with a beneficial ownership, leaving the title in the government, as with the vesting of a fee-simple title in the Indian.

But whatever may have been the intent of the framers of the agreement, § 2079, Rev. Stat., prohibited the making of any contract with the Indians by treaty; and the Moses agreement was expressly made "upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement." The act of confirmation (23 Stat. at L. 80, chap. 180) was subject to the proviso that the Secretary of the Interior should cause the quantity of land stipu-624]lated to be selected in as compact *form as possible, "the same, when so selected, to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws," etc. Irrespective of the general recognition of the guardianship of the government over the Indians, the clear antithesis in this proviso between the disposition of other lands to settlers and the retention of the lands in question for the use and occupation of the Indians admits of but one construction.

The Executive order of August 1, 1886, is consistent with this. So are the decisions of the General Land Office and the Secretary of the Interior, already referred to (16 Land Dec. 15; 32 Land Dec. 568).

And the act of March 3, 1905 (33 Stat. at L. 1064, chap. 1479), above quoted, expressly authorizing and directing the Secretary of the Interior to issue a patent to Long Jim for the lands that had been allotted to him, is a recognition by Congress that without the act he had no right to the land in fee. Further corroboration is to be found in the act of March 8, 1906 (34 Stat. at L. 55, chap. 629), above quoted, which requires patents to be issued, with a restriction against alienation, to the other beneficiaries of the Moses agreement.

The contention of the appellant that Long Jim had a title in fee at the time of the making of the warranty deed in the year 1900 must therefore receive a negative response.

As to the effect of the warranty upon the after-acquired title, while the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title (Bigelow, Estoppel, 2d ed. p. 324, etc.), it is well settled that the doctrine does not apply to the case of a conveyance made by one *non sui juris*, or that is contrary to public policy or statutory prohibition. Bank of *Amer-[625 ica v. Banks, 101 U. S. 240, 247, 25 L. ed. 850, 853; Doe ex dem. Chandler v. Ford, 3 Ad. & El. 649, 5 Nev. & M. 209, 1 H. & W. 378, 5 L. J. K. B. N. S. 25; Den ex dem. Wooden v. Shotwell, 24 N. J. L. 789; Connor v. McMurray, 2 Allen, 202, 204; Doyle v. Coburn, 6 Allen, 71, 72; Merriam v. Boston, C. & F. R. Co. 117 Mass. 241, 244; Brick v. Campbell, 122 N. Y. 337, 346, 10 L.R.A. 259, 25 N. E. 493; Kennedy v. M'Cartney, 4 Port. (Ala.) 141, 158.

Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel.

Judgment affirmed.

B. ZAVELO, Plff. in Err.,
v.
J. S. REEVES, J. H. Reeves, D. F. C. Reeves, J. F. Bell, Green Benton, O. B. Washington, W. B. Fuller, and J. E. Sparkman, Copartners under the Firm Name of J. S. Reeves & Co.

(See S. C. Reporter's ed. 625–632.)

**Error to state court — Federal question — bankruptcy — discharge.**

1. A right or immunity was set up and claimed under the Federal bankrupt act, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Federal Supreme Court to state courts, where the defendant relied upon his discharge in bankruptcy to defeat an action upon a debt which the plaintiffs claim was revived by a new promise made in the interim between the adjudication in bankruptcy and the discharge.

[For other cases, see Appeal and Error, 1956–1962, in Digest Sup. Ct. 1908.]

**Bankruptcy — extortion.**

2. Extortion or attempted extortion as a consideration for acting or forbearing to act in bankruptcy proceedings, which is forbidden by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 29b, cl. 5, cannot be inferred from a promise by the bankrupt after adjudication, that if certain creditors would loan him a specified sum to be used in paying the consideration of a composition with creditors, he would pay them the balance of their claim when such composition was confirmed, after deducting their share of the consideration of the composition, which promise they accepted, making the loan for the said purpose.

**Bankruptcy — discharge — revival by new promise.**

3. A provable debt which would be barred under the bankrupt act of July 1, 1898, § 17, by a discharge in bankruptcy, may be revived by a new promise, made in the interim between the adjudication and the discharge.

[For other cases, see Bankruptcy, XI. d, in Digest Sup. Ct. 1908.]

**Bankruptcy — provable debts — time of contracting.**

4. Debts founded upon open account or upon contract, express or implied, which are provable under the bankrupt act of July 1, 1898, § 63a, cl. 4, include only such as existed at the time of the filing of the petition in bankruptcy.

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

**Bankruptcy — composition with creditors.**

5. A bankrupt may use his credit to acquire the money required for the purposes of a composition offered conformably to the bankrupt act of July 1, 1898, § 12, to his creditors.

[For other cases, see Bankruptcy, XII., in Digest Sup. Ct. 1908.]

[No. 299.]

Argued and submitted January 7, 1913.
Decided February 24, 1913.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the City Court of Birmingham, in that state, in favor of plaintiffs in an action upon a debt which defendant claims is barred by his discharge in bankruptcy. Affirmed.

See same case below, 171 Ala. 401, 54 So. 654.

The facts are stated in the opinion.

Mr. Oscar R. Hundley submitted the cause for plaintiff in error:

There is involved in this case a right, title, privilege, or immunity of the plaintiff in error, claimed under the bankruptcy statute, which has been denied by the state court.

Collier, Bankr. 6th ed. p. 298; Hill v. Harding, 107 U. S. 631, 27 L. ed. 493, 2 Sup. Ct. Rep. 404; Hennequin v. Clews, 111 U. S. 677, 28 L. ed. 566, 4 Sup. Ct. Rep. 376.

The agreement was void for uncertainty in that the payment depended on whether or not the composition was confirmed by the court. All the cases agree that the new promise must be unequivocal, and not dependent on a condition.

Smith v. Stanchfield, 7 Am. Bankr. Rep. 498.

Moreover, the confirmation of the composition effectuated the agreement between all the creditors, whereby all the debts were released, and it appears from the replication that defendants in error voluntarily agreed, by their acceptance of the terms of the composition, to this result.

McDonald v. Taylor & Co. 26 Am. Bankr. Rep. 635.

After all, the test of the validity of the agreement set out in the replication is

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. *Illinois*, 42 L. ed. U. S. 998.

*On how and when questions* must be *raised and decided in a state* court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to review of decisions of state courts in cases involving questions of bankruptcy—see note to Thompson v. Fairbanks, 49 L. ed. U. S. 577.

whether the judge would confirm a composition if it were made to appear to him that, either before or after a creditor had assented thereto, an agreement was made whereby all the said creditor's debt was to be paid in full. If such an agreement would result in a refusal of confirmation, then it would follow that the agreement would be subject to all the objections urged in the demurrers of plaintiff in error. If the agreement was secret, and not known to the court, it would certainly warrant a refusal to confirm.

Re Jacobs, 18 Nat. Bankr. Reg. 48, Fed. Cas. No. 7,159; Collier, Bankr. 6th ed. p. 168.

Mr. Samuel A. Putman argued the cause and filed a brief for defendants in error:

The new promise was made after the adjudication of bankruptcy, for a new and valuable consideration; but it was a good promise whether there was any new consideration or not. The bankruptcy does not extinguish the debt, but merely bars the remedy: and the moral obligation to pay is in itself a sufficient consideration to sustain a new promise.

Mutual Reserve Fund Life Asso. v. Beatty, 35 C. C. A. 573, 93 Fed. 747; Griel v. Solomon, 82 Ala. 85, 60 Am. Rep. 733, 2 So. 322; Torry v. Krauss, 149 Ala. 200, 43 So. 184.

Mr. Justice Pitney delivered the opinion of the court:

Defendants in error sued plaintiff in error November 22, 1907, in the city court of Birmingham, Alabama, declaring upon the common counts for moneys due December 10, 1906, and February 19, 1906, and by an amendment declared upon a promissory note for about $250, which was a part of a claim of the defendants in error that antedated the bankruptcy of the plaintiff in error. The defendant (now plaintiff in error) pleaded that on November 22, 1905, he filed in the district court of the United [627] States *for the northern district of Alabama, his petition in bankruptcy; that said court had jurisdiction of said bankruptcy proceedings, and duly adjudicated him a bankrupt on that date; that subsequently he offered a composition to his creditors, and the offer was accepted and a composition made in said proceedings and duly confirmed by said district court February 6, 1906, a certified copy of the decree of confirmation being attached to and made a part of the plea; that the plaintiffs were then creditors of the bankrupt, and as such accepted the offer of composition and were paid a dividend thereon; that the claim sued on herein is a part of and was included in said claim on which said dividend was paid, and the claim herein is barred by said proceedings and discharged by said composition. The plaintiffs replied, (a) that on January 1, 1906 (which date was after the adjudication and before the discharge), defendant promised that if plaintiffs would lend him $500 for use in paying the consideration of a composition with his creditors in said bankruptcy proceedings, he, defendant, when said composition was confirmed, would pay plaintiffs the balance of the demand sued on, after deducting therefrom plaintiffs' share of the consideration of such composition; and plaintiffs averred that they accepted defendant's said offer and promise, and did so lend him the said sum of $500 for the said purpose; and (b) for further replication, that after the filing of defendants' said petition in bankruptcy, and after he had been adjudged a bankrupt, defendant promised plaintiffs that he would pay what he owed them, being the same demand sued on herein, when his composition in bankruptcy was confirmed, and that plaintiffs accepted said promise. To these replications the defendant demurred. The city court overruled the demurrers and proceeded to a trial of the issues of fact, which resulted in favor of the plaintiffs upon both the common counts and the note. The defendant appealed *to the supreme court of Ala- [628] bama, which affirmed the judgment. 171 Ala. 401, 54 So. 654. Whereupon he sued out the present writ of error.

The case is brought here under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), the contention being that a right or immunity set up and claimed by the plaintiff in error under the Federal bankruptcy act was denied by the state court. See Linton v. Stanton, 12 How. 423, 13 L. ed. 1050; Mays v. Fritton, 131 U. S. cxiv, Appx. and 21 L. ed. 127; Hill v. Harding, 107 U. S. 631, 27 L. ed. 493, 2 Sup. Ct. Rep. 404; Rector v. City Deposit Bank, 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289.

It is not contended that the record imports a secret or fraudulent agreement between the bankrupt and the plaintiffs at the expense of other creditors. The state court construed the replications as not averring secrecy or fraud, saying (171 Ala. 408): "That an advantage accrued to plaintiffs as the result of the loan is true; but that it came as a result of fraud, collusion, or extortion, cannot be read from these replications. On the contrary, the advantage, so far as the pleadings show, was the result of the advancement made by way of the loan described. There is nothing in the replications on which to rest a conclusion that

anything other than the loan induced the promise relied on for recovery here."

This construction of the pleadings is not disputed here. We therefore are not in this case concerned with the general equitable principle that composition agreements are invalid if based upon or procured by a secret arrangement with one or more favored creditors, in violation of the equality and reciprocity upon which such an agreement is avowedly based. Story, Eq. Jur. 9th ed. §§ 378, 379; Clarke v. White, 19 Pet. 178, 199, 9 L. ed. 1046, 1055; Wood v. Barker, L. R. 1 Eq. 139, 35 L. J. Ch. N. S. 276, 11 Jur. N. S. 905, 13 L. T. N. S. 318, 14 Week. Rep. 47; McKewan v. Sanderson, L. R. 20 Eq. 65, 44 L. J. Ch. N. S. 447, 32 L. T. N. S. 385, 23 Week. Rep. 607; Bissell v. Jones, L. R. 4 Q. B. 49, 9 Best & S. 884, 38 L. J. Q. B. N. S. 2, 19 L. T. N. S. 262, 17 Week. Rep. 49; Ex parte Nicholson, L. R. 5 Ch. 332, 22 L. T. N. S. 286, 18 Week. Rep. 411; Crossley v. Moore, 40 N. J. L. 27, 34; Feldman v. Gamble, 26 N. J. Eq. 494; Dicks v. Andrews, 132 Ga. 601, 604, 64 S. E. 788, 16 Ann. Cas. 1070. 629] *Of the questions raised, only three deserve notice.

(1) It is contended that the transaction set up in the former of the two replications mentioned was in violation of the prohibition of § 29b, cl. 5 of the bankruptcy act (30 Stat. at L. chap. 541, pp. 544, 554, U. S. Comp. Stat. 1901, pp. 3418, 3433), which declares that "a person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently . . . extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings." It is sufficient to say that we are unable to see in this record anything of extortion or attempted extortion.

(2) It is contended as to both replications that although a debt barred by discharge in bankruptcy may be revived by a new promise made after the discharge, this cannot be done by a new promise made in the interim between the adjudication and the discharge.

It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the *indebtedness*; that, generally speaking, it *relates to the inception of the* proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, *is as effectual when[630 made after the filing of the petition and before the discharge as if made after the discharge. Kirkpatrick v. Tattersall, 13 Mees. & W. 766, 1 Car. & K. 577, 14 L. J. Exch. N. S. 209, 9 Jur. 214; Otis v. Gazlin, 31 Me. 569; Hornthal v. McRae, 67 N. C. 21; Fraley v. Kelly, 67 N. C. 78; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926; Knapp v. Hoyt, 57 Iowa, 591, 42 Am. Rep. 59, 10 N. W. 925; Lanagin v. Nowland, 44 Ark. 84; Wiggin v. Hodgdon, 63 N. H. 39; Griel v. Solomon, 82 Ala. 85, 60 Am. Rep. 733, 2 So. 322; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338.

Our attention is not called to any decision in point arising under the present bankruptcy act; but we deem it clear that the same rule should be applied. If there is any distinction between this and former acts that would require a different rule, it must arise from the time to which the discharge is made to relate. As to this, § 17 of the act of 1898 declares that "a discharge in bankruptcy shall release a bankrupt from all his provable debts," with certain exceptions not now pertinent. For the definition of "provable debts" we are referred to § 63, which is set forth in full in the margin.† Of the several *classes of[631 liabilities, those in clauses 1, 2, and 3 are in terms described as existing at or before the

†Sec. 63. Debts which may be proved.—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was, at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee, and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, ex-

filing of the petition. Clause 5 relates to liabilities "founded upon provable debts reduced to judgment after the filing of the petition," etc.; plainly meaning that they arose before its filing. Clause 4 describes simply debts that are "founded upon an open account, or upon a contract, express or implied," not in terms referring to the time of the inception of the indebtedness. But, reading the whole of § 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under § 63a, cl. 4 include only such as existed at the time of the filing of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, 1898, under the authority conferred by § 30, a form of discharge was prescribed (Forms in Bankruptcy, No. 59), by which it is ordered that the bankrupt "be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the — day of ———, A. D. ——, on which day the petition for adjudication was filed him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." And the forms prescribed for proof of debts all declare that the indebtedness existed "at and before the filing of the said petition." Forms 31 to 36, inclusive. The General Orders and Forms, etc., are to be found in 172 U. S. 700-704, 43 L. ed. 1217, 1218, 18 Sup. Ct. Rep. xxxii.-xxxv.; 32 C. C. A. lxvi.-lxix., 89 Fed. xlii.-xlv.; 3 Foster, Fed. Pr. 4th ed. 2526, 2559, 2572.

The view above expressed as to clause 4 of § 63a is the same that has been generally adopted in the Federal district courts. Re [632] Burka, 104 Fed. 326; Re *Swift, 50 C. C. A. 264, 112 Fed. 315, 321; Re Adams, 130 Fed. 381; Coleman Co. v. Withoft, 195 Fed. 250, 252; and see Re Roth, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 667, 673.

And so, upon the whole matter, we conclude that under the present act an express promise to pay a provable debt is good although made after the filing of the petition and before discharge.

3. What has been said disposes at the same time of the contention that the promises set up in the two replications under consideration were discharged by the confirmation of the composition. As these obligations were entered into after the adjudication of bankruptcy, they were, of course, not provable under § 63; and only provable debts are discharged.

With respect to the money loaned to the bankrupt for use in paying the consideration of the composition, it is perhaps worth while to remark that § 12 of the act, in prescribing the time and mode of offering terms of composition, plainly contemplates that a composition in money may be offered, and expressly prescribes that an application for the confirmation of a composition may be made after, but not before, "the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority, and the cost of the proceedings, have been deposited in such place as shall be designated by, and subject to the order of, the judge." And the same section provides that "upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed."

The act, of course, contemplates that the bankrupt may acquire the money required for the purposes of the composition by the use of his credit.

Judgment affirmed.

press or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court. be liquidated in such manner as it shall direct, and may thereafter be proved and allowed *against his estate.*

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*JOSEPH MARRONE, Plff. in Err., [633

v.

WASHINGTON JOCKEY CLUB OF THE DISTRICT OF COLUMBIA, S. S. Howland, Henry J. Morris, and Samuel Ross.

(See S. C. Reporter's ed. 633-637.)

**Election of remedies — choice — right of holder of race track ticket.**

A ticket of admission to a race track inclosure is only a revocable license, and the holder's only remedy, where he has been forcibly prevented from entering, or has been forcibly ejected just after he had dropped his ticket into the box, is by an action for damages for the breach of the contract. He cannot maintain an action of trespass.

[For other cases, see Election of Remedies, III., In Digest Sup. Ct. 1908.]

[No. 59.]

NOTE.—On the nature and extent of rights of holder of ticket of admission to place of amusement—see note to report of this case in 43 L.R.A.(N.S.) 961

Argued February 28, 1913. Decided March 10, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the District Court in favor of defendants in an action of trespass based upon the refusal of admission, or the ejection of the holder of a ticket of admission, to a race track inclosure. Affirmed.

See same case below, 35 App. D. C. 82.

The facts are stated in the opinion.

Mr. Lorenzo A. Bailey argued the cause, and, with Mr. George A. Prevost, filed a brief for plaintiff in error:

A conspiracy, for the purposes of a civil action, is a combination of two or more persons by some concerted action to accomplish any purpose by unlawful means, or an unlawful purpose by any means.

Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829.

It may be a verbal agreement or undertaking, or a scheme evidenced by the action of the parties.

Franklin Union v. People, 220 Ill. 355, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176.

Any conspiracy the object of which is wrongfully or maliciously to injure another in business, trade, or reputation, is actionable. Although in criminal conspiracy the combination is the gist of the offense, in civil conspiracy damage is the gist, and not the combination itself.

Eddy, Combinations, §§ 253, 371, 373.

The evidence of conspiracy is generally, from the nature of the case, circumstantial. It is not necessary to prove that the defendants came together and actually agreed in terms.

Greenl. Ev. Redf. ed. § 93; 8 Cyc. 685.

In an action for conspiracy wrongfully to expel plaintiff from the society, whether the members acted fairly and in good faith in finding that a letter written by plaintiff was in violation of the constitution and laws of the order was for the jury.

St. Louis Southwestern R. Co. v. Thompson, 102 Tex. 89, 113 S. W. 144, 19 Ann. Cas. 1250.

The weight of authority and the proposition sustained by reason and well-established principles, as stated in 28 Am. & Eng. Enc. Law, 124, is that the holder of a ticket of admission to a theater has more than a revocable license; his right is more in the nature of a lease, entitling him to the ingress and egress; and where the holder of a ticket of admission to a place of public amusement is wrongfully ejected, the wrongdoer is liable for all consequential damages resulting from the unlawful ejection.

Tayler v. Waters, 7 Taunt. 374, 2 Marsh. 551, 18 Revised Rep. 499; Drew v. Peer, 93 Pa. 234; McGoverney v. Staples, 7 Alb. L. J. 219; MacGowan v. Duff, 12 N. Y. S. R. 680; Cremore v. Huber, 18 App. Div. 231, 45 N. Y. Supp. 947; Smith v. Leo, 92 Hun, 242, 36 N. Y. Supp. 949; Collister v. Hayman, 183 N. Y. 250, 1 L.R.A.(N.S.) 1188, 111 Am. St. Rep. 740, 76 N. E. 20, 5 Ann. Cas. 344; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; Baylies v. Curry, 128 Ill. 287, 21 N. E. 595; Joseph v. Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102.

A person who has a right to enter upon the land of another and there do an act may use what force is required for the purpose without being liable to an action, though such right was not acquired by deed.

W. T. Walker Furniture Co. v. Dyson, 32 App. D. C. 90, 19 L.R.A.(N.S.) 606.

A license, founded upon a valuable consideration, to enter the land of another, is not revocable at the will of the licensor.

Chicosa Irrig. Ditch Co. v. El Moro Ditch Co. 10 Colo. App. 276, 50 Pac. 731; Burrow v. Terre Haute & L. R. Co. 107 Ind. 432, 8 N. E. 167.

The conditions upon which the defendants could refuse to admit plaintiff are specified on the back of the ticket. The good faith of the stewards in their decision is directly impeached and put in issue in this suit, and, upon all the evidence, was a question of fact for the jury.

St. Louis Southwestern R. Co. v. Thompson, 102 Tex. 89, 113 S. W. 144, 19 Ann. Cas. 1250.

Mr. A. S. Worthington argued the cause, and, with Mr. Charles L. Frailey, filed a brief for defendants in error:

The exclusion of the plaintiff from the race-track inclosure gave him no cause of action against the defendants except, at the most, a right to sue for breach of contract, in which, on the evidence in this case, his damages would have been limited to the amount paid for his tickets.

Wood v. Leadbitter, 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161, 9 Jur. 187, 16 Eng. Rul. Cas. 49; Horney v. Nixon, 213 Pa. 20, 1 L.R.A.(N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496; McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745; Burton v. Scherpf, 1 Allen, 136, 79 Am. Dec. 717; Johnson v. Wilkinson, 139 Mass. 3, 52 Am. Rep. 696, 29 N. E. 62; Pearce v. Spalding, 12 Md. App. 144; Buenzle v. Newport Amusement

Asso. 29 R. I. 23, 14 L.R.A.(N.S.) 1242, 68 Atl. 721; Meisner v. Detroit, B. I. & W. Ferry Co. 154 Mich. 545, 19 L.R.A.(N.S.) 872, 129 Am. St. Rep. 493, 118 N. W. 14; W. W. V. Co. v. Black, 113 Va. 728, 75 S. E. 82; 21 Enc. Pl. & Pr. 647; Shubert v. Nixon Amusement Co. — N. J. —, 83 Atl. 369; Taylor v. Cohn, 47 Or. 540, 84 Pac. 388, 8 Ann. Cas. 527; Purcell v. Daly, 19 Abb. N. C. 301; People ex rel. Burnham v. Flynn, 114 App. Div. 578, 100 N. Y. Supp. 31, affirmed in 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420.

Mr. Justice Holmes delivered the opinion of the court:

This is an action of trespass for forcibly preventing the plaintiff from entering the Bennings Race Track in this District after he had bought a ticket of admission, and for 636] *doing the same thing, or turning him out, on the following day, just after he had dropped his ticket into the box. There was also a count charging that the defendants conspired to destroy the plaintiff's reputation, and that they excluded him on the charge of having "doped" or drugged a horse entered by him for a race a few days before, in pursuance of such conspiracy. But as no evidence of a conspiracy was introduced, and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right *in rem*. 35 App. D. C. 82. Wood v. Leadbitter, 13 Mees. & W. 838, 14 L. J. Exch. N. S. 161, 9 Jur. 187, 16 Eng. Rul. Cas. 49; McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745; Johnson v. Wilkinson, 139 Mass. 3, 52 Am. Rep. 698, 29 N. E. 62; Horney v. Nixon, 213 Pa. 20, 1 L.R.A.(N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349; Meisner v. Detroit, B. I. & W. Ferry Co. 154 Mich. 545, 19 L.R.A. (N.S.) 872, 129 Am. St. Rep. 493, 118 N. W. 14; W. W. V. Co. v. Black, — Va. —, 75 S. E. 82, 85; Shubert v. Nixon Amusement Co. — N. J. —, 83 Atl. 369; Taylor v. Cohn, 47 Or. 538, 540, 84 Pac. 388, 8 Ann. Cas. 527; People ex rel. Burnham v. Flynn, 114 App. Div. 578, 100 N. Y. Supp. 31, 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420.

We see no reason for declining to follow the commonly accepted rule. The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker, but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal, but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did not create such an interest, that is to say, a right *in rem*, valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach. It is true that if the contract were incidental to a *right of property either[637 in the land or in goods upon the land, there might be an irrevocable right of entry; but when the contract stands by itself, it must be either a conveyance or a license, subject to be revoked.

Judgment affirmed.

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JOHN F. BAXTER, Plff. in Err.,
v.
BUCHHOLZ-HILL TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 637, 638.)

**Judgment — res judicata — dismissal without prejudice.**

A decree of a Federal circuit court of appeals which affirmed a decree in admiralty adjudging a sunken barge to be liable to the owners of a tugboat for damages resulting from a collision, but dismissing the libel as against the person who, it is averred, had agreed to mark the wreck, without prejudice to a new action against him, cannot be given effect as a judgment on the merits in his favor, because in its opinion the court expressed a decision upon the merits, where, upon motion, it so far changed its view as to exclude such a decision, and to leave it open to the libellant to bring a new action.

[For other cases, see Judgment, III. f, 1, in Digest Sup. Ct. 1908.]

[No. 882.]

Submitted February 24, 1913. Decided March 10, 1913.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson v. Wharton, 38 L. ed. U. S. 429, and Southern P. R. Co. v. United States, 42 L. ed. U. S. 356.

affirmed a judgment of the Appellate Division of the Supreme Court, Second Department, which had, in turn, affirmed a judgment of the Supreme Court in and for the County of Nassau, in favor of plaintiff in an action for damages resulting from the alleged failure of defendant to mark a wreck. Dismissed.

See same case below in appellate division, 142 App. Div. 25, 126 N. Y. Supp. 514; in court of appeals, 206 N. Y. 173, 99 N. E. 180.

**Mr. Charles C. Burlingham** submitted the cause for plaintiff in error. Messrs. Norman B. Beecher and Ray Rood Allen were on the brief:

Parties are not confined to the recitals in the judgment alone, but proof *aliunde* the record is admissible to show what questions were actually litigated and decided.

Young v. Black, 7 Cranch, 565, 567, 3 L. ed. 440, 441; Washington A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 334, 16 L. ed. 650, 652; Miles v. Caldwell, 2 Wall. 35, 43, 17 L. ed. 755, 758; Washington A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 591, 18 L. ed. 550, 553; Russell v. Place, 94 U. S. 606, 608, 24 L. ed. 214, 215; Campbell v. Rankin, 99 U. S. 261, 263, 25 L. ed. 435, 436, 12 Mor. Min. Rep. 257; Holford v. James, 69 C. C. A. 263, 136 Fed. 555; Ætna L. Ins. Co. v. Hamilton County, 54 C. C. A. 468, 117 Fed. 88; Clark v. Scovill, 198 N. Y. 279, 91 N. E. 800; Doty v. Brown, 4 N. Y. 75, 53 Am. Dec. 350; Kerr v. Hays, 35 N. Y. 338; Smith v. Smith, 79 N. Y. 634; Adams v. Conover, 87 N. Y. 429, 41 Am. Rep. 381; Carleton v. Lombard, A. & Co. 149 N. Y. 152, 43 N. E. 422.

The opinion of the circuit court of appeals in an admiralty suit is admissible to show what was actually decided in that suit.

Cahill v. Standard Marine Ins. Co. 204 N. Y. 190, 97 N. E. 486.

Findings of fact are admissible in support of a plea of *res judicata*.

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 690, 39 L. ed. 859, 863, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205.

The insertion of the provision in the mandate of the circuit court of appeals that the affirmance should be without prejudice to the bringing of a new action does not deprive it of its effect as a bar or as an estoppel.

Bostwick v. Abbott, 40 Barb. 331; Prondzinski v. Garbutt 9 N. D. 239, 83 N. W. 23.

There is no particular virtue in the name which a court may apply to its judgment.

*Dooley v. Heintz*, 169 N. Y. 129, 62 N. E. 158; *Elwell v. McQueen*, 10 Wend. 520.

But, whether or not the proceedings in the circuit court of appeals constitute a bar to this action, that court conclusively determined that the appellant did not make the contract with the respondent which is the basis of this judgment; that issue of fact is settled as between these parties and cannot again be litigated.

Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; White v. Coatsworth, 6 N. Y. 137; Carson v. Three States Lumber Co. 79 C. C. A. 197, 149 Fed. 377; Munson v. Munson, 30 Conn. 425; Huntley v. Holt, 59 Conn. 102, 21 Am. St. Rep. 71, 22 Atl. 34.

**Mr. Arthur English** submitted the cause for defendant in error:

This court has no jurisdiction of the case.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429.

Memorandum opinion by direction of the court. By Mr. Justice **Holmes**:

*This is an action brought by the[638 Buchholz-Hill Transportation Company, defendant in error, against Baxter for failing to use due diligence in locating and marking a sunken coal barge with a buoy, as he had agreed to, by reason of which failure a tug ran into the wreck and was sunk. It is alleged that the owners of the tug libeled the barge in the admiralty, that the Buchholz-Hill Company answered and filed a petition to bring in Baxter under the 59th admiralty rule, that the district court entered a decree against the barge, but gave costs to Baxter without prejudice to a new action against him; and that the circuit court of appeals affirmed the decree. The defendant set up the decree dismissing the libel as against him, alleging that the decision was upon the merits, and that the decree, in so far as it purported to be without prejudice, was not warranted by law. The appellate division and the court of appeals both held the plea bad. 142 App. Div. 25, 126 N. Y. Supp. 514, 206 N. Y. 173, 99 N. E. 180.

The defendant relies upon the fact that the circuit court of appeals in its opinion expressed a decision upon the merits. The Macy, 96 C. C. A. 146, 170 Fed. 930. But upon motion it so far changed its view as to exclude such a decision, and to leave it open to the company to bring a new action. The matter was still in the breast of the court; it was free to change its opinion if it saw fit, and it was free to do so by changing the decree without delivering a new opinion to explain what the decree made manifest. If it thought, rightly or wrongly, that the collateral question of the present defendant's liability could not be tried in that case, it properly embodied its decision in the decree.

The decree is the dominant act, and cannot be given a greater effect than it purports to have and than would be warranted by the opinion that the court finally reached.

Writ of error dismissed.

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639] *KANSAS CITY SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
J. M. CARL.

(See S. C. Reporter's ed. 639-656.)

**Connecting carriers — right to benefit of shipper's contract with first carrier.**

1. Any limitation of liability contained in a contract made by the initial carrier of an interstate shipment for the benefit of itself and connecting carriers which would be valid in its own behalf, under the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591, § 7, U. S. Comp. Stat. Supp. 1911, p. 1304), to the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, making the initial interstate carrier liable for loss or damage occurring anywhere *en route*, will likewise inure to the benefit of any succeeding carrier in the chain of transportation when sued for the loss or damage.

[For other cases, see Carriers, II. c, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — agreed value — effect of Carmack amendment.**

2. A limitation of liability in case of loss or damage to a valuation agreed upon for the purpose of determining which of two alternative rates shall apply to a particular shipment is not forbidden by the provision in the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, that no contract, receipt, rule, or regulation shall exempt an interstate carrier from the "liability thereby imposed."

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — released rates — Carmack amendment.**

3. A case of valuation to adjust the rate, and not one of exemption from liability for negligence, which would be forbidden by the provision of the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, that no contract, receipt, rule, or regulation shall exempt an interstate carrier from the liability thereby imposed, is presented where the shipper, upon receipt of the bill of lading, signed and delivered to the initial carrier of an interstate shipment of household goods, an agreement purporting to "release" the carrier from "all liability from any loss or damage said property may sustain in excess of $5 per hundred pounds," such agreement bearing a footnote directing the carrier's agent to require the owner's signature if household goods are shipped "at a rate based on valuation of $5 per hundred pounds," and to note the fact on the bill of lading, which was done, the carrier's tariff sheets on file with the Interstate Commerce Commission showing two rates on household goods, one when released to $5 per hundred pounds, and a higher rate when not so released, and the rate indorsed on the bill of lading and paid by the shipper being such lower rate.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 16.]

Argued March 5, 1912. Ordered for reargument April 8, 1912. Reargued October 22, 1912. Decided March 10, 1913.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court for Benton County, in that state, affirming a justice's judgment for the value of an undelivered interstate shipment, notwithstanding a stipulation limiting the carrier's liability. Reversed and remanded for further proceedings.

See same case below, 91 Ark. 97, 134 Am. St. Rep. 56, 121 S. W. 932.

Statement by Mr. Justice Lurton:

Action by the holder of a bill of lading issued by the Chicago, Rock Island, & Pacific Railway for two boxes and one barrel containing "household goods," received at Lawton, in what was then the Indian territory, a station on the line of the railway company, for transportation to Gentry, Arkansas, a station on the line of railway of plaintiff in error. One of the boxes was never delivered, and the shipper sued to recover its value.

The defense was that the plaintiff had, in order to obtain the lower of two freight rates, shipped the boxes under an agreement that the goods, in case of a loss, should be valued at $5 per hundredweight, and that it, as a succeeding carrier in the route, was entitled to the benefit of that limitation of value. The total weight of the two boxes and barrel was 400 pounds, and the weight of the box lost was not over 200 pounds. The limitation of liability was in the form

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NOTE.—On the liability of a connecting carrier for loss beyond its own line—see note to Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1.

On the construction of the Hepburn act (Carmack amendment)—see note to Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. U. S. 516.

On the validity of stipulation limiting carrier's liability to agreed valuation, as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

of a release signed by the shipper, and was delivered to the primary carrier on receipt of the bill of lading.

The relevant parts of the bill of lading were in these words:

Lawton, 10-8-1907.

Received from J. M. Carl, in apparent good order, by the Chicago, Rock Island, 641]& Pacific Railway Company, *the following described packages marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said company, to be transported over the line of this railroad to ———— and delivered, after payment of freight, in like good order to the next carrier (if the same are to be forwarded beyond the line of this company's road), to be carried to the place of destination; it being especially agreed that the responsibility of this company shall cease at this company's depot at which the same are to be delivered to such carrier; but this company guarantees that the rates of freight for the transportation of said packages from the place of shipment to ——— shall not exceed — per — and charges advanced by this company, subject to the following conditions:

. . . . . .

It is further especially agreed that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier or forwarder only in whose custody may be actually at the happening thereof, it being understood that the Chicago, Rock Island, & Pacific Railway Company assumes no other responsibility for their safe carriage or safety than may be incurred on its own road.

. . . . . .

| Consignee: | Destination: |
|---|---|
| J. M. Carl. | Gentry, Ark. |

Description of Articles.

| No. | Weights. | Stamp. |
|---|---|---|
| 2 Bx. H. H. goods.<br>1 Brl. H.H. goods.<br>O. R. Val. 5.00 cwt. | Subject to correction.<br>400<br>127016 | Paid to apply<br>$3.80 |

R. F. Prettyman, Agent.

642] *The legend "O. R. Val. 5.00 cwt." on the bill of lading is an abbreviation for "Owner's released valuation $5 per hundred weight," and was intended to connect with the contract of release, which was in these words:

Lawton Station, 10, 8, 1907.

*In consideration of* the price (special *rates on carloads and first-class* rates on less quantities) at which the Chicago, Rock Island, & Pacific Railway Company hereby agrees to transport a quantity of household goods, furniture, or emigrants' movables—including live stock, if any in the car—from Lawton, O. T. station to Gentry, Arkansas, station, the same being consigned to J. M. Carl. I, —— ——, the consignor, hereby release the said company, and all other railroad and transportation companies over whose lines the above property may pass to destination, from all liability from any loss or damage said property may sustain in excess of $5 per 100 lbs., and I hereby guarantee all charges for freight on connection lines to destination.

J. M. Carl, Consignor.

N. B.—When household goods, etc., are shipped at rate based on valuation of $5 per hundred pounds, agents will require the owner or consignor to sign this agreement, and when signed, same must be kept on file at forwarding station. Agent must then note on Way Bill, "Released to valuation of $5 per hundred pounds."

The suit was started before a state justice of the peace, and the pleadings were informal. There was a judgment for $75, which was the uncontradicted full value of the goods lost. The case was taken to the circuit court for Benton county, where there was a verdict and a judgment for the same amount. This judgment was, upon a writ of error, affirmed in the supreme court of the state, the case being reported in 91 Ark. 97, 134 Am. St. Rep. 56, 121 S. W. 932.

*The uncontradicted evidence was[643 that two boxes and a barrel containing household goods were delivered to the initial carrier, and that the plaintiff in error received same, but delivered only one of the boxes and the barrel, and that the value of the box lost was $75; that there were two rates in effect upon household goods shipped from Lawton to Gentry, one based upon a released valuation of $5 per hundredweight, and a higher rate upon such articles not so released, and that the latter rate was 78 cents per hundred pounds higher than the released valuation rate, and that these two rates "were evidenced by tariffs duly filed with the Interstate Commerce Commission and published according to law."

The defendant in error testified, over objection, that though he could read and write, and had signed the release set out above, and had received the bill of lading, he had neither read them nor asked any questions about them, and had not been given any information as to the contents of either document, and had no knowledge

of the existence of the two rates. He was also allowed to testify that if he had known of the difference between the two rates, and the effect of accepting the lower, he would have paid the higher rate. There was no evidence tending to show any misrepresentation made by the company, or of any deceit, or fraud, or concealment, unless it be inferred from the fact that the company made no explanation of the rates or the contents of either the bill of lading or the release. The shipper merely said that the bill of lading was handed to him with the release, which he was asked to sign. Exceptions were taken to the rulings upon evidence and to certain parts of the charge, and for the refusal of the court to grant certain requests.

Mr. A. B. Browne argued the cause for plaintiff in error on original argument.

Mr. Samuel W. Moore argued the cause, and, with Mr. James B. McDonough, filed a brief for plaintiff in error on reargument:

The sole purpose of the Hepburn act was to give the shipper a right of action against the initial carrier issuing the bill of lading, for any loss or damage occurring during the entire transit, even though a number of connecting carriers were involved; and this purpose was accomplished by requiring the initial carrier to assume a responsibility for the property during its entire transit, and making the connecting carriers its agency for the purpose of through carriage.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

It must be assumed that Congress, in enacting this legislation, did so, having before it the rule universally established in both state and Federal jurisdictions, that a carrier may, by contract, limit its liability to an agreed valuation in the event of the loss of articles, particularly where such agreement, as in this case, is based upon a valuable consideration.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; Jennings v. Smith, 45 C. C. A. 249, 106 Fed. 139; Missouri, K. & T. R. Co. v. Patrick, 75 C. C. A. 434, 144 Fed. 632; Ballou v. Earle, 17 R. I. 441, 14 L.R.A. 443, 33 Am. St. Rep. 881, 22 Atl. 1113; Louisville & N. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Richmond & D. R. Co. v. Payne, 86 Va. 481, 6 L.R.A. 849, 10 S. E. 749; Normile v. Oregon R. & Nav. Co. 41 Or. 177, 69 Pac. 928; Zouch v. Chesapeake & O. R. Co. 36 W. Va. 524, 17 L.R.A. 116, 15 S. E. 185; Pierce v. Southern P. Co. 120 Cal. 156, 40 L.R.A. 350, 354, 47 Pac. 874, 52 Pac. 302, 1 Am. Neg. Rep. 211, 3 Am. Neg. Rep. 636; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 292, 30 L.R.A. 860, 64 N. W. 899; Duntley v. Boston & M. R. Co. 66 N. H. 263, 9 L.R.A. 449, 49 Am. St. Rep. 610, 20 Atl. 327; Starnes v. Louisville & N. R. Co. 91 Tenn. 516, 19 S. W. 675.

In the following cases, stipulations substantially the same as in the case at bar, releasing the value of property in case of loss to $5 per hundred pounds, were upheld:

Carleton v. New York Central & H. R. R. Co. 64 Misc. 51, 117 N. Y. Supp. 1021; Missouri, K. & T. R. Co. v. McLaughlin, 29 Okla. 345, 116 Pac. 811; Missouri, K. & T. R. Co. v. Patrick, 75 C. C. A. 434, 144 Fed. 634; Huguelet v. Warfield, 84 S. C. 87, 65 S. E. 985; Lansing v. New York C. & H. R. R. Co. 52 Misc. 334, 102 N. Y. Supp. 1092; Hazel v. Chicago, M. & St. P. R. Co. 82 Iowa, 477, 48 N. W. 926.

The Hepburn act left the carriers free to contract as they had done under the rules of the common law, except that the initial carrier assumed the burden of the liability of its connection in addition to its own.

Greenwald v. Barrett, 199 N. Y. 170, 35 L.R.A.(N.S.) 971, 92 N. E. 218; Fielder v. Adams Exp. Co. 69 W. Va. 138, 71 S. E. 99; Blackwell v. Southern P. Co. 184 Fed. 489; George N. Pierce Co. v. Wells, F. & Co. 110 C. C. A. 645, 189 Fed. 561; Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A. (N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351.

The plaintiff, having signed the contract of release, is conclusively presumed to have assented to both the contract and bill of lading; and will not be heard to say that he did not read them or know what they meant.

St. Louis, I. M. & S. R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 34; Hutchinson v. Chicago, St. P. M. & O. R. Co. 37 Minn. 524, 35 N. W. 433; Coles v. Louisville, E. & St. L. R. Co. 41 Ill. App. 607; Johnstone v. Richmond & D. R. Co. 39 S. C. 55, 17 S. E. 512; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Wabash, St. L. & P. R. Co. v. Black, 11 Ill. App. 465; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151

John Wood Co. v. American Pneumatic Service Co. 191 Mass. 27, 77 N. E. 638; Black v. Wabash, St. L. & P. R. Co. 111 Ill. 351, 53 Am. Rep. 628; Stewart v. Cleveland, C. C. & St. L. R. Co. 21 Ind. App. 218, 52 N. E. 89; Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Davis v. Central Vermont R. Co. 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313; Taylor v. Weir, 162 Fed. 585; Mulligan v. Illinois C. R. Co. 36 Iowa, 181, 14 Am. Rep. 514; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Ct. Rep. 663, 16 Am. Neg. Rep. 659.

To permit the judgment in this case to stand is to set aside and annul the lawfully published interstate tariffs of the defendant, and to create the very discrimination which it is the purpose and intent of the interstate commerce act to prevent.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The bill of lading and contract of release inure to the benefit of the defendant and may be availed of by it.

The Key City (Young v. The Key City) 14 Wall. 653, 20 L. ed. 896; Central Trust Co. v. Cincinnati, J. & M. R. Co. 58 Fed. 500; Tompkins v. Augusta Southern R. Co. 102 Ga. 445, 30 S. E. 992; Collins v. Kaw City Mill & Elevator Co. 26 Okla. 641, 110 Pac. 734; Spear Min. Co. v. Shinn, 93 Ark. 346, 124 S. W. 1045; Chambers v. Philadelphia Pickling Co. 79 N. J. L. 1, 75 Atl. 159; Eau Claire-St. Louis Lumber Co. v. Banks, 136 Mo. App. 44, 117 S. W. 44; Luedecke v. Des Moines Cabinet Co. 140 Iowa, 223, 32 L.R.A.(N.S.) 616, 118 N. W. 456; Bethlehem Iron Co. v. Hoadley, 152 Fed. 735; Fish v. First Nat. Bank, 80 C. C. A. 266, 150 Fed. 524; Whitehill v. Western U. Teleg. Co. 136 Fed. 499.

No brief was filed for defendant in error.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:

The supreme court of the state declined to consider or pass upon any of the questions made in that court for reversal except the single question as to whether the plaintiff in error, as the final carrier in the route, was entitled to the benefit of the stipulation in the release signed by the shipper, releasing the Chicago, Rock Island & Pacific Railway, the primary carrier, *647]"and all other railroad and *transportation companies over whose lines the above property may pass to destination, from any loss or damage the property may sustain in excess of $5 per hundredweight."

The court, after saying that the plaintiff in error "relies for a reversal on the clause in the contract with the initial carrier limiting the liability as to value in case of loss . . . as a stipulation for its benefit as well as for the benefit of the initial carrier, and bases this contention on our decisions to that effect," in answer to this contention, said:

"But in making their contention they have not taken into consideration the effect of the Hepburn amendment [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288] to the interstate commerce act [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284], which became effective on June 29th, 1906, a date prior to the time the contract in question was made."

The provisions of the 20th section of that act were then set out, and the court proceeded by saying:

"The undisputed evidence shows that the initial carrier received the property for transportation from a point in one state to a point in another state, and the presumption, in the absence of evidence to the contrary, was, as will be seen from our decisions hereinafter referred to, that the goods were lost through the negligence of appellant, the last carrier.

"The section of the Hepburn act above quoted makes the carrier liable 'for any loss, damage, or injury to such property caused by it, . . . and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.'

"The express terms of the act make the carrier liable for any loss caused by it, and provide that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid all stipulations designed to limit liability for losses caused by the carrier. Public *policy[648 forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason a statute may prohibit it from making stipulations in a contract which provide for such partial exemption.

"If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it should not make a contract limiting the liability of its connecting carriers; for the section of the Hepburn act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier on whose

line the loss occurs the amount of the loss it may be required to pay the owner."

As the shipment was interstate, the contract was controlled by the 20th section of the act of Congress of June 29, 1906. The initial carrier, under that provision of the interstate commerce act, as an interstate carrier, holding itself out to receive shipments from a point upon its own line in one state to a point in another state upon the line of a succeeding and connecting carrier, came under liability not only for its default, but also for loss or damage upon the line of a connecting carrier in the route. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164. Any stipulation in its own receipt was ineffective in so far as it was not authorized by the section of the act referred to, whether intended for its own benefit or that of the succeeding carrier. It is also true that any limitation of liability contained in its contract which would be valid in its own behalf would likewise inure to the benefit of its connecting carrier. The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act. This provision of the interstate commerce act has been so fully considered and decided that we need not go further into the matter. Adams Exp. Co. v. Cronin-649]ger, 226 *U. S. 491, ante, 314, 33 Sup. Ct. Rep. 148; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, ante, 328, 33 Sup. Ct. Rep. 155; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, ante, 323, 33 Sup. Ct. Rep. 155. That provision, under the opinions above cited, does not forbid a limitation of liability in case of loss or damage to a valuation agreed upon for the purpose of determining which of two alternative lawful rates shall apply to a particular shipment.

But it is said that upon the face of the contract of limitation here involved, it is an exemption from liability for negligence forbidden by the Carmack amendment, and that the judgment should therefore be affirmed.

That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore withdraw them from the influence of state regulation. Adams Exp. Co. v. Croninger, above cited. Every such initial carrier is required "to issue a receipt or bill of lading therefor," when it receives property for transportation from one state to another. Such initial carrier is made liable to the holder of such receipt for any loss or damage "caused by it," or by any connecting carrier in the route to whom it shall make delivery. It is then declared that no contract, receipt, rule, or regulation shall "exempt" such a common carrier "from the liability hereby imposed."

In speaking of the "liability" imposed by the provision referred to, we said, in the Croninger Case, that "the statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the states." Referring to the exemption forbidden by the same clause, we said, that that was "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." Citing Bernard v. Adams Exp. Co. 205 Mass. 254, 259, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351, and Greenwald v. Barrett, 199 N. Y. 170, 175, 35 L.R.A.(N.S.) 971, 92 N. E. 218, and other cases.

*Is the contract here involved one[650 for exemption from liability for negligence, and therefore forbidden? An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law. Thus in Gibbon v. Paynton, 4 Burr. 2298, it was said by Lord Mansfield: "His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be in proportion to the risk." In the leading case of Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, the right of the carrier to adjust the rate to the valuation which the shipper places upon the thing to be transported is the very basis upon which a limitation of liability in case of loss or damage is rested. This is an administrative principle in rate-making recognized as reasonable by the Interstate Commerce Commission, and is the basis upon which many tariffs filed with the Commission are made. Re Released Rates, 13 Intera. Com. Rep. 550.

It follows, therefore, that when the carrier has filed rate sheets which show two rates based upon valuation upon a particular class of traffic, that it is legally bound to apply that rate which corresponds to the valuation. If the shipper desires the lower rate, he should disclose the valuation; for, in the absence of knowledge, the carrier has a right to assume that the higher of the rates based upon value applies. In no other 651]way can it protect itself in its *right to be compensated in proportion to its insurance risk. But when a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped, upon plain principles of justice, from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. If such a valuation be made in good faith, for the purpose of obtaining the lower rate applicable to a shipment of the declared value, there is no exemption from carrier liability due to negligence forbidden by the statute when the shipper is limited to a recovery of the value so declared. The ground upon which such a declared or agreed value is upheld is that of estoppel. Thus in Hart v. Pennsylvania R. Co. 112 U. S. 331, 340, 341, 28 L. ed. 717, 721, 5 Sup. Ct. Rep. 151, it is stated:

"As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed."

In summing up the view of the court in the same case it was said:

"The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based 652]on the condition *that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss or damage a greater sum. In saying this we lay on one side, as not here involved, every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby causing a discrimination or preference forbidden by the positive terms of the act of Congress and made punishable as a crime. To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. Texas & P. R. Co. v. Mugg, 202, U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648.

It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to *the declared or agreed value.[653 Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. Texas & P. R. Co. v. Mugg, supra. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. Illinois C. R. Co. v. Henderson Elevator Co. 226 U. S. 441, ante, 290, 33 Sup. Ct. Rep. 176. Nor can a car-

rier legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. Chicago & A. R. Co. v. Kirby, supra.

That the valuation and the rate are dependent each upon the other is an administrative rule applied in reparation proceedings by the Interstate Commerce Commission. Southern Cotton Oil Co. v. Southern R. Co. 19 Inters. Com. Rep. 79; Miller & Lux v. Southern P. Co. 20 Inters Com. Rep. 129.

In Hart v. Pennsylvania R. Co. supra, parol evidence that the horses shipped were of a far greater value than the valuation agreed upon was rejected as incompetent. "The presumption is conclusive," said the court, "that if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation."

The difference between two rates upon the same commodity, based upon valuation, is presumably no more than sufficient to protect the carrier against the greater amount of risk he assumes by reason of the difference in value. When the higher rate is 654 no more than to reasonably insure *the carrier against the larger responsibility a real choice of rate is offered, and the shipper has no reasonable excuse for undervaluation. If the margin between the rates is unreasonably beyond protection against the larger risk, the shipper may be induced to misrepresent the value to escape the unreasonably high rate upon the real value. This would result in permitting the shipper to obtain a rate to which he is not entitled, and in the carrier escaping from a portion of its statutory liability. Both the adjustment of rates upon the class of articles, based upon difference in valuation, as well as the acceptance of stipulations in the carrier's bill of lading which affect the liability declared by the Carmack amendment, are administrative duties of the Commission. To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate.

In the instant case, we must assume that the difference between the rates upon household goods of less value than $5 per hundredweight and the rate upon the same class of goods of a higher value has been fixed upon this principle. We must, for the purpose of this case, accept the high and low rate as reasonable. If the present rates upon such goods, as shown in the tariffs filed, are inadequate to protect the carrier, a remedy can be had by an order of the Interstate Commerce Commission readjusting the rates to meet the requirements of justice, alike to shipper and carrier.

Coming now to the application of the principles we have indicated, we are at once confronted with the suggestion that the contract in this case is not one of valuation. Upon the side of the shipper the pregnant words are that he thereby "releases the said company from all liability for any loss or damage said property may sustain in excess of $5 per 100 lbs." At the foot and below the signature of the consignor is a notation addressed to the company's agent, stating in substance, that when household *goods are shipped at 655 the rate based on a valuation of $5 per 100 lbs., the agent will require the owner or consignor to "sign this agreement," and then note on the bill of lading,—"Released to valuation of $5 per hundred." This was done, showing that the agent understood that the household goods were shipped upon a valuation of $5 per hundred pounds. The tariff sheets filed with the Commission showed two rates on household goods, one "when released to $5 per hundred and a higher rate when not so released." The rate indorsed on the bill of lading and paid by the shipper was the lower rate so prescribed by the rate sheets. The lawful rate when valued at more than $5 per hundred was 20 per cent higher than the rate under which the consignor's household goods were shipped. In the light of the published tariffs and of the rate applied to this shipment, the two papers, read together, plainly mean that the household goods included in the two boxes and one barrel were valued, for the purpose of coming under the lower rate, at $5 per hundred.

The phrase "hereby releases," etc., is said to indicate not a valuation, but a release from liability for a part of the value. The words are somewhat misleading. Yet contracts for the limitation of loss to an agreed valuation are largely in this form. The Commission, which has the rate sheets of hundreds of railroads including stipulations as to value, treats the topic under the title, "Released Rates." 13 Inters. Com. Rep. 550. The phrase has, we may take notice, come to be a term applied to contractors of shipment containing in one form or another an agreement to adjust a loss or damage upon the basis of an agreed or declared value. It is difficult not to see, when we read the bill of lading and the release, with its note, in the light of the filed rate sheets and the rate paid upon this shipment, corresponding to the lower of two rates upon household goods, that the consignor and the carrier mutually understood *that these boxes and barrels 656

contained household goods of the average value per hundredweight of $5. The defendant in error must be presumed to have known that he was obtaining a rate based upon a valuation of $5 per hundredweight, as provided by the published tariff. This valuation was conclusive, and no evidence tending to show an undervaluation was admissible.

It has been suggested that a rate of $5 per hundred pounds upon household goods indiscriminately is arbitrary, and has no reasonable relation to the actual value. This objection goes to the classification made in the filed tariff sheets. They place two rates upon household goods valued over and under $5 per hundred pounds. This basis has not been regarded by the Commission as either arbitrary or unreasonable. In the opinion styled, "In the matter of Released Rates," cited above, the Commission, among other things, said:

"The practice of basing rates upon the condition that the carrier shall not be responsible for losses due to causes beyond its control has received legal sanction. Similarly we find no impropriety in a graduation of rates in accordance with the actual values of specific commodities. Household goods, for example, differ widely in value, and it is fair to all that the man who ships goods of low value should receive the benefit of a lower rate than the man who ships more expensive goods. Rate-making upon this principle is in every respect legitimate."

Our conclusion is that the shipping contract does not upon its face offend against the statute, and the judgment must, for the errors indicated, be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Hughes and Mr. Justice Pitney dissent.

*MISSOURI, KANSAS, & TEXAS [657
RAILWAY COMPANY, Plff. in Err.,
v.
HARRIMAN BROTHERS.

(See S. C. Reporter's ed. 657–673.)

**Appeal — question not raised below — evidence.**

1. It is too late to object for the first time in the Federal Supreme Court to a defect in the documentary evidence which, if made below, could have been remedied.

[For other cases, see Appeal and Error, VIII. j, 5, in Digest Sup. Ct. 1908.]

**Commerce — Federal power — superseding state regulation — carrier's liability.**

2. State laws or policy nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value upon which the rate was based are superseded, so far as interstate shipments are concerned, by the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1304), § 7, to the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), § 20, which furnishes the exclusive rule on the subject of the liability of a carrier under contracts for interstate shipment.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — agreed value — effect of Carmack amendment.**

3. The shipper and carrier of an interstate shipment are not forbidden to contract to limit the carrier's liability to an agreed value made to adjust the rate by the provisions of the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, prohibiting exemptions from the liability imposed by that act.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — agreed value — effect of Carmack amendment.**

4. A stipulation in a shipping contract limiting the carrier's liability in case of the loss of an interstate shipment of cattle to the agreed value of $30 for each bull and $20 for each cow, made to secure the lower of two rates on file with the Interstate Com-

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Note.—On the liability of a connecting carrier for loss beyond its own line—see note to Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1.

On the construction of the Hepburn act (Carmack amendment)—see note to Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. U. S. 516.

On the validity of stipulation limiting carrier's liability to agreed valuation, as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

Statutory prohibition against limitation of carrier's common-law liability as affecting *validity of contract limitation of time for bringing suit.*

While statutes of this character are almost uniformly held to invalidate stipulations limiting the time for the presentation to a carrier of claims for loss or damage (see note to Liquid Carbonic Co. v. Norfolk & W. R. Co. 13 L.R.A.(N.S.) 753), the few cases on the effect of such statutes upon stipulations between carrier and shipper limiting the time for bringing suit are in accord with Missouri, K & T. R. Co. v. Harriman Bros.

Thus, in Ray v. Missouri, K. & T. R. Co. — Kan. —, 133 Pac. 847, it was held that the Carmack amendment does not prevent the carrier and shipper from stipulating for a reasonable limitation as to the time for

merce Commission, was not forbidden by the provisions of the Carmack amendment of June 29, 1906, to the act of February 4, 1887, prohibiting exemptions from the liability imposed by that act, although the true value of the cattle greatly exceeded this valuation, where they were loaded by the shipper, and were not seen by the company's agent, and it is not claimed that he was informed of their value or quality.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — agreed value — effect of Carmack amendment.**

5. The valuation named in a shipping contract signed by the shipper is as much an agreed valuation within the meaning of the rule that a carrier, when its rates are graduated by value, may, under the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, limit its liability for the loss of an interstate shipment to the agreed or declared value, as though the shipper had stated the value on inquiry.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

**Commerce — Federal power — superseding state regulation — carrier's liability.**

6. State laws declaring contracts invalid which require the bringing of an action against a carrier for loss of or damage to a shipment in less than the statutory period were superseded, so far as interstate shipments are concerned, by the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, which furnishes the exclusive rule on the subject of the liability of the carrier under contracts for interstate shipment.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

**Carriers — limiting liability — time for bringing suit — Carmack amendment.**

7. The shipper and carrier of an interstate shipment are not forbidden to stipulate that an action against the carrier in case of damage to the shipment must be brought within ninety days after the damage was sustained, by the provisions of the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, prohibiting exemptions from the liability imposed by that act.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 121.]

Argued and submitted January 20, 1913.
Decided March 10, 1913.

IN ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Grayson County in that state against a carrier for the full value of a damaged interstate shipment, notwithstand-

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bringing an action in case of loss of or damage to an interstate shipment.

And in Hafer v. St. Louis Southwestern R. Co. 101 Ark. 310, 142 S. W. 176, it was held that a stipulation in a contract of shipment that actions for the recovery of any claim arising thereunder must be commenced within six months after the cause of action accrues does not violate Ark. Acts 1907, p. 557, forbidding common carriers to abridge, modify, limit, or abrogate their common-law liability. The court said: "A contract, however, which does not in anyway abridge or defeat the complete vestiture of a right to recover from the carrier for any breach of duty imposed upon it by the common law, or growing out of any liability created against it by the common law, does not operate as a limitation, modification, or abridgment of any duty or liability imposed by the common law upon the carrier. The limitation of the time within which suit shall be brought for any cause of action is but a period fixed in which the right itself must be asserted. It does not in any way abridge or impair such right itself, nor limit in any way any liability incurred by the carrier which creates such right. It simply affects the remedy for the enforcement of such right. The general period of limitation fixed by statute names a time within which an action must be brought against a carrier; and yet such statute of limitation cannot be said to abridge or limit any liability of a common carrier as fixed by the common law. For the same reason contract limiting the time within which the right of action shall be asserted does not abridge or limit such liability."

And in Gulf, C. & S. F. R. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567, a contract between a shipper of live stock and a railway company which limited the time within which suit might be brought by the shipper for any claim for damages arising under the contract to forty days from the time the damage occurs was held to be reasonable and valid notwithstanding a statutory provision that common carriers cannot limit or restrict their common-law liability. Such a contract, the court said, did not in any way defeat the complete vestiture of the right to recover from a common carrier for a breach of duty that the common law would give, and hence did not operate as a restriction on the common-law liability of the carrier, but merely required the assertion of that right by action at an earlier period than would be necessary to defeat it through the operation of the ordinary statutes of limitation.

The Illinois statute forbidding a carrier to limit its common-law liability by any stipulation or limitation in the receipt given for the property shipped, leaving untouched the right of the carrier so to limit its liability by a contract with the shipper, does not invalidate a limitation by contract of the time for bringing suits for loss or damage to one year. Ingram v. Weir, 166 Fed. 328.

ing stipulations limiting the carrier's liability to the agreed value, and limiting the time for bringing suit. Reversed and remanded for further proceedings.

See same case below, — Tex. Civ. App. —, 128 S. W. 932.

The facts are stated in the opinion.

Messrs. Joseph M. Bryson and Cecil H. Smith submitted the cause for plaintiff in error. Mr. Alexander S. Coke was on the brief:

The purpose of the act to regulate commerce was to compel the carrier, as a public agent, to give equal treatment to all.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1101, 26 Sup. Ct. Rep. 628.

A carrier's rules and regulations fixing or affecting the amount of the charges which it may demand, or the value of the service rendered, when embodied in its duly issued, filed, and published tariffs, become, in effect, rules and regulations imposed by law, and have the same binding force upon the shipper and carrier as if they had been enacted by Congress itself.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648.

The courts, whether state or Federal, have no power to declare unreasonable the rates, rules, or regulations specified by a carrier in its tariffs unless the matter shall first have been presented to the Interstate Commerce Commission. In other words, the machinery prescribed for ascertaining the reasonableness or unreasonableness of such rates, rules, and regulations requires that the jurisdiction of the Interstate Commerce Commission be first invoked and its order made with reference thereto.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651.

The carrier's warranty and insurance are in respect of the reward he is to receive, and the reward ought to be proportionate to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and therefore he ought, in reason and justice, to have a greater reward.

Gibbon v. Poynton, 4 Burr. 2298.

Prior to the statute of 11 Geo. IV., and 1 Wm. IV., chap. 68, it had been the general custom in England for carriers to give notice by advertisement and posters that they would not be responsible for goods of greater value than 5 pounds, and in some cases 10 pounds, unless the value was declared at the time of shipping, and the rate paid accordingly; and it was uniformly held by the courts that a carrier who had given such notice would not be liable at all, even for the 5 pounds or the 10 pounds, to a shipper who shipped a package of greater value, as an ordinary package, without disclosing its real value.

Ibid.; Clay v. Willan, 1 H. Bl. 298; Isett v. Mountain, 4 East, 371; Batson v. Donovan, 4 Barn. & Ald. 21, 22 Revised Rep. 599.

Under the statute 11 Geo. IV., and 1 Wm. IV., chap. 68, which required the shipper to give notice of the value if the value exceeded 10 pounds, it was held that the carrier is not liable even if the loss happens by the gross negligence of his servants, where a parcel of greater value than 10 pounds is delivered without declaring its value, and paying the rate according to value.

Hinton v. Dibbin, 2 Q. B. 646, 2 Gale & D. 36, 6 Jur. 601.

Long prior to the passage of the Carmack amendment this court, in the case of Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, held that a contract fairly made, agreeing on the valuation of the property carried, with the freight rate based on an assumption by the carrier of liability only to the extent of the agreed valuation, even where the loss resulted from the negligence of the carrier, would be upheld. The courts said it was just and reasonable to uphold such contracts, and it would be unjust and unreasonable if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

The rule of the Hart Case has been followed in many cases, among them:

Kidd v. Greenwich Ins. Co. 35 Fed. 351; Calderon v. Atlas S. S. Co. 64 Fed. 374,

16 C. C. A. 332, 35 U. S. App. 587, 69 Fed. 574; The Kensington, 88 Fed. 331; Jennings v. Smith, 45 C. C. A. 249, 106 Fed. 139; Saunders v. Southern R. Co. 62 C. C. A. 523, 128 Fed. 15; Macfarlane v. Adams Exp. Co. 137 Fed. 982; Missouri, K. & T. R. Co. v. Patrick, 75 C. C. A. 434, 144 Fed. 632; Taylor v. Weir, 162 Fed. 585; Blackwell v. Southern P. Co. 184 Fed. 489; George N. Pierce Co. v. Wells, F. & Co. 110 C. C. A. 645, 189 Fed. 561; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397–442, 32 L. ed. 788–792, 9 Sup. Ct. Rep. 469; Calderon v. Atlas S. S. Co. 170 U. S. 272, 42 L. ed. 1033, 18 Sup. Ct. Rep. 588; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 S. W. 1072; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; O'Malley v. Great Northern R. Co. 86 Minn. 380, 90 N. W. 974; Loeser v. Chicago, M. & St. P. R. Co. 94 Wis. 571, 69 N. W. 372; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Baltimore & O. R. Co. v. Hubbard, 72 Ohio St. 302, 74 N. E. 214, 18 Am. Neg. Rep. 231; Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 327, 18 Ann. Cas. 351; Cau v. Texas & P. R. Co. 194 U. S. 431, 48 L. ed. 1056, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Baltimore & O. S. W. R. Co. v. Voight, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

The main purpose of the Carmack amendment was to give the holder of the bill of lading a right of action against the initial carrier for loss caused by connecting carriers; but it also creates a cause of action against the initial line which is in the nature of a right created by Federal law to take the place of rights prior thereto, existing under the common law, or under state enactments.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Southern P. Co. v. Crenshaw Bros. 5 Ga. App. 675, 63 S. E. 865.

The amendment has been frequently construed by state courts and by inferior Federal courts as not prohibiting agreements of the kind in question.

Greenwald v. Barrett, 199 N. Y. 170, 35 L.R.A.(N.S.) 971, 92 N. E. 218; Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A. (N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351; Travis v. Wells, F. & Co. 79 N. J. L. 83, 74 Atl. 444; Pittsburgh C. C. & St. L. R. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996; Larsen v. Oregon Short Line R. Co. 38 Utah, 130, 110 Pac. 983; Fry v. Southern P. R. Co. 247 Ill. 564, 93 N. E. 906; McElvain v. St. Louis & S. F. R. Co. 151 Mo. App. 126, 131 S. W. 745; Fielder v. Adams Exp. Co. 69 W. Va. 138, 71 S. E. 99; J. C. Shaffer & Co. v. Chicago, R. I. & P. R. Co. 21 Inters. Com. Rep. 8; Miller & Lux v. Southern P. Co. 20 Inters. Com. Rep. 129; Re Bills of Lading, 14 Inters. Com. Rep. 346; Re Released Rates, 13 Inters. Com. Rep. 550.

Decisions under the Harter act are persuasive in this connection.

Calderon v. Atlas S. S. Co. 64 Fed. 874; Calderson v. Atlas S. S. Co. 16 C. C. A. 332, 35 U. S. App. 587, 69 Fed. 574; Calderon v. Atlas S. S. Co. 170 U. S. 272, 42 L. ed. 1033, 18 Sup. Ct. Rep. 588; George N. Pierce v. Wells, F. & Co. 110 C. C. A. 645, 189 Fed. 561; Hohl v. Norddeutscher Lloyd, 99 C. C. A. 166, 175 Fed. 544.

Many states having statutory provisions restricting the right of common carriers to limit their liability by contract, nevertheless apply the rule of the Hart Case.

D'Arcy v. Adams Exp. Co. 162 Mich. 363, 127 N. W. 261; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Oppenheimer v. United States Exp. Co. 69 Ill. 62, 18 Am. Rep. 596; Johnstone v. Richmond & D. R. Co. 39 S. C. 55, 17 S. E. 512.

No law or public policy of a state can serve to set aside or change the rates, rules, and regulations of a carrier affecting interstate commerce, specified in its duly issued, filed, and published tariffs.

Second Employers' Liability Cases (Mondou v. NewYork, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Congress has rightfully assumed jurisdiction of the subject-matter, and therefore state laws covering the same must yield.

Southern R. Co. v. Reid, 222 U. S. 424, 444, 56 L. ed. 257, 263, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

Defendants in error, in declaring the value of their cattle at less than their true value, for the purpose of securing a lower rate than they would have been charged by

the true value been declared, were guilty of an unlawful act, under the act to regulate commerce and the Elkins act, and they cannot maintain a suit based upon such transaction.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Ellison v. Adams Exp. Co. 245 Ill. 410, — L.R.A.(N.S.) —, 92 N. E. 277; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; Brown v. Tarkington, 3 Wall. 377, 18 L. ed. 255; Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439; The Florida, 101 U. S. 37, 25 L. ed. 898; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493.

The provision in the live-stock contract requiring the shipper to serve notice of any claim upon the carrier within thirty days was valid.

Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556; The Queen of the Pacific, 180 U. S. 54, 45 L. ed. 421, 21 Sup. Ct. Rep. 278; Chicago, R. I. & P. R. Co. v. Williams, 101 Ark. 436, 142 S. W. 826; St. Louis & S. F. R. Co. v. Keller, 90 Ark. 308, 119 S. W. 264, 21 Am. Neg. Rep. 522; St. Louis, I. M. & S. R. Co. v. Furlow, 89 Ark. 404, 117 S. W. 517; McElvain v. St. Louis & S. F. R. Co. 151 Mo. App. 126, 131 S. W. 736; George v. Chicago, R. I. & P. R. Co. 214 Mo. 551, 127 Am. St. Rep. 690, 113 S. W. 1099; McFadden v. Missouri P. R. Co. 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689.

The clause in the live-stock contract requiring suit to be filed within ninety days was valid under the Carmack amendment, and the court should have held accordingly.

Ginn v. Ogdensburg Transit Co. 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985; 6 Cyc. 508; Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97; North British & Mercantile Ins. Co. v. Central Vermont R. Co. 9 App. Div. 4, 40 N. Y. Supp. 1113, affirmed in 158 N. Y. 726, 53 N. E. 1128; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; Thompson v. Chicago & A. R. Co. 22 Mo. App. 321; Gulf, C. & S. F. R. Co. v. Gatewood, 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913; McCarty v. Gulf, C. & S. F. R. Co. 79 Tex. 33, 15 S. W. 164; Texas, & P. R. Co. v. Hawkins, — Tex. Civ. App. —, 30 S. W. 1113; Ingram v. Weir, 166 Fed. 328.

Mr. William M. Williams argued the cause, and, with Mr. J. A. L. Wolfe, filed a *brief for defendants in error:*

*This court, in a case from a state court,* will only review the Federal questions presented by the record; and where there are other adequate grounds, based upon general or local law, for the judgment, the writ of error will be dismissed or the judgment affirmed.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

It was for the state court to determine the applicatory law, and also to decide what that law permitted and what it inhibited. This court will not review its rulings upon these questions.

Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

The state appellate court accepted, without examination, a construction of that act that would prohibit special contracts by a carrier of the character relied upon here. While this court has not passed upon that construction, and it has been denied by several state courts, yet others have adopted it.

Kansas City Southern R. Co. v. Carl, 91 Ark. 97, 134 Am. St. Rep. 56, 121 S. W. 932; Southern P. Co. v. Crenshaw, 5 Ga. App. 675, 63 S. E. 865; Louisville & N. R. Co. v. Warfield & Lee, 6 Ga. App. 550, 65 S. E. 308; Galveston, H. & S. A. R. Co. v. F. A. Piper Co. 52 Tex. Civ. App. 568, 115 S. W. 107.

A carrier may fix its rates for interstate shipments with reference to the service to be performed, and may adopt rules and regulations concerning the same; but a shipper will not be bound by a contract which is invalid and prohibited by law, simply because the rate collected is conditioned upon the signing of such void agreement.

Drey & K. Glass Co. v. Missouri P. R. Co. 156 Mo. App. 178, 136 S. W. 757; O'Connor v. Great Northern R. Co. 118 Minn. 223, 136 N. W. 743; Hooker v. Boston & M. R. Co. 209 Mass. 598, — L.R.A.(N.S.) —, 95 N. E. 945, Ann. Cas. 1912 B, 669; Adams Exp. Co. v. Mellinchamp, 138 Ga. 443, 75 S. E. 600; Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387.

One of the grounds for the decision of the state court, and which, of itself, is sufficient to sustain the judgment, was that, upon the general and local applicatory law, the special contract, attempting to limit the carrier's liability for its own negligence, and fixing an arbitrary and unreasonable value upon the cattle, was void. This court

has expressly held that there is nothing in the interstate commerce act to prevent a state court from enforcing its own rules upon this subject, and that a judgment based upon the state law as contained in its statutes or decisions raises no Federal question; so the record in this case presents no Federal question which has not heretofore been determined by this court adversely to the plaintiff in error.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

There is nothing in the interstate commerce act, or its amendments, since the opinion in the Hughes Case, supra, expressly permitting such special contracts by the carrier, or overturning the rule laid down in that case.

Adams Exp. Co. v. Mellinchamp, 138 Ga. 443, 75 S. E. 596; Southern Exp. Co. v. Hanaw, 134 Ga. 445, 137 Am. St. Rep. 227, 67 S. E. 944; O'Connor v. Great Northern R. Co. 118 Minn. 223, 136 N. W. 743; Hooker v. Boston & M. R. Co. 209 Mass. 598, — L.R.A.(N.S.) —, 95 N. E. 945, Ann. Cas. 1912 B, 669; Louisville & N. R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866; Cramer v. Chicago, R. I. & P. R. Co. 153 Iowa, 103, 133 N. W. 387; Latta v. Chicago, St. P. M. & O. R. Co. 97 C. C. A. 198, 172 Fed. 850.

Mr. Justice **Lurton** delivered the opinion of the court:

This was an action in a state court of Texas by a shipper of cattle, under a special live-stock transportation contract for a shipment from a point in Missouri to a point in Oklahoma, to recover the value of cattle killed by a negligent derailment occurring in the former state. The shipment consisted of four bulls and thirteen cows, claimed to have been very valuable "show cattle." They were all killed, and plaintiffs recovered their full value, $10,640, and this judgment was affirmed by the court below.

As the transaction was an interstate shipment, the case comes here upon questions which involved the validity of certain provisions in the contract of shipment when tested by the 20th section of the act to regulate commerce [24 Stat. at L. 386, chap. 104], as amended by the act of June 29, 1906 [34 Stat. at L. 593, chap. 3591, § 7 U. S. Comp. Stat. Supp. 1911, p. 1304].

Aside from the question of negligence, which we assume to be closed by the verdict and judgment in the state court, the defenses pressed here are, first, that the limitation of value in case of loss or damage to $30 for each bull and $20 for each cow was a valid declaration of the valuation upon which the rate was based; and, second, that the action was not brought within ninety days after damages sustained, both being stipulations found in the shipping contract.

Those provisions in the contract which directly relate to the questions stated are as follows:

The title at the head of the contract is,—

*RULES AND REGULATIONS FOR THE[665 TRANSPORTATION OF LIVE STOCK.

NOTICE.

"This company has two rates on live stock."

Then follows a paragraph in these words:

"Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted, and understood to be at less than published tariff rate applying thereon when transported at carrier's risk.

"All kinds of live stock, carrier's risk, will be taken under the provisions and at rates provided for by existing tariffs and classification."

Then follows the contract described as "Special Live Stock Contract No. 4. Executed at Pilot Grove Station, 1-30-1907."

Passing over a number of provisions concerning the agreement upon the part of the carrier, and a number of things which the shipper assumes to do, we come to § 8, which is in these words:

"8. The carrier does not ship live stock or emigrant outfit under this contract, or at the rate hereon given, upon which its liability in case of any loss or injury shall exceed the following prices per head:

| | |
|---|---|
| Each horse (gelding, mare, stallion, mule, or jack) | $100 |
| Each pony or range horse | 30 |
| Each ox, steer, or bull | 30 |
| Each cow | 20 |
| Each calf or hog | 7 |
| Each sheep or goat | 2 |

"Emigrant outfit (not live stock) consisting of emigrant movables, household goods, second-hand farm *machinery, etc.,[666 when loaded with live stock, as per classification at valuation not to exceed $5 per 100 pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation or handling of said cars as aforesaid, it is mutually agreed, in

consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, the shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above."

The provision of the published tariff sheet referred to in the contract is set out in the margin, preceded by the offer of counsel to file it in evidence.† By a clause in the 9th 667] *section of the contract under which the cattle were shipped, it is stipulated that "no suit shall be brought against any carrier, and only against the carrier on whose lines the injuries occur, after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding."

In respect of the two stipulations just referred to, the trial judge charged the jury as follows:

"The contract for shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.

"Said contract also contains a stipulation to the effect that if the cattle in the shipment are lost or killed, that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

This charge was approved upon appeal and the judgment affirmed. The ground upon which the charge in respect to the limitation of recovery in case of loss was based was, first, that every such contract, where the loss was due to negligence, was null and void under the law and public policy of the state; and, second, that it was a contract of exemption forbidden by the Hepburn act of June 29, 1906, being the Carmack amendment of the *20th section[668 of the general act to regulate commerce of February 4, 1887.

That the shipper had the choice of two rates, one 20 per cent higher than the other, upon this shipment, is shown by the provisions of the shipping contract and the tariff sheets referred to therein. That the difference between the two rates was not unreasonable, the one when the cattle were not valued and the other when their value was declared, is to be assumed from the acceptance of the rates as filed with the Commission. That the "portion" of the rate sheets in evidence does not include the "Current Live Stock Contract" referred to in the part filed is of no vital significance. The objection was not made below. The case was proceeded with in the state court upon the hypothesis that the "Current Live Stock Contract," referred to in the "portion" of the rate sheets actually in evidence, was the live stock contract executed by the parties, and had been duly filed as part of the rate sheets. It is too late to make an objection here which, if made below, might have been remedied by filing all instead of a "portion" of the filed tariff. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. In any event, the rate sheets do provide for a choice between two rates, one with and one without a declared valuation. In one case the carrier is liable for whatever loss or damage the shipper sustains, and in the other its liability is limited to the valuation upon which the rate was based. The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes

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†Mr. Head: We offer the following portions of I. C. C. tariff No. A—1636, M. K. & T. Local Distance Tariff No. 2548, applying on classes and commodities:

Missouri, Kansas, & Texas Railway Co.
The "Katy" Route.
Local Distance Tariff No. 2548.
(Cancels No. 737.)

Applying on classes and commodities between stations on the Missouri, Kansas, & Texas Ry. as follows:

Between stations in
Indian territory
Missouri or Kansas
Missouri or Kansas
And stations in
Oklahoma territory
Indiana territory
Oklahoma territory
And locally between stations in the Indiana or Oklahoma territories.

Rates in Cents Per 100 lbs.
Cattle. (See Rule 3.)

| Distance. | Commodities. | Carloads. |
|---|---|---|
| 380 miles and over | 370 | 26½ |

Rule 3.
Live stock—Continued.

Limitation of liability.—Rates provided on live stock will apply only on shipments made at owner's risk, with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract provided by this company, the contract to be first duly executed in manner and form provided therein.

120 per cent of the rates named in this tariff will be charged on shipments made without limitations of carrier's liability at common law, and under this status, shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided for herein.

the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in Adams Exp. Co. v. Croninger, 226 U. S. 491, ante, 314, 33 Sup. Ct. Rep. 148, and Kansas City Southern R. Co. v. Carl, just decided [227 U. S. 639, ante, 683, 33 Sup. Ct. Rep. 391], that we only need to refer to the opinions in those cases, without further elaboration.

That the trial court and the court of civil 669]appeals *erred in holding this stipulation null and void because forbidden by either the law or policy of the state of Texas, or by the 20th section of the act of June 29, 1906, is no longer an open question since the decisions of this court in the cases just referred to.

Nor is there anything upon the face of this contract, when read in connection with the rate sheets referred to therein (of which the defendants in error were compelled to take notice, not only because referred to in the contract signed by them, but because they had been lawfully filed and published), which offends against the provisions of the 20th section of the act of June 29, 1906.

Neither is the valuation of cattle at $30 and $20 per head subject to impeachment as upon its face arbitrary and unreasonable. The valuation in this case was made by the consignor himself. The contract upon this point reads, "And said shipper represents and agrees that his said live stock . . . do not exceed in value these prices," referring to the schedule set out immediately above that declaration. That the cattle were not other than average or ordinary cattle, of no peculiar value as "show cattle," or otherwise, is indicated by the character of the printed form of contract signed by the consignor. After reciting that the company had two rates on live stock, it proceeds,—"Ordinary live stock transported under this special contract," etc.

The contract here involved is substantially identical with the contract and schedule upheld in Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, where the transportation was "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding $200 each. If cattle or cows, not exceeding $75 each."

In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract 670] *handed to him and made no declaration. But the same point made in the Hart Case, when the court said:

"A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

It is said that the contract in the case at bar includes a valuation of all bulls and all cows at the same sum, and that this is arbitrary, and not the result of any real effort to value the particular bulls and cows to be transported. But the same objection applied to the contract in the Hart Case, where horses were valued at the same maximum value and other cattle at the same fixed sum. But here, as there, it is plain that all animals, horses and other cattle, have not a fixed value, and so the contract fixes "a graduated value according to the nature of the animal."

It is not unreasonable, for the purpose of graduating freight according to value, to divide the particular subject of transportation into two classes: those above and those below a fixed maximum amount. No other method is practicable; and this is a method administratively approved by the Commerce Commission.

That the value of the cattle shipped under this valuation did greatly exceed the valuation therein represented may *be[671 true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate. Having obtained a rate based upon the declared value, he is concluded, and there is no room for parol evidence to show otherwise. Hart v. Pennsylvania R. Co. and Kansas City Southern R. Co. v. Carl, supra.

When the carrier graduates its rates by value, and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of

two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the 1st section of the Elkins act of February 19, 1903 [32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309]. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648. The particular cattle were loaded by the shipper and were never seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped. We see no ground upon which this contract can be held upon its face to have offended against the statute.

The court below held that the stipulation in the shipping contract, that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, "any statute or limitation to the contrary notwithstanding," was void.

It is conceded that there are statutes in Missouri, the state of the making of the contract, and the state in which the loss and damage occurred, and in Texas, the state of the forum, which declare contracts invalid which require the bringing of an action for 672]a carrier's liability *in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract, was brought within the statutory period of both states.

The liability sought to be enforced is the "liability" of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment of the Hepburn act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. Adams Exp. Co. v. Croninger, 226 U. S. 491, ante, 314, 33 Sup. Ct. Rep. 148; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, ante, 417, 33 Sup. Ct. Rep. 192. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. Adams Exp. Co. v. Croninger, and Michigan C. R. Co. v. Vreeland, cited above; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Southern Exp. Co. v. Caldwell, 21 Wall. 264, 267, 22 L. ed. 556, 558; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. Riddlesbarger v. Hartford F. *Ins. Co. 7 Wall. 386, 19 L. ed.[673 257. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. We cite a few: Central Vermont R. Co. v. Soper (C. C. A. 1st C.) 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; Ginn v. Ogdensburg Transit Co. (C. C. A. 7th C.) 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985; Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97; North British & Mercantile Ins. Co. v. Central Vermont R. Co. 9 App. Div. 4, 40 N. Y. Supp. 1113, affirmed in 158 N. Y. 726, 53 N. E. 1128. Before the Texas and Missouri statutes forbidding such special contracts, short limitations in bills of lading were held to be valid and enforceable. McCarty v. Gulf, C. & S. F. R. Co. 79 Tex. 33, 15 S. W. 164; Thompson v. Chicago & A. R. Co. 22 Mo. App. 321. See cases to same effect cited in 6 Cyc. p. 508. The provision requiring suit to be brought within ninety days is not unreasonable.

For the errors indicated, the judgment must be reversed for such further proceedings as may be consistent with this opinion.

Mr. Justice Hughes concurs in the result. Mr. Justice Pitney dissents.

# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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*675] *GEORGE MENGEL, Plaintiff in Error, v. BLANCHE MENGEL and Louis Eckhart, Sheriff. [No. 178.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the District Court of Scott County, in that state, refusing to vacate a decree for alimony or to enjoin the enforcement of such decree.

See same case below, 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899.

Mr. Benjamin I. Salinger for plaintiff in error.

Mr. I. S. Pepper for defendants in error.

January 27, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 101, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; Deming v. Carlisle Packing Co. 226 U. S. 102, ante, 140, 33 Sup. Ct. Rep. 80.

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GULF, COLORADO, & SANTA FE RAILWAY COMPANY, Plaintiff in Error, v. J. H. THORN. [No. 134.]

Error to state court — review — non-Federal question — changed condition.

In Error to the County Court of Sabine County, State of Texas, to review a judgment awarding an attorney's fee to the successful plaintiff in an action to recover from a carrier on account of injuries to a shipment while in transit.

Messrs. A. B. Browne, J. W. Terry, A. H. Culwell, Gardiner Lathrop, Alex. Britton, and Evans Browne for plaintiff in error.

No appearance for defendant in error.

January 27, 1913. *Per Curiam:* Judgment reversed with costs, and cause remanded for further proceedings, upon the authority of Gulf, C. & S. F. R. Co. v. Dennis, 224 U. S. 503, 56 L. ed. 860, 32 Sup. Ct. Rep. 542.

EX PARTE: IN THE MATTER OF NATHAN EISEMANN, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Mandamus.

Mr. Eugene P. Carver for petitioner.

February 3, 1913. Denied.

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*EX PARTE: IN THE MATTER OF DAN[*676 CHAIN, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Habeas Corpus.

Messrs. A. M. Belcher and H. W. Houston for petitioner.

February 3, 1913. Denied.

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IN THE MATTER OF THE PETITION OF WILLIAM ARMSTRONG to strike the name of Fletcher Dobyns from the roll of attorneys. [No. —, Original.]

Motion for leave to file petition.

Mr. William Armstrong for petitioner.

March 3, 1913. Denied.

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EX PARTE: IN THE MATTER OF GORDON R. McGEE, Petitioner. [No. —, Original.]

Habeas corpus — to test sufficiency of indictment.

Motion for leave to file petition for a writ of habeas corpus to inquire into a detention under an indictment charging impersonation of a Federal officer.

Mr. Frans E. Lindquist for petitioner.

March 10, 1913. *Per Curiam:* Denied. Ex parte Webb, 225 U. S. 663, 674, 56 L. ed. 1248, 1252, 32 Sup. Ct. Rep. 769, and authorities there cited.

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LOUISIANA & TEXAS LUMBER COMPANY, Petitioner, v. C. S. SWIFT. [No. 917.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. L. C. Boyle and Joseph S. Brooks for petitioner.

Mr. Cone Johnson for respondent.

January 20, 1913. Denied.

677]*J. B. CLEMENTS et al., Petitioners, v. GEORGE P. NORTHROP et al., Executors. [No. 926.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 115 C. C. A. 218, 195 Fed. 262.

Mr. Alexander Akerman for petitioners.

Mr. Arthur H. Codington for respondents.

January 27, 1913. Denied.

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M. P. HALL et al., Petitioners, v. W. A. HUFF et al. [No. 927.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 115 C. C. A. 332, 195 Fed. 430.

Mr. Alexander Akerman for petitioners.

Messrs. DuPont Guerry and Thomas S. Felder for respondents.

January 27, 1913. Denied.

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FIREBALL GAS TANK & ILLUMINATING COMPANY et al., Petitioners, v. COMMERCIAL ACETYLENE COMPANY et al. [No. 905.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Hugh K. Wagner for the petitioners.

No appearance for respondents.

February 3, 1913. Granted.

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A. D. HOWE MACHINE COMPANY, Petitioner, v. COFFIELD MOTOR WASHER COMPANY. [No. 935.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 117 C. C. A. 37, 197 Fed. 541.

Mr. Conrad H. Syme for petitioner.

Mr. R. J. McCarty for respondent.

February 3, 1913. Denied.

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JOSEPH F. GUFFEY et al., Petitioners, v. JAMES A. SMITH et al. [No. 902]; and 678]*JOSEPH F. GUFFEY et al., Petitioners, v. SUSANNAH SMITH et al. [No. 903.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Joseph W. Bailey, J. H. Beal, Levy Mayer, and J. W. Moses for petitioners.

Messrs. J. A. Hindman, John W. Kern, *and Abram Simmons* for respondents.

*February 24, 1913. Granted.*

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MALLEABLE IRON RANGE COMPANY, Petitioner, v. ARTHUR K. BECKWITH. [No. 947.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 203 Fed. 45.

Messrs. Thos. A. Banning and Arthur L. Morsell for petitioner.

Mr. Fred L. Chappell for respondent.

February 24, 1913. Denied.

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FRED D. MAY et al., Petitioners, v. UNITED STATES. [No. 957.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 420, 199 Fed. 42.

Messrs. P. H. Cullen, Thos. T. Fauntleroy, and Shepard Barclay for petitioners.

The Attorney General and Mr. Assistant Attorney General Harr for respondent.

February 24, 1913. Denied.

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MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS et al., Petitioners, v. UNITED STATES. [No. 942.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Cecil H. Smith for petitioners.

No opposition.

March 3, 1913. Granted.

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*MARY A. VELATI, Petitioner, v. WIL- [679
LIAM J. DANTE, Trustee. [No. 956.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 39 App. D. C. 372.

Mr. Wilton J. Lambert for petitioner.

Messrs. Edwin C. Brandenburg, Clarence A. Brandenburg, and F. Walter Brandenburg for respondent.

March 3, 1913. Denied.

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JOSEPHINE P. MCGOWAN, Executrix, etc., et al., Petitioners, v. EMILY E. PARISH, Executrix, etc. [No. 961.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 39 App. D. C. 184.

Messrs. Nathaniel Wilson and J. J. Darlington for petitioners.

Messrs. Leigh Robinson and Holmes Conrad for respondent.

March 3, 1913. Denied.

J. A. FOLGER, Petitioner, v. KATE C. PUTNAM, Administratrix, etc. [No. 968.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Walter D. Mansfield for petitioner.

Mr. Edward M. Cleary for respondent.

March 3, 1913. Granted.

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ISAAC B. WALKER, Petitioner, v. UNITED STATES. [No. 977.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 201 Fed. 1023.

Messrs. Francis M. Etheridge, Joseph M. McCormick, and Hannis Taylor for petitioner.

The Attorney General and the Solicitor General for respondent.

March 3, 1913. Denied.

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680]*THERESA L. LANG et al., Petitioners, v. CHOCTAW, OHLAHOMA, & GULF RAILROAD COMPANY et al. [No. 962.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 146, 198 Fed. 38.

Messrs. Wm. M. Randolph and Wassell Randolph for petitioners.

Mr. Thos. S. Buzbee for respondents.

March 10, 1913. Denied.

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MISSISSIPPI VALLEY FUEL COMPANY et al., Petitioners, v. WATSON COAL COMPANY. [No. 988.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 202 Fed. 122.

Mr. Thos. Wm. White for petitioners.

Messrs. John A. Blevins, Wm. M. Acton, and J. W. Jamison for respondent.

March 10, 1913. Denied.

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UNITED STATES, Petitioner, v. F. W. WHITRIDGE, Receiver, etc. [No. 983]; AND UNITED STATES, Petitioner, v. A. H. JOLINE et al., Receivers, etc. [No. 984].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General, the Solicitor General, and Mr. Wm. C. Herron for petitioner.

Messrs. Arthur H. Masten and Matthew C. Fleming for respondents.

March 10, 1913. Granted.

*ROBERT H. MONTGOMERY,‡ Trustee in[681 Bankruptcy of Maurice G. Samuels, Appellant, v. CHARLES A. READ, Trustee, etc. [No. 278.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Leon Lauterstein and Jackson H. Ralston for appellant.

No appearance for appellee.

January 15, 1913. Dismissed with costs, on motion of Mr. E. C. Brandenburg, in behalf of counsel for the appellant.

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AXEL GUSTAVESON et al., Plaintiffs in Error, v. STATE OF IOWA. [No. 130.]

In Error to the Supreme Court of the State of Iowa.

Mr. Benjamin I. Salinger for plaintiffs in error.

No appearance for defendant in error.

January 16, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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COMMERCIAL LIFE INSURANCE COMPANY, Plaintiff in Error, v. PEOPLE OF THE STATE OF ILLINOIS, UPON INFORMATION OF GEORGE J. AMBROSE. [No. 225.]

In Error to the Supreme Court of the State of Illinois.

See same case below, 247 Ill. 92, 93 N. E. 90.

Mr. George A. Chritton for plaintiff in error.

Messrs. Thomas F. Sheridan and George B. Gillespie for defendant in error.

January 20, 1913. Dismissed, without costs to either party, per stipulation of counsel.

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COMPAÑIA DE LOS FERROCARRILES DE PUERTO RICO, Plaintiff in Error, v. KARL ROHRER et al. [No. 137.]

*In Error to the District Court of[682 the United States for Porto Rico.

Mr. Francis H. Dexter for plaintiff in error.

The Attorney General for defendants in error.

January 21, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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‡Bankruptcy of Maurice G. Samuels suggested, and Robert H. Montgomery, trustee in bankruptcy of Maurice G. Samuels, substituted January 15, 1913, as the appellant herein.

R. A. MARKS et al., Plaintiffs in Error, v. S. A. DAVIS et al. [No. 773.]

In Error to the Supreme Court of the State of Kansas.

See same case below, 87 Kan. 796, 125 Pac. 344.

Mr. Marlin E. Olmsted and Mr. D. R. Hite for plaintiffs in error.

No appearance for defendants in error.

January 23, 1913. Dismissed with costs, on motion of Mr. M. E. Olmsted for the plaintiff in error.

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CONGREGACIÓN DE LA MISIÓN DE SAN VICENTE DE PAUL, Appellant, v. FRANCISCO REYES Y MIJARES and Banco Español Filipino. [No. 950.]

Appeal from the Supreme Court of the Philippine Islands.

Mr. Evans Browne for appellees.

January 27, 1913. Docketed and dismissed with costs, on motion of Mr. Evans Browne for the appellees.

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CENTRAL VERMONT RAILWAY COMPANY, Appellant, v. JOHN W. REDMOND et al., Constituting the Public Service Commission of the State of Vermont. [No. 461.]

Appeal from the Circuit Court of the United States for the District of Vermont.

Messrs. C. W. Witters and George B. Young for appellant.

No appearance for appellees.

January 29, 1913. Dismissed with costs on motion of counsel for the appellant, and cause remanded to the District Court of the United States for the District of Vermont.

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683]*HENRY S. REDMOND et al., Appellants, v. PAUL ALEXANDER, as Trustee in Bankruptcy of Bornn & Company. [No. 164.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 103 C. C. A. 446, 180 Fed. 92.

Messrs. Herbert A. Heyn, C. E. Thorn, and Chas. K. Beekman for appellants.

Mr. Frederick C. McLaughlin for appellee.

February 24 1913. Dismissed per stipulation.

LOUIS CELLA, Appellant, v. WILLIAM HENKEL, United States Marshal, etc., et al. [No. 700]; ANGELO CELLA, Appellant, v. WILLIAM HENKEL, United States Marshal, etc., et al. [No. 701]; and SAMUEL ADLER, Appellant, v. WILLIAM HENKEL, United States Marshal, etc., et al. [No. 702.]

Appeals from the District Court of the United States for the Southern District of New York.

Messrs. A. S. Worthington, Chas. L. Frailey, and Howard Taylor for appellants.

The Attorney General for appellee.

February 24, 1913. Dismissed with costs, on motion of counsel for the appellants.

---

DAN SHAW, Plaintiff in Error, v. CITY OF ATLANTA. [No. 770.]

In Error to the Court of Appeals of the State of Georgia.

Mr. Chas. T. Hopkins for plaintiff in error.

No appearance for defendant in error.

February 24, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

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UNITED STATES, Appellant, v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al. [No. 840.]

*Appeal from the District Court of [684 the United States for the Eastern District of Missouri.

The Attorney General for appellant.

No appearance for appellees.

February 26, 1913. Dismissed, on motion of Mr. Solicitor General Bullitt for appellant.

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UMENO SHIGEMATSU, Appellant, v. H. HACKFELD & COMPANY, Limited. [No. 166.]

Appeal from the District Court of the United States for the Territory of Hawaii.

Mr. John W. Cathcart for appellant.

Mr. Frank E. Thompson and Mr. Chas. F. Clemons for appellee.

February 27, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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JOSEPH ATWATER, Plaintiff in Error, v. W. T. HASSETT, Judge, et al. [No. 173.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. John Devereux for plaintiff in error.

No appearance for defendants in error.

March 3, 1913. Dismissed with costs, pursuant to the Tenth Rule.

FREDERICK M. HUBBELL et al., as Trustees, etc., Plaintiffs in Error, v. LAFAYETTE HIGGINS. [No. 174.]

In Error to the Supreme Court of the State of Iowa.

Messrs. Alonzo C. Parker and Will E. Johnston for plaintiffs in error.

No appearance for defendant in error.

March 3, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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PHŒNIX KNITTING WORKS, Appellant, v. NATHAN J. RICH et al., as N. J. Rich & Company. [No. 761.]

685] *Appeal from the District Court of the United States for the Northern District of Ohio.

Mr. Chas. F. Fawsett for appellant.

Mr. Albert Lynn Lawrence for appellees.

March 5, 1913. Dismissed per stipulation.

RIWKE MAISEN, *alias* Riwke Maisch, Appellant, v. LOUIS T. WEIS, United States Commissioner of Immigration, etc., et al. [No. 224.]

Appeal from the District Court of the United States for the District of Maryland.

Messrs. Eugene O'Dunne and Thos. J. Mason for appellant.

No appearance for appellees.

March 6, 1913. Dismissed with costs, on motion of counsel for the appellant.

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PULLMAN COMPANY, Plaintiff in Error, v. ELLSWORTH C. IRVINE, Receiver, et al. [No. 220.]

In Error to the Supreme Court of the State of Ohio.

Messrs. Wm. B. Sanders, Andrew Squire, F. B. Daniels, and Harold T. Clark for plaintiff in error.

Messrs. Fred C. Rector, Gilbert H. Stewart, Gilbert H. Stewart, Jr., and T. E. Powell for defendant in error.

March 10, 1913. Dismissed per stipulation.

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ARGUED AND DECIDED

IN THE

# SUPREME COUR

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1912.

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Vol. 228.

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# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1912.

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1] *ABILENE NATIONAL BANK OF ABILENE et al., Appts.,

v.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas.

(See S. C. Reporter's ed. 1-5.)

**National banks — discrimination by state.**

1. National banks are not unconstitutionally discriminated against by the Kansas bank depositors' guaranty law of March 6, 1909, because it may make the state banks more attractive to the public than national banks, which cannot avail themselves of the scheme and remain national banks.

[For other cases, see Banks, IV. c, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — impairing contract obligations — discrimination against national banks.**

2. National banks cannot claim that, as to dealings after the Kansas bank depositors' guaranty law of March 6, 1909, went into effect, the obligation of their contracts was impaired, and their property taken without due process of law, because, as creditors, they do not share equally with depositors under that statute in the assets of an insolvent state bank.

[For other cases, see Constitutional Law, IV. a, 5; IV. g, 2, in Digest Sup. Ct. 1908.]

[No. 175.]

Submitted March 5, 1913. Decided March 17, 1913.

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NOTE.—On the constitutionality of bank guaranty laws—see note to the decision of the circuit court of appeals in this case, as reported in 32 L.R.A.(N.S.) 1062.

APPEAL from the Circuit Court of the United States for the District of Kansas to review a decree dismissing the bill in a suit to restrain the enforcement of the Kansas bank depositors' guaranty law. Affirmed.

The facts are stated in the opinion.

Messrs. John Lee Webster, B. P. Waggener, Chester I. Long, and J. W. Gleed submitted the cause for appellants. Mr John L. Hunt was on the brief:

The Kansas bank depositors' guaranty act discriminates against national banks as instrumentalities of the public service, and destroys their business and success and efficiency.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29-33, 23 L. ed. 196-198; Mercantile Nat. Bank v. New York, 121 U. S. 138-155, 30 L. ed. 895-901, 7 Sup. Ct. Rep. 826; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229.

The Kansas statute gives the preference to private depositors in state banks to the exclusion of national banks as creditors, and results in unequal distribution of the assets of an insolvent state bank, to the disadvantage of national banks.

Davis v. Elmira Sav. Bank, 161 U. S. 275-283, 40 L. ed. 700-701, 16 Sup. Ct. Rep. 502.

The Kansas statute was intended to, and does, injuriously affect and unlawfully discriminate against national banks.

Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

The law will presume that the legislature knew national banks could not accept the guaranty provisions, and that the legislat

intended to discriminate against them, and to induce them to reorganize as state banks.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Easton v. Iowa, 188 U. S. 220–238, 47 L. ed. 452–459, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 122; Mugler v. Kansas, 123 U. S. 623–661, 31 L. ed. 205–210, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313–319, 34 L. ed. 455–457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217–227, 52 L. ed. 1031–1037, 28 Sup. Ct. Rep. 638; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Bailey v. People, 190 Ill. 36, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98.

National banks, by reason of the effect of the guaranty act upon them, have a right to challenge its constitutionality.

Chicago v. Collins, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; Hutchinson v. Beckham, 55 C. C. A. 333, 118 Fed. 399; Old Colony Trust Co. v. Atlanta, 83 Fed. 39, 32 C. C. A. 125, 59 U. S. App. 230, 88 Fed. 859; Cicero Lumber Co. v. Cicero, 176 Ill. 1, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; Merchants' Exch. v. Knott, 212 Mo. 616, 111 S. W. 565.

The features of the bank guaranty law which make it obnoxious to national banks are so connected with other sections of the act as to make this statute unconstitutional.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463–501, 52 L. ed. 297–309, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Trade-Mark Case, 100 U. S. 82, 25 L. ed. 550; Baldwin v. Franks, 120 U. S. 678–685, 30 L. ed. 766–768, 7 Sup. Ct. Rep. 656, 763; Warren v. Charlestown, 2 Gray, 84; Western U. Teleg. Co. v. Austin, 67 Kan. 208, 72 Pac. 850.

Mr. John S. Dawson, Attorney General of Kansas, and Mr. F. S. Jackson, submitted the cause for appellees. Mr. G. H. Buckman was on the brief:

Complainants do not show an interest, the nature of which entitles them to question the constitutionality of the statute attacked by them.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; 8 Cyc. 787; State v. Smiley, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Clark v. Kansas City, *176 U. S.* 114, 44 L. ed. 392, 20 Sup. Ct. Rep. *284; Albany County v. Stanley*, 105 U. S. *305, 26 L. ed. 1044; Pittsburgh*, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 99 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; National Bank v. Baltimore, 40 C. C. A. 254, 100 Fed. 29; Easton v. Iowa, 188 U. S. 234, 47 L. ed. 458, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; Com. v. Merchants & Mfrs. Nat. Bank, 168 Pa. 309, 31 Atl. 1065; Hamilton v. Vicksburg, S. & P. R. Co. 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20.

The real question involved in this case is the question whether or not a state has the right to pass a law controlling its own corporate creatures.

Dolley v. Abilene Nat. Bank, 32 L.R.A. (N.S.) 1065, 102 C. C. A. 607, 179 Fed. 463; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Heath & M. Mfg. Co. v. Worst, 207 U. S. 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 114; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 256, 52 L. ed. 197, 28 Sup. Ct. Rep. 89; People ex rel. Atty. Gen. v. Naglee, 1 Cal. 232, 52 Am. Dec. 312; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 106, 43 L. ed. 913, 19 Sup. Ct. Rep. 609; Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 325, 46 L. ed. 932, 22 Sup. Ct. Rep. 662.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to restrain the putting into operation of the Kansas bank depositors' guaranty act, and to have it declared unconstitutional. *It seems to have been [4 filed at about the same time as the bill in Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189, in which case the law was upheld. The main difference between the two suits is that the other was brought by state banks, and this by national banks. The circuit court of appeals held the bill bad on demurrer (32 L.R.A.(N.S.) 1065, 102 C. C. A. 607, 179 Fed. 461); and it was dismissed. A writ of certiorari was denied by this court. 218 U. S. 673, 54 L. ed. 1205, 31 Sup. Ct. Rep. 223. In view of the decisions in 219 U. S. and in this case below, we shall add comparatively few words.

The ground peculiar to this case is an alleged discrimination against national banks. Allegations in the bill as to the purpose and intent of the statute, of course, are immaterial. They introduce no new facts, and leave the question as it would be without them; namely, whether anything can be discerned in the terms or effect of the act that infringes the plaintiffs' com-

stitutional rights. A good deal of the argument seems to be that the statute will make state banks so attractive to the public that the national banks will suffer. It is replied that experience has not justified the prophecy. But even if it had, there is nothing to hinder the states from permitting a competing business and doing what Kansas has done with intent to make it popular and safe. The national banks are free to come into the scheme. The suggestion that they could not come in and remain national banks is simply a statement of the situation of all competitors. They cannot retain the advantages of their adverse situation and share those of the parties with whom they contend. The statutes of the United States when they do not attempt to prohibit competition with national banks do not forbid competitors to succeed.

The specific discrimination pointed out is that, under the Kansas statutes, the national banks do not share equally with depositors in the assets of an insolvent state bank. The bill alleges that the plain-5]tiffs necessarily have *and make deposits with state banks, and that banks necessarily borrow money from other banks and rediscount paper in other banks, and that the obligation of their contracts will be impaired and they will be deprived of the property without due process of law, contrary to article 1, § 10, and the 14th Amendment of the Constitution. The section of the statute specified as having this effect is § 4, which contemplates the primary application of the assets of the bank and the double liability of stockholders to depositors. It is replied that the word "depositors" obviously was used by mistake for "creditors," and that the statute was amended by substituting the latter word in 1911. Chap. 62, § 1. But, further, the language of the bill and the argument show that the complaint refers to future transactions, not to past. There is nothing sufficient to raise a question as to dealings before the law went into effect. Contracts made after the law was in force, of course, are made subject to it, and impose only such obligations and create only such property as the law permits. Denny v. Bennett, 128 U. S. 489, 494, 32 L. ed. 491, 9 Sup. Ct. Rep. 134; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 638, 639, 56 L. ed. 924, 927, 928, 32 Sup. Ct. Rep. 577.

The greater part of the bill is taken up with objections to the scheme of the statute, in which the plaintiffs have no concern, and that have been disposed of by the former decision of this court upon the Kansas act. There is nothing in it that calls for further remark.

Decree affirmed

*UNITED STATES EX REL. HERMAN[6 KNIGHT, Plff. in Err.,

v.

FRANKLIN K. LANE,† Secretary of the Interior.

(See S. C. Reporter's ed. 6-13.)

**Mandamus — to control official discretion.**

The decision of the Secretary of the Interior revoking his prior approval of a proposed adjustment of a contest over a Cherokee allotment, whereby, for a monetary consideration, the selection on behalf of a minor, being first in point of time, was to be withdrawn, will not be revised by mandamus where such revocation was made after a hearing, and in the exercise of a judgment and discretion confided to him by the act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), and within the thirty days which the departmental regulations allowed for rehearing, and before title had passed under the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), § 5, which required that patent should first be recorded in the office of the Commissioner of the Five Civilized Tribes.

[For other cases, see Mandamus, II. d. 4, in Digest Sup. Ct. 1908.]

[No. 163.]

Argued March 5 and 6, 1913. Decided March 17, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, refusing a writ of mandamus to require the Secretary of the Interior to issue a land patent. Affirmed.

See same case below, 35 App. D. C. 429.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. James W. Zevely,

†Suggestion of resignation of Richard A. Ballinger, and motion to substitute Walter L. Fisher as the party defendant in error herein, granted on motion of Mr. Frederic D. McKenney for the plaintiff in error on April 3, 1911.

Retirement of Walter L. Fisher as Secretary of the Interior suggested, and Franklin K. Lane, his successor in office, substituted March 6, 1913, as the party defendant in error herein.

NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whiteside, 3 L.R.A. 777; ex parte Hurn, 13 L.R.A. 129.

James M. Givens, and Richard William Stoutz, filed a brief for plaintiff in error:

The Secretary of the Interior had but the ministerial power and duty of effecting the recordation and delivery of the patent,—a duty which, within all the definitions, can be enforced by the writ of mandamus.

Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Garfield v. United States, 211 U. S. 249, 262, 53 L. ed. 168, 174, 29 Sup. Ct. Rep. 62; Roberts v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Frasher v. O'Connor, 115 U. S. 112, 29 L. ed. 314, 5 Sup. Ct. Rep. 1141; Butterworth v. United States, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Barney v. Dolph, 97 U. S. 652, 24 L. ed. 1063.

Messrs. Frederic D. McKenney, John Spalding Flannery, William Hitz, James W. Zevely, James M. Givens, and Edgar Smith filed a brief for plaintiff in error in opposition to a motion to dismiss or affirm.

Assistant Attorney General Cobb argued the cause, and, with Solicitor General Bullitt, filed a brief for defendant in error:

Congress has conferred upon the Secretary of the Interior full and exclusive jurisdiction in the allotment of lands among the qualified members of the Five Civilized Tribes. The exercise of this duty and jurisdiction involves the exercise of judgment and discretion. A decision of an executive officer, made in the discharge of a duty imposed by such laws, and involving the exercise of judgment and discretion, may not be reviewed by mandamus, nor can he be compelled by that means to retract his decision so made, and to give effect to another, not his own, and having his approval.

United States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356; United States ex rel. West v. Hitchcock, 205 U. S. 80, 85, 86, 51 L. ed. 718, 721, 722, 27 Sup. Ct. Rep. 423; Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338.

The United States has a reversionary interest in the lands of the Cherokees. While this title remains in the United States and the proceedings for acquiring it are still *in fieri*, the courts are without power by mandamus or otherwise to control the judgment and discretion of the Secretary of the Interior in respect of the disposition of such lands under the public land laws.

Heckman v. United States, 224 U. S. 413, 435, 56 L. ed. 820, 829, 32 Sup. Ct. Rep. 424; United States v. Schurz, 102 U. S. 378, 396, 26 L. ed. 167, 171; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Brown v. Hitchcock, 173 U. S. 473, 476–478, 43 L. ed. 772–774, 19 Sup. Ct. Rep. 485; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 49 L. ed. 1074, 23 Sup. Ct. Rep. 698; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667.

Former Solicitor General Lehmann and Assistant Attorney General Lawler filed a brief for defendant in error in support of a motion to dismiss or affirm.

Mr. Justice Van Devanter delivered the opinion of the court:

This writ of error brings up for review a judgment of the court of appeals of the District of Columbia (35 App. D. C. 429), affirming a judgment of the supreme court of the District, refusing a writ of mandamus commanding the Secretary of the Interior to deliver to the relator a patent for a tract of land claimed by the latter as a Cherokee allotment. The facts upon which the decision must turn are these:

On August 21, 1907, a parcel of allottable land containing 50 acres, in the Cherokee Nation, was selected as an allotment for Eva Waters, a minor Cherokee child belonging to the class whose rights to participate in the distribution and allotment of the tribal funds and lands were sustained in the recent decision in Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580. A week later William Twist and the relator Herman Knight, enrolled Cherokees, respectively selected the westerly 20 acres and the easterly 30 acres of the same *tract as allotments for themselves, and[9 in furtherance of their selections instituted contests against that of Eva Waters. A hearing on Twist's contest resulted in a decision in his favor by the Commissioner to the Five Civilized Tribes. On an appeal to the Commissioner of Indian Affairs that decision was reversed, and a further appeal carried the contest before the Secretary of the Interior. Knight's contest was held in abeyance, before the Commissioner to the Five Civilized Tribes, awaiting the outcome of Twist's. In this situation negotiations were had between representatives of Twist and Knight and the parents of Eva Waters, acting in her behalf, looking to a withdrawal of her selection, subject to the approval of the Secretary of the Interior, in order that there might be no obstacle to the

allowance of the later selections of Twist and Knight. The negotiations resulted in an application to the Secretary for permission to effect such an adjustment of the two contests on the payment, for the use of the minor, of an adequate consideration for her potential interest in the land. After a hearing on this application, the Secretary, on May 10, 1909, rendered a decision approving the proposed adjustment on condition that there be paid, for the use of the minor, $10,000 for her claim to the 20 acres in Twist's contest, and $15,000 for her claim to the 30 acres in Knight's. The Secretary then sent to the Commissioner to the Five Civilized Tribes the following telegram: "Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of $25,000 for use of minor Waters. Contestants given including 15th to make payment. . . . Prepare deeds to respective contestants and have them executed and forwarded here for approval. Report promptly by wire." Within the time named the $25,000 was paid to the Commissioner, for the use of the minor, and thereupon patents to Twist and Knight 10]were executed by the principal chief *of the Cherokee Nation and were forwarded by the Commissioner to the Secretary for his approval.

Under the regulations governing the institution and disposition of contests over allotments a party was accorded thirty days after a decision by the Secretary within which to apply for a rehearing. Within this period the parents of Eva Waters, acting in her behalf, applied to the Secretary for a rehearing of the matter covered by his decision of May 10, 1909, it being asserted in that connection that her potential interest was worth much more than the sum named in the decision, and that her parents' consent to the adjustment had been grounded on inaccurate and misleading information. The application was entertained, and, after a hearing thereon in which Twist and Knight participated, the Secretary rendered a further decision vacating the former one, and disapproving the proposed adjustment, on the ground that the consideration which the minor was to receive was not at all adequate. The Secretary also ruled that both contests should be considered and disposed of on their merits and that the $25,000 should be returned. The money was not actually repaid, but this may have been because those who paid it were as yet unwilling to take it back. In consequence of his later decision the Secretary declined to approve the patents executed by the principal chief, or to permit them to be recorded or delivered.

On July 16, 1909, Knight's contest was called for hearing before the Commissioner to the Five Civilized Tribes in pursuance of the Secretary's direction that it be considered and disposed of on its merits, and Knight then appeared and protested against any further steps therein, insisting that, in virtue of the matters here recited, he had acquired a fixed and absolute right to the patent, and that the administrative officers were without authority to proceed with the contest. The protest was disregarded, and on the same day he applied to the supreme *court of the District of [11 Columbia for a writ of mandamus, as before indicated, to compel the Secretary of the Interior to deliver to him the patent for the 30 acres, and to perform any other acts necessary to clothe him with the full legal title.

The question for decision is whether, in the circumstances, the Secretary was without authority to reconsider and vacate his decision of May 10, 1909, approving the proposed adjustment of the relator's contest, whereby the minor, Eva Waters, was to withdraw her selection in consideration of the payment by the relator of $15,000 for her use. It is frankly conceded by counsel for the relator, and rightly so, that the adjustment could not have been made without the Secretary's approval, which means that he possessed a power of decision in the matter. The act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), under which the Cherokee lands were being allotted in severalty, shows that Congress was solicitous not only that every member of the tribe should receive an allotment (§§ 11, 16), but that the rights of minors should be specially asserted and conserved (§ 70). And that it was intended to clothe the Secretary with comprehensive powers is shown in the provisions that all matters relating to allotments should be determined under his direction (§ 22), and that all things necessary to carry into effect the provisions of the act, not otherwise therein specifically provided for, should be done under his authority and direction (§ 65). The question, therefore, is reduced to this: Was his power of decision exhausted when, on May 10, 1909, he approved the proposed adjustment? To this there can be only a negative answer. That decision was not final, but interlocutory. In terms it showed that the patent was not to be effective or delivered until he approved it, and the act of 1902 declared that it must have his approval (§ 59). Not only so, but, no statutory provision opposing, effect was to be given to the regulation providing for rehearings, *and allowing thirty days\12 within which to apply therefor. Thus, it

was as if the decision itself had made provision for a rehearing. Proper regard must also be had for the fact that the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), § 5, expressly contemplated that the title should not pass until the patent was recorded in the office of the Commissioner to the Five Civilized Tribes. In such a case we perceive no reason for departing from the rule applicable to kindred proceedings in the Land Department, which is well stated in the following excerpts from the opinion in Brown v. Hitchcock, 173 U. S. 473, 476–478, 43 L. ed. 772–774, 19 Sup. Ct. Rep. 485:

"Until the legal title to public land passes from the government, inquiry as to all equitable rights comes within the cognizance of the Land Department. In United States v. Schurz, 102 U. S. 378, 396, 26 L. ed. 167, 171, which was an application for a mandamus to compel the delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.'

. . . . . .

"We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the Land Department, or when the Department refuses to act at all. United States v. Schurz, supra, and Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, are illustrative of these exceptional cases.

"Neither do we affirm that the administrative right of the Departments in reference to proceedings before them justifies action without notice to parties interested, 13]any *more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.

. . . . . .

"But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the government."

As entirely apposite, we repeat the statement in New Orleans v. Paine, 147 U. S. *261, 266,* 37 L. ed. 162, 163, 13 Sup. Ct. *Rep. 303: "Until the matter is closed by final action, the proceedings of an officer of a Department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing."*

Inasmuch as the decision of the Secretary, revoking his prior approval of the proposed adjustment, was not arbitrary or capricious, but was given after a hearing, and in the exercise of a judgment and discretion confided to him by law, it cannot be reviewed, or he be compelled to restract it, by mandamus. United States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356.

The decisions in Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62, and Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338, are not in conflict with the views here expressed. In the former the writ was awarded to compel the respondent to erase and disregard an entry which he arbitrarily and without notice had caused to be made upon a public record, thereby beclouding the relator's right to an Indian allotment. In the latter the writ was awarded to compel the delivery of a patent which was withheld solely through the unauthorized action of the Secretary in entertaining and sustaining a proceeding in the nature of a contest after the expiration of the time limited by statute for instituting such a proceeding.

Judgment affirmed.

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*UNITED STATES, Plff. in Err., [14
v.
WILLIAM GEORGE.

(See S. C. Reporter's ed. 14–22.)

**Perjury — oath authorized by law — affidavit of homestead claimant — departmental regulations.**

A charge of perjury cannot be based upon false statements as to residence and cultivation in the affidavit of a homestead claimant when making final proof, on the theory that his oath as to these matters was authorized by a law of the United States because of a regulation of the Land Department requiring the claimant to testify as other witnesses, adopted under the supposed authority of U. S. Rev. Stat. §§ 161, 441–453, 2478 (U. S. Comp. Stat. 1901, pp. 80, 252, 257, 1586), conferring administrative powers, or of § 2246 (U. S. Comp. Stat. 1901, p. 1371), empowering and requiring the register and receiver "to administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of the public lands," since these sections do not justify any additions to the requirements of § 2291 (U. S. Comp. Stat. 1901,

p. 1390), that cultivation and residence be proved by two credible witnesses, and non-alienation and allegiance by affidavit of the claimant.

[For other cases, see Perjury, in Digest Sup. Ct. 1908.]

[No. 442.]

Argued February 26, 1913. Decided March 24, 1913.

IN ERROR to the District Court of the United States for the District of Nebraska to review a judgment sustaining a demurrer to an indictment for perjury. Affirmed.

The facts are stated in the opinion.

Solicitor General Bullitt argued the cause and filed a brief for plaintiff in error:

A proceeding before an administrative officer such as is referred to in this indictment is a case in which false swearing may be perjury within U. S. Rev. Stat. § 5392, U. S. Comp. Stat. 1901, p. 3653.

Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513.

A valid administrative rule requiring an oath is a law of the United States within § 5392, so that perjury may be predicated on the falsity of such oath.

Ibid.

An executive regulation is valid (1) if the executive officer who issued it has statutory authority to make that sort of rule; (2) if the rule itself is in pursuance or enforcement of some law, and is not contrary to any provision of law; and (3) if no delegation of legislative power is involved.

United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113.

Mr. J. J. Halligan argued the cause, and, with Messrs. W. T. Wilcox and H. C. Brome, filed a brief for defendant in error:

The act of Congress especially provides what the entryman shall make affidavit to in making his final proof, and the Secretary of the Interior has no authority to enlarge the act of Congress, and require the entryman to swear to facts which the act provides shall be proven by two credible witnesses; and perjury cannot be based upon the oath of the entryman to facts to which Congress did not require him to make affidavit, but proof of which was required to be made by two other credible witnesses.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Robnett v. United States, 95 C. C. A. 244, 169 Fed. 778; Dwyer v. United States, 95 C. C. A. 416, 170 Fed. 160; Patterson v. United States, 104 C. C. A. 434, 181 Fed. 970; United States v. Howard, 37 Fed. 666; United States v. Bedgood, 49 Fed. 54; Silver v. State, 17 Ohio, 369; United States v. Maid, 116 Fed 650; United States v. Eaton, 144 U. S. 678, 36 L. ed. 591, 12 Sup. Ct. Rep. 764.

The case at bar is not to be confounded with those cases wherein Congress has expressly authorized executive departments to make rules to carry out the specific provisions of various acts, and which rules were not provided by Congress itself. Conspicuous examples of those cases are:

United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; United States v. Nelson, 199 Fed. 464.

Mr. Justice McKenna delivered the opinion of the court:

Indictment for perjury,† by which defendant in error (herein referred to as defendant) is charged with falsely and corruptly taking his solemn oath in a proceeding wherein a law of the United States authorized an oath to be administered before the register of the United States land office at North Platte, Nebraska, the proceeding being the making of proof and final entry of a homestead claim of certain described lands.

The indictment charges that defendant took an oath and subscribed the same, and deposed thereby that he built a house and other improvements on the land, which he described and stated their value to be $300, and established his residence thereon in April, 1901. The dimensions of the house and other improvements were stated. He further deposed that he had continuously *resided on the land after he had estab- [17 lished his residence thereon, and his family, after his marriage, in 1902, with the exception of certain absences which were stated.

These facts, it is alleged in the indictment, were matters of material inquiry of the good faith of the defendant in perfecting his homestead entry. The indictment explicitly negatived the facts so deposed

†Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished, etc. U. S. Comp. Stat. 1901, p. 3653.

by defendant, and charged that he "was not acting in good faith in making said entry and final proof as a home for himself, but in fact to defraud the United States out of the use, title, and possession of said land."

Defendant demurred to the indictment and stated as grounds thereof (1) that it failed to state or charge any crime under the laws of the United States. (2) That there was no law of the United States which required defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment, the law of the United States requiring that the facts be proved by two credible witnesses other than the claimant, and did not authorize the claimant to testify in his own behalf with reference thereto.

The demurrer was sustained, and the case was then brought here under the criminal appeals act.

It will be observed that the indictment charges that the oath was taken in a proceeding wherein a law of the United States authorized an oath to be administered. Whether it was is the question in the case; and we are brought to the inquiry as to what law of the United States authorized the oath. To this inquiry the record discloses divergent answers on the part of the government. In the district court it was the view and contention of the government that the indictment was founded on § 5392 of the Revised Statutes and § 2291, as amended by the act of March 3, 1877 (19 Stat. at L. 403, chap. 122, U. S. Comp. Stat. 1901, p. 1391). The record not disclosing this, and that it might appear, a bill of exceptions was tendered to and au- 18]thenticated by the district judge. *The bill of exceptions recites that the court, in sustaining the demurrer, based its decision upon those sections as the law upon which the indictment was founded, "and held that there is no law of the United States which required the defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment; the law of the United States requiring that said facts be proved by two credible witnesses other than the claimant, and not authorizing the claimant to testify in his own behalf with reference thereto." And so far as the assignment of errors is specific, it states § 2291 (U. S. Comp. Stat. 1901, p. 1390) as the applicable law and assails its construction.

This view of the applicable law of the indictment is now abandoned. Indeed, it is distinctly rejected. The government, in its *brief here, says:* "The present indictment *was not based on § 2291, for it seems prob-*

*714

able that the 'two credible witnesses' there provided for mean two persons *other* than the claimant himself. Therefore, we must seek elsewhere for the authority in law for the claimant to make the oath as to his residence on, and cultivation of, the land he seeks to homestead." And, going elsewhere, the government finds the law, as it contends, in certain regulations made by the Interior Department.

There is ground for a contention that if this court should be put to a choice between these views of the applicable law of the indictment we should have to select that urged and passed upon by the trial court, and a query might then occur,—has this court jurisdiction under the criminal appeals act? That act allows a direct appeal to this court "from a decision or judgment . . . sustaining a demurrer to any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." 34 Stat. at L. 1246, chap. 2564.

*This statute seems to require an ex- [19 plicit declaration of the law upon which an indictment is based and a ruling on its validity or construction. To contend for one law as applicable in the trial court and another law in the appellate court would seem not only to be opposed to the requirement of the statute, but to be inconsistent with orderly procedure, and to confound the relation of trial and appellate tribunals.

But, accepting the case as properly here, we pass to the consideration of the present contention of the government. Section 2291 is certainly a necessary if not a determinative element in that consideration. It provides as follows:" . . . If . . . the person making such entry . . . proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years . . . and makes affidavit that no part of such land has been alienated . . . and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they . . . shall be entitled to a patent." It will be observed that the facts required to be proved are stated, by what means proved, and the manner of proof and its quantum. The facts to be proved are (1) cultivation of and residence upon the land and (2) nonalienation and allegiance; the means of proof of the first being two credible witnesses; of the second, affidavit of the claimant. In other words, the section is not only explicit as to what is to be proved, but in what manner proved; and what is required of the claimant himself, to wit, an affidavit, is distin-

guished from what he must establish by others, to wit, two credible witnesses. Such, then, are the conditions seemingly legislatively made the exact measure of the obligation of the homestead claimant. It certainly will not be asserted that they can be detracted from. It is asserted that they may be added to, and have been added to by virtue of certain sections of the Revised 20] *Statutes. We insert the sections in the margin.† It will be seen that they confer administrative power only. This is indubitably so as to §§ 161, 441, 453, and 2478 (U. S. Comp. Stat. 1901, pp. 80, 252, 257, 1586); and certainly, under the guise of regulation legislation cannot be exercised. United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222. Especial stress, however, is put upon § 2246 (U. S. Comp. Stat. 1901, p. 1371). By that section the register or receiver is authorized and it is made his "duty to administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of land." These sections, it is contended, as we have seen, were the law of the indictment.

†Sec. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

. . . . . .

Second. The public lands . . .

Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all . . . [grants] of land under the authority of the government.

Sec. 2246. The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

Acting under the authority presumed to be given by § 2246 and the other sections, a regulation was promulgated which prescribed forms of taking pre-emption and *final homestead proof by questions and [21 answers, and provided that "the claimant will be required to testify, as a witness, in his own behalf, in the same manner." It was testimony exacted in pursuance of this regulation and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; § 2291 requires two only, and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by § 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what § 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all, it is as broad as its subject, and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

In United States v. United Verde Copper Co. supra, this court considered the power of the Secretary of the Interior under an act of Congress giving the right to cut timber from the public lands for certain purposes, which were enumerated, "or domestic purposes," and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe "for the protection of the timber and of the undergrowth growing on such lands, and *for other purposes.*" (Italics ours.) The Secretary made a regulation which provided, among other things, that no *timber [22 should be "permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining." The justification urged for the regulation was that the word "domestic" meant household. This court rejected the contention, and decided that the regulation transcended the power of the Secretary. We said: "If rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to

abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis. In illustration we may cite Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; Dwyer v. United States, 95 C. C. A. 416, 170 Fed. 161.

Judgment affirmed.

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THE FAIR, Appt.,
v.
KOHLER DIE & SPECIALTY COMPANY.

(See S. C. Reporter's ed. 22–26.)

**Appeal — from circuit court — jurisdiction below — certificate.**

1. The absence of a formal certificate does not defeat an appeal to the Federal Supreme Court from a decree of a circuit court, taken solely upon the question of the jurisdiction of the latter court, which had rendered a decree *pro confesso*, defendant having done nothing except to file a plea to the jurisdiction.

[For other cases, see Appeal and Error, 919–937, in Digest Sup. Ct. 1908.]

**Federal courts — jurisdiction — patent suit.**

2. A case arises under the Federal patent laws, of which the Federal courts have original jurisdiction without regard to the citizenship of the parties, even if the bill can be so construed as to confine the claim of infringements of plaintiff's rights under its patent to the alleged sales of its patented devices in violation of a price restriction attempted to be imposed upon second purchasers.

[For other cases, see Courts, 553–569, in Digest Sup. Ct. 1908.]

[No. 169.]

Argued and submitted March 6, 1913. Decided March 24, 1913.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree taking *pro confesso* the bill in a patent infringement suit. Affirmed.

The facts are stated in the opinion.

Mr. David S. Wegg argued the cause, and, with Mr. Walter H. Chamberlin, filed a brief for appellant:

Under the admitted facts of this case and the proper interpretation of the word "vend" in the act of Congress, we claim and insist that the court below was devoid of jurisdiction.

The Ira M. Hedges, 218 U. S. 264, 270, 54 L. ed. 1039, 1040, 31 Sup. Ct. Rep. 17, 90 Ann. Cas. 1235; Proctor & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

Jurisdiction is amply certified and is now here for decision.

Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; Re New York & P. R. S. S. Co. 155 U. S. 523, 39 L. ed. 246, 15 Sup. Ct. Rep. 183; Re Lehigh Min. & Mfg. Co. 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 Sup. Ct. Rep. 823; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286.

Messrs. Frank T. Brown and Francis A. Hopkins submitted the cause for appellee:

This appeal is not properly lodged with

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

the Supreme Court of the United States, for the reason that the circuit judge has not certified the case up to the Supreme Court, as is required by the statute, and appellant has not applied to the Supreme Court for certiorari ordering the case to be sent up.

Maynard v. Hecht, 151 U. S. 328, 38 L. ed. 181, 14 Sup. Ct. Rep. 353; Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the appellee, an Illinois corporation, against the Fair, also an Illinois corporation, for an injunction against the Fair's making and vending certain patented gas heating devices, or selling such devices of the plaintiff's manufacture at less than $1.50 each; for an account and for triple damages. The bill alleges that the plaintiff has the sole and exclusive right to make and sell the devices throughout the United States, and that the defendant, with full notice, has sold and is selling the same without license, in violation of the plaintiff's right. It then goes on to allege that the plaintiff, when it sells, imposes the condition that the goods shall not be sold at less than $1.50, and at-
24] taches to the goods a notice to that *effect, and that any sale in violation of the condition, or use of the article, if so sold, will be an infringement of the patent. It further avers that the defendant obtained a stock of the devices with notice of the conditions, and sold them for $1.25 each, in infringement of the plaintiff's rights under the patent.

The Fair appeared specially and pleaded that all the devices in question sold by it were purchased from the plaintiff by a jobber, that the jobber paid the full price to the plaintiff, that upon these facts there was no question arising under the patent or other laws of the United States, and that the court had no jurisdiction of the case. The case was set down for hearing on the plea, so that the foregoing allegations of fact must be taken to be true. Farley v. Kittson, 120 U. S. 303, 314, 30 L. ed. 684, 688, 7 Sup. Ct. Rep. 534. The court, in deference to Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424, maintained its jurisdiction, and as the defendant did not answer within the time allowed, took the bill as confessed and made a decree for the plaintiff. The judge stated that he did not feel at liberty to give a formal certificate, but added what appears from the record, that the defendant did nothing except to file the above plea. The appeal is upon the question of jurisdiction alone. There is no uncertainty or ambiguity, and we are of opinion that the case is properly here. Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 492, 50 L. ed. 281, 284, 26 Sup. Ct. Rep. 133.

Obviously the plaintiff sued upon the patent law, so far as the purport and intent of the bill is concerned. It was a resident of the same state as the defendant, and could have had no other ground. In the earlier paragraphs of the bill it charged an infringement of its patent rights in general terms, and it sought triple damages, which it could have done only by virtue of the statute. It is true that later it set up the sale at $1.25 as an infringement, and that we may guess that this is the only one, although it does not say so. But if that is the plaintiff's *only cause of action, still [25 the plaintiff relies upon it as an infringement and nothing else; so that, good or bad, the cause of action alleged is a cause of action under the laws of the United States.

Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a "suit arising under" the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defense, even when anticipated and replied to in the bill. Devine v. Los Angeles, 202 U. S. 313, 334, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652. Conversely, when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim. It might be defeated, no doubt, in a case depending on diversity of citizenship, by a plea to the citizenship of parties. Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 219, 40 L. ed. 401, 402, 16 Sup. Ct. Rep. 272. We are speaking of a case where jurisdiction is incident to a Federal statutory cause of action. Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that it is good. See Fauntleroy v. Lum, 210 U. S. 230, 235, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641. No doubt if it should appear that the plaintiff was not really relying upon the patent law for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court (Excelsior Wooden Pipe Co. v. Pacific Bridge Co 185 U. S. 282, 287, 288, 46 L. ed. 919, 921

914, 22 Sup. Ct. Rep. 681), and in the latter the jurisdiction would not be denied, except, possibly, in form (Deming v. Carlisle Packing Co. 226 U. S. 102, 109, ante, 140, 144, 33 Sup. Ct. Rep. 80). But if the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad.

26] *Thus, in Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 68, 46 L. ed. 808, 809, 22 Sup. Ct. Rep. 585, it was pointed out that, while the certificate inquired whether a Federal question was involved upon the pleadings, and while the counsel had argued the merits of the case, the function of this court "is restricted to the inquiry whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed so as to give the circuit court jurisdiction in a suit between citizens of the same state." For that reason the court declined to pass upon the validity of the contract the obligation of which was alleged to have been impaired. Id. 82, s. c. 202 U. S. 453, 458, 50 L. ed. 1102, 1106, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 322, 323, 51 L. ed. 198, 203, 204, 27 Sup. Ct. Rep. 83; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 32, 50 L. ed. 353, 358, 26 Sup. Ct. Rep. 224.

In this case the plea, though purporting to go to the jurisdiction of the court, merely means that the patent law does not give a patentee a right to impose such a condition as the plaintiff attempted to impose upon second purchasers of the device. The plaintiff no doubt maintains that the law does give him that right, and that even if the alleged infringements are confined to the acts admitted by the plea, they are infringements none the less. The bill hardly can be confined to that claim, but if it were, it is made in good faith and is not frivolous, it is a claim of right under the patent law, and the circuit court properly took jurisdiction of the case. Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 295, 46 L. ed. 910, 917, 22 Sup. Ct. Rep. 681; White v. Rankin, 144 U. S. 628, 635, 636, 639, 36 L. ed. 569, 572, 573, 12 Sup. Ct. Rep. 768.

Decree affirmed.

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27] *HENRY FRIEND et al., Petitioners,

v.

JAMES TALCOTT.

(See S. C. Reporter's ed. 27-42.)

**Certiorari — scope of review.**

1. *Questions passed* upon by the circuit court of appeals are open for consideration in the Federal Supreme Court on writ of certiorari, though not raised in, nor considered by, the trial court.

[For other cases, see Certiorari, II, c, in Digest Sup. Ct. 1908.]

**Bankruptcy — proving claim — false representation — election or waiver.**

2. Proof of a claim in bankruptcy as one upon contract, and participation in the distribution arising from a composition with creditors, is not a bar to an action for deceit in obtaining on credit, by false reports to a commercial agency, the goods, the price of which formed the basis of such claim.

[For other cases, see Bankruptcy, X; Estoppel, III. b, 7; Election of Remedies, IV., in Digest Sup. Ct. 1908.]

**Bankruptcy — discharge — exemptions.**

3. The exemptions from the operation of a discharge in bankruptcy, made by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 17, do not rest upon any theory of the exclusion of the creditor from the bankrupt act, or of deprivation of right to participate in the distribution, but solely on the ground that although such rights are enjoyed, an exemption from the effect of the discharge is superadded.

[For other cases, see Bankruptcy, XI., in Digest Sup. Ct. 1908.]

**Judgment — discharge in bankruptcy — bar — action for deceit.**

4. A general discharge in bankruptcy, resulting, under the bankrupt act of July 1, 1898, § 14, subdiv. c, from the approval of a composition with creditors, over an objection by a creditor that the bankrupt had obtained goods from him and other creditors by false reports as to financial condition, made to a commercial agency, cannot be regarded as such an adjudication as will bar an action by such creditor for deceit, in view of the distinction which the bankrupt act makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge.

[For other cases, see Judgment, III. j, in Digest Sup. Ct. 1908.]

[No. 155.]

Argued January 30 and 31, 1913. Decided April 7, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which reversed a judgment of the Circuit

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NOTE.—On certiorari in the Federal courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

On the effect of the election of remedies in cases of fraudulent purpose—see note to Browning v. DeFord, 44 L. ed. U. S. 1033.

On proof of claim in bankruptcy as bar to action for deceit in securing credit—see note to the decision of this case in the circuit court of appeals, as reported in 43 L.R.A.(N.S.) 649.

Court for the Northern District of Illinois in favor of defendants in an action for deceit. Affirmed.

See same case below, 43 L.R.A.(N.S.) 649, 103 C. C. A. 80, 179 Fed. 676.

The facts are stated in the opinion.

**Mr. Chester E. Cleveland** argued the cause, and Messrs. Jacob Newman, Salmon O. Levinson, and Benjamin V. Becker filed a brief for petitioners:

The business between Talcott and Friend, Moss, & Morris was all partnership business; the supposed financial statement relied on by Talcott was made by or on behalf of them as a partnership; and their discharge in bankruptcy was of them as partners.

Re Bertenshaw, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986; Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 2 N. B. N. Rep. 1037; Dickas v. Barnes, 5 L.R.A.(N.S.) 654, 72 C. C. A. 261, 140 Fed. 849; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166; Re Perley, 138 Fed. 927; Re Forbes, 128 Fed. 137; Francis v. McNeal, 108 C. C. A. 459, 186 Fed. 481.

Talcott on the one side, and Friend, Moss, & Morris on the other side, cannot be divided into different parts or capacities so as to say that the adjudication of the bankruptcy court was binding upon one part or capacity, and not binding upon the other part or capacity.

24 Am. & Eng. Enc. Law, 735, 737; Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 745, 24 L. ed. 190, 191; United States v. California & O. Land Co. 192 U. S. 355, 357, 48 L. ed. 476, 478, 24 Sup. Ct. Rep. 266.

Talcott invoked the jurisdiction of the bankruptcy court to hear and determine whether or not Friend, Moss, & Morris should be denied a discharge in bankruptcy because they had obtained from him property on credit by means of a materially false statement in writing, and he is therefore bound by the adjudication of the bankruptcy court on that issue.

Starbuck v. Starbuck, 173 N. Y. 503, 93 Am. St. Rep. 631, 66 N. E. 193; Hewitt v. Northrup, 75 N. Y. 510; 11 Am. & Eng. Enc. Law, 446, 447.

While the precise cause of action set forth in Talcott's present declaration may not have been involved in the bankruptcy proceeding, nevertheless the precise issue as to the effect upon a discharge of the facts relating to the statement to Woods Commercial Agency was involved in the bankruptcy proceeding as well as in the present action; and there is therefore such a *res judicata* as is known as an estoppel by verdict.

24 Am. & Eng. Enc. Law, 714, 780; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18; Stone v. United States, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 670.

The adjudication was no less conclusive because it was upon a question of law rather than upon a question of fact.

Bissell v. Spring Valley Twp. 124 U. S. 225, 232, 31 L. ed. 411, 414, 8 Sup. Ct. Rep. 495; 24 Am. & Eng. Enc. Law, 799; Gould v. Evansville & C. R. Co. 91 U. S. 526, 533, 23 L. ed. 416, 418; Northern P. R. Co. v. Slaght, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442.

The conclusive effect of the adjudication is not destroyed by the fact, if it be a fact, that the decree of the bankruptcy court was erroneous.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 290, 50 L. ed. 477, 486, 26 Sup. Ct. Rep. 252; Deposit Bank v. Frankfort, 191 U. S. 499, 510, 48 L. ed. 276, 280, 24 Sup. Ct. Rep. 154.

By filing a claim for goods sold, and thus affirming the contract, respondent waived all claims for deceit.

Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493; Adler v. Fenton, 24 How. 407, 16 L. ed. 696; Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106; Simon v. Goodyear Metallic Rubber Shoe Co. 52 L.R.A. 745, 44 C. C. A. 612, 105 Fed. 573.

A judgment merges not only the cause of action sued on, but all concurrent remedies, even if consistent.

Barth v. Loeffelholtz, 108 Wis. 562, 84 N. W. 846; Caylus v. New York K. & S. R. Co. 76 N. Y. 609; Bowen v. Mandeville, 95 N. Y. 237; Morgan v. Skidmore, 3 Abb. N. C. 92; Brumbach v. Flower, 20 Ill. App. 219; Karr v. Barstow, 24 Ill. 580.

The order of a court of bankruptcy allowing a claim is a judgment.

Kuehling v. Leberman, 2 W. N. C. 616; Mitchell v. Mayo, 16 Ill. 83; Wheeler v. Dawson, 63 Ill. 54.

That such judgment is not so efficient as another remedy might be does not change the rule.

Karr v. Barstow, 24 Ill. 580.

Talcott's claim was provable.

Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493.

It is not excepted from the operation of a discharge.

Ibid.

**Mr. Albert M. Kales** argued the cause, and Messrs. Horace Kent Tenney and Roger Sherman filed a brief for respondent:

There is no estoppel by judgment. The two causes are not the same. There must

be identity of parties, subject-matter, and cause of action.

Markley v. People, 171 Ill. 262, 63 Am. St. Rep. 234, 49 N. E. 502; Wright v. Griffey, 147 Ill. 498, 37 Am. St. Rep. 228, 35 N. E. 732.

The subject-matter of the two proceedings is different.

Re Mussey, 99 Fed. 71.

There may be estoppel by verdict where the two causes of action are different, but some specific matter is actually passed upon in the first cause and relied upon in the second.

Riverside Co. v. Townshend, 120 Ill. 18, 9 N. E. 65; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 400, 5 Ann. Cas. 314; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

A judgment rendered upon demurrer is sometimes conclusive of the facts confessed by the demurrer.

Bissell v. Spring Valley Twp. 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 490.

The bankruptcy act, § 12b, provides what must be alleged by the bankrupt in his petition for confirmation of composition. He need allege only the facts required by that section.

Re Thomas, 92 Fed. 913.

One who has a claim that is not dischargeable will not be heard to object to a discharge.

Re Servis, 140 Fed. 222.

The finding of the court in the order of discharge that the bankrupts had not done any act barring a discharge, not being supported by evidence, is not binding.

Burleigh v. Foreman, 12 Am. Bankr. Rep. 88; 3 Cyc. 362.

The burden of proof is on him who claims an estoppel by verdict. The burden has not been sustained by the defendant.

Russell v. Place, 94 U. S. 606, 608, 24 L. ed. 214, 215; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co. 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690; Enfield v. Jordan, 119 U. S. 680, 691, 30 L. ed. 523, 7 Sup. Ct. Rep. 358.

A misrepresentation to a third person is as effectual, as a basis for an action of deceit, as a direct representation to the one who is deceived.

Katzenstein v. Reid, M. & Co. 41 Tex. Civ. App. 106, 91 S. W. 360, 16 Am. Bankr. Rep. 740.

If the record leaves it uncertain whether the judgment in the first case was based on a fact essential to plaintiff's recovery in the second case, there is no estoppel.

Hudson v. Remington Paper Co. 71 Kan. 304, 80 Pac. 568, 6 Ann. Cas. 103.

Proving a claim in the bankruptcy court, or taking judgment in assumpsit, does not waive the claimant's right to sue for deceit.

Katzenstein v. Reid, M. & Co. 41 Tex. Civ. App. 106, 91 S. W. 360, 16 Am. Bankr. Rep. 740; Standard Sewing Mach. Co. v. Kattell, 132 App. Div. 539, 117 N. Y. Supp. 32, 22 Am. Bankr. Rep. 379; Re Lewensohn, 99 Fed. 74, 2 N. B. N. Rep. 381, affirmed in 44 C. C. A. 309, 104 Fed. 1006; Standard Sewing Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711; Frey v. Torrey, 70 App. Div. 166, 75 N. Y. Supp. 40, 175 N. Y. 501, 67 N. E. 1082; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Bowen v. Mandeville, 95 N. Y. 237; Sheldon v. Clews, 13 Abb. N. C. 41; Whittier v. Collins, 15 R. I. 90, 2 Am. St. Rep. 879, 23 Atl. 472; Union Central L. Ins. Co. v. Schidler, 130 Ind. 214, 15 L.R.A. 89, 29 N. E. 1071; Standard Sewing Mach. Co. v. Owings, 140 N. C. 503, 8 L.R.A. (N.S.) 582, 53 S. E. 345, 6 Ann. Cas. 211; Norton v. Huxley, 13 Gray, 285; Brumbach v. Flower, 20 Ill. App. 219, 131 Ill. 646, 23 N. E. 335; Bacon v. Moody, 117 Ga. 207, 43 S. E. 482; Drainage Dist. v. Dowd, 132 Ill. App. 499; Strang v. Bradner, 114 U. S. 555, 560, 29 L. ed. 248, 249, 5 Sup. Ct. Rep. 1038; Stokes v. Mason, 10 R. I. 261; McBean v. Fox, 1 Ill. App. 177.

The decision in the case of Frey v. Torrey, 70 App. Div. 166, 75 N. Y. Supp. 40, is not affected by subsequent decisions.

Tindle v. Birkett, 183 N. Y. 267, 76 N. E. 25; Maxwell v. Martin, 130 App. Div. 80, 114 N. Y. Supp. 349, 22 Am. Bankr. Rep. 97; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493.

There is no inconsistency between a suit in assumpsit, based on a contract, and an action for deceit for false representations in inducing the making of the contract.

Bowen v. Mandeville, 95 N. Y. 237; Siltz v. Springer, 236 Ill. 276, 85 N. E. 748; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625.

Those who have claims not released by a discharge are not "parties in interest."

Collier, Bankr. 9th ed. p. 262; Re Servis, 140 Fed. 222.

A discharge does not release liabilities arising out of deceit or any tort excepted by the statute.

Re Lewensohn, 99 Fed. 73, 2 N. B. N. Rep. 381; Taylor v. Farmer, 81 Ky. 458; Turner v. Atwood, 124 Mass. 411; Nelson v. Petterson, 131 Ill. App. 450, affirmed in 229 Ill. 240, 13 L.R.A.(N.S.) 912, 82 N. E. 229, 11

Ann. Cas. 178; Katzenstein v. Reid, M. & Co. 41 Tex. Civ. App. 106, 91 S. W. 360, 16 Am. Bankr. Rep. 740.

One holding a judgment that is not dischargeable under the act may oppose a discharge and still recover on the judgment.

Tinker v. Colwell, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. Rep. 505; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735.

The proper practice is to grant a discharge and try the question whether a given claim is barred by the discharge when a suit is commenced on such claim.

Collier, Bankr. 9th ed. p. 311; Re Rhutassel, 96 Fed. 597; Re Thomas, 92 Fed. 912; Re Tinker, 99 Fed. 79, 2 N. B. N. Rep. 391.

Mr. Chief Justice White delivered the opinion of the court:

On February 1, 1904, the commercial firm of Friend, Moss, & Morris, and its members, were adjudicated bankrupts. As the issues here to be considered are unaffected thereby and the subject was treated as irrelevant by the courts below and no question concerning it is insisted on by the respondent, we put out of view an order subsequently made, setting aside the adjudication as to the members of the firm individually.

Talcott, the respondent, was allowed a claim for $3,204.91, the unpaid price of goods sold to the firm on credit. The firm, availing of the right to make a composition with its creditors, given by §§ 12 and 13 of the bankruptcy act, asked the court to approve a proposed composition. Talcott, among others, opposed, upon the ground that the bankrupt had procured the sale on credit of the goods, the price of which form the basis of his (Talcott's) allowed claim, by means of false reports made to a commercial agency of the financial condition of 34]the firm. The *specification of the grounds of objection just stated is reproduced in the margin.†

Before a master the bankrupt contended that the objection of Talcott was insufficient, because, even if the facts were true, they were inadequate to prevent the approval of the composition. The master, accepting that view, without taking testimony, reported in favor of approval. The report on the subject was as follows:

"As to specification No. 8 of James Talcott, referred to, I am of the opinion that a reasonable and proper construction of § 14b (3) [32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1911, p. 1496] would require the 'materially false statement in writing' to be made directly to the creditor in question; and I deem the allegations in this specification, which are to the effect that the alleged false statement was made to a commercial agency, to be insufficient, *and I am of the opinion that [35 the specification should be overruled for this reason."

This report was objected to by Talcott on the ground that the master erred in refusing to take proof as to the alleged false statements, and in treating them as legally insufficient. The objections were overruled and the report was confirmed. The order of confirmation, following the requirements of paragraph d of § 12, recited that the composition was "for the best interests of the creditors," and that "the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge." [30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1495.] The result was to give the bankrupt a general discharge in virtue of subdivision c of § 14, which says: "The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition, and those not affected by a discharge."

In April, 1905,—about a year after the composition,—Talcott commenced this action to recover from the former bankrupt firm the damages suffered by him because

†That said bankrupts obtained from said James Talcott and from other creditors property upon credit upon a materially false statement in writing made to said creditors for the purpose of obtaining such property on credit; that said statement was so made on or about the 21st day of January, 1903, to Woods Dry Goods Commercial Agency, which, as said bankrupts knew, was a commercial agency engaged in the business of receiving statements of the financial condition of persons applying for the purchase of goods upon credit, and to be communicated to those from whom they sought such credit; that said statement was duly communicated to said James Talcott and to others by said *Commercial Agency for the purpose of being acted upon by them in selling goods to* said bankrupts upon credit, and that thereafter said James Talcott and others did sell and deliver goods to said bankrupts upon credit, relying upon said statement; that by the statement so made in writing by said bankrupts it was averred that they had a net surplus on January 1st, 1903, of $92,988.95 over and above all debts and liabilities, whereas, in truth and in fact, they had no surplus over and above their debts, but were wholly insolvent. All of which facts were well known to said bankrupts at the time the statement was made, but were not known to said James Talcott and other creditors who sold goods to said bankrupts in reliance upon said statement, until after the filing of the petition in bankruptcy herein.

of deceit practised in procuring the sale of goods on credit. The deceit relied upon was the deceit which had been alleged as a basis for the opposition to the composition; that is, false reports made in writing to a commercial agency as to the financial condition of the firm, except that in one count no mention was made of the commercial agency. On the face of the declaration the sales asserted to have been made were the same sales the price of which formed the basis of the claim filed and allowed, and if not accurately, at least approximately, the amount of the damage sought to be recovered was the difference between the aggregate price of such sales, diminished by the extent of the distribution paid upon the composition. In addition to the general issue the defendants set up as *res judicata* the order arising from confirmation of the 36] composition. *The cause was heard upon the issue of former adjudication, and judgment was entered in favor of the defendants, the judgment reciting that the matters and things involved in the suit had been fully adjudicated in the bankruptcy proceedings. On reviewing the cause, the circuit court of appeals concluded that the act of Talcott in going into the bankruptcy proceedings and proving his claim as one on contract did not constitute an election by him to be bound by the discharge if otherwise under the bankruptcy act the claim was excepted from such discharge, and that the fact of participating in the bankruptcy proceeding for the purpose of obtaining the benefits of the distribution therein made was not a wavier by Talcott of his right to proceed in an action for deceit to collect the deficiency notwithstanding the discharge. The court, moreover, decided that the opposition to the composition, its confirmation, and the resulting general discharge, did not constitute the thing adjudged, estopping Talcott from asserting that his claim for damages suffered by the deceit was not embraced by the discharge.

The judgment of the trial court was therefore reversed (43 L.R.A.(N.S.) 649, 103 C. C. A. 80, 179 Fed. 676), and the case is here on the allowance of a certiorari.

There is a contention that the questions of waiver and election, although passed on by the court below, are not open for our consideration because it is asserted they were not raised in or considered by the trial court. As we think the contention is without merit, we proceed to dispose of the propositions concerning election and waiver and *res judicata*. In doing so we shall direct our attention to four propositions taken from one of the printed arguments *on behalf of* the petitioners, and which we think embrace all the contentions relied upon. The propositions are these:

1. The record of the bankruptcy proceedings evidenced *an election of remedies [37 by respondent which barred his suit for fraudulent representations.

2. The order confirming the composition discharged petitioners from respondent's claim.

3. The order confirming the composition was a complete adjudication against respondent's right of action.

4. Neither the reasons assigned by the district court for holding respondent's specifications insufficient, nor such holding itself, detract from the legal efficacy of the order confirming the composition as an adjudication of the rights of the parties.

At the outset it is to be observed that the propositions are redundant, since they really involve only two distinct contentions: 1st, election and resulting waiver from the proof by Talcott of his claim in bankruptcy, and his participation in the distribution arising from the composition; and 2d, the binding force of the discharge on the claim of Talcott, because of the force of the thing adjudged, resulting from the order approving the composition over the objection of Talcott, and the general statutory discharge which resulted.

Coming to dispose of the first contention, we put out of view as irrelevant much that is urged in argument concerning what constitutes an election and waiver in the general sense, since the question here for decision is only whether there was a waiver or election under and for the purposes of the bankrupt law.

The theory of election and waiver arising from the proof of the claim in bankruptcy as one upon contract, where the right to sue in tort also existed, must rest upon the assumption that it was within the power of the creditor to exercise an election to come under the operation of the bankruptcy proceedings and thus to be bound by the result of such proceedings, or to stay out and escape the operation of the act. This must be the case, as it is impossible to conceive of a right of election in a case where *no such right [38 existed. But this theory has been expressly decided to be without foundation. Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9. In that case the ruling was that where a debt was of such a character as to cause it to be within the power of the creditor to enforce the same as an obligation arising on contract, or, if he chose to do so, as one in tort, as from the point of view of contract the debt was provable in bankruptcy, even conceding that it might not be so provable if the tort was

relied upon, that it was the duty of the creditor to prove as under contract, and if he abstained from so doing, his debt or claim, being provable, was operated upon and barred by the proceedings. The theory of election and waiver being thus established to be unreal, there is, of course, nothing left for the proposition to rest upon. But it is said Crawford v. Burke is inapposite because in that case, although the claim under consideration involved both the elements of contract and tort, as no judgment had been entered establishing the tort, under the bankrupt law as then existing the debt was not excepted from a discharge, while here, in consequence of the amendment of 1903, the debt, if there has been no waiver, is excepted from the discharge. This being the case, it is urged that an election and waiver resulted from the act of the debtor in proving his claim as on contract, and thus taking advantage of the bankruptcy proceedings, and thereby obtaining rights or benefits which he would not have had if he had stayed out, and thus saved his right to be freed from the operation of the discharge. But this distinction is also wholly without foundation. Its error lies in assuming that the right which the bankrupt act confers upon enumerated classes of debts to be exempt from the operation of a discharge rests upon the conception that such debts are exempt because they are excluded from the act, and may not participate in the distribution of assets. That is to say, the confusion lies in not distinguishing between creditors 39]who are excluded *from the bankrupt act and those who, although included therein, have had conferred upon them the benefit of an exception from the operation of the discharge. Even a superficial analysis of the text of the bankruptcy act will make this clear. Thus, § 63a and b enumerates the debts which may be proved, and which are therefore entitled to participate in the benefits of the act and are bound by its provisions, including a discharge. Section 17 enumerates the debts not affected by a discharge; that is, those exempted from its operation. It is apparent that the exemptions do not rest upon any theory of the exclusion of the creditor from the bankrupt act, or of deprivation of right to participate in the distribution, but solely on the ground that, although such rights are enjoyed, an exemption from the effect of the discharge is superadded. The text leaves no room for any other view, since the exceptions in terms are accorded to certain classes of debts which are provable under § 63, and therefore debts which are entitled to participate in the distribution, the language being: "A discharge in bankruptcy shall release a bankrupt from all of his *provable* debts, except such as," etc.,

And a brief reference to the more important of the prior bankruptcy acts throws abundant light on the text. The act of 1841, in the 1st section (5 Stat. at L. 440, chap. 9), comprehensively stated the classes of claims which were embraced within its scope, and expressly excluded certain enumerated classes. No exemption from the operation of a discharge when granted was conferred, and therefore all who were within the scope of the act, while enjoying its benefits, were bound by its burdens. Under this act, in Chapman v. Forsyth, 2 How. 202, 11 L. ed. 236, it was held that although a claim was excluded from the law if brought in by the voluntary act of the creditor, and he thereby participated in the distribution, the creditor by such election waived his right to *be treated [40 as not bound by the statute, and consequently the debt or claim was discharged. The act of 1867, presumably to correct the injustice which arose from excluding from all participation in the distribution of assets those creditors who it was thought, because of the meritorious nature of their debt, should not be bound by the discharge, departed from the system of excluding such creditors from the act, and, on the contrary, adopted the principle of including them in the benefits of the act, and yet at the same time exempting them from the operation of the discharge. To accomplish this result, § 19 of the act (14 Stat. at L. 525, chap. 176) made a most comprehensive enumeration of provable debts, including as well unliquidated damages for torts as for breaches of contracts. Those things which, in the act of 1841, were stated to be excluded from the operation of the act, were embodied in a particular section (33) dealing with exemptions from discharge, and to avoid all possible misconception the section provided " . . . but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." It is obvious that the present act embodies the same policy, since the exemptions from discharge which are given by the statute are found in a section devoted to that subject, and are stated in words, as we have said, to be exemptions from discharge allowed in favor of provable debts; that is, debts entitled to participate, which are given the benefit of an exemption from the operation of the discharge.

While the considerations just stated dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to *res judicata;* that is, a confusion of thought arising from treating things which are

different as one and the same. To constitute *res judicata*, it is elementary that there must be identity of cause between 41]the two cases. In view of *the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge, it needs but statement to demonstrate the difference of cause which necessarily obtains between determining, on the one hand, in favor of the bankrupt, whether he is entitled to a general discharge, and of deciding, on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge, and the question after it is granted, whether a particular debt is exempted by law from its operation—than does the provision of the statute (§ 14c) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, "those not affected by a discharge." It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties, and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition. On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge are the facts which were conceded to exist, and were not traversed for the purpose of the hearing on the composition.

Conceding, for the sake of argument, that the facts which were alleged as the basis of 42]the opposition to the approval *of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not, under the very terms of the statute, involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata*. The contention urged in many forms, based upon the recitals in the order of confirmation of the composition, made conformably to the statute, as to the absense of fraud or other wrongdoing, etc., is but a reiteration of the contention as to *res judicata*, which we have shown to be without foundation.

Affirmed.

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WILLIAM G. PLESTED and Charles Beuchat, Appts.,
v.
SAMUEL A. ABBEY and John J. Lambert.

(See S. C. Reporter's ed. 42-52.)

**Public lands — coal lands — sale.**

1. The rights of persons seeking to purchase coal lands belonging to the United States must be measured by their second application, where, instead of invoking and pursuing any remedy in the courts which they might have had, growing out of the rejection by the Land Department of their original application, they acquiesced in that decision for more than one and a half years, and then made an entirely new application. [For other cases, see Public Lands, I. e. 5, in Digest Sup. Ct. 1908.]

**Courts — relation to Land Department.**

2. The refusal of subordinate officials of the Land Department, acting under the instructions of their official superiors, to accept an application to purchase coal lands belonging to the United States, is not subject to review or correction in the courts. [For other cases, see Courts, I. e, 6, in Digest Sup. Ct. 1908.]

[No. 156.]

Argued January 31, 1913. Decided April 7, 1913.

APPEAL from the Circuit Court of the United States for the District of Colorado to review a decree sustaining a demurrer to and dismissing the bill in a suit to control by a restraining and mandatory injunction the action of subordinate officers in the Land Department with reference to

NOTE.—On the conclusiveness and effect of the decisions of the Land Department—see notes to Hartman v. Warren, 22 C. C. A. 38; Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 344; and Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. 57 C. C. A. 207.

an application to purchase coal lands. Affirmed.

The facts are stated in the opinion.

Messrs. Jesse G. Northcutt and William C. Prentiss argued the cause, and, with Messrs. Robert H. Widdicombe and A. Watson McHendrie, filed a brief for appellants:

It seems to be the view of the trial court that no act of a register or receiver in dealing with the public lands, while the title remains in the government, be it ever so arbitrary or contrary to the letter of the law, can be restrained or prevented by the action of the courts. Judicial sanction cannot be found for this radical doctrine. The limit to which the courts have gone is, that so long as the title of the land remains in the government, the officers of the Land Department will not be interfered with in the discharge of their official duties, "unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion."

Litchfield v. The Register (Litchfield v. Richards) 9 Wall. 575, 19 L. ed. 681.

Discretion exists, and the law permits the exercise of it, only within the purview of granted power; and if parties claiming to be public functionaries, and claiming to discharge public or official duties, step beyond the pale of the law, they have gone beyond its protection, and not only will they not be protected in their attempted usurpation, but courts of equity will restrain them from such exercise, just as they do private individuals.

2 Story, Eq. 12th ed. § 955; 3 Pom. Eq. Jur. 3d ed. § 4340; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Board of Liquidation v. McComb, 92 U. S. 531–541, 23 L. ed. 623–628; La Chapalle v. Bubb, 69 Fed. 481; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; New Orleans Nat. Bank v. Merchant, 18 Fed. 841.

Where the action involved is not of a political or executive character, and calls into exercise no judgment or discretion, but is purely ministerial in character, and affects private rights of individuals, the party called upon to act is amenable to the courts.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.

If the ministerial act within the law will be enforced or restrained by the order of the court, *a fortiori* will any attempted wrongful ministerial demand without the law be restrained by the court when such restraint is the only adequate protection which the aggrieved party has.

Rector v. Gibbon, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. Rep. 605.

If the order of the Department under which the defendants here claim to act is not clearly within the power granted to the Interior Department, it is not law, and has no binding force or effect.

United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222; Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338.

Mandamus or injunction is available to require the performance of a duty or prevent a wrong, where the duty sought or the act complained of is purely ministerial. The question most difficult of solution usually is whether the act is discretionary or ministerial. The only possible judicial or discretionary act which the land officers in this case could claim to have had under consideration was the determination of the price of the land; and this they must do from the reading of the statute. Is this act discretionary?

Roberts v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376.

Assistant Attorney General Cobb argued the cause, and, with Solicitor General Bullitt, filed a brief for appellees:

It appears on the face of the bill that the title to the land sought to be acquired is in the United States, and that the proceedings to acquire that title are still *in fieri*, in the only forum, *i. e.*, the Land Department, appointed by law to adjudicate such matters, involving, as they do, the exercise of judgment and discretion; and the courts are therefore without jurisdiction to interfere, in equity or at law, by review or otherwise, with the exercise of that judgment and discretion.

Brown v. Hitchcock, 173 U. S. 473, 476, 478, 43 L. ed. 772–774, 19 Sup. Ct. Rep. 485; United States v. Schurz, 102 U. S. 378, 396, 26 L. ed. 167, 171; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667; United States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356; Litchfield v. The Register (Litchfield v. Richards) 9 Wall. 575, 19 L. ed. 681.

Mr. Chief Justice White delivered the opinion of the court:

The appellants prosecute this direct appeal from a decree sustaining a demurrer to a bill by them filed, and dismissing the cause for want of jurisdiction. The suit concerned the right of the complainants under the laws of the United States

[48

purchase certain coal lands belonging to the United States, and the defendants were the local land officers of the United States at Pueblo, Colorado.

The theory that the decree dismissing the bill is susceptible of being directly reviewed rests upon the assumption that the controversy, because of its nature and because of the official character of the defendants, was one of exclusive Federal cognizance, and therefore the refusal to exercise jurisdiction necessarily involved a ruling concerning the authority of the court below as a Federal court.

To decide the issue it is essential to consider the averments of the bill and the reasons which led the court below to sustain the demurrer. The bill alleged that in the spring of 1897 the complainants took possession of and commenced the improvement of 240 acres of coal land, the property of the United States, situated within 15 miles of a completed railroad, in Las Animas county, Colorado. In due time, it was averred, they filed in the local land office at Pueblo the declaratory statement authorized by § 2349, Revised Statutes (U. S. Comp. Stat. 1901, p. 1440), and on July 1, 1907, tendered $20 per acre for the land, and applied to enter the same under § 2350, Revised Statutes. It was alleged that on January 11, 1908, both the declaratory statement and the application were rejected by the local land office upon the ground that the land had been withdrawn from sale under the coal land laws by a departmental order dated July 26, 1906, and that on appeal the Commissioner of the General Land Office affirmed the action of the local officials, and on a further appeal such decision was approved on January 30, 1909, by the Secretary of the Interior.

The following facts were then averred: 49] *In June, 1910, the land in question, with other land, was restored to entry, and on June 28, 1910, the register notified the complainants in writing that they would be allowed sixty days from the receipt of the communication in which to make a formal claim to the land as to which they had previously filed a notice of claim, and that the price fixed by the United States Geological Survey for certain of the land was $125 per acre, and for the remainder $115 per acre, aggregating $30,000 for the entire tract. It was alleged that soon afterwards the complainants filed in the local land office a written application for the purchase of the land, and by direction of the register a notice of the application was published, and copies thereof were posted as required by statute, and due proof of the performance of such acts was filed in the land office. In September following, in response to communications from the complainants, the local land office notified complainants that payment for the land must be made within thirty days or the application to purchase would be rejected. Within the time fixed a tender of $4,800 was made to the receiver, as being the price fixed by § 2347, Revised Statutes. The receiver refused to accept the money or to give any receipt therefor. The bill then averred that it was the intention of the land officers to refuse to permit the complainants to purchase the land unless they were willing to pay, not the alleged statutory price, but the sum of $30,000 arbitrarily fixed by the Secretary of the Interior as the price of the lands. The prayer of the bill was for both a restraining and a mandatory injunction, the one forbidding the defendant land officers from carrying out the orders of the Secretary of the Interior and the Commissioner of the General Land Office, and the other commanding the defendant land officers to accept the application of the complainants, and allow them *to purchase [50 the lands upon the payment of the sum of $20 per acre. It was, moreover, prayed that defendants he restrained from receiving or accepting the application of any other person for the entry of the lands.

As at the outset stated, a demurrer was sustained and the cause was dismissed for want of jurisdiction, the court in its certificate stating that this was done "upon the ground that a ruling or decision by the officers of a local land office of the United States, made in the usual course of proceedings for the acquisition of the title to public lands, is not subject to review or correction in the courts while the title to the lands remains in the United States, and also upon the further ground that while the title to public lands remains in the United States, and the proceedings for acquiring that title are still *in fieri*, the courts are without power, by injunction or otherwise, to control the judgment and discretion of the officers of the Land Department in respect of the disposal of such lands under the public land laws."

In testing the correctness of the ruling, we treat as negligible the averments of the bill assailing the validity of the rejection on January 30, 1909, of the application then pending to enter the land. We do this because if complainants had a remedy in the courts growing out of such rejection it was their duty to invoke and pursue that remedy; and not having done so, but, on the contrary, having for more than a year and a half acquiesced in the judgment of the Land Department, and having made subsequently an entirely new application, we think their rights must be measured by the later ap-

plication. Considering the issue in that aspect, we are of opinion that the principle which caused the circuit court to hold that it had no jurisdiction to award the relief prayed, and hence to dismiss the bill, was a correct one. The United States had not parted with the legal title to the land. The defendants were subordinate officials 51] of the Land *Department, and the acts and omissions complained of were done pursuant to instructions from the head of the Land Department, vested by law with the power to control the conduct of his subordinates in matters of this character.

As officers administering the land laws, the defendants therefore were, in the nature of things, under the control and their acts were subject to the review of their official superiors,—the Commissioner of the General Land Office, and, ultimately, of the Secretary of the Interior. As said in Litchfield v. The Register (Litchfield v. Richards), 9 Wall. 575, 578, 19 L. ed. 681, 682, subordinate officials of the Land Department should not be called upon "to put the court in possession of their views and defend their instructions from the Commissioner, and convert the contest before the Land Department into one before the court." Indeed, the doctrine upon which the court below based its action has been frequently announced and enforced. It was thus epitomized in Brown v. Hitchcock, 173 U. S. 473, 476-478, 43 L. ed. 772-774, 19 Sup. Ct. Rep. 485, that "until the legal title to public land passes from the government, inquiry as to all equitable rights comes within the cognizance of the Land Department." In United States v. Schurz, 102 U. S. 378, 396, 26 L. ed. 167, 171, the doctrine is thus stated:

"Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in feri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

See also United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667; and the very recent decision in United 52] *States ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356. In the last-named decision the Litchfield Case was cited with approval, and it was again reiterated that Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and quasi judicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands.

Without, therefore, expressing any opinion upon the merits, we hold that under the facts stated in the bill this resort to the courts was premature, and the judgment below must therefore be affirmed.

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UNITED STATES, Plff. in Err.,
v.
O. T. ANDERSON.

(See S. C. Reporter's ed. 52-60.)

**Indians — unlawful sale of cattle.**

The prohibition against the sale of any cattle purchased by the government, and in the possession or control of Indians, to any person not a member of the tribe to which the owners belong, unless with the consent in writing of the agent of the tribe, which is made by the Indian appropriation act of July 4, 1884 (23 Stat. at L. 76, chap. 180), covers sales of cattle bought by the government out of the purchase price of land sold by the Indians to the United States, and issued to the various Indians on the reservations entitled thereto, and cannot be confined to sales of cattle to which the United States had title as owner, because of a further distinct and nonrelated clause in the act, empowering the President to use "any sum appropriated for the subsistence of the Indians, and not absolutely necessary for that purpose, for the purchase of cattle for the benefit of the Indians for whom such appropriation is made."

[For other cases, see Indians, II.; VIII., in Digest Sup. Ct. 1908.]

[No. 705.]

Argued and submitted February 26, 1913.
Decided April 7, 1913.

IN ERROR to the District Court of the United States for the District of Oregon to review a judgment sustaining a demurrer to an indictment charging a violation of the statute forbidding purchases of cattle from Indians. Reversed.

See same case below, 189 Fed. 262.

The facts are stated in the opinion.

Solicitor General Bullitt argued the cause and filed a brief for plaintiff in error.

Mr. Arthur C. Emmons submitted the cause for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

By the Indian appropriation act of July 4, 1884, chap. 180, 23 Stat. at L. 76, 94, the following general provision was enacted:

"That where Indians are in possession or control of cattle or their increase which have been purchased by the government, such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong, or to any citizen of the United States, whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void, and the offending purchaser, on conviction thereof, shall be fined not less than five hundred dollars, and imprisoned not less than six months."

55] *The United States brings this case directly here to review the action of the court below in sustaining a demurrer to an indictment charging the defendant in error with a violation of the provision just referred to on the ground that, when rightly construed, it did not embrace the acts charged in the indictment to have been committed in violation of its provisions. The facts stated in the indictment as the basis of the charge were these:

"That on the 17th day of June, 1901, an agreement was entered into between an agent of the United States, to wit, James McLaughlin, who was then and there acting for and on behalf of the said United States, and the Klamath and Modoc Tribes of Indians and the Yahooskin Band of Snake Indians, all of which said Indians belong to the Klamath Indian Reservation located in the state of Oregon, by the terms of which said agreement the said Indians ceded to the government of the United States approximately 600,000 acres of land, for which said land the said United States was to pay to the said Indians the sum of $537,007.20 in the manner and form as follows, that is to say: $25,000 of the said amount was to be paid in cash, to be distributed amongst the said Indians; $350-000 of the said amount was to be deposited with the Treasurer of the United States to the credit of the said Indians, which said last named sum of money was to draw interest, and the interest thereof was to be disbursed to the said Indians in annual payments; that the remaining portion of the said $537,007.20, after the payment of attorney's fees, was to be expended for the benefit of the said Indians, under the direction of the Secretary of the Interior, and upon request of the said Indians, acting through the proper Indian agent, for the following purposes; that is, in the drainage or irrigation of their land and in the purchase of stock cattle for issue to them, and for such other purposes as might, in the discretion of the Secretary of the Interior, best promote *the welfare of the[56 said Indians, including a reasonable cash payment *per capita*, not exceeding 10 per centum of the principal sum.

"That by the act of Congress approved June 21, 1906 (34 Stat. at L. 368, chap. 3504), the said agreement was duly ratified and the sum of $537,007.20 was appropriated out of the money of the Treasury of the United States, for the purpose of carrying into effect the aforesaid agreement, it being provided that out of the sum so appropriated '$350,000 shall be deposited in the Treasury of the United States to the credit of said Indians, and the remainder shall be expended as provided in the 3d article of said agreement.'

"The grand jurors further find that, acting under authority of the aforesaid agreement and the act of Congress ratifying the same, the Indians of the Kalmath Indian Reservation made requisition through the United States Indian agent in charge of said reservation, to the proper officers of the government for an issue of cattle to be made to the said Indians, and thereafter the Indian Department advertised in the manner provided by law for the purchase of 4,500 heifers to be delivered at the Kalmath Agency for issue to the said Indians; that pursuant to the said advertisement, and in conformity therewith, and after receiving proper bids, the Commissioner of Indian Affairs did, on May, 1909, purchase of and from one Wm. Hanley, of Portland, Oregon, 4,000 heifers, which were delivered during the month of August, 1909, to the superintendent of the Kalmath Indian Reservation at Klamath Agency, Oregon, and thereafter payment was duly made to the said Wm. Hanley from money appropriated to carry into effect the aforesaid agreement.

"That after the cattle were duly delivered to the superintendent of said Indian Reservation they were branded with the United States government brand, and were issued to the various Indians on said reservation who *were entitled thereto, and[57 that each Indian, upon receipt of his apportioned number of cattle, branded the same with his own individual brand; that Frank Lynch and Elmer Lynch were two Indians residing on said Klamath Indian Reservation who were entitled to and who received cattle that had been purchased and issued in the manner aforesaid.

"And the grand jurors further find, al-

lege, and present, that O. T. Anderson, on, to wit, the 24th day of October, 1910, in Klamath county, in the state and district of Oregon, and within the jurisdiction of this court, did then and there knowingly and unlawfully purchase of and from Frank Lynch and Elmer Lynch, who were then and there Indians living and residing within the limits of the Klamath Indian Reservation, and wards of the government, fifteen head of cattle, a more accurate description of which cattle is to the grand jurors aforesaid unknown, said cattle being then and there in the possession of the said Frank Lynch and Elmer Lynch, and which said cattle so purchased as aforesaid by the said defendant had been before that time brought by the government of the United States and issued to the said Frank Lynch and Elmer Lynch in the manner heretofore set out in this indictment, and that the said O. T. Anderson, defendant above named, at the time of so purchasing the said cattle from the said Indians, was not a member of the tribe of Indians to which the said Frank Lynch and Elmer Lynch belonged, nor was he a member of any Indian tribe; and that the sale of said cattle of the said Frank Lynch and Elmer Lynch, and the purchase thereof by the said O. T. Anderson, defendant as aforesaid, was without the consent in writing or otherwise by the agent in charge of said Indians, and that at the time of the purchase of said cattle by the said O. T. Anderson, as aforesaid, he, the said O. T. Anderson, well knew that the said Frank Lynch and Elmer Lynch 58]were Indians and wards of the *government of the United States, and that the cattle so purchased by him had before that time been issued by the government of the United States to the aforesaid Indians, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

As we have said, the provision charged to have been violated was enacted as part of a general Indian appropriation bill. In such bill there was a clause authorizing the President to use any sum appropriated for the subsistence of the Indians, and not absolutely necessary for that purpose, for the purchase of cattle for the benefit of the Indians for whom such appropriation is made. 23 Stat. at L. 97, chap. 180. Although this clause was not even by proximity associated with the provision here involved,—indeed, the two were separated by many intervening and entirely distinct provisions, and there was nothing from which otherwise the inference was deducible that they were intended to be associated,—the court below thought, because they were in the same appropriation bill, it was essential to treat them as interdependent. Upon this premise, as it was deemed that the sum of the unexpended appropriations was money of the United States, the inference was deduced that cattle bought with such money were the property of the United States after their delivery to Indians on a reservation, and that only cattle so owned were covered by the prohibition against sale.

Coming to determine whether the facts stated in the indictment brought the case within the statute as thus interpreted, it was held that as the money with which the cattle embraced in the indictment were bought was Indian money, the price of land sold by them to the United States, the relation of principal and agent existed, and hence the cattle, when bought were acquired by the Indians through the United States as their representative, were owned by them, and their sale was not within the *prohibition against sale. In addition[59 this result was fortified by what was decided to be the intent of Congress in enacting the prohibition against sale; that is, the protection of the property of the United States, and not the preventing the Indians on a reservation from selling their own cattle. But conceding, without so deciding, the soundness of the inference deduced from the premise upon which the court proceeded, we are of opinion that error was committed in bringing together wholly distinct and nonrelated provisions simply because they were found in one general appropriation bill, and thus interpreting the act not by its true text, but by an imaginary context. When the ambiguity produced by the erroneous consolidation is removed, the text is, we think, free from obscurity. The cattle bought under the conditions stated in the indictment were beyond doubt "cattle purchased by the United States," and which were on the reservation "in possession and control" of the Indian by whom it is charged they were wrongfully sold. The theory that the words "possession and control" contemplated only cattle which *belonged to the United States cannot be indulged in without reading out the words forbidding the sale of cattle, in possession or control, to anyone not a member "of the tribe to which the owners of the cattle belong." The fact that sales are not prohibited when made between members of the tribe, and the further fact that even the prohibited sales are permitted when made "with the consent in writing of the agent of the tribe to which the possessor or owner of the cattle belongs," demonstrates clearly that the purpose of the prohibition was not merely to protect cattle to which the United States had title as owner. This must be unless

be assumed that although the object of the legislation was to protect the title of the United States, the right to violate that title was freely permitted if only the wrong was accomplished by agreement of two or 60]more Indians *or was consented to by an Indian agent. And the right which the statute thus recognizes in the members of a tribe on the reservation to freely sell, among themselves, cattle, even although they may have been in possession or control as the result of a purchase made by the United States, joined with the authority conferred upon the Indian agent, not only adds to the certainty of the plain meaning of the text, but demonstrates the intent of the act; that is, the public purpose of protecting the Indians on the reservation, and of keeping thereon cattle purchased by the United States. As suggested in argument by the government, we think this continuing public purpose is cogently illustrated by the acts of May 1, 1888, chap. 213, 25 Stat. at L. 113, 114, and of June 10, 1896, chap. 398, 29 Stat. at L. 321, 355, in both of which cattle bought for Indian use from the proceeds of the price of land ceded by the Indians were subjected to a prohibition against sale like that embodied in the statute under consideration. Nor do we think there is force in the suggestion made on the other hand, that the expression of the prohibition in the particular cases referred to must be taken as indicating that it was deemed that the general prohibition of the statute here involved did not apply to cattle bought under such circumstances, otherwise the enactment of the special prohibition was unnecessary. We say this since the contention disregards the fact that in the two cases referred to the special legislation added to the restrictions contained in the general law by subjecting the cattle in the particular cases dealt with, not only to a prohibition against sale, but also against exchange or slaughter of such cattle,—an extension of the prohibition of the general law which presumably experience had demonstrated to be essential to the efficient execution of the public purpose which that law, as also the special provisions, was intended to accomplish.

Reversed.

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61] *METROPOLIS THEATER COMPANY et al., Plffs. in Err.,

v.

CITY OF CHICAGO and Ernest J. Magerstadt.

(See S. C. Reporter's ed. 61–70.)

**Constitutional law — equal protection of the laws — classification — license taxes.**

*Grading a municipal license fee for theaters according to the price asked for the highest priced seats other than box seats, rather than according to revenue, is not so palpably arbitrary as to offend against the guaranty of U. S. Const., 14th Amend., of the equal protection of the laws.*

[For other cases see Constitutional Law, 360–368, in Digest Sup. Ct. 1908.]

[No. 181.]

Argued March 12, 1913. Decided April 7, 1913.

IN ERROR to the Supreme Court of the State of Illinois to review a decree which reversed a decree of the Circuit Court of Cook County, in that state, enjoining the enforcement of a municipal license tax, and remanded the case, with directions to sustain the demurrer and dismiss the bill. Affirmed.

See same case below, 246 Ill. 20, 92 N. E. 597.

Statement by Mr. Justice McKenna:

Bill in equity brought in the circuit court of Cook county, state of Illinois, to restrain the enforcement of a certain ordinance of the city of Chicago, requiring licenses for places of amusement. The ordinance divides the places of amusement into twenty-one classes. The entertainments offered by complainants fall within the first class, which is defined as "all entertainments of a theatrical, dramatic, vaudeville, variety, or spectacular character." The license fee is graded according to the price of admission, exclusive of box seats, as follows: If $1 or more, the fee is $1,000; if it exceeds 50 cents, *but is [62 less than $1, $400; if it exceeds 30 cents, but is less than 50 cents, $300; if it exceeds 20 cents, but not more than 30 cents, $250; if it does not exceed 20 cents, $200.

The foundation of the bill is that the ordinance, in so far as it charges an annual license fee of $1,000 upon theaters charging $1 or more for any seat, exclusive of box seats, violates the 14th Amendment of the Constitution of the United States.

The city filed a demurrer to the bill, which was overruled, and, the city declining to plead further, a decree was entered, enjoining the enforcement of § 104 of the ordinance. The decree was reversed

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NOTE.—On graduation of license fees according to extent of business—see note to Clark v. Titusville, 46 L. ed. U. S. 569.

On the limit of amount of license fees generally—see note to State ex rel. Toi v. French, 30 L.R.A. 415.

On the right to grade license tax according to volume of business or amount of capital employed—see note to Salt Lake City v. Christensen Co. 17 L.R.A.(N.S.) 898.

by the supreme court of the state, and the case remanded, with directions to sustain the demurrer and dismiss the bill. This writ of error was then sued out.

The bill describes the complainants as persons, firms, or corporations, and describes the theaters conducted by each of them as follows: The Colonial theater, capacity 1,482 seats; McVicker's theater, 1,868 seats; Illinois theater, 1,249 seats; Powers's theater, 1,115 seats; Studebaker theater, 1,350 seats; Cort theater, 962 seats; Grand Opera House, 1,379 seats; Great Northern theater, 1,205 seats; LaSalle theater, 770 seats; Princess theater, 950 seats; Chicago Opera House, 1,434 seats; Olympic theater, 1,532 seats; Garrick theater, 1,259 seats; Whitney Opera House, 708 seats.

The following are the other pertinent facts: The theaters cannot, under the ordinance, accommodate or grant admission to any number of persons in excess of the number of the seats.

There have been given and produced at the theaters respectively, excepting in the Cort theater, for more than two years last past, and in the Cort theater for more than two months last past, entertainments and performances of the various kinds described 63]in the ordinance, *and in some of the theaters the price of admission has not exceeded $1 and in others it has not exceeded $2. In some the minimum price of admission has been 50 cents, and in some 25 cents. All the theaters, with the exception of one or two, have at different times during the last two years made, and intend in the future to make different maximum and minimum prices of admission, dependent upon the location of seats and according to the cost of production, the season of the year, and condition of business. It is impossible to tell in advance the condition of business or the character of entertainment or the highest or lowest prices of admission. At the present time the highest price to some parts of each of the theaters is $1 or over, and the lowest price is much less. There is not now and never has been any fixed rule or standard among theaters in Chicago as to the number of seats in any theater for which an admission fee of $1 or over is made. In some of the theaters owned and operated by complainants, and in some theaters owned and operated by others, there are more seats sold for more than $1 for a performance, than in others operated by complainants. The gross revenue per performance of complainants' theaters and other theaters, if all of the seats were occupied, would differ and vary according to the seating capacity of the theaters, respectively, and also according to the conditions prevailing, including in the conditions the charge made for admission, and the different prices of admission to different parts of the theaters, there being no theaters in Chicago wherein the prices of admission to all parts of the theater are identical with the prices of admission charged for the same number of seats in any other theater.

The seating capacity of the largest theater of complainants is 1,868, and of the smallest 708, the gross revenue of the latter being, when fully occupied, less than $1,000, and, of the former not more than $1,500, figured on the *basis of existing[64 prices of admission to all parts of the theater. The largest theater or place of amusement in Chicago (the performance being of the kind described in the ordinance, and similar to those given by complainants) has a seating capacity in excess of 4,000, its highest price of admission is $1, and during many weeks of each licensed period its gross revenue is in excess of $4,000; to wit: $5,000. And there are other theaters to which the highest price of admission is less than $1, performances in which are given twice a day, thereby increasing their seating capacity; and the gross and net revenue thereof is more than twice that of some of complainants' theaters. In many other theaters, including those of complainants, charging more than $1 for admission, eight performances only are given per week.

The complainants pay taxes upon their buildings and personal property, and they have expended in excess of $10,000 for the purpose of producing and giving entertainments of the kind described, and in excess of $5,000 in advertising. The good will and business of complainants are of great value, and if the theaters are not permitted to continue as places of amusement, a large part of the investment of complainants will be destroyed, and they will suffer great and irreparable damage, and in an amount which cannot be adequately ascertained or compensated in an action at law.

The business of complainants is lawful, and their theaters have been approved by the authorities of the city, and have conformed in every particular to the ordinance of the city.

On December 17, 1909, an ordinance was passed which the officers of the city threatened to enforce against complainants, whereupon a suit was brought by the latter and others to enjoin the same, upon the grounds, among others, that its provisions were discriminatory. The ordinance in controversy was then passed.

There are theaters in Chicago other than those of complainants *with various[65 seating capacities which, under the ordinance of December 17, 1909, were obliged to pay

license fee of $1,000, but which, under the ordinance in controversy, are required to pay only $400.

The income obtained by theaters of the second, third, and fourth classes of the amended ordinance is often largely in excess of the income obtained by those of the first class, and there are and for a long time have been given entertainments at which large assemblages of persons congregate and to which no admission fee is charged.

Complainants intend to give entertainments at their theaters and have refused to pay the license required by the ordinance, and, as such theaters are not impressed with a public use, the city has no right to designate the amount to be charged as admission thereto.

Many causes of action are threatened against complainants and many of their managers and officers.

Theaters and places of amusement in Chicago have paid a license fee starting at $100, in 1881, and progressively increasing during certain periods to January 1, 1910, when it was fixed at $500, and complainants paid the license fee exacted during the several periods.

The inspection and regulation of complainants' theaters do not cost the city more than $50 per year.

The other provisions of the bill set forth in other ways what is alleged to be the discriminatory character of the ordinance arising from basing the license fee upon the price of admission, and an infringement of the Constitution of the state of Illinois and of the United States is charged.

Mr. **Alfred S. Austrian** argued the cause, and, with Mr. Levy Mayer, filed a brief for plaintiffs in error:

While classification is permissible in an ordinance imposing a license fee either for the purposes of regulation or revenue, the distinctions created by such ordinance must bear some reasonable and just relation to the subject-matter of the classification, and to the proposed purposes of the ordinance; and if an arbitrary and improper classification is made, the ordinance cannot be sustained, as a person discriminated agianst by such an ordinance is deprived of the equal protection of the law, and suffers the deprivation of his property without due process of law.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Los Angeles v. Lankershim, 160 Cal. 800, 118 Pac. 215; Fiscal Ct. v. F. & A. Cox Co. 132 Ky. 738, 21 L.R.A. (N.S.) 83, 117 S. W. 296; St. Louis v. Wehrung, 46 Ill. 392; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; Hibbard v. Chicago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256; Monmouth v. People, 183 Ill. 634, 56 N. E. 348; Zanone v. Mound City, 103 Ill. 552; State ex rel. McCue v. Ramsey County, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; Lappin v. District of Columbia, 22 App. D. C. 68; State v. Shedroi, 75 Vt. 277, 63 L.R.A. 179, 98 Am. St. Rep. 825, 54 Atl. 1081, 15 Am. Crim. Rep. 129; Nichols v. Walter, 37 Minn. 264, 33 N. W. 800.

Mr. **Charles M. Haft** argued the cause, and, with Mr. William H. Sexton, filed a brief for defendants in error:

The ordinance in question creates a reasonable classification, and does not violate the Federal Constitution by depriving the complainants of the equal protection of the law, or causing them to suffer the deprivation of their property without due process of law.

Douglas v. People, 225 Ill. 544, 8 L.R.A. (N.S.) 1116, 116 Am. St. Rep. 162, 80 N. E. 341; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338–354, 52 L. ed. 236–243, 28 Sup. Ct. Rep. 114; Hawthorn v. People, 109 Ill. 311, 50 Am. Rep. 610; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; State Railroad Tax Cases, 92 U. S. 601, 23 L. ed. 669; State, Jelliff, Prosecutor, v. Newark, 48 N. J. L. 106, 2 Atl. 627; Head Money Cases, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; People ex rel. Iron Silver Min. Co. v. Henderson, 12 Colo. 369, 21 Pac. 144; St. Louis v. Wehrung, 46 Ill. 392; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364–371, 46 L. ed. 949–954, 22 Sup. Ct. Rep. 673; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Banta v. Chicago,

172 Ill. 219, 40 L.R.A. 611, 50 N. E. 233; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Re Abel, 10 Idaho, 288, 77 Pac. 621; State v. Montgomery, 92 Me. 433, 43 Atl. 13; Ex parte Heylman, 92 Cal. 482, 28 Pac. 675; Mechanicsburg v. Koons, 18 Pa. Super. Ct. 131; Nashville, C. & St. L. R. Co. v. Attalla, 118 Ala. 362, 24 So. 450; Gamble v. Montgomery, 147 Ala. 682, 39 So. 53; Ex parte Lemon, 143 Cal. 558, 65 L.R.A. 946, 77 Pac. 455; State v. McKinney, 29 Mont. 375, 74 Pac. 1095, 1 Ann. Cas. 579; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; Browne v. Selser, 106 La. 691, 31 So. 290; Cowart v. Greenville, 67 S. C. 35, 45 S. E. 122; Morgan v. Com. 98 Va. 812, 35 S. E. 448; Iowa City v. Newall, 115 Iowa, 55, 87 N. W. 739; Newton v. Atchison, 31 Kan. 151, 47 Am. St. Rep. 486, 1 Pac. 288; Ex parte Li Protti, 68 Cal. 636, 10 Pac. 113; Vosse v. Memphis, 9 Lea, 294; Howland v. Chicago, 108 Ill. 500; Smith v. Louisville, 9 Ky. L. Rep. 779, 6 S. W. 911; St. Paul v. Dow, 37 Minn. 20, 5 Am. St. Rep. 811, 32 N. W. 860; St. Louis v. Bircher, 7 Mo. App. 169; Gibson v. Coraopolis, 22 Pittsb. L. J. N. S. 64; State v. Schlier, 3 Heisk. 281, 8 Heisk. 455; State v. Schonhausen, 37 La. Ann. 42; Amador County v. Kennedy, 70 Cal. 458, 11 Pac. 757; Tulloss v. Sedan, 31 Kan. 165, 1 Pac. 285; New Orleans v. Ponchartrain, 41 La. Ann. 519, 7 So. 83; State v. Traders' Bank, 41 La. Ann. 329, 6 So. 582; State v. Liverpool, L. & G. Ins. Co. 40 La. Ann. 463, 4 So. 504; Ficklin v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Ex parte Mount, 66 Cal. 448, 6 Pac. 78; Walker v. Springfield, 94 Ill. 364; State, North Hudson County R. Co., Prosecutors, v. Hoboken, 41 N. J. L. 71; Fretwell v. Troy, 18 Kan. 271; St. Joseph v. Ernst, 95 Mo. 360, 8 S. W. 558; State v. Greenspan, 70 Mo. App. 468; Kiliski v. Grady, 25 La. Ann. 576; State v. Rolle, 30 La. Ann. 991, 31 Am. Rep. 234; Sacramento v. Crocker, 16 Cal. 119; New Orleans v. Dubarry, 33 La. Ann. 481, 30 Am. Rep. 273; Webber v. Chicago, 50 Ill. App. 110, 148 Ill. 313, 36 N. E. 70; Littlefield v. State, 42 Neb. 223, 28 L.R.A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; McGrath v. Newton, 29 Kan. 364; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Rosenbloom v. State, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053; Humes v. Ft. Smith, 93 Fed. 857; Augusta v. Clark, 124 Ga. 254, 52 S. E. 88; Des Moines v. Bolton, 128 Iowa, 108, 102 N. W. 1095, 5 Ann. Cas. 906; Iowa Mut. Tornado Ins. Asso. v. Gilbertson, 129 Iowa, 658, 106 N. W. 153; State v. Hammond Packing Co. 110 La. 180, 98 Am. St. Rep. 459, 34 So. 368; People v. Hotchkiss, 118 Mich. 59, 76 N. W. 142; Re Lipschitz, 14 N. D. 622, 95 N. W. 157; Com. v. Muir, 180 Pa. 47, 36 Atl. 413; State v. Doherty, 3 Idaho, 384, 29 Pac. 855; State v. O'Hara, 36 La. Ann. 94; Osborn v. State, 33 Fla. 162, 25 L.R.A. 120, 39 Am. St. Rep. 99, 4 Inters. Com. Rep. 731, 14 So. 588; Re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; Hays v. Com. 107 Ky. 655, 55 S. W. 425; Danville v. Weaver, 17 Pa. Co. Ct. 17; State v. Webber, 214 Mo. 272, 113 S. W. 1054, 15 Ann. Cas. 983; People v. Smith, 147 Mich. 391, 110 N. W. 1102; Chicago v. Brownell, 146 Ill. 64, 34 N. E. 595; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192.

There is no provision in the Federal Constitution which forbids unequal taxation by the states.

Davidson v. New Orleans, 96 U. S. 97, 106, 24 L. ed. 616, 620; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 351, 35 L. ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Merchants & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; St. Louis, I. M. & S. R. Co. v. Davis, 132 Fed. 629.

Mr. Justice McKenna delivered the opinion of the court, after making the above statement:

The attack of complainants (we so call plaintiffs in error) is upon the classification of the ordinance. It is contended that the purpose of the ordinance is to raise revenue, and that its classification has no relation to such purpose, and therefore is arbitrarily discriminatory, and thereby offends the 14th Amendment of the Constitution of the United States. The character ascribed to the ordinance by the supreme court of the state is not without uncertainty. But we may assume, as complainants assert, that the court considered the ordinance as a revenue measure only. The court said: "The ordinance may be sustainable under the taxing power alone, without reference to its "reasonableness as a regulatory meas-[69 ure." And, regarding it as a revenue measure, complainants attack it as unreasonable in basing its classification upon the price of admission of a particular theater, and not upon the revenue derived therefrom; and exhibit the discrimination which is an

to result, a comparison is made between the seating capacity of complainants' theaters and the number of their performances within given periods, and the theaters of others in the same respects, and the resulting revenues. But these are accidental circumstances and dependent, as the supreme court of the state said, upon the advantages of the particular theater or choice of its owner, and not determined by the ordinance, It will immediately occur upon the most casual reflection that the distinction the theater itself makes is not artificial, and must have some relation to the success and ultimate profit of its business. In other words, there is natural relation between the price of admission and revenue, some advantage, certainly, that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial; and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it cannot be declared to be so palpably arbitrary as to be repugnant to the 14th Amendment. This is the test of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as that Amendment is concerned, to declare in words, and the cases illustrate by examples, the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations,—illogi-
70 cal, it may be, and unscientific. *But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its papably arbitrary exercises which can be declared void under the 14 Amendment; and such judgment cannot be pronounced of the ordinance in controversy. Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192.

Judgment affirmed.

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CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Plff. in Err.,

v.

WILBUR I. CRAM.

(See S. C. Reporter's ed. 70–85.)

***Constitutional law — police power — regulating carriers of live stock.***

***1. A limitation of the time for the transportation of live stock by common carriers may be imposed by a state legislature, as is done by Neb. Laws 1905, chaps. 107, 506, passed in the power of the state to regulate the conduct of the carriers in the performance of their duties to the public.***

[For other cases, see Constitutional Law, IV. c, in Digest Sup. Ct. 1908.]

**Constitutional law — usurping judicial power — fixing liquidated damages — due process of law.**

2. Fixing the damages for culpable violations of Neb. Laws 1905, chap. 107, p. 506, which impose a limitation of the time for the transportation of live stock by com-

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NOTE.—Validity of statute fixing minimum speed for transportation of live stock.

In Downey v. Northern P. R. Co. 19 N. D. 621, 26 L.R.A.(N.S.) 1017, 125 N. W. 475, the North Dakota statute making it an absolute requirement that common carriers should maintain as to all trains transporting any live stock within the state, an average minimum rate of speed of not less than 20 miles per hour from time of loading until arrival at destination, deducting only such reasonable time as is necessary for unloading to feed, water, and rest, and reloading, was held to be unconstitutional and void as an unreasonable exercise of the police power of the state, as applied to a shipment of live stock between two points in the state over a route passing outside the state. The court rests its decision largely upon Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, pointing out that "the statute in question makes no exception in cases of sudden congestion of traffic, and no allowance for interference of traffic occasioned by wrecks or other accidents, the breaking of bridges, accidental fires, washouts, snow storms, or other unavoidable consequences of heavy weather."

So, in Leibengood v. Missouri, K. & T. R. Co. 83 Kan. 25, 28 L.R.A.(N.S.) 985, 109 Pac. 988, the court said that if the Kansas statute requiring common carriers to transport live stock at a speed of not less than 15 miles per hour, unless prevented by some unavoidable cause, were to be applied to a shipment between two points in Kansas over a route passing outside the state, it would necessarily be invalid as a regulation of interstate commerce.

This interstate feature of the transportation is wholly absent in CHICAGO, B. & Q. R. Co. v. CRAM, and the statute, though containing no exception in cases of the act of God, or inevitable accident, is construed by the supreme court of the state as not precluding the carrier from excusing, on those grounds, its failure to deliver a carload of live stock within the time limit.

On the right to limit the speed of interstate and mail trains—see note to Petersen v. State, 14 L.R.A.(N.S.) 292.

And on the constitutionality of legislation affecting the amount of liability or penalty for delay in delivery, or for destruction of freight—see note to Seaboard Air Line R. Co. v. Simon, 20 L.R.A.(N.S.) 128.

mon carriers, at $10 for each car for every hour by which the time of transportation exceeds the statutory limit, is not such a legislative usurpation of judicial functions as renders the statute repugnant to the due process of law clause of U. S. Const., 14th Amend., where the highest court of the state holds that the statute imposes only compensatory damages, fixing them at a sum certain because of the difficulty of the ascertainment of the actual damages suffered.

[For other cases, see Constitutional Law, III. a, 2; IV. b, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — law existing at date of contract.**

3. A state statute cannot be said unconstitutionally to impair the obligation of contracts made subsequent to its enactment.

[For other cases, see Constitutional Law, 1277–1280, in Digest Sup. Ct. 1908.]

[No. 193.]

Argued March 18, 1913. Decided April 7, 1913.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which modified, and, as modified, affirmed, a judgment of the District Court of Garfield County, in that state, in favor of plaintiff in an action to recover for violations of a state statute imposing a limitation of the time for transportation of live stock by common carriers. Affirmed.

See same case below, 84 Neb. 607, 26 L.R.A.(N.S.) 1022, 122 N. W. 31; on rehearing, 85 Neb. 586, 26 L.R.A.(N.S.) 1028, 123 N. W. 1045, 19 Ann. Cas. 170.

Statement by Mr. Justice McKenna:

71] *The state of Nebraska enacted a law requiring railroads conveying live stock to convey the same at a rate of speed so that the time consumed in a journey from the initial point of receiving the stock to the point of feeding or destination should not exceed one hour for each 18 miles travel, including the time of stops at stations or other points. It is provided that where the initial point is not a division station, and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each 12 miles of the distance, including stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required.

It is further provided that upon branch lines not exceeding 125 miles in length, live stock of less than six cars in one consignment, the railroad company may designate three days in each week as stock-shipping days, and publish and make public the days so designated. After notice of ten days of the days selected and designated, the schedule provided in the act shall only apply to such stock-shipping days. It is provided that a carrier "violating any provisions of the act shall pay to the owner of such live stock the sum of $10 for each hour for each car it extends or prolongs the time of transportation beyond the period here limited as liquidated damages, to be recovered in an ordinary action, as other debts are recovered." The act was approved March 30, 1905. Nebraska Session Laws 1905, chap. 107, p. 506.

Defendant in error brought an action against plaintiff in error in the district court of Garfield county, for the sum of $1,770, being the aggregate of twenty-five violations of the act for stock delivered to the railroad July 14, 1905, *and subsequent[72 dates, for transportation in full carloads, each violation being made a cause of action, the amount of each varying with the time of prolongation of the transportation of the stock.

There was alleged in the cause of action no ground of recovery other than the statute and the delay in the transportation of the stock. In other words, the time consumed in the transportation of the stock, such time being given and alleged to be "longer than permitted by the statutes of Nebraska, to the damage of the plaintiff . . . . as provided for by statutes."

A demurrer was filed to the petition, charging that the statute violated the due process and equality clauses of the 14th Amendment of the Constitution of the United States; that the plaintiff (defendant in error) sought "to recover property or money from the defendant without its consent and for the private use of the plaintiff, without compensation, and which recovery, if had, would amount to confiscation of the property of the defendant, in violation of the provisions of article 14 of the Amendments of the Constitution of the United States; that the recovery, if permitted, would be the recovery of a penalty under an act of the legislature which is penal in its character, and was not such a right as the plaintiff could have or enforce, in violation of § 5, art. 8, of the Constitution of Nebraska."

The demurrer was overruled and the defendant answered, alleging the following: The shipments were duly and properly made without unnecessary delay, and the consignments carried were each and all duly delivered to the consignee in accordanc

with the contracts made for the shipment of the stock, and without any fault or negligence on the part of the defendant company.

A written contract for each shipment was duly made and entered into by plaintiff and defendant, by which it was contracted and 73]agreed that the shipments would *not be carried within any specified time, nor to arrive at destination for any particular market.

The damages sought to be recovered are in reality a penalty or forfeiture, and that a recovery by plaintiff would be in violation of the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

The plaintiff's cause of action is for the recovery of a penalty sought to be imposed upon the defendant contrary to the provisions of article 8, § 5, of the Constitution of Nebraska, and plaintiff had no right or authority under the law to prosecute the action, or to recovery therein.

An amended answer was filed which repeated the above, and alleged that the stock was accepted and carried according to the laws, rules, and usages that regulated and governed common carriers, and in accordance with the schedules for the movement of trains, as established and in force at the times the shipments were made. The line of the defendant's railroad was alleged, the manner of conducting its business, the times of receiving the various shipments, their arrival at particular stations and at destination.

A replication was filed to the answer, denying its allegations.

The case was tried by the court without a jury, and judgment was rendered for plaintiff in the sum of $1,640 and costs.

The supreme court decided that the judgment was excessive in the amounts of $250 and $170, and those sums, in accordance with the order of the court, were remitted by the plaintiff, and with those reductions the judgment was affirmed. 84 Neb. 607, 26 L.R.A.(N.S.) 1022, 122 N. W. 31, 85 Neb. 586, 26 L.R.A.(N.S.) 1028, 123 N. W. 1045, 19 Ann. Cas. 170.

Mr. Halleck F. Rose argued the cause, and, with Messrs. John F. Stout and James E. Kelby, filed a brief for plaintiff in error:

The construction given to the statute by the highest court of the state must be accepted by this court in judging whether the statute conforms to the Constitution of the United States.

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 467, 45 L. ed. 619, 626, 21 Sup. Ct. Rep. 423; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 353, 44 L. ed. 192 194, 20 Sup. Ct. Rep. 136; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 414, 41 L. ed. 489, 494, 17 Sup. Ct. Rep. 130; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 152, 41 L. ed. 107, 110, 16 Sup. Ct. Rep. 1096; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Gatewood v. North Carolina, 203 U. S. 531, 541, 51 L. ed. 305, 309, 27 Sup. Ct. Rep. 167.

The due process clause of the state Constitution forbids the legislature to provide for, and the courts to allow, punitive damages in any class of cases between private suitors.

Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; Roose v. Perkins, 9 Neb. 315, 31 Am. Rep. 409, 21 N. W. 715; Riewe v. McCormick, 11 Neb. 264, 9 N. W. 88; Boldt v. Budwig, 19 Neb. 745, 28 N. W. 280; Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 525, 71 N. W. 48.

Legislative authority to liquidate damages was the sole ground of the decision in Graham v. Kibble, 9 Neb. 185, 2 N. W. 455; Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 525, 71 N. W. 48.

If, in any event, the existence of legislative power, without notice or hearing, to fix or decree the amount of a civil recovery in a court of justice, depends on the inability of the suitors to adduce evidence in court on the issue of actual damage, then that question is inherent in the asserted Federal right of due process, and this court will determine it independently.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 158, 159, 41 L. ed. 388, 389, 17 Sup. Ct. Rep. 56.

The constitutional guaranties of the rights of private property are restraints upon arbitrary exercise by the nation and the states of the sovereign powers of taxation and eminent domain,—prerogatives the proper exercise of which are essential to the support and maintenance of any organized government.

Vanhorne v. Dorrance, 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655–667, 22 L. ed. 455–459; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 158, 159, 41 L. ed. 388, 389, 17 Sup. Ct. Rep. 56; Davidson v. New Orleans, 96 U. S. 107, 24 L. ed. 620; Missouri P. R. Co. v. Nebraska, 164 U. S. 403–417, 41 L. ed. 489–495, 17 Sup. Ct. Rep. 130; Wilkinson v. Leland, 2 Pet. 656–658, 71 L. ed. 552–553; Missouri P. R. Co. v. Nebraska, 164 U. S. 417, 41 L. ed. 495, 17 Sup. Ct. Rep. 130; Monongahela Nav. Co. v. United States, 148 U. S. 312–345, 37 L. ed. 463–474, 13 Sup. Ct. Rep. 622; Isom v. Mississippi C. R. Co. 36 Miss. 315.

In a system of social government in which

the inviolability of property is sacred against arbitrary exactions for the extreme necessities of the state, is it possible that the state is left free to take the property of a citizen and turn it over to a private person without notice, process, or hearing? Is it possible that our Constitution affords private property ample protection against public necessity, and none whatever against private exactions? Is the right to a hearing, to contest for the continued enjoyment of private property, after notice of an adverse claim, in some appropriate proceeding, conformable to due process, less sacred against private exactions than against public necessity?

The state courts cannot satisfy the constitutional guaranty by merely granting a hearing; they must, upon a hearing, recognize and enforce substantive rights of property.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 233, 236, 41 L. ed. 983, 984, 17 Sup. Ct. Rep. 581.

It is true the property of railroads is employed to perform the public service of transportation; but it is, none the less, private property, under the dominion of private ownership, and within the protection of constitutional guaranties. Because of its public employment this species of property is not left open to exploitation and plunder, nor excepted from the protecting guaranties of the 14th Amendment, nor subject to deprivation by the state under the guise of regulation, or any other pretext employed to cloak or veil the attempted exercise of arbitrary power.

Missouri P. R. Co. v. Nebraska, 164 U. S. 417, 41 L. ed. 495, 17 Sup. Ct. Rep. 130; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 466, 33 L. ed. 970, 984, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156.

This court has never sanctioned an invasion of the Constitution on the ground that the mischief entailed in the particular case was not as great as it might be in others, or that there might have been a wider departure from the constitutional rule.

Boyd v. United States, 116 U. S. 635, 29 L. ed. 752, 6 Sup. Ct. Rep. 524.

Let us assume the legislature to be unfettered in the exercise of this despotic power. The power once admitted, the legislature may fix the sum or amount of the claim at any figure that suits its will or whim, or that will gratify the cupidity of the favored class. For example, the legislature of North Dakota, more moderate than that of Nebraska, in an act, since held invalid as an undue burden on commerce, fixed $5 per car per each hour as the measure of the stock shipper's claim for delay in transportation beyond a statutory speed schedule (Downey v. Northern P. R. Co. 19 N. D. 621, 26 L.R.A.(N.S.) 1017, 125 N. W. 475). While liquidating the stock shipper's claim at $10 per hour for each car, under the act in question, the Nebraska legislature has fixed the same sort of claim for delays at the stock yards in unloading at $2.50 per half hour. As expressed by the Nebraska court, if a party can lawfully stipulate that the damages shall not exceed $100, he could likewise contract that he should not pay more than $25 or any smaller sum.

Chicago, R. I. & P. R. Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436, 49 N. W. 183.

The state court has assumed that the rule applied by many courts, of enforcing liquidated damages stated by contract, only in those cases in which proof of the precise amount is difficult, would also be an appropriate test of legislative power. The soundness of the rule itself was denied by this court in Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240. But the state court overlooked the fact that private parties can by contract do many things compelling the sanction of the courts, which are utterly beyond the power of the legislature.

Previous to the adjudications under review, the Nebraska court had not found that there was any difficulty in proving the amount of damages actually sustained in such cases.

Nelson v. Chicago, B. & Q. R. Co. 78 Neb. 57, 110 N. W. 741; Denman v. Chicago, B. & Q. R. Co. 52 Neb. 140, 71 N. W. 967; Chicago, B. & Q. R. Co. v. Williams, 61 Neb. 608, 55 L.R.A. 289, 85 N. W. 832; Wente v. Chicago, B. & Q. R. Co. 79 Neb. 179, 15 L.R.A.(N.S.) 756, 112 N. W. 300, 115 N. W. 859; Squires v. Elwood, 33 Neb. 126, 49 N. W. 939; Gillilan v. Rollins, 41 Neb. 540, 59 N. W. 893; Lee v. Carroll Normal School Co. 1 Neb. (Unof.) 681, 96 N. W. 65.

In so far as the holding of the state court in favor of legislative authority to determine the measure of recovery in civil cases is rested on judicial precedent, that court has clearly misconceived the doctrines of the cases cited. The holding of the state court is unprecedented.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Brew

dy v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62.

The act in question denies to plaintiff in error the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Mr. E. J. Clements argued the cause, and, with Mr. S. H. Cowan, filed a brief for defendant in error:

The Constitution of the United States does not prohibit a state legislature from exercising judicial functions, and whether or not it has done so is not a Federal question.

Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28, 5 Am. Crim. Rep. 253; Reetz v. Michigan, 188 U. S. 507, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Carfer v. Caldwell, 200 U. S. 297, 50 L. ed. 489, 26 Sup. Ct. Rep. 264; Prentis v. Atlantic Coast Line R. Co. 211 U. S. 225, 53 L. ed. 158, 29 Sup. Ct. Rep. 67; Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103.

Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. When a statute is susceptible of two constructions, one making it constitutional and the other unconstitutional, the former must be adopted.

Black, Const. Law, § 30; 8 Cyc. 801, 804; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 407, 53 L. ed. 848, 29 Sup. Ct. Rep. 527; Hooper v. California, 155 U. S. 648, 657, 39 L. ed. 297, 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 43 L. ed. 912, 19 Sup. Ct. Rep. 609.

In all of its relations to the public, a railroad company has the character of a public agent, is a quasi public corporation, and is subject to any reasonable legislative regulation or control.

2 Elliott, Railroads, §§ 662, 670; 7 Cyc. 447, 448; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 195, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

Legislative power to regulate and control quasi public corporations is not confined to railroad companies alone, but extends to *banks, elevator,* insurance, gas, water, *telephone, and telegraph* companies, and all corporations engaged in business of a public nature.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186.

The right of the legislature to regulate and control a business affected with a public interest is a part of the police power of the state.

9 Enc. U. S. Sup. Ct. Rep. 483; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 296, 297, 43 L. ed. 702, 706, 707, 19 Sup. Ct. Rep. 465; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Stone v. Farmers' Loan & T. Co. 116 U. S. 334, 29 L. ed. 645, 6 Sup. Ct. Rep. 334, 388, 1191; Freund, Pol. Power, § 398; 33 Cyc. 648; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Sinking Fund Cases, 99 U. S. 747, 25 L. ed. 511.

It is a matter of common knowledge that the ordinary and usual method of enforcing a police regulation of the character of that under discussion is by providing a penalty for its violation, the same to be recovered by an action in the name of the state, the informer, or the party who has been injured by the delinquency. This method of enforcement does not in any manner conflict with the 14th Amendment, or any other provision of the Federal Constitution.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 312, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 31, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

This court is not bound by the holding of the state supreme court that the purpose for

which a state statute authorizes the levy of a tax on property is a public use; nor by the holding of such a court that a state statute is or is not a police regulation.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 159, 41 L. ed. 388, 17 Sup. Ct. Rep. 56; Huntington v. Attrill, 146 U. S. 657, 682, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 100, 43 L. ed. 909, 911, 19 Sup. Ct. Rep. 609.

The following rules of law are firmly established and enforced by the supreme court of Nebraska, to wit:

1. Any law which requires actual compensatory damages to be ascertained from the evidence, and then requires the same to be doubled, or permits a further sum to be added thereto, as a punishment for the defendant, is unconstitutional and void.

2. When the damages which may result from the failure to perform a duty imposed by statute are difficult of ascertainment, the amount recoverable by a private person sustaining injury from said breach of duty may be fixed by the legislature, and such statute, although penal, or quasi penal, in its nature, does not conflict with any constitutional inhibition, and will be sustained.

Graham v. Kibble, 9 Neb. 184, 2 N. W. 455; Phœnix Ins. Co. v. Bohman, 28 Neb. 251, 44 N. W. 111; Phœnix Ins. Co. v. McEvony, 52 Neb. 566, 72 N. W. 956; Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N. W. 133; Deering v. Miller, 33 Neb. 655, 50 N. W. 1056; Boyer v. Barr, 8 Neb. 68, 3 Am. Rep. 814; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 526, 71 N. W. 48.

A state legislature has the power to fix, by statute, the maximum, or even the exact amount recoverable by a person sustaining injury from the delinquency of a public, or quasi public, agent; and such a statute does not violate any of the provisions of the 14th Amendment.

Graham v. Kibble, 9 Neb. 182, 2 N. W. 455; Lancashire Ins. Co. v. Bush, 60 Neb. 121, 82 N. W. 313; Oshkosh Gaslight Co. v. Germania F. Ins. Co. 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 226, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62; Pirkl v. Smith, 42 Fed. 410; Havens v. Germania Ins. Co. 123 Mo. 403, 26 L.R.A. 107, 45 Am. St. Rep. 570, 27 S. W. 718; Coover v. Moore, 31 Mo. 574; Carroll v. Missouri P. R. Co. 88 Mo. 239, 57 Am. Rep. 382; Miller v. Missouri P. R. Co. 109 Mo. 350, 32 Am. St. Rep. 673, 19 S. W. 58; Texas C. R. Co. v. Hannoy—Frerichs & Co. — Tex. Civ. App. —, 130 S. W. 250; Orange County v. Harris, 97 Cal. 600, 32 Pac. 594; Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 638, 38 S. W. 85; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The rule prevailing in Nebraska is that a provision for liquidated damages, in a contract or statute, will be upheld in cases where the actual damages are impossible or difficult of exact ascertainment. Said rule, as applied to contracts, obtains in nearly all jurisdictions, including that of this court.

Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240.

An alleged unconstitutional feature of a law will be considered and passed upon only when raised by a party injured thereby.

Southern R. Co. v. King, 217 U. S. 534, 54 L. ed. 871, 30 Sup. Ct. Rep. 594.

Mr. Justice McKenna delivered the opinion of the court, after stating the case as above:

The case is here in a simple aspect. There was no attempt made to explain or justify the delays in the shipments, and any attack on the statute on the ground that it includes delays resulting from the act of God, or cause over which the carriers have no control, is precluded by the construction put upon the act by the supreme court of the state.

The only proposition, then, which is presented, is whether the statute is beyond the power of government, and therefore offends the 14th Amendment of the Constitution of the United States by depriving plaintiff in error of its property without due process of law.

This is contended upon two grounds: 1. That statute, as considered by the supreme court of the state, is a legislative determination of the quantum of damages arising from a breach of a private contract for the shipment of live stock, and a legislative determination of damages wholly distinct and apart from the exercise of police power, and not a punitive measure to enforce compliance with the commands of the statute. 2. The statute, being declared of such character, is "a usurpation of functions which are exclusively judicial, contrary to the law of the land," and repugnant to the provisions of the 14th Amendment.

It is the concession of the contentions that had the statute been considered by the supreme court a police regulation, the objection made to it would be without *foun-[82 dation. But, meeting the effect of the concession, plaintiff in error asserts that if the

court had so ruled, defendant in error would have had no right of action, because, under § 5, article 8, of the Constitution of the state, all penalties must be appropriated to the use and support of the common schools.

The court found no conflict between the law and the Constitution of the state. Section 5, article 8, however, was not discussed in any of the opinions. Other provisions of the Constitution were considered and the contentions based on them decided to be untenable. The omission is not important to our inquiry, and we shall assume, as plaintiff in error contends, that the court regarded the statute as giving compensation for damages for injuries suffered, rather than penalties for omission of duties prescribed. It does not follow, however, that the court decided that the statute was not passed in exercise of the power of the state to regulate the conduct of the carriers in the performance of their duties to the public. The opinion of the court makes the contrary manifest. The court said: "In the instant case the enforcement of the law, as we view the record, will not deprive defendant of any constitutional guaranty, state or national. Defendant's property is affected by a public interest; having devoted that property to a use in which the public have an interest, it must, to the limit of the interest thus acquired by the public, submit to the control of such property for the public good. . . . The public is interested not only in being permitted to have its property transported for a reasonable compensation, but also in having that property, especially if subject to rapid depreciation, transported with reasonable promptness and care. . . . It is a matter of common knowledge that live stock confined in a freight car deteriorates in condition, and that if the animals are to be placed on market within a short time of the termination of the transportation, the depreciation is [83] not confined to a shrinkage in weight, but to many other factors difficult to prove, but actually existing, and seriously affecting the market value of said property. As the damage accruing from the protracted confinement of stock is difficult to prove with reasonable exactitude, and yet always exists, the legislature has the power to provide for liquidated damages. Such legislation is not unsound in principle and has been upheld in many courts." [84 Neb. 611, 26 L.R.A. (N.S.) 1022, 122 N. W. 31.]

The court, in illustration of its views and the quality of the statute, compared it to § 4966 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3415), which provides for a liability of $100 for the first infringing performance of a copyrighted dramatic piece, and $50 for the second performance, as, the court said, "a reasonable liquidation of damages which the proprietor had suffered from the wrongful acts of the defendant."

The court also adduced two examples from statutes of the state, sustained by decisions, in both of which $50 was given as liquidated damages; in one, against an officer for collecting a fee greater than allowed by law; in the other, against a mortgagee for failing to release a chattel mortgage; and $500 against an officer for rearresting a person after his discharge on habeas corpus.

Answering the objection that the legislature might subject an occupant of a public office to damages for particular unlawful acts, and not have such power over others, the court said that the reason applied as well to "like provisions in statutes passed to regulate public carriers in the transaction of their business."

It is clear from the excerpts from the opinion of the court that it considered the statute as passed to regulate public carriers, and to give damages against them for the omission of the duties prescribed by it, which, though existing, could not be exactly estimated or proved. The court, therefore, [84] only announced and applied the principle of liquidated damages. It would seem, too, by the examples it adduced from other statutes of the state, to reject the view asserted by plaintiff in error, that even if the statute be regarded as imposing penalties upon the carriers, it was thereby made to conflict with § 5, article 8, of the state Constitution, and could not be made payable to the party injured. This was declared in Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N. W. 133, and sums provided to be recovered by other statutes were decided in other cases to be in the nature of penalties. Graham v. Kibble, 9 Neb. 184, 2 N. W. 455; Phœnix Ins. Co. v. Bohman, 28 Neb. 251, 44 N. W. 111; Phœnix Ins. Co. v. McEvony, 52 Neb. 566, 72 N. W. 956; Deering v. Miller, 33 Neb. 655, 50 N. W. 1056. These cases are distinguishable from those cited by plaintiff in error in which the court disapproved a statute which purported to give double damages, and the court, in the case at bar, explicitly distinguished them from cases in which liquidated damages were provided for. In other words, the court decided that the statute imposed only compensatory damages, fixing them at a sum certain because of the difficulty "of the ascertainment of the actual damages suffered by the aggrieved person."

We need not extend the discussion. We repeat, the case is here in a simple aspect. Two propositions only are involved: (1)

the power of the legislature to impose a limitation of the time for the transportation of live stock; (2) to provide a definite measure of damages which may be difficult to estimate or prove. It is too late in the day to deny the possession of the first power, and we think the other is as fully established, and that the statute was enacted to meet conditions which had arisen from the conduct of carriers, and which, in the judgment of the legislature, demanded a remedy. And the court confined the act strictly to culpable violation of its requirements. To the plea of extra expense which might be 85]incurred by *obedience to the statute, the court said it could be compensated by extra charge.

The contention is made that the statute impairs the obligation of the contracts which existed between plaintiff in error and defendant in error; but that contention was not made in the court below and cannot therefore be made here. Besides, there is no evidence of the contracts in the record. Contracts were pleaded, and there appears to have been some attempt to introduce them in evidence, but unsuccessfully, and they were stricken from the bill of exceptions. But, assuming the contracts may be considered on this record, a complete answer to the contention that the statute impairs their obligation is, they were made subsequently to the statute, and therefore are subject to it.

Judgment affirmed.

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CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Plff. in Err.,
v.
JAMES M. KYLE.

(See S. C. Reporter's ed. 85-87.)

This case is governed by the decision in Chicago, B. & Q. R. Co. v. Cram, ante, 734.

[No. 194.]

Argued March 18, 1913. Decided April 7, 1913.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Merrick County, in that state, in favor of plaintiff in an action to recover for violations of a state statute imposing a limitation of the time for transportation of live stock by common carriers. Affirmed.

See same case below, 84 Neb. 621, 122 N. W. 37.

The facts are stated in the opinion.

Mr. Halleck F. Rose argued the cause, and, with Messrs. John F. Stout and Jam E. Kelby, filed a brief for plaintiff in erro

Mr. E. J. Clements argued the cause and, with Mr. S. H. Cowan, filed a brief fo defendant in error.

For contentions of counsel, see the briefs as reported in Chicago, B. & Q. R. C v. Cram, ante,

*Mr. Justice McKenna delivered the[8 opinion of the court:

This case also involves the validity of th statute of Nebraska which was considered i Chicago, B. & Q. R. Co. v. Cram, No. 19 [228 U. S. 70, ante, 734, 33 Sup. Ct. Re 437], and was submitted at the same tim with that case.

The cause of action was based on th ground of prolongation in the transport tion beyond the statutory schedule of fi cars of cattle from Palmer, Nebraska, South Omaha, in the same state, which we delivered to the railroad September 6, 190 It was alleged that the time of transport tion was for a period of nine hours "ov the time allowed by law in that behalf," an that by failure to transport the catt "within a reasonable time and within th time allowed by law for that purpose," th plaintiff was damaged in the sum of $45 which was the statutory rate of $10 p hour.

The answer filed by the railroad compan to the petition alleged that the shipmen was made pursuant to a contract in wri ing, and that the cattle were transport and delivered as contracted for without an fault or negligence on its part. The an swer also denied the allegations of the pet tion. A replication was filed to the answe

The case was tried to a jury, which re dered a verdict for Kyle, upon which jud ment was entered. It was affirmed by th supreme court of the state for the reason stated by the court in Cram's Case.

The case was submitted to the jury up the evidence of the plaintiff, the railro company offering no testimony. There w no proof that there was actual injury damage done to the shipper by the alleg delay in transportation. The statute w the sole basis of the claim in the suit. T court instructed the jury that if the tim exceeded that provided for by the statu under the conditions expressed by the sta ute, they should find for the *complain-[8 ant; otherwise, for the defendant. The rai road company requested explicit instructio against the recovery by the plaintiff of a sum.

The contentions are the same as Cram's Case, and upon the authority of decision the judgment in this case be firmed.

UNITED STATES OF AMERICA, Plff. in Err.,
v.
PACIFIC & ARCTIC RAILWAY & NAVIGATION COMPANY, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, et al.

(See S. C. Reporter's ed. 87-108.)

**Monopoly — under anti-trust act — through-route agreements.**

1. An agreement between connecting railway and steamship carriers and a wharfage company to establish a through route and joint rates for transportation between Puget sound and Yukon river points, to refuse to make such arrangements with other connecting carriers, and to charge high local rates and discriminating wharfage charges,—all with the intent and result of eliminating all competition, violates the prohibitions of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations or conspiracies in restraint of interstate or foreign trade or commerce, or the monopolization of, or attempt to monopolize, any part of such trade or commerce.

[For other cases, see Monopoly, II., in Digest Sup. Ct. 1908.]

**Monopoly — anti-trust act — extraterritorial effect.**

2. Extraterritorial effect is not given to the provisions of the anti-trust act of July 2, 1890, by construing it to forbid a combination of foreign and domestic corporations to restrain competition in, and to monopolize, the transportation of freight and passengers between Puget sound and Yukon river points over a route which lies in part outside the United States.

[Construction of anti-trust act, see Monopoly, in Digest Sup. Ct. 1908.]

**Carriers — remedy for discrimination — necessity of action by Interstate Commerce Commission.**

3. Discriminations practised by carriers in the giving or refusing of joint traffic arrangements contrary to the act to regulate commerce cannot be redressed by the courts in either a criminal or civil proceeding in advance of action by the Interstate Commerce Commission.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

**Appeal — by government in criminal case — construction of indictment.**

4. A decision of a Federal district court on demurrer, that the averments of an indictment charging violations of the anti-trust act of July 2, 1890, were not sufficient to connect the individual defendants with the offense charged, is a construction of the indictment, and may not be reviewed in the Federal Supreme Court at the instance of the government.

[For other cases, see Appeal and Error, I.a, in Digest Sup. Ct. 1908.]

**Appeal — judgment — remanding — directions to lower court.**

5. The Federal Supreme Court, when reversing a judgment of a Federal district court, sustaining demurrers to an indictment charging violations of the anti-trust act of July 2, 1890, which is based upon the construction of that act, will leave it open to that court to pass upon such of the grounds of demurrer as were not considered in the former ruling,—especially where the government does not express great confidence in the sufficiency of the indictment.

[For other cases, see Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

[No. 697.]

Argued February 26, 1913. Decided April 7, 1913.

IN ERROR to the District Court of the United States for Alaska, Division No. 1, to review a judgment sustaining demurrers to an indictment charging violations of the anti-trust and interstate commerce acts. Reversed in part and remanded for further proceedings.

Statement by Mr. Justice McKenna:

Indictment for alleged violations of the Sherman anti-trust act and of the interstate commerce act.

The indictment contains six counts. The first and second counts charge violations of the anti-trust law. The first, by the defendants engaging in a combination and conspiracy in restraint of trade and commerce with one another, to eliminate and destroy competition in the business of transportation in freight and passengers between various ports in the United States and British Columbia in the south, and the various cities in the valleys of the Yukon river and its tributaries, both in British and American territory, in the north, upon a line of traffic described, for the purpose and with the intention of monopolizing such trade and commerce. The second count charges the monopolization of trade and commerce in the *same business and between the same[89 ports. The manner of executing the alleged criminal purpose is charged to be the same in both counts.

The places of the incorporation of the corporate defendants are alleged, and the following facts: The Pacific Coast Steamship Company and the Alaska Steamship Company operate respectively lines of steamships as common carriers of freight

NOTE.—On illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

On review by government in criminal case under the act of March 2, 1907, see note to *United States* v. Stevenson, 54 L. ed. U. S. 152.

and passengers running in regular route between Seattle, state of Washington, and Skagway, Alaska. The Canadian Pacific Railway Company is a like carrier, and operates a line of steamships between Vancouver, British Columbia, and Skagway. During the time mentioned in the indictment, the Pacific & Arctic Railway & Navigation Company owned and operated a railroad from tidewater at Skagway to the summit of White Pass, a distance of about 20 miles to the boundary line between Alaska and British Columbia, at which latter point it connected with a railroad owned and operated by the British Columbia Yukon Railway Company. The latter road extended from the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and Yukon district of Canada, a distance of about 25 miles, at which point it connected with another railroad, owned and operated by the British Yukon Railway Company, which extends to White Horse on the headwaters of the Yukon river, in Yukon district of Canada. During all the times mentioned there was a line of steamers plying upon the Yukon river and the headwaters thereof between White Horse and Dawson, owned and operated by the British Yukon Navigation Company. The four corporations last above mentioned and their stocks and bonds were owned and controlled by the same persons and individuals, and the said three lines of railroads and their lines of steamers were under one and the same management, and were operated as one continu-
90]ous line *of common carriers of freight and passengers between the towns of Skagway and Dawson and way points, under the name and style of the White Pass & Yukon Route, referred to as "the railroad," and had the sole and exclusive monopoly of the transportation business between Lynn canal and the navigable waters of the Yukon river. A general trade and commerce was carried on between British Columbia and Puget sound ports and the Yukon valley, both in American and British territory, over the designated routes and to the various places on the routes, and the shortest and most natural route for such trade and commerce was, has been, and is by water craft from said southern ports to Skagway, and thence over Moore's wharf, so called, to the points of destination. Trade and commerce from White Horse and Dawson to said southern ports would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headwaters of that river, and thence, by the way of said railroad, to Skagway, Alaska, thence over said Moore's wharf, and thence by steamship or other water craft to the said southern ports.

The North Pacific Wharves & Trading Company was the owner and in exclusive possession and control of all of the wharves at Skagway at which steamships or other water crafts could take and discharge, or load cargo, that company having a complete and absolute monopoly of the wharfage business at Skagway, and owning and operating the Moore wharf, which wharf, by agreement between the Wharves Company and the railroad, had been made and was the terminus of the railroad, over which all freight going to or coming from or passing through Skagway had necessarily to pass. The wharf was operated as a public wharf. Continuously during the three years immediately preceding the finding of the indictment, the defendants combined and conspired together to eliminate and destroy competition in the transportation business between the said southern ports and Skagway, for the purpose and *with[91 the intention of giving to and creating for the Alaska Steamship Company, the Pacific Coast Steamship Company, and the Canadian Pacific Railroad Company, a monopoly of such business, and, to that end, purpose, and intention, entered into, and continuously maintained, a joint traffic arrangement between the railroad and the steamship companies, by and through the individual defendants as officers and agents of the corporate defendants, pursuant to which arrangement either of the steamship companies could and did bill freight and passengers through from either of the said southern ports to any point on the said railway or on said Yukon river or its tributaries along and over the route of travel and transportation described, and the railroad could and did bill freight and passengers through from Yukon and other northern points to said southern ports only on ships from Skagway south, billing to either of the steamship companies. The rates for freight and passengers were fixed, and an apportionment between the said respective carriers of the gross receipts was established and agreed upon. With the like intent and purpose it was agreed that the railroad should, and it did, refuse to enter into any joint through traffic arrangement with any other carrier or carriers, and refused to receive any other through billing on shipments from the said southern ports except such as arrived at Skagway by some ship belonging to one of the steamship companies, or from said Yukon points to the southern ports, except by the same ships. As part of the same combination and with the same intent and purpose it was agreed

that the Wharves Company should, and it did, during all the times mentioned, charge wharfage at the rate of $2 per ton for all freight handled over its wharf except when the same was shipped on a vessel owned by either of the companies, or was consigned to someone who had entered into or was about to enter into a contract with either of 92]said steamship companies to *bind himself to have all of his freight carried by such steamship company and by no one else, in which latter case a wharfage of $1 per ton only was charged, and any charge in excess of $1 was unreasonably high, and was exacted for the unlawful purpose aforesaid. With like intention and purpose, and as part of the same combination and conspiracy, it was arranged and agreed by and between the defendants that the said railroad should, and it accordingly did, fix and establish local rates and transportation charges for freight and passengers from 5 per cent to 25 per cent higher than the through joint rates, differing according to classification of the various commodities shipped. Pursuant to such arrangement, and the purpose and intention aforesaid, the said railroad received for through shipments, as its share of freight charges, from 15 per cent to 30 per cent less than it charged for the same class of freight shipped between Skagway and the same Yukon points. By reason of the facts alleged it became and was, during all of the time mentioned, unprofitable for the public to employ any carrier in the trade, traffic, or commerce save and except the said steamship companies, and competition in the said water transportation between the steamship companies and other carriers was in that manner and by the means of said combination and conspiracy eliminated and destroyed, the defendants being enabled to monopolize such trade, traffic, transportation, and commerce, to the injury of the public.

The third count charged an unlawful and unjust discrimination in the transportation of passengers and freight, in violation of the interstate commerce act. The discrimination is charged to have been practised against the Humboldt Steamship Company between January 1, 1909, and August 10, 1910, which company is alleged to be a California corporation, and engaged as a common carrier of freight and passengers, operating a line of steamers from the same ports from which the defendant steamship 93]*companies operate their respective lines to Skagway, Alaska. In the conduct of its business the Humboldt Steamship Company operated a steamship called the "Humboldt" *on a regular schedule* and route between Se*attle, Washington,* and Skagway. "The railroad," as we have seen the White Pass & Yukon Route is called in all of the counts, had entered into and maintained during the time aforesaid, with the defendant steamship companies, a joint traffic arrangement whereby and under the terms of which freight and passengers might be billed at a joint through rate from the said southern ports over the route described to the various Yukon points, but refused, without cause or excuse, to enter into a joint traffic arrangement with the Humboldt Company, though requested to do so, or to receive, carry, or handle any freight billed through from Seattle to Yukon points on the railroad or the Yukon river; and neither would nor did carry any freight whatever from Skagway to any of said points in British or American territory at a less rate or charge than from 5 per cent to 30 per cent more, according to classification and character, than it received from the defendant steamship companies as its proportion of joint through rates from such southern points to the corresponding Yukon points. The railroad company, it is charged, caused the North Pacific Wharves & Trading Company to charge for all freight shipped on the steamship "Humboldt" for transhipment on the railroad to points along its line on the Yukon river, a wharfage of $2 per ton, whereas it included at the same time in its portion of the through rate on through bills under its arrangement with defendant steamship companies all wharfage charges. And it is alleged that the defendants knowingly, wilfully, and maliciously induced and incited the railroad company to practise the discrimination described, and each and all aided and abetted one another and the railroad company in such practice.

*The other facts as to routes, commerce,[94 and carriers, their relations and arrangements and the effect of them, are the same as in the first and second counts, the order of statement being somewhat different.

Count 4 is the same, as to the facts alleged, as the third count, except the discrimination is charged to have been practised against the Humboldt Steamship Company between August 18, 1910, and January 1, 1912.

Count 5 brings the discrimination charged down to the finding and presentation of the indictment. There is no allegation of discrimination in wharfage charges.

Count 6 charges the crime of conspiracy to commit an offense against the United States by destroying competition between the defendant steamship companies and the Humboldt Steamship Company. The same facts are alleged as in the other counts.

Motions to quash the indictment and each

of its counts were made and denied. Demurrers to the indictment were filed and sustained to all counts but the 6th. To that, the demurrer of the individual defendants was sustained.

Solicitor General Bullitt argued the cause and filed a brief for plaintiff in error:

The Sherman anti-trust act and the interstate commerce act have different purposes, seek to remedy different evils, are wholly independent of each other, and have no relation the one to the other.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 17 Sup. Ct. Rep. 25; Railroad Commission v. Atchison, T. & S. F. R. Co. 20 Inters. Com. Rep. 465; Meeker v. Lehigh Valley R. Co. 106 C. C. A. 94, 183 Fed. 548; United States v. Reading Co. 226 U. S. 324, ante, 243, 33 Sup. Ct. Rep. 90.

The whole object of the interstate commerce act was to create an administrative body "to prevent discrimination between persons and places" (Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 102, 54 L. ed. 946, 954, 30 Sup. Ct. Rep. 651); and, as fully pointed out in Procter & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761, the object of the act, as amended, was to impose upon carriers certain regulations and duties in the interest of the public and of the shippers, and thereby give new rights to shippers, which required a single administrative body with quasi judicial attributes properly to enforce the act.

Suits between private parties, *i. e.*, shippers and carriers, and suits between the United States and shippers or carriers, are governed by wholly different rules as to the necessity for prior action by the Interstate Commerce Commission.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Proctor & G. Co. v. United States, 225 U. S. 282, 296, 56 L. ed. 1091, 1096, 32 Sup. Ct. Rep. 761; Columbus Iron & Steel Co. v. Kanawha & M. R. Co. 171 Fed. 713, affirmed in 101 C. C. A. 621, 178 Fed. 261; Houston Coal & Coke Co. v. Norfolk & W. R. Co. 171 Fed. 723, affirmed in 101 C. C. A. 626, 178 Fed. 266; Atlantic Coast Line R. Co. v. Macon Grocery Co. 92 C. C. A. 114, 166 Fed. 206, affirmed on other grounds in 215 U. S. 501, 54 L. ed. 300, 30 Sup. Ct. Rep. 184; Wickwire Steel Co. v. New York C. & H. R. R. Co. 104 C. C. A. 504, 181 Fed. 316; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558, affirmed by a divided court in 212 U. S. 563, 53 L. ed. 653, 29 Sup. Ct. Rep. 689; Great Northern R. Co. v. United States, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313; New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 500, 53 L. ed. 613, 624, 29 Sup. Ct. Rep. 304, 309; United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323; United States v. Vacuum Oil Co. 153 Fed. 598; United States v. Hocking Valley R. Co. 194 Fed. 234; United States v. Sunday Creek Co. 194 Fed. 252; Chicago, St. P. M. & O. R. Co v. United States, 90 C. C. A. 211, 162 Fed. 835; Wisconsin C. R. Co. v. United States, 94 C. C. A. 444, 169 Fed. 76; Lehigh Valley R. Co. v. United States, 110 C. C. A. 513, 188 Fed. 879; Standard Oil Co. v. United States, 103 C. C. A. 172, 179 Fed. 614; United States v. Great Northern R. Co. 157 Fed. 288; Atchison, T. & S. F. R. Co. v. United States, 95 C. C. A. 446, 170 Fed. 250; United States v. Philadelphia & R. R. Co. 184 Fed. 543; United States v. Texas & P. R. Co. 185 Fed. 820; United States v. Merchants' & M. Transp. Co. 187 Fed. 363; United States v. Baltimore & O. R. Co. 153 Fed. 997.

Mr. W. H. Bogle argued the cause, and, with Messrs. Carrol B. Graves, W. B. Stratton, Ira Bronson, Morven Thompson, and Bruce C. Shorts, filed a brief for defendants in error:

The Pacific & Arctic Railway & Navigation Company was constructed and operated from the international boundary line to Skagway. It was under no legal duty to assume any obligations whatever with respect of the carriage of either freight or passengers by water between Skagway and the southern ports. If it voluntarily assumed any obligations for carriage beyond its own line, it had the legal right at its own discretion to select the agencies beyond its own line for which it would be responsible. Under the principles of common law, it had this absolute right, and could enter into an agreement for through routing and through rating with one connecting carrier, and refuse to enter into any such agreement with any other connecting carrier.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Southern P. Co. v. Inter-

state Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; St. Louis Drayage Co. v. Louisville & N. R. Co. 5 Inters. Com. Rep. 137, 65 Fed. 39; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 73 Fed. 438; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113.

The interstate commerce act has not changed the common law and made it the absolute duty of every carrier to enter through routing agreements with each and every connecting carrier.

Cardiff Coal Co. v. Chicago, M. & St. P. R. Co. 13 Inters. Com. Com. Rep. 460; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417.

The establishment or nonestablishment of a through route in a given instance is administrative in its nature, and the determination of the necessity for its establishment is, in the first instance, committed exclusively to the judgment of the Commission.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 482, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Proctor & G. Co. v. United States, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. Rep. 761.

The right to make through rating with some carriers and refuse to make similar agreements with others, being recognized by law and countenanced by the interstate commerce act, the exercise of such right cannot, in and of itself, be held to amount to undue restraint of trade or unlawful pooling, although it does result to some extent in restricting the power of competition among the connecting carriers.

Southern P. R. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330.

The construction of the indictment by the court below, showing a difference in the conditions under which the different wharfage rates were charged, is binding upon this court.

United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; United States v. Patten, 226 U. S. 525, ante, 333, 33 Sup. Ct. Rep. 141; United States v. Winslow, 227 U. S. 202, ante, 481, 33 Sup. Ct. Rep. 253.

The reasonableness of the wharfage rate on local shipments, and the reasonableness of the difference in the rate on local and through-routed shipments, are questions for the solution of which there is no certain or fixed standard, and upon which different men might reasonably reach different conclusions. To make criminality depend, not upon facts, but upon the view of a jury as to the reasonableness of rates, is contrary to fundamental principles.

Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 545.

Our laws relating to interstate and foreign commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and cannot be extended so as to control or affect the foreign carriage.

American Banana Co. v. United Fruit Co. 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047.

The carrier, having the right to extend his service beyond his own line by through routing agreements, or to refuse so to extend it, owes no duty to the public either to exercise or decline to exercise the right so to extend. Back of any idea of undue discrimination or undue restraint, there must be found a duty resting upon the carrier with respect to the particular thing about which the discrimination is charged.

Atchison, T. & S. F. R. Co. v. Tiedt, 40 L.R.A.(N.S.) 848, 116 C. C. A. 168, 196 Fed. 349; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 21 L.R.A.(N.S.) 982, 94 C. C. A. 217, 168 Fed. 161, 16 Ann. Cas. 613; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The district court said that it was "without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment in either a criminal or civil proceeding," until the matters of discrimination between carriers or shippers, or the giving or refusing of joint traffic arrangements, "have been submitted to *and passed on by the Interstate Com- [101
merce Commission." For this conclusion the court relied on Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 427, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, and Baltimore & O. R. Co. v. United States, 215

U. S. 492, 54 L. ed. 296, 30 Sup. Ct. Rep. 164.

It may be well, even at the expense of repetition, to give a summary of the indictment before passing to the special contention of the parties. The route described is between ports of the United States (called southern ports) and places in northern Alaska and Canada (called northern ports)—(1) by steamship lines from the United States and Vancouver, (southern ports) to Skagway (the entire wharfage facilities being owned by the North Pacific Wharves & Trading Company); (2) thence by railroad to the headwaters of the Yukon river; (3) thence by boat down the Yukon river to Dawson, etc. (called the northern ports). The route is designated as the White Pass & Yukon Route, and is constituted of (a) the Pacific & Arctic Railway & Navigation Company, a West Virginia corporation; (b) the British Columbia-Yukon Railway Company, incorporated under the laws of British Columbia; (c) the British-Yukon Railway Company, incorporated under the laws of the Dominion of Canada; and (d) the British-Yukon Navigation Company, Limited, incorporated under the laws of British Columbia. These companies are referred to as "the railroad company," and own the only line of transportation between the wharf at Skagway and the Yukon river.

By mutual agreement between the defendant steamship companies, the Wharves Company, and the railroad company, through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the United States (southern ports) and northern Alaska (northern ports).

The Humboldt Steamship Company and other independent lines plied between the United States and Skagway.

102] *By agreement between the defendants, the railroad refused to make any through route or joint rates with the Humboldt Company, or with any of the independent steamship lines, and refused to bill freight or passengers from the United States to Yukon river points, or reversely, except by ships belonging to one of the defendant companies.

By agreement between the defendants the railroad fixed so-called local rates between Skagway and the Yukon river points, which rates were very much higher than the railroad's *pro rata* of the through rate.

The Wharves Company charged $2 a ton for freight if shipped on a vessel not owned by one of the defendant companies. If so shipped and consigned to one who had entered into, or was about to enter into, a contract to have all of his shipments so carried, the wharfage charge was only $1. Wharfage charges in excess of $1 are unreasonably high.

As a result of the agreement, shippers were compelled to use only the ships of the defendant steamship companies, as in that way alone could lower through rates be obtained. Competition in water transportation was destroyed between the defendant steamship companies and the independent lines, defendants obtained a monopoly of the transportation business between the United States and Alaska, and the Humboldt Company was discriminated against in the matter of through rates. These agreements between the defendant companies are alleged to be (count 1) for the purpose of eliminating competition from the business of transportation between the United States and Alaska; (second count) to monopolize such business; (counts 3, 4, and 5) to discriminate against the Humboldt Company. Count 6 we omit from consideration for the present.

The charges of the indictment may be even further concentrated and attention directed to these elements: The *defend-[103 ant steamship lines and the Humboldt and independent lines from the United States to Skagway, the wharf at Skagway, and the railroad from Skagway to the Yukon river points. The only possibility of competition is in the water part of this route. This controlled, the entire transportation is controlled; and to this control the action of the defendants was directed, the means of control being an agreement between the defendants to throw all the trade into the hands of the defendant steamship companies by the railroad company establishing through route and joint rates with them, and refusing to do so with the Humboldt Company or any of the independent companies. The Wharves Company gave its assent by its wharfage charges, and all evasion was prevented by so fixing the local rates that their combination was greater than the through rate agreed on. It is manifest that the scheme was effective, and cut out the Humboldt line and the independent lines as factors in the routes of transportation between the United States and the Yukon river points. Is the scheme illegal?

This is asserted by the government and denied by the defendants. The court below, if we take some parts of its decisions, held that the forum of that question was the Interstate Commerce Commission. But, considering the decision of the court as a whole, we think it construed the anti-trust act, upon which counts 1 and 2 were based, and to those counts we shall confine our discussion for the present. This is admitted

by defendants. They say that as the court held that, in order to constitute restraint of trade or monopolization of trade under the anti-trust act, the acts charged must be such as at common law constituted restraint of trade, and were unlawful, to that extent the court construed the act. And, setting forth the grounds of the ruling, counsel say that the court decided that the entering into through-route agreements by a common carrier with one or more con-
104]necting carriers, *and the refusal to make such agreements with other connecting carriers, was not unlawful either at common law or by the interstate commerce act; and the court held, therefore, that such act did not constitute restraint within the meaning of the anti-trust act. The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the interstate commerce act, for our present purposes), and if there were nothing else in the case the conclusion of the district court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska, and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the anti-trust law,—of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276. We do not pause to justify this conclusion, either by the general purpose of the act or by its adjudged applications. Its general purpose has been elaborately set forth in very recent cases; and particular instances of its application, pertinent to the case at bar and illustrative of it, are exhibited by Swift & Co. v. United States, supra, and Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, ante, 107, 33 Sup. Ct. Rep. 9. In those cases, as here, rights were brought forward to justify a purpose which transcended the limits put upon their exercise by the anti-trust act. In those cases, as
105]here, the purpose (the *means being different) was the prevention or destruction *of competition, and* the agreements here are *exactly adapted to the purpose.* Not the railroad only, but the Wharves Company as well, is charged to be in the combination. It was intermediate the railroad and the steamship lines, and discriminated in its wharfage charge, it is alleged, to aid in the purpose of the combination; and, to complete and make effective the purpose, the local rates from Skagway to Yukon points were made greater than that part of the through transportation.

Whether $2 per ton (the rate charged to independent lines, as against $1 per ton, charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important, and the defendants make it prominent in their contentions. The plan makes the parts unlawful (Swift & Co. v. United States, supra), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such. We are dealing with an indictment which charges a criminal violation of the anti-trust act, and of that the criminal courts have cognizance, with power of decision upon the principle which we have expressed.

The next contention of defendants is that, as part of the transportation route was outside of the United States, the anti-trust law does not apply. The consequences and, indeed, legal impossibility, are set forth to such application, and, it is said, "make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that *our laws cannot [106 be extended so as to control or affect the foreign carriage." This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad), and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the

United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

The ruling of the district court, sustaining the demurrer to the first and second counts, was therefore erroneous.

The decision of the district court upon counts 3, 4, and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The district court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The government attacks the conclusion with arguments of great strength, and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the interstate commerce act, but gives the Commission the control and practical determi-107]nation of *the criminal provisions of the law. The argument, in effect, is that the conclusion of the district court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding, and by what proof will it be supported? What degree of proof is to be accorded to the finding of the Commission—presumptive or conclusive? If neither, it is argued, "it would be a senseless thing to regard such a finding as a condition precedent of the United States to indict." If, it is asked further, the finding of the Commission is to have either prima facie or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the 6th Amendment of the Constitution? The argument of the government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the district court the Interstate Commerce Commission "becomes practically the court of final criminal jurisdiction."

The contentions of the government would be formidable indeed if the interstate commerce act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the interstate commerce act what it was intended to be and defined to be in the cases cited by the district court, to wit: Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 427, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, and Baltimore & O. R. Co. v. United States, 215 U. S. 492, 54 L. ed. 296, 30 Sup. Ct. Rep. 164. And it would, in our judgment, be an erroneous view to take that the great problems which *the act was intended to [108 solve, and the great purposes it was intended to effect, should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the interstate commerce act to establish a tribunal to determine the relation of communities, shippers, and carriers, and their respective rights and obligations dependent upon the act, has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

The district court sustained count 6 against the demurrer of the corporate defendants, but held its averments were not sufficient to connect the individual defendants with the offense charged. This is a construction of the indictment, and not subject to review.

It is urged by the individual defendants that the objection is applicable to the other counts of the indictment, and that the court would have undoubtedly so ruled but for its construction of the anti-trust act; and it is also urged that in case of reversal of the court's decision upon the construction of the act, it be permitted to pass upon such of the grounds of demurrer as were not passed upon in the former ruling. We yield to the request, and the more readily as the government does not express great confidence in the sufficiency of the indictment. Its final contention is that the judgment of the district court be reversed, with instructions "to pass on the sufficiency of the indictment without regard to the action or nonaction of the Interstate Commerce Commission."

The judgment is therefore reversed as to counts 1 and 2, and the case remanded with instructions to proceed in accordance with this opinion.

109] *CATHARINE M. S. FROSCH, Ida S. Monday, Emma A. Schwab, et al., Appts.,
v.
WILLIAM WALTER.

(See S. C. Reporter's ed. 109–114.)

**Deeds — description of parties — surviving children.**

1. Those only who answered the description "surviving children" at the time of the execution of a trust deed to provide for the grantor's children by his first wife are meant by that term as used in a clause which directs that in the event of the death without issue of any one of the "above-mentioned children," his share shall be sold after the death of the grantor, and the proceeds paid over in equal portions to the grantor's surviving children.

[For other cases, see Deeds, III. b; Wills, III. b; III. g, in Digest Sup. Ct. 1908.]

**Deeds — description of parties — surviving children.**

2. Adult children who had otherwise been provided for were not embraced in the term "surviving children," as used in a trust deed purporting to be executed to provide for the minor children of the grantor, which directs that in the event of the death without issue of any one of the "above-mentioned children," his share shall be sold after the death of the grantor, and the proceeds paid over in equal portions to the grantor's surviving children.

[For other cases, see Deeds, III. b; Wills, III. b; III. g, in Digest Sup. Ct. 1908.]

**Real property — vested or contingent interests.**

3. The death without issue of one of the children described in a trust deed purporting to be executed to provide for the grantor's children determines who shall take as "surviving children" under a clause which directs that, in the event of the death without issue of any one of the "above-mentioned children," the property held in trust for him shall be sold after the death of the grantor, and the proceeds paid over in equal portions to the grantor's surviving children, and hence, where one of such children survived her brother, dying without issue, but herself died before the grantor, her children will take, although the gift over is contained in the direction for distribution after sale, and this was postponed until after the grantor's death.

[For other cases, see Real Property, I. e; Wills, III. g, 9, in Digest Sup. Ct. 1908.]

[No. 192.]

Argued March 17 and 18, 1913. Decided April 7, 1913.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District in favor of complainant in a suit in equity, involving the construction of a trust deed. Reversed, and original decree of Supreme Court restored.

See same case below, 34 App. D. C. 338.

The facts are stated in the opinion.

Messrs. Ralph P. Barnard and Benjamin F. Leighton argued the cause, and, with Mr. Guy H. Johnson, filed a brief for appellant Catharine M. S. Frosch:

In interpreting deeds like the one in controversy the intention of the grantor, as shown by the deed itself and the surrounding circumstances, is the paramount rule of construction.

Alton v. Illinois Transp. Co. 12 Ill. 38, 52 Am. Dec. 479; Lyon v. Pollock, 99 U. S. 668, 25 L. ed. 265; Matthews v. Ward, 10 Gill & J. 444; Jackson v. Myers, 3 Johns. 395, 3 Am. Dec. 504; 2 Devlin, Deeds, § 837; Green v. Green, 23 Wall. 490, 23 L. ed. 77; Ware v. Richardson, 3 Md. 541; McElroy v. McElroy, 113 Mass. 509; Ayer v. Ayer, 16 Pick. 327; Williams v. Claiborne, 7 Smedes & M. 488; Parker v. Murch, 64 Me. 54; State v. Lang, 2 Bail. L. 430; Woods v. Nashua Mfg. Co. 5 N. H. 467; Moore v. Magrath, Cowp. pt. 1, p. 9; Pike v. Munroe, 36 Me. 309, 58 Am. Dec. 751; Walsh v. Hill, 38 Cal. 481.

If a sale is or is not to take place as a particular event may or may not happen, no conversion takes place until the happening of the event and a sale accordingly.

Fletcher v. Ashburner, 1 Bro. Ch. 497, 1 White & T. Lead. Cas. in Eq. p. 968, 7 Eng. Rul. Cas. 1; Keller v. Harper, 64 Md. 74, 1 Atl. 65; 3 Pom. Eq. Jur. 3d ed. § 1162; Ward v. Arch, 15 Sim. 389, 10 Jur. 977; Moncrief v. Ross, 50 N. Y. 431; McClure's Appeal, 72 Pa. 414; Bank of Ukiah v. Rice, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020; 2 Williams, Exrs. & Admrs. (7th Am. ed.) 1096; Brograve v. Winder, 2 Ves. Jr. 634; Jones v. Colbeck, 8 Ves. Jr. 38, 6 Revised Rep. 207; Burnsides v. Wall, 9 B. Mon. 318; Nichols v. Guthrie, 109 Tenn. 536, 73 S. W. 107; Richey v. Johnson, 30 Ohio St. 288; McClain v. Capper, 98 Iowa, 145, 67 N. W. 102; Twaites v. Waller, 133 Iowa, 84, 110 N. W. 279; Benner v. Mauer, 133 Wis. 325, 113 N. W. 663; McCartney v. Osburn, 118 Ill. 412, 9 N. E. 210; 2 Jarman, Wills, 455, 797; Webber v. Jones, 94 Me. 429, 47 Atl. 903; Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Re Baer, 147 N. Y. 348, 41 N. E. 702; Storrs v. Burgess, 101 Me. 26, 62 Atl.

NOTE.—On time for ascertaining member of class described as testator's "heirs," "next of kin," "relation," etc., to whom an estate in real or personal property is limited by way of remainder or executory gift—see note to Welch v. Blanchard, 33 L.R.A.(N.S.) 1.

On character of remainder given by will as affected by a direction that children of a deceased remainderman shall take their parent's share—see note to Redman v. Hubbard, 37 L.R.A.(N.S.) 722.

730; Dougherty v. Thompson, 167 N. Y. 472, 60 N. E. 760; Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239; Re Hogarty, 34 Misc. 610, 70 N. Y. Supp. 428, affirmed in 62 App. Div. 79, 70 N. Y. Supp. 839; Hale v. Hobson, 167 Mass. 397, 45 N. E. 913; Boston Safe Deposit & T. Co. v. Blanchard, 196 Mass. 35, 81 N. E. 654; Reilly v. Bristow, 105 Md. 326, 66 Atl. 262; Emory v. Goodwin, 79 Md. 55, 28 Atl. 894.

The word "children" does not include grandchildren.

5 Am. & Eng. Enc. Law, 2d ed. p. 1085; Adams v. Law, 17 How. 417–421, 15 L. ed. 149–151; Tayloe v. Mosher, 29 Md. 443; Taylor v. Watson, 35 Md. 519; Thomson v. Ludington, 104 Mass. 193; Cromer v. Pinckney, 3 Barb. Ch. 466; Marsh v. Hague, 1 Edw. Ch. 186.

Mr. M. J. Colbert also argued the cause and filed a brief for appellants Oscar J. Walter et al.

Mr. Hugh T. Taggart filed a brief for appellants Ida S. Monday et al.:

Intention governs as manifested in the grant by its terms, or by reasonable and necessary implication from the situation of the parties.

Ewing v. Burnet, 11 Pet. 54, 9 L. ed. 630; 2 Devlin, Deeds, §§ 839, 840, 844; Interstate Land Co. v. Maxwell Land Grant Co. 139 U. S. 581, 35 L. ed. 283, 11 Sup. Ct. Rep. 656; Newago Mfg. Co. v. Chicago & W. M. R. Co. 64 Mich. 114, 30 N. W. 910; Zimmer v. Miller, 64 Md. 296, 1 Atl. 858; Greenl. Real Prop. § 26.

Construction should effectuate intention.

Batavia Mfg. Co. v. Newton Wagon Co. 91 Ill. 230; 2 Devlin, Deeds, §§ 837, 843; Elliott v. Jefferson, 133 N. C. 207, 64 L.R.A. 135, 45 S. E. 558.

Generally all relative words are read as referring to the nearest antecedent.

Martindale, Conv. § 98.

If George N. Walter had died in the lifetime of his father, leaving children, it is plain that under the deed they would, upon the death of their father, have become vested with an equitable fee-simple estate in the lot, subject to the life interest therein of the grantor. The death of said George, without issue, did not leave the equitable estate in fee, subject to the grantor's life estate, without an owner. That would be contrary to the rule of the law which favors the vesting of estates at the earliest moment. Such equitable estate, upon the death of said George, without issue, became vested in those who were declared by the deed to be entitled in that event to the proceeds of the sale, although the enjoyment of the property or its proceeds was postponed until the termination of the grantor's life estate.

Den ex dem. Holcomb v. Lake, 24 N. J. L. 689; Westbrooke v. Romeyn, Baldw. 196, Fed. Cas. No. 17,428.

At any time before the sale they might have elected to take the property instead of the proceeds.

Craig v. Leslie, 3 Wheat. 578, 4 L. ed. 463; Cropley v. Cooper, 19 Wall. 167, 22 L. ed. 109.

There seems to be no doubt that the real estate held in trust for George N. Walter was converted into personalty from the date of his death without issue, and that the conversion did not take place at the death of the grantor in the deed in trust, and that the interests of the parties in title became vested accordingly.

Craig v. Leslie, 3 Wheat. 577, 4 L. ed. 463; Pom. Eq. Jur. § 1159; Lash v. Lash, 209 Ill. 605, 70 N. E. 1049; Thomman's Appeal, 161 Pa. 444, 29 Atl. 84; Re Bennett, 3 Kay & J. 280; Clarke v. Franklin, 4 Kay & J. 257, 27 L. J. Ch. N. S. 567, 6 Week. Rep. 836; Griffith v. Ricketts, 7 Hare, 299, 19 L. J. Ch. N. S. 100, 14 Jur. 166, 7 Eng. Rul. Cas. 26; Hewitt v. Wright, 1 Bro. Ch. 86.

Mr. Oliver Metzerott filed a brief for appellants Henry C. and Frederick L. Walter:

The rule of equitable conversion merely amounts to this; that when there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes and in aid of justice construe the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But whenever the direction is for a future sale, up to the time fixed, the land is governed by the law of real estate.

Re Walkerly, 108 Cal. 652, 49 Am. St. Rep. 97, 41 Pac. 772; Ward v. Arch, 15 Sim. 389, 10 Jur. 977; Moncrief v. Ross, 50 N. Y. 431; McClure's Appeal, 72 Pa. 414; Bank of Ukiah v. Rice, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

In the District of Columbia the doctrine of conversion does not affect the character of a remainder.

Hauptman v. Carpenter, 16 App. D. C. 524; Cropley v. Cooper, 19 Wall. 167, 175, 22 L. ed. 109, 113; Myers v. Adler, 6 Mackey, 515, 1 L.R.A. 432.

No legal title vested until the division of the proceeds, but an equitable title vested upon the execution of the deed.

Potter v. Couch, 141 U. S. 296, 35 L. ed. 721, 11 Sup. Ct. Rep. 1005; McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652.

As the sale and distribution were postponed only to the end of the grantor's life and for his convenience (Myers v. Adler, 751

6 Mackey, 515, 1 L.R.A. 432), all the conditions for the vesting of the remainder were present.

Doe ex dem. Poor v. Considine, 6 Wall. 458–481, 18 L. ed. 869–876; Blanchard v. Blanchard, 1 Allen, 227.

Mr. James B. Archer argued the cause, and, with Messrs. Andrew Lipscomb and John Lewis Smith, filed a brief for appellee:

The children of John, Jr., and Barbara could not take under the designation, "surviving children of John Walter, Senior," because, in the absence of special circumstances, not existing in this case, grandchildren are not included in the designation "children."

Adams v. Law, 17 How. 417–423, 15 L. ed. 149–151.

The children of John, Jr., and Barbara do not take by inheritance from George, because, assuming, but not conceding, that the provision for George was a grant of real estate in contradistinction to personalty, George, in such case, did not take a fee, but took only an equitable life estate. He could take more than an equitable life estate in such case only if the rule in Shelley's Case applied. But it has been settled by this court that in the District of Columbia the addition of the words "their heirs," after a limitation in remainder to children, takes the case out of the rule in Shelley's Case, even in the instance of a will.

De Vaughn v. Hutchinson, 165 U. S. 566–578, 41 L. ed. 827, 831, 17 Sup. Ct. Rep. 461.

The limitation over is contingent in two respects; namely, the distributees are to be "surviving children" of John Walter, Sr., and the distribution to "surviving children" is contingent upon the death of George, Barbara, or Catharine, without issue, in the lifetime of the grantor. Now, one of these contingencies, at least, was such as to prevent the ultimate interest carried by the grant from vesting at the time of its execution and delivery; namely, the death of George, Barbara, or Catharine, without issue, in the lifetime of the grantor; because it was an event which was not bound to happen by the ordinary efflux of time.

Doe ex dem. Poor v. Considine, 6 Wall. 478, 18 L. ed. 875.

If it be said that by the death of George, without issue, in the lifetime of his father, the grantor, this contingency was eliminated and the interest of George thereby vested in some, at least, of the children of John Walter, Sr., including in any event Barbara and Catharine, the character of the limitation over was such that it was subject to be divested by the death of any of such children in the lifetime of the grantor, for, as we have above seen, the direction to distribute to children does not include grandchildren, and where distribution to a class, such as children, is ordered, the individuals constituting the class are not ascertained until the time of distribution; in this case, "after the death of John Walter, Senior."

Satterfield v. Mayes, 11 Humph. 58; Nichols v. Guthrie, 109 Tenn. 535, 73 S. W. 107; McClain v. Capper, 98 Iowa, 145, 67 N. W. 102; Thomson v. Ludington, 104 Mass. 193; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Reilly v. Bristow, 105 Md. 326, 66 Atl. 262; Boston Safe Deposit & T. Co. v. Blanchard, 196 Mass. 35, 81 N. E. 654; Storrs v. Burgess, 101 Me. 26, 62 Atl. 730; Webber v. Jones, 94 Me. 429, 47 Atl. 903.

Much latitude is indulged, in the construction of wills, to ascertain and declare the intent of the testator, but even in the construction of wills the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention, found on the face of the will.

Wright v. Denn, 10 Wheat. 204, 6 L. ed. 303.

An expressed intention in a will may serve to explain language afterwards used therein, but the intention must be found in the acts or dispositions of the testator, and not alone in any previously expressed purpose.

Blake v. Hawkins, 98 U. S. 315, 25 L. ed. 139.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity brought by Catharine Frosch against a trustee under a deed to compel him to transfer *to her or [110 otherwise, according to the construction of the instrument, certain of the property conveyed by the deed. Other parties in interest are joined, and argument has been heard on their behalf. The facts are as follows: John Walter, the plaintiff's father, executed the deed on June 18, 1869. At that time his first wife had died, leaving five children, of whom the plaintiff is one, and he had married again.

Two of these children, John Walter, Junior, and William Walter, were of age. On the date mentioned their father gave them severally certain property in fee simple, and then made the deed before us, reciting therein that he was "desirous of making provision for his children by his first wife, to wit: Catharine Magdalena Sophia Walter [the plaintiff], George N. Walter, and Mrs. Barbara King," these three then being under age. The final limitation is the one to be construed, but it will be understood better when the previous ones have been summed up.

The deed conveys to John Walter, Jr.,

certain parcels of land in trust, after certain contingent prior payments and after the death of the grantor, to hold the first-named parcel and pay the rents and profits to the plaintiff for life, and then to hold for the use of her children in fee. It similarly disposes of a bond for $10,000, given by John Walter, Jr., to his father as part consideration for the above-mentioned gift to him, stating that it is "in order to equalize the division of my property between my said children." Then comes a gift of the second and third parcels upon like limitations and trusts for another daughter, Mrs. Barbara King, and also of secured notes for $7,300, like the gift of the bond for Catharine, "in order more fully to equalize the division of his property among his children." The fourth parcel is given upon similar trust for George N. Walter, the youngest son.

Then comes the doubtful clause. "In the event of the death of any one of the above 111]mentioned children of the *said John Walter, Senior, to wit: Catharine, George & Barbara, without leaving any child or children, or any issue of any child or children, then and in that case that the property held in trust by said trustee party of the second part for the benefit of the party then dying without issue shall be sold by said party of the second part, after the death of John Walter, Senior, and the proceeds paid over in equal portions to the surviving children of the said John Walter, Senior." John Walter, Senior, died on April 12, 1907. Before that date George had died in 1892, unmarried, and it is the disposition to be made of his share that is in question here. Barbara had died on August 23, 1904, leaving eight children, defendants herein, and John Walter, Jr., had died on November 17, 1906, leaving two children, defendants herein. William Walter, who, with John, had been provided for separately, survives and also is made a defendant. The grantor's second wife afterwards died, childless, and he married a third wife, who died leaving four children, also defendants in this suit. It may be remarked, if in any way material, that the grantor in 1900 provided for these last-mentioned children by gifts similar to the above, subject like them to a life estate in himself.

To begin with the claim of the children of the third marriage, we are of opinion that it is unfounded. The word "heirs," if used as a term of purchase in a will, might be held to reach forward and to signify whoever might turn out to be such by the law in force and applicable to the testator's death. But this is a deed and the word is "children." In view of what we have to say further, it is enough to state our opinion that the word as here used is confined to persons who answered the description at the moment when the deed was executed and spoke.

The court of appeals held that all persons were embraced who answered that description at that time, provided they survived the grantor, and directed a decree *in[112 favor of the plaintiffs, Catharine and William Walter. 34 App. D. C. 338. But we take a different view. In the first place we are of opinion that the word "children," as used habitually in the deed, means the three children for whom it declares at the outset that its object is to provide. That very declaration not only dominates the deed as a statement of the sole reason for the whole thing, but foreshadows the mode of referring to these three children in terms broad enough to signify all,—"is desirous of making provisions for his children by his first wife,"—a phrase only cut down by a "to wit: Catharine, George, and Mrs. King." When the grantor speaks of equalizing his property "between my said children," we understand him to refer to the three that have been mentioned together under that name. And we understand him to mean nothing different when later he speaks of equalizing the division of his property among his children. This interpretation perhaps is strengthened by the fact that "my property" cannot properly include that which had been conveyed to his two elder sons, and therefore that the equalizing contemplated was an equalizing as between the three children among whom his remaining property was divided by the present deed.

In the clause under consideration he shows whom he meant by "said children" when he says "above-mentioned children, . . . to wit: Catharine, George, and Barbara,"—and when a few lines further on he says "surviving children," the inference is strong that he means the children that up to that moment he had been talking about by that name throughout. It would seem that the grantor considered that he had made a division that would be fair as against the two elder children, who had received their gifts in fee, if each of the three children, and after them their descendants, respectively, received and retained the portion allotted to each. The groups set over against each other in his mind were the two adults *and the three minors. If one of[113 the latter died without issue, and his share went to the other two, the equality was kept up because all of the three were equally subject to the chance; but assuming a substantial equality between the five lots, the two adults, being subject to no chance of loss, had no claim to a chance of gain. It follows that William Walter is excluded,

contrary to the decree of the court of appeals.

There remains the question whether children of Barbara King are entitled to share with Catharine, as held by the supreme court. The court of appeals was of opinion that the interest of Barbara King was contingent upon her surviving the grantor, and that as she died before him, her children could not take, the word "children" obviously being used in its proper sense, and not embracing issue of such children, mentioned antithetically in the same sentence. It reached this conclusion because the direction to sell and distribute did not operate till after the death of the grantor, and in its view the time of distribution determined the time of vesting an individual title in any child. On this point also we take a different view. The limitation over on the death of one of the three children without issue was of general import and scope, and was not confined to such a death before the grantor's. If George had died after his father, instead of before, the gift over still would have taken effect. Surviving children, then, means those of the three children who survive the child who dies without issue. The death of the child determines who shall take as surviving children. It is true that if that death happens before the grantor's, the distribution is postponed, but that obviously is inserted to exclude any implication that in that event the grantor gives up the life estate that he has reserved throughout. It does not appear to us to warrant the conclusion that the time of the child's death, with reference to this collateral fact, was to affect the nature or quality of the interest given to the 114]children *who survive. It is true that the gift is contained in the direction for distribution after sale, but in view of our opinion that it would have operated equally whenever George died, and that the reason of the postponement of distribution to after the grantor's death was solely on the grantor's own account, that fact cannot affect the result. The decree of the Court of Appeals is reversed and the original decree of the Supreme Court will be restored.

Decree reversed.

Mr. Justice Pitney, concurring:

I concur in the result reached, and agree with the reasoning expressed in the opinion of the court except upon one point. The opinion states:

"The limitation over on the death of one of the three children without issue was of general import and scope, and was not confined to such a death before the grantor's. *If George* had died after his father, instead of before, the gift over still would have taken effect."

Upon this point I agree with the view expressed in the opinion of the supreme court of the District, that—"the equitable title to George's portion, subject to the life estate of John Walter, Sr., became vested in the complainant herein (Mrs. Frosch) and her sister, Barbara King, at George's death, May 14, 1892. Being so vested, Barbara's share passed by her death to her eight children; and William Walter, the children of John Walter, Jr., and the four children of the third wife, have no share in the said property."

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*GEORGE McDERMOTT, Plff. in Err., [115
v.
STATE OF WISCONSIN. (No. 112.)

T. H. GRADY, Plff. in Err.,
v.
STATE OF WISCONSIN. (No. 113.)

(See S. C. Reporter's ed. 115-137.)

**Pure food law — adulteration — misbranding — package.**

1. The word "package," or its equivalent expression, as used by Congress in the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), §§ 7 and 8, in defining what shall constitute adulteration and what misbranding within the meaning of the act, refers to the immediate container of the article which is intended for consumption by the public, and not simply to the outside wrapping or box containing the packages intended to be purchased by the consumer.

[Adulterated food, see Foods, in Digest Sup. Ct. 1908.]

**Commerce — in adulterated or misbranded food — power of Congress.**

2. Construing the word "package" or its equivalent expression as used by Congress in the food and drugs act of June 30, 1906, §§ 7, 8, in defining what shall constitute adulteration and what misbranding within the meaning of the act, as referring to the immediate container of the article which is intended for consumption by the public, and not simply to the outside wrapping or

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NOTE.—On labeling requirements of pure food laws as applicable to small retail packages taken from original package of the manufacturer—see note to Armour & Co. v. Bird, 25 L.R.A.(N.S.) 616.

As to what constitutes an original or unbroken package—see note to State v. Maire, 39 L.R.A.(N.S.) 1051.

On the validity of police regulations as to branding or labeling articles of commerce—see note to Alcorn Cotton Oil Co. v. State, 40 L.R.A.(N.S.) 875.

box containing the packages intended to be purchased by the consumer, does not render the statute invalid as in excess of the power of Congress over interstate commerce.

[For other cases, see Commerce, IV. b, 1, in Digest Sup. Ct. 1908.]

**Commerce — conflicting state and Federal regulations — adulterated or misbranded foods.**

3. Permitting a sale of cans of a mixture of glucose and refiner's syrup shipped into the state only when the labels prescribed by Wis. Laws 1907, chap. 557, governing the sales of food products, are substituted for those affixed in an honest attempt to comply with the food and drugs act of June 30, 1906, is an unlawful attempt by the state to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the government and the shipper, and to impair the effect of a Federal law which has been enacted under the constitutional power of Congress over the subject.

[For other cases, see Commerce, 65–67, 399, in Digest Sup. Ct. 1908.]

**Commerce — in adulterated or misbranded foods — power of Congress — original packages — state regulation.**

4. Congress having, by the food and drugs act of June 30, 1906, made adulterated and misbranded articles contraband of interstate commerce, could, in order to make the legislation effective, authorize, as it did in § 10 of that act, seizures for confiscation and condemnation so long as the articles remained unsold, whether in the original packages or not; and such means of enforcement may not be thwarted by state legislation, like Wis. Laws 1907, chap. 557, under which cans of a mixture of glucose and refiner's syrup which have been removed from the boxes in which they were shipped in interstate commerce, and are held upon the shelves of the importers for sale, must bear only the labels required by the state law, to the exclusion of those affixed conformably to the Federal law.

[For other cases, see Commerce, 65–67, 399, 425–437, in Digest Sup. Ct. 1908.]

[Nos. 112 and 113.]

Argued January 17 and 20, 1913. Decided April 7, 1913.

TWO WRITS OF ERROR to the Supreme Court of the State of Wisconsin to review judgments of affirmance of convictions in the Circuit Court of Dane County, in that state, of violations of the pure food law. Reversed and remanded for further proceedings.

See same case below, 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

The facts are stated in the opinion.

Mr. H. O. Fairchild argued the cause and filed a brief for plaintiffs in error:

There is a recognized field of regulation incidentally affecting interstate commerce, over which the state and the Federal government have concurrent jurisdiction. In this field the states are permitted to legislate until Congress assumes to legislate upon the same subject, when the power of the states in that respect ceases, to the extent that Congress itself assumes to occupy the field; but when Congress acts, since its power is supreme and exclusive, any attempt thereafter by the state to adopt regulations covering the same subject is absolutely futile and void from the beginning.

Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 212, 38 L. ed. 962, 966, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Gulf, C. & S. F. R. Co. v. Hefly, 158 U. S. 98, 104, 105, 39 L. ed. 910, 912, 913, 15 Sup. Ct. Rep. 802; Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. 167 U. S. 633, 642, 42 L. ed. 306, 309, 17 Sup. Ct. Rep. 986; Keller v. United States, 213 U. S. 138, 146, 53 L. ed. 737, 739, 29 Sup. Ct. Rep. 470; Southern R. Co. v. Reid, 222 U. S. 424, 436, 443, 56 L. ed. 257, 260, 262, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, 222 U. S. 370, 377–379, 56 L. ed. 237, 239, 240, 32 Sup. Ct. Rep. 160; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The lower court holds the state statute to cover both interstate and intrastate commerce.

McDermott v. State, 143 Wis. 29, — L.R.A.(N.S.) —, 126 N. W. 888, 21 Ann. Cas. 1315.

This construction of the state statute by the court is conclusive upon this court.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 152, 41 L. ed. 107, 110, 16 Sup. Ct. Rep. 1096; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Olsen v. Smith, 195 U. S. 332, 342, 49 L. ed. 224, 229, 25 Sup. Ct. Rep. 52.

Assuming a conflict between the state statute and the food and drugs act, the state statute, if inoperative and void as to interstate commerce, must be held void as to intrastate commerce also, within the ruling of all the cases, and therefore wholly inoperative and void as to both the defendants, whether their acts complained of constituted interstate or intrastate traffic.

United States v. Ju Toy, 198 U. S. 253, 262, 263, 49 L. ed. 1040, 1043, 1044, 25 Sup. Ct. Rep. 644; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 497, 498, 509, 52 L. ed. 297, 308, 309,

313, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 530, 51 L. ed. 298, 304, 305, 27 Sup. Ct. Rep. 153; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 98, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; International Text-Book Co. v. Pigg, 217 U. S. 91, 112, 113, 54 L. ed. 678, 687, 688, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 25 L. ed. 550, 22 Sup. Ct. Rep. 431; State v. Chicago M. & St. P. R. Co. 136 Wis. 417, 19 L.R.A.(N.S.) 326, 117 N. W. 686; Gilbert-Arnold Land Co. v. Superior, 91 Wis. 357, 64 N. W. 999; Huber v. Martin, 127 Wis. 445, 3 L.R.A.(N.S.) 653, 667, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 Ann. Cas. 400.

The view taken by the state court of the Federal act is a palpable misconception of its scope and purpose.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 475, 109 Am. St. Rep. 961, 102 N. W. 888; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; McDermott v. State, 143 Wis. 30, — L.R.A.(N.S.) —, 126 N. W. 888, 21 Ann. Cas. 1315.

In the absence of congressional legislation the right to import a lawful article of commerce from one state to another continues until a sale (by the importer) in the original unbroken package in which the article is introduced into the state.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 475, 109 Am. St. Rep. 961, 102 N. W. 888; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 125, 34 L. ed. 128, 138, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lottery Case (Champion v. Ames) 188 U. S. 321, 361, 47 L. ed. 492, 503, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; American Steel & Wire Co. v. Speed, 192 U. S. 500, 522, 48 L. ed. 538, 547, 24 Sup. Ct. Rep. 365; American Exp. Co. v. Iowa, 196 U. S. 133, 142, 49 L. ed. 417, 421, 25 Sup. Ct. Rep. 182; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Congress having passed no statute authorizing the state to set aside the standards of the food and drugs act as to brands or labels, or to prescribe a branding of any other character than that prescribed by it, *while the article remains in interstate commerce, it necessarily follows that the branding which accords with such standards, at the time of its introduction into interstate commerce, continues a legal branding until the article ceases longer to be in interstate commerce; that is, until after sale by the importer in the original package, the article being retained by the importer in such package.*

Heyman v. Southern R. Co. 203 U. S. 270, 276, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 137, 51 L. ed. 987, 992, 27 Sup. Ct. Rep. 606.

An article declared by Congress to be a lawful subject of interstate commerce cannot be declared otherwise, by state courts or legislatures, whatever the character of the article may be.

Leisy v. Hardin, 135 U. S. 110, 125, 34 L. ed. 132, 138, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lottery Case (Champion v. Ames) 188 U. S. 361, 47 L. ed. 503, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

One who imports and sells in the original unbroken package an adulterated or misbranded article of food or drugs certainly "received," within the meaning of the act, such article from another state, and having received it delivers it to another "for pay," and is therefore subject to the penalty of the act. So he who offers for sale, offers to deliver the article, and he who sells delivers it, "for pay" to another, within the meaning of the act. A completed sale or offer to sell includes and contemplates a delivery "for pay."

Butler v. Thomson, 92 U. S. 412, 414, 23 L. ed. 684, 685; 7 Words & Phrases, 629; Iowa v. McFarland, 110 U. S. 471, 478, 28 L. ed. 198, 200, 4 Sup. Ct. Rep. 210; Pittsburg Melting Co. v. Reese, 118 Pa. 355, 12 Atl. 362; Parker v. Donaldson, 2 Watts & S. 19; Com. v. Williams, 6 Gray, 6.

The protection of purchasers and consumers in the states as well as in the territories and District of Columbia is the purpose of the Federal act.

United States v. Charles L. Heinle Specialty Co. 175 Fed. 299; United States v. 65 Casks Liquid Extracts, 170 Fed. 453; United States v. 68 Cases of Syrup, 172 Fed. 783; United States v. 100 Cases of Tepee Apples, 179 Fed. 987.

Whether an article is misbranded or not is a judicial question under the Federal act, —one of fact, to be determined in a judicial proceeding upon proofs, and by a jury if the defendant so elects; while under the state statute the question is legislative,— is determined conclusively and arbitrarily by the statute itself. Under the state statute the accused has no day in court as to the truthfulness of the name he uses for the article or its ingredients. He may not

in any case of dispute show by proofs that the label under which he sells or holds in possession for that purpose is truthful, because that is not the test of his guilt. Under the Federal act judicial proceedings are provided for, in which the burden of showing that the label or brand is in fact false, deceptive, or misleading to the consumer is cast upon the government, which must assert and prove the fact.

United States v. 650 Cases of Tomato Catsup, 166 Fed. 773; Re Wilson, 168 Fed. 566.

Here the entire statute is void. Because of this fact there is no law which can be enforced in any of its parts. The situation is as though no statute had ever been passed. It has no validity for any purpose or to any extent, or as to any person.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 497, 498, 509, 52 L. ed. 308, 309, 314, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 517, 51 L. ed. 298, 299, 27 Sup. Ct. Rep. 153; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Huntington v. Worthen, 120 U. S. 97, 101, 102, 30 L. ed. 588, 589, 590, 7 Sup. Ct. Rep. 469; Norton v. Shelby County, 118 U. S. 429, 442, 444, 30 L. ed. 178, 186, 187, 6 Sup. Ct. Rep. 1121; Re Rahrer, 10 L.R.A. 444, 43 Fed. 556; States v. Redmon, 134 Wis. 101, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; States v. Paige, 78 Vt. 286, 62 Atl. 1017, 6 Ann. Cas. 725; Cooley, Const. Lim. 7th ed. p. 259; Hopkins v. Clemson Agri. College, 221 U. S. 636, 644, 55 L. ed. 890, 894, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

It is within the sound discretion of Congress what means it will adopt to make effective its powers to regulate commerce between the states, unless there is some limitation upon that discretion found in the Federal Constitution,—and none is there found.

Lottery Case (Champion v. Ames) 188 U. S. 321, 355, 356, 357, 47 L. ed. 492, 500–502, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Buttfield v. Stranahan, 192 U. S. 470, 492, 495, 48 L. ed. 525, 534, 535, 24 Sup. Ct. Rep. 349; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 473, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; United States v. 43 Gallons of Whiskey, 93 U. S. 188, 194, 23 L. ed. 846, 847; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 480, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

Congress may declare, as we think it has in the food and drugs act, that the package of food put up by the manufacturer or wholesaler for delivery to the consumer—such dealer being the importer—shall, for the purpose of so protecting the consumer, be deemed the original unbroken package of interstate commerce, which is made the subject of its regulations.

Re Spickler, 10 L.R.A. 446, 43 Fed. 657; Re Rahrer, 140 U. S. 545, 562, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865; Swift & Co. v. United States, 196 U. S. 375, 400, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. Green, 137 Fed. 184; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

We know of no limitation in the Constitution upon the power of Congress to prescribe such regulations, whatever be their character, as it may deem wise or proper for the protection of the consumer of foods and drugs while they remain in interstate commerce; and for that purpose to determine at what point they may be deemed to have entered, and at what point of time to have departed from, such commerce.

Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Southern R. Co. v. Reid, 222 U. S. 424, 440, 441, 56 L. ed. 257, 261, 262, 32 Sup. Ct. Rep. 140; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The fact that the words "original unbroken package" are used in the food and drugs act is not decisive that they are to be construed to mean the same as similar words when used by the courts in laying down the original-package rule. The food and drugs act itself defines the meaning of the words, and resort must be had to that act, its history and its evident purpose, to ascertain their true meaning.

McKee v. United States, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; Kentucky Bd. of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 732.

The necessity for varying regulations as to when interstate shipments shall become incorporated into the mass of the property of the state must, of course, be admitted as the character of the property or the purposes of regulation shall be different. If the protection of consumers of foods and drugs from deceptive branding or harmful adulteration is the purpose of a statute, as here, it is apparent that the package or container in which the consumer is to receive the article he purchases should be, or at least may be, if Congress so wills, the package that is to bear the label or brand that is to inform him what he is buying and the ingredients of it; otherwise the

statute is ineffective to accomplish its evident and conceded purpose.

United States v. Green, 137 Fed. 189.

It is common knowledge that very frequently both druggists and grocers import in one large box, crate, barrel, or other container, a number of different kinds of drugs or food products, each one of which requires a different label. Of this fact the court will take judicial notice.

Nicol v. Ames, 173 U. S. 509, 517, 43 L. ed. 786, 792, 19 Sup. Ct. Rep. 522; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811; American Nat. Bank v. Bushey, 45 Mich. 139, 7 N. W. 725; Crystaleid Water Co. v. Schultz, 77 Misc. 26, 135 N. Y. Supp. 273.

The police power is a law of necessity. In order to justify its exercise to the injury of the citizen's property or personal rights there should exist some danger to the public interests to challenge attention as one reasonably requiring, for the public interests, a remedy.

State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Dobbins v. Los Angeles, 195 U. S. 223, 236–238, 49 L. ed. 169, 175, 176, 25 Sup. Ct. Rep. 18; Freund, Pol. Power, § 143.

There is no doubt of the power of the state, in the absence of congressional regulation covering the same subject, to exclude from or to regulate the reception into and the sale in the state of food products falsely or deceptively branded.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Crossman v. Lurman, 192 U. S. 189, 199, 200, 48 L. ed. 401, 405, 406, 24 Sup. Ct. Rep. 234; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

But there must be deception or misleading of the public by such branding to justify the exercise of the police power in such cases.

People v. Hawkins, 157 N. Y. 8, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Dobbins v. Los Angeles, 195 U. S. 223, 236–238, 49 L. ed. 169, 175, 176, 25 Sup. Ct. Rep. 18.

The mere fact that the public is led by the use of the name "corn syrup" to buy the article when it would not buy it if labeled to contain "glucose" does not give the state any right to require the use of the word "glucose" instead of "corn syrup," but quite the contrary.

State v. Hanson, 118 Minn. 85, 40 L.R.A. (N.S.) 865, 136 N. W. 414; Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; Davis v. Cleveland, C. C. & St. L. R. Co. 146 Fed. 412.

Prescribing such an obnoxious branding is unreasonable and prejudicial to sale, and therefore invalid.

Freund, Pol. Power, §§ 50, 51; People v. Hawkins, 157 N. Y. 18, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Crossman v. Lurman, 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097; Crossman v. Lurman, 192 U. S. 189, 195, 199, 200, 48 L. ed. 401, 403, 405, 406, 24 Sup. Ct. Rep. 234; State v. Hanson, 118 Minn. 85, 40 L.R.A.(N.S.) 865, 136 N. W. 414.

It is the evident intent of the food and drugs act that a label such as the act authorizes, and which the container of an article of food bears when it enters interstate commerce, shall remain in such container until it is sold by the importer in such container.

United States v. 65 Casks Liquid Extract, 170 Fed. 449; United States v. Green, 137 Fed. 179.

Congress would have the power, if necessary or convenient, to accomplish the beneficent purposes of the food and drugs act, even incidentally to regulate intrastate commerce.

United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 330, 13 Ann. Cas. 893; Shepard v. Northern P. R. Co. 184 Fed. 795.

Mr. John M. Olin argued the cause, and, with Mr. L. H. Bancroft, Attorney General of Wisconsin, and Messrs. Harry L. Butler, William R. Curkeet, and Burr W. Jones, filed a brief for defendant in error:

All the authorities agree that (at least, in the absence of congressional action otherwise indicating) an article ceases to be the subject of interstate commerce, and becomes subject to the police power of the state, when the original package in which it is usually and in good faith shipped has been received and broken by the importer, or

when he has made the first sale thereof, in the original package so received.

Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888.

Congressional regulation does not exclude state regulation except so far as the former, lawfully exercised, conflicts with the latter.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; State v. Chicago, M. & St. P. R. Co. 136 Wis. 416, 19 L.R.A.(N.S.) 326, 117 N. W. 686; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 287; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 624, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; Western U. Teleg. Co. v. James, 162 U. S. 650, 654, 40 L. ed. 1105, 1106, 16 Sup. Ct. Rep. 934; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Savage v. Scovell, 171 Fed. 566; Northern P. R. Co. v. Washington, 222 U. S. 370, 379, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 442, 56 L. ed. 257, 262, 32 Sup. Ct. Rep. 140; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. The repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.

Reid v. Colorado, 187 U. S. 137, 148, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 257, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101.

As to the importer in any state, the penalty only reaches him who, having received an interstate shipment, delivers or offers to deliver the same in the "original unbroken package" to any other person, thus making the original importer alone subject to the penalty, and then only when he shall sell or offer to sell the article in the original unbroken package in which he received it. It is not a violation of the statute merely to receive the article in the unbroken package.

United States v. 5 Boxes of Asafœtida, 181 Fed. 564.

The term "original unbroken package," as used in §§ 2 and 10 of the act, and "unbroken package," as used in § 3 of the act, had, prior to its adoption, been judicially treated as synonymous.

Low v. Austin, 13 Wall. 29, 20 L. ed. 517; United States v. Fox, Deady, 579, Fed. Cas. No. 15,155.

An original package within the meaning of the food and drugs act is the unit, complete in itself, delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner.

Thornton, Foods & Drugs, p. 971.

The foregoing was the judicially accepted definition of "original package," "original unbroken package," and "unbroken package," at the time of the adoption of the act.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Low v. Austin, 13 Wall. 29, 20 L. ed. 517; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Guckenheimer v. Sellers, 81 Fed. 997; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Re Harmon, 43 Fed. 372; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; State ex rel. Gelpi v. Board of Assessors, 46 La. Ann. 145, 49 Am. St. Rep. 318, 15 So. 10; Com. use of Philadelphia County v. Schollenberger, 156 Pa. 201, 22 L.R.A. 155, 36 Am. St. Rep. 32, 4 Inters. Com. Rep. 488, 27 Atl. 30; Thornton, Foods & Drugs, 1912, pp. 143, 150–177; United States v. Fox, Deady, 579, Fed. Cas. No. 15,155.

The object of the law is to keep adulterated articles out of the channels of interstate commerce; or, if they enter such commerce, to condemn them while being transported, or when they have reached their destination, provided they remain unloaded, unsold, or in unbroken, original packages.

Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The Federal act in question is not to be construed as displacing state authority to regulate the adulteration or branding of foods which have been shipped from without the state, and thereby become wi

to the Federal law, but which have been removed from the original package of shipment.

Armour & Co. v. Bird, 159 Mich. 1, 25 L.R.A.(N.S.) 616, 123 N. W. 580; Savage v. Scovell, 171 Fed. 566.

The regulation of the internal affairs of a state by Congress is as unconstitutional as is the direct attempt by a state to regulate interstate commerce.

Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Geer v. Connecticut, 161 U. S. 519, 531, 40 L. ed. 793, 797, 16 Sup. Ct. Rep. 600; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 210, 38 L. ed. 962, 964, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113; The Daniel Ball, 10 Wall. 557, 564, 19 L. ed. 999, 1001; United States v. De Witt, 9 Wall. 41, 19 L. ed. 593; Gibbons v. Ogden, 9 Wheat. 1, 186, 6 L. ed. 23, 67; License Cases, 5 How. 504, 574, 12 L. ed. 256, 287; Keller v. United States, 213 U. S. 139, 53 L. ed. 737; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Re Agnew, 89 Neb. 306, 35 L.R.A. (N.S.) 836, 131 N. W. 819, Ann. Cas. 1912 C, 676.

A statute whose terms are broad enough to include both intrastate and interstate commerce will be construed as applicable only to intrastate commerce, when it would be unconstitutional if applied to interstate commerce.

Chicago & N. W. R. Co. v. State, 128 Wis. 650, 108 N. W. 557; Church of the Holy Trinity v. United States, 143 U. S. 457, 459, 36 L. ed. 227, 228, 12 Sup. Ct. Rep. 511; State ex rel. Gubbins v. Anson, 132 Wis. 473, 112 N. W. 475, 17 Am. & Eng. Enc. Law, 2d ed. 75, 76; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 427, 428, 32 L. ed. 229, 233, 234, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; McCabe v. Atchison, T. & S. F. R. Co. 109 C. C. A. 110, 186 Fed. 972; Com. v. Gagne, 153 Mass. 205, 10 L.R.A. 442, 26 N. E. 449; Com. v. Peoples Exp. Co. 201 Mass. 564, 131 Am. St. Rep. 416, 88 N. E. 424; Western U. Teleg. Co. v. State, — Tex. Civ. App. —, 121 S. W. 194, 196; Wagner v. Western U. Teleg. Co. 152 Mo. App. 369, 133 S. W. 91; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 476, 109 Am. St. Rep. 961, 102 N. W. 888; State ex rel. Coleman v. Western U. Teleg. Co. 75 Kan. 620, 90 Pac. 299; Gulf, C. & S. F. R. Co. v. Gray, 87 Tex. 313, 28 S. W. 280; International & G. N. R. Co. v. Railroad Commission, 99 Tex. 332, 89 S. W. 961; *McCord v. State,* 2 Okla. Crim. Rep. 214, *101 Pac. 286; Standard Oil Co. v. State,* 117 Tenn. 618, 10 L.R.A.(N.S.) 1020, 100 S. W. 709; McGwigan v. Wilmington & W. R. Co. 95 N. C. 428, 59 Am. Rep. 247; Beardsley v. New York, L. E. & W. R. Co. 15 App. Div. 251, 44 N. Y. Supp. 178; Dillon v. Erie R. Co. 19 Misc. 116, 43 N. Y. Supp. 326; Re Agnew, 89 Neb. 306, 35 L.R.A.(N.S.) 836, 131 N. W. 820; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 96, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Com. v. Kimball, 24 Pick. 362, 35 Am. Dec. 326; State v. Smiley, 69 Kan. 199, 67 L.R.A. 908, 69 Pac. 199.

One part of a statute may stand while another may fall, unless the two are so connected or dependent on each other in subject-matter, meaning, or purpose that the good cannot remain without the bad.

Warren v. Charleston, 2 Gray, 84; Allen v. Louisiana, 103 U. S. 80, 84, 26 L. ed. 318, 319; Loeb v. Columbia Twp. 179 U. S. 472, 490, 45 L. ed. 280, 290, 21 Sup. Ct. Rep. 174; Berea College v. Kentucky, 211 U. S. 45, 55, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; Com. v. Kimball, 24 Pick. 362, 35 Am. Dec. 326; Com. v. Gagne, 153 Mass. 207, 10 L.R.A. 442, 26 N. E. 449; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 427, 428, 32 L. ed. 229, 233, 234, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Dillon v. Erie R. Co. 19 Misc. 116, 43 N. Y. Supp. 326; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 476, 109 Am. St. Rep. 961, 102 N. W. 888; Presser v. Illinois, 116 U. S. 252, 263, 29 L. ed. 618, 619, 6 Sup. Ct. Rep. 580; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Marshall Field & Co. v. Clark, 143 U. S. 649, 695, 696, 36 L. ed. 294, 310, 311, 12 Sup. Ct. Rep. 495; Huntington v. Worthen, 120 U. S. 97, 102, 30 L. ed. 588, 590, 7 Sup. Ct. Rep. 469; Scott v. Donald, 165 U. S. 58, 105, 41 L. ed. 632, 647, 17 Sup. Ct. Rep. 265; State ex rel. Williams v. Sawyer County, 140 Wis. 634, 123 N. W. 248; Quiggle v. Herman, 131 Wis. 382, 111 N. W. 479; State ex rel. Cornish v. Tuttle, 53 Wis. 45, 9 N. W. 791; Lynch v. The Economy, 27 Wis. 72; State ex rel. Walsh v. Dousman, 28 Wis. 541; Kennedy v. Milwaukee & St. P. R. Co. 22 Wis. 590; Wakeley v. Mohr, 15 Wis. 611; Slauson v. Racine, 13 Wis. 404; Fayette County v. People's & D. Bank, 47 Ohio St. 503, 10 L.R.A. 201, 25 N. E. 697; McCullough v. Virginia, 172 U. S. 102, 112, 43 L. ed. 382, 385, 19 Sup. Ct. Rep. 134; Des Moines Water Co. v. Des Moines, 192 Fed. 196; Willcox v. Consolidated Gas Co. 212 U. S. 19, 21, 53, 53 L. ed. 382, 400, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Waters-Pierce Oil Co. v. Texas,

177 U. S. 28, 42, 44 L. ed. 657, 663, 20 Sup. Ct. Rep. 518; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 591, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; St. Louis I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 469; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 395, 45 L. ed. 244, 248, 21 Sup. Ct. Rep. 101; Buffalo Refrigerating Mach. Co. v. Pennsylvania Heat & Power Co. 102 C. C. A. 196, 178 Fed. 696; Spinello v. New York, N. H. & H. R. Co. 106 C. C. A. 189, 183 Fed. 762.

The state law assumes jurisdiction over the article only after the United States law has ceased to operate. Beyond this point it is no concern of the United States what the individual states may do in the enactment of laws for the regulation of the sale, within their borders, of food products.

Armour & Co. v. Bird, 159 Mich. 1, 36 L.R.A.(N.S.) 1056, 123 N. W. 580.

Whether the act in question applies to interstate commerce or not is not of much importance under the conceded facts of this case, since the defendants are in no position to raise that question, because the transactions involved were wholly of an intrastate character. It is only persons engaged in interstate commerce who can raise the constitutional question that a state statute violates the commerce clause of the United States Constitution.

Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Lee v. New Jersey, 207 U. S. 67, 70, 52 L. ed. 106, 107, 28 Sup. Ct. Rep. 22; Spain v. St. Louis & S. F. R. Co. 151 Fed. 530; Williams v. Walsh, 222 U. S. 415, 423, 56 L. ed. 253, 256, 32 Sup. Ct. Rep. 137; State v. Sbragia, 138 Wis. 582, 23 L.R.A.(N.S.) 697, 119 N. W. 290; State ex rel. Bergh v. Sparling, 129 Wis. 164, 107 N. W. 1040; Strange v. Oconto Land Co. 136 Wis. 524, 117 N. W. 1023; Appleton Waterworks Co. v. Appleton, 116 Wis. 373, 93 N. W. 262; Re O'Brien, 29 Mont. 530, 75 Pac. 198, 1 Ann. Cas. 373; Farrell v. Atlantic Coast Line R. Co. 82 S. C. 410, 64 S. E. 266; McCutchen v. Atlantic Coast Line R. Co. 81 S. C. 71, 61 S. E. 1108; State v. Paige, 78 Vt. 286, 62 Atl. 1017, 6 Ann. Cas. 725; State ex rel. Watts v. Cain, 78 S. C. 348, 58 S. E. 937; Thompson v. Mitchell, 133 Iowa, 527, 110 N. W. 903; Cooley, Const. Lim. 6th ed. 196; 6 Am. & Eng. Enc. Law, 2d ed. 1084.

Whether the statute in question shall be construed to be applicable to intrastate commerce solely, or not, is purely a question for the state court; and upon the proper construction to be given, the state courts are not restricted by Federal decisions. In such cases the Federal courts adopt the construction given by the state courts.

Osborne v. Florida, 164 U. S. 650, 654, 41 L. ed. 586, 588, 17 Sup. Ct. Rep. 214; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 591, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 395, 45 L. ed. 244, 248, 21 Sup. Ct. Rep. 101; Buffalo Refrigerating Mach. Co. v. Pennsylvania Heat & Power Co. 102 C. C. A. 196, 178 Fed. 696; Spinello v. New York, N. H. & H. R. Co. 106 C. C. A. 189, 183 Fed. 762; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; San Diego Land & Town Co. v. National City, 174 U. S. 739, 748, 43 L. ed. 1154, 1157, 19 Sup. Ct. Rep. 804; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

The act in question falls clearly within the police power of the state, and as such should be sustained. It is only when the bounds of reason have been so clearly exceeded as to violate some constitutional prohibition, express or implied, that the court has any power to interfere with the exercise of this legislative power.

State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408.

When the state acts within these bounds, the state does not deprive any citizen of liberty or property without due process of law.

Re Rahrer, 140 U. S. 545, 35 L. ed. 574, 11 Sup. Ct. Rep. 865; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

Aside from the question of the wholesomeness or unwholesomeness of the article, the legislation in Wisconsin is a proper exercise of the police power. This extends to the prevention of deception and fraud in the sale of food products as well as to the securing of wholesomeness in such products. The Wisconsin supreme court has, in a number of cases, laid down the rule that the legislature, in the exercise of its police power, may legislate as to all matters appertaining to the lives, limbs, health, comfort, good morals, peace, and safety of society.

Baker v. State, 54 Wis. 372, 12 N. W. 12; State ex rel. Larkin v. Ryan, 70 Wis. 681, 36 N. W. 823; State v. Heinemann, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818; Bittenhaus v. Johnston, 92 Wis. 588, 32 L.R.A. 380, 66 N. W. 305; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A.

252, 87 N. W. 561; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; State ex rel. Ornstine v. Cary, 126 Wis. 135, 11 L.R.A.(N.S.) 174, 105 N. W. 792; People v. Freeman, 242 Ill. 373, 90 N. E. 368, 17 Ann. Cas. 1098; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 611.

The history of the oleomargarin legislation in this country furnishes an excellent example as to how far the legislature may go, not only in regulating, but even prohibiting, the manufacture and sale of an article of food that may be calculated to deceive the consumer, even though the article be wholesome. The courts have held, without exception, that it is within the police powers of the legislature to require that oleomargarin offered for sale should be so labeled as to inform the purchaser of the character of the article he was purchasing, although it was generally conceded that oleomargarin is a wholesome article of food, and that the coloring of the same so as to make it resemble the color of butter does not in any way interfere with its wholesomeness. But such an article, so manufactured, tends to deceive the public, and it is for this reason that all of the courts hold it proper for the legislature to regulate the sale of the article by requiring it to be free from coloring matter that shall cause it to look like butter, and also by requiring that it shall be particularly marked or branded.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; State v. Marshall, 64 N. H. 549, 1 L.R.A. 51, 15 Atl. 210; People v. Arensberg, 105 N. Y. 129, 11 N. E. 277, 59 Am. Rep. 483; Slate v. Addington, 77 Mo. 118; Butler v. Chambers, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; State ex rel. Wiedeman v. Horgan, 55 Minn. 183, 56 N. W. 688; State, Waterbury, Prosecutor, v. Newton, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; State ex rel. Atty. Gen. v. Capital City Dairy Co. 62 Ohio St. 350, 57 L.R.A. 181, 57 N. E. 62, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Com. v. Caulfield, 211 Pa. 644, 61 Atl. 243; Com. v. McDermott, 224 Pa. 362, 73 Atl. 427; People v. Freeman, 242 Ill. 373, 90 N. E. 267, 17 Ann. Cas. 1098.

Such legislation as is here attacked by the learned counsel is nothing new. It exists in all of the states and has been uniformly sustained not only as to regulations for the sale of oleomargarin, but as to almost every variety of food. So uniformly have these laws been sustained, now for many years, that the courts have become wearied in being further called upon to consider their constitutionality.

Com. v. Caulfield, 211 Pa. 644, 61 Atl. 243; Com. v. McDermott, 224 Pa. 362, 73 Atl. 427; Crossman v. Lurman, 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; State v. Aslesen, 50 Minn. 5, 36 Am. St. Rep. 620, 52 N. W. 220; State v. Hanson, 84 Minn. 42, 54 L.R.A. 468, 86 N. W. 768; State v. Snow, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410; State v. Sherod, 80 Minn. 446, 50 L.R.A. 660, 81 Am. St. Rep. 268, 83 N. W. 417; State v. Layton, 160 Mo. 474, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429; Chicago v. Bowman Dairy Co. 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700; People v. Barie, 86 Mich. 594, 13 L.R.A. 286, 49 N. W. 609; State v. Tetu, 98 Minn. 351, 107 N. W. 953, 108 N. W. 470; Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889, 68 Pac. 376; People v. Niagara Fruit Co. 75 App. Div. 11, 77 N. Y. Supp. 805, affirmed in 173 N. Y. 629, 66 N. E. 1114; People v. Girard, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; State v. Crescent Cream Co. 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; People v. Worden Grocer Co. 118 Mich. 604, 77 N. W. 315; Board of Health v. Vandruens, 77 N. J. L. 443, 72 Atl. 125; Com. v. Evans, 132 Mass. 11; People v. Cipperly, 37 Hun, 324, dissenting opinion affirmed in 101 N. Y. 634, 4 N. E. 107; People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; State v. Campbell, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; State v. Smythe, 14 R. I. 100, 51 Am. Rep. 344; Arbuckle v. Blackburn, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616; Armour & Co. v. Bird, 159 Mich. 1, 25 L.R.A.(N.S.) 616, 123 N. W. 580.

The Constitution of the United States does not secure to anyone the privilege of defrauding the public.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234.

The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosper-

ity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government, and that in this respect it is not interfered with by the 14th Amendment.

Re Rahrer, 140 U. S. 545, 554, 555, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889, 68 Pac. 376; People v. Niagara Fruit Co. 75 App. Div. 11, 77 N. Y. Supp. 805; Jewett Bros. & Jewett v. Small, 20 S. D. 232, 105 N. W. 738; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Logan v. Postal Teleg. & Cable Co. 157 Fed. 570, 583; State v. Crescent Creamery Co. 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; Arbuckle v. Blackburn, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616.

The provision of the Federal Constitution, invoked by the defendants, was not designed to interfere with the exercise of the police power by the states, and it has not shorn the states of their power to regulate trades and occupations so as to guard against injury to the public, and to prevent deception and fraud in the manufacture and sale of food products.

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; St. Louis v. Fisher, 167 Mo. 654, 64 L.R.A. 679, 99 Am. St. Rep. 614, 67 S. W. 872; St. Louis v. Bippen, 201 Mo. 528, 100 S. W. 1048; Powell v. Com. 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350, 7 Am. Crim. Rep. 32; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; People ex rel. Hill v. Hesterberg, 184 N. Y. 126, 3 L.R.A.(N.S.) 163, 128 Am. St. Rep. 528, 76 N. E. 1032, 6 Ann. Cas. 352; Health & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10.

Mr. Justice Day delivered the opinion of the court:

The plaintiffs in error, George McDermott and T. H. Grady, were severally convicted in the circuit court of Dane county, in the state of Wisconsin, upon complaints made against them by an assistant dairy and food commissioner of that state, for the [125] violation of a statute of Wisconsin relating to the sale of certain articles and for the protection of the public health. The convictions were affirmed by the decision of the supreme court of Wisconsin. 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

The complaint against McDermott charged that on March 2, 1908, at Oregon, in Dane county, he "did unlawfully have in his possession with intent to sell, and did offer and expose for sale and did sell, a certain article, product, compound, and mixture composed of more than 75 per cent glucose and less than 25 per cent of cane syrup, said cane syrup being then and there mixed with said glucose, and that the can containing said compound and mixture was then and there unlawfully branded and labeled 'Karo Corn Syrup,' and was then and there further unlawfully branded and labeled, '10 per cent Cane Syrup, 90 per cent Corn Syrup,' contrary to the statute in such case made and provided." As to Grady, the complaint was similar to that against McDermott, except that the label designated the mixture as "Karo Corn Syrup with Cane Flavor," and added "Corn Cyrup, 85 per cent." The statute of Wisconsin for the violation of which plaintiffs in error were convicted is found in Laws of Wisconsin for 1907, at page 646, being chapter 557, and the pertinent parts of it are as follows:

"Section 1. . . . No person, . . . by himself . . . or agent . . . shall sell, offer, or expose for sale, or have in his possession with intent to sell, any syrup, maple syrup, sugar-cane syrup, sugar syrup, refiners' syrup, sorghum syrup or molasses, mixed with glucose, unless the barrel, cask, keg, can, pail, or other original container, containing the same, be distinctly branded or labeled so as to plainly show the true name of each and all of the ingredients composing such mixture, as follows:

. . . . . .

"Third. In case such mixture shall [126] contain glucose in a proportion exceeding 75 per cent by weight, it shall be labeled and sold as 'Glucose flavored with Maple Syrup,' 'Glucose flavored with Sugar-cane Syrup,' . . . 'Glucose flavored with Refiners' Syrup,' . . . as the case may be. The labels . . . shall bear the name and address of the manufacturer or dealer. . . . In all mixtures in which glucose is used in the proportion of more than 75 per cent by weight, the name of the syrup or molasses which is mixed with the glucose for flavoring purposes, and the words showing that said syrup or molasses is used a

a flavoring, as provided in this section, shall be printed on the label of each container of such mixture. . . . The mixture or syrups designated in this section shall have no other designation or brand than herein required that represents or is the name of any article which contains a saccharin substance; . . . nor shall any of the aforesaid glucose, syrups, molasses, or mixtures contain any substance injurious to health, nor any other article or substance otherwise prohibited by law in articles of food."

The facts are that the plaintiffs in error were retail merchants in Oregon, Dane county, Wisconsin; that before the filing of the complaints against them each had bought for himself for resale as such merchant from wholesale grocers in Chicago, and had received by rail from that city, 12 half-gallon tin cans or pails of the articles designated in the complaints, each shipment being made in wooden boxes containing the cans, and that when the goods were received at their stores the respective plaintiffs in error took the cans from the boxes, placed them on the shelves for sale at retail, and destroyed the boxes in which the goods were shipped to them, as was customary in such cases. From their nature, the articles thus canned and offered to be sold, instead of being labeled as they were, if labeled in ac-[127] cordance with *the state law, would have been branded with the words "Glucose flavored with Refiners' Syrup." And, as the statute provides that the mixtures or syrups offered for sale shall have upon them no designation or brand which represents or contains the name of a saccharin substance other than that required by the state law, the labels upon the cans must be removed, if the state authority is recognized.

Plaintiffs in error contend that the cans were labeled in accordance with the food and drugs act passed by Congress, June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), and that that fact is evidenced by the decision of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, made under the claimed authority of that act, which is as follows:

Washington, D. C. February 13, 1908.

We have each given careful consideration to the labeling, under the pure food law, of the thick, viscous syrup obtained by the incomplete hydrolysis of the starch of corn, and composed essentially of dextrose, maltose, and dextrin. In our opinion it is lawful to label this syrup as corn syrup, and if to the corn syrup there is added a small percentage of refiner's syrup, a product of cane, the mixture in our judgment is not misbranded if labeled "corn syrup with cane flavor."

George B. Cortelyou,
Secretary of the Treasury.
James Wilson,
Secretary of Agriculture.
Oscar H. Strauss,
Secretary of Commerce and Labor.

And it is insisted that the Federal food and drugs act, passed under the authority of the Constitution, has taken possession of this field or regulation, and that the state act is a wrongful interference with the exclusive power of Congress over interstate commerce, in which, it appears, the goods in question were shipped. The case presents, *among other questions, the con-[128] stitutional question whether the state act, in permitting the sale of this article only when labeled according to the state law, is open to the objection just indicated.

That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution, it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605; Lottery Case (Champion v. Ames) 188 U. S. 321, 355, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; Hoke v. United States, 227 U. S. 308, ante, 523, 33 Sup. Ct. Rep. 281.

The food and drugs act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs, and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. Hipolite Egg Co. v. United States, supra.

Section 2 of the act provides that "the introduction into any state or territory or the District of Columbia from any other

state or territory or the District of Columbia . . . of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohib-
129]ited; and any person who shall *ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia . . . any such article so adulterated or misbranded within the meaning of this act, . . . shall be guilty of a misdemeanor, and for such offense be fined," etc. The article of food or drugs, the shipment or delivery for shipment in interstate commerce of which is prohibited and punished, is such as is *adulterated or misbranded within the meaning of the act.* What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined.

According to the terms of § 7 drugs are "adulterated" where, if they are sold under a name recognized in the United States Pharmacopœia, and differ from the standard of strength therein laid down, the standard of strength, etc., is not plainly stated upon the bottle, box, or other container; and food is "adulterated" where it contains an added poisonous or other added deleterious ingredient which may render it injurious; except that, where directions are printed on the covering or the package for the necessary removal of such preservative, the provisions of the act shall apply only when the food is ready for consumption. Turning to § 8, we find that the term "misbranded," as used in the statute, shall apply to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which is false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, etc., in which it was manufactured; and in the case of drugs it is provided that, if the contents of the package as originally put up shall have been removed in whole or in part, and other contents placed in such package, or, if the package fail to bear a statement on the label as required, the drugs
130] *shall be deemed misbranded; and as to food, if it shall be labeled or branded so as to deceive or mislead a purchaser, or purport to be a foreign product when not so, or, if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package; or, if the package fail to bear a statement on the label as required, or, if in package form and the contents are stated in terms of weight or measure, and they are not plainly and correctly stated on the outside of the package; or, if the package containing it or its label contain any design or device regarding the ingredients or the substances contained therein which are false or misleading in character, the food shall be deemed misbranded. That the word "package," or its equivalent expression, as used by Congress in §§ 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient, for the decision of these cases, that we consider the extent of the word "package" as thus used only, and we therefore have no occasion, and do not attempt, to decide what Congress included in the terms "original unbroken package," as used in the 2d and 10th sections, and "unbroken package" in the 3d section. Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the imported, by *removing and destroying[131 such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits, the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the act by the Federal courts. Re Wilson, 168 Fed. 566; Nave-McCord Mercantile Co. v. United States, 104 C. C. A. 486, 182 Fed. 46; United States v. American Druggists' Syndicate, 186 Fed. 387; United States v. 10 Barrels of Vinegar, 186

Fed. 400; Van Bremen v. United States, 113 C. C. A. 296, 192 Fed. 904; United States v. 75 Boxes of Alleged Pepper, 198 Fed. 934.

While these regulations are within the power of Congress, it by no means follows that the state is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, in which the power of the state to make regulations concerning the same subject-matter, reasonable in their terms, and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the state of Indiana were held not to be inconsistent with the food and drugs act of Congress. While this is true, it is equally well settled that the 132]state *may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N. S.) 44, 32 Sup. Ct. Rep. 169; Savage v. Jones, 225 U. S. 533, 56 L. ed. 1194, 32 Sup. Ct. Rep. 715.

Having in view the interpretation we have given the food and drugs act, and applying the doctrine just stated to the instant cases, how does the matter stand? When delivered for shipment and when received through the channels of interstate commerce, the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. Whether the Secretaries had the power, under the food and drugs act, to make the regulation set out above, is not now before us. It is enough for the present purpose to say that, so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the act of Congress, and, if they were not so labeled, by § 2 provision is made for the enforcement of the act by criminal prosecution, and by § 10 by proceedings *in rem*. Whether the labels complied with the Federal law was not for the state to determine. This was a matter provided for by the act of Congress, and to be determined as therein indicated by proper proceedings in the Federal courts.

The label upon the unsold article is, in the one case, the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal *authorities[133 depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act, his goods are immune from seizure by Federal authority; if the label is false or misleading within the terms of the law, the goods may be seized and condemned. In other words, the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress. While in this situation, the goods being unsold, as a condition of their legitimate sale within the state, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharin substance, as do the labels in these cases). In others words, it is essential to a legal exercise of possession of and traffic in such goods under the state law that labels which presumably meet with the requirements of the Federal law, and for the determination of the correctness of which Congress has provided effectual means, shall be removed from the packages before the first sale by the importer. In this connection it might be noted that, as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one state, and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the state the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal *statute which have ac-[134 crued both to the government and the shipper, and to impair the effect of a Federal

law which has been enacted under the Constitutional power of Congress over the subject.

To require the removal or destruction before the goods are sold of the evidence which Congress has by the food and drugs act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the Federal law, is beyond the power of the state. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error, and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original-package doctrine as it is said to have been laid down in the former decisions in this court. The term "original package" had its origin in Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678, in which this court had to consider the extent of the protection given under Federal authority to articles imported into this country from abroad for sale, and it was there held that (p. 441):

"When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it 135] *was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the state authority where the sovereign power of the nation or state is involved in dealing with property. And where it has been found necessary to decide the boundary of Federal authority, it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce, and delivered to the consignee, and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the state may be asserted. Some of the cases in which this doctrine has been considered will be found in the margin.† In the view, however, which we take of this case, it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the act, and when § 2 has been violated, the Federal authority, in enforcing either § 2 or § 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

*Congress, having made adulterated[136 and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in § 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remaining "unloaded, unsold, or in original unbroken packages," and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection *en route* may be very inadequate. The real opportunity of government inspection may

†Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Rhodes v. Iowa, 170 U. S. 412, 424, 42 L. ed. 1088, 1095, 18 Sup. Ct. Rep. 664; Schollenberger v. Pennsylvania, 171 U. S. 1, 19 et seq., 43 L. ed. 49, 56, 18 Sup. Ct. Rep. 757; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, et seq., 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Heyman v. Southern R. Co. 203 U. S. 270, 276, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Savage v. Jones, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 200, ante, 184, 33 Sup. Ct. Rep. 44.

only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.

The doctrine of original package had its origin in the opinion of Chief Justice Marshall in Brown v. Maryland, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of interstate into state jurisdiction for the purpose of taxa-137]tion is entirely *different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the effectual exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and it follows that the judgments of the state court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the state must be reversed, and the cases are remanded to the state court for further proceedings not inconsistent with this opinion.

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HENRY L. BOGART, †Townsend Lawrence, and Anita Lawrence, as Executors of Walter B. Lawrence, Suing on Behalf of Themselves and Other Stockholders, etc., Appts.,

v.

SOUTHERN PACIFIC COMPANY et al.

(See S. C. Reporter's ed. 137–148.)

**Appeal — from circuit court — jurisdiction below.**

A decree of a Federal circuit court, in a case removed from a state court for diversity of citizenship, dismissing the suit as the result of applying the general rule as to indispensable parties, unaffected by U. S. Rev. Stat. § 737, U. S. Comp. Stat. 1901, p. 587, or equity rule 47, where a certain nonresident corporation which it found was such a party had not been served, and had not appeared or waived service, does not present any question of the jurisdiction of the court as a Federal tribunal which, under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, will sustain an appeal to the Federal Supreme Court.

[For other cases, see Appeal and Error, 895–914, in Digest Sup. Ct. 1908.]

[No. 165.]

Argued March 5, 1913. Decided April 7, 1913.

APPEAL from the Circuit Court of the United States for the Eastern District of New York to review a decree dismissing, for want of an indispensable party, the bill in a suit which had been removed to that court from a state court. Dismissed.

See same case below, 180 Fed. 822.

The facts are stated in the opinion.

Mr. H. Snowden Marshall argued the cause, and, with Messrs. James A. O'Gorman, A. J. Dittenhoefer, and David Gerber filed a brief for appellants:

The recitals by the court below that the case was decided on jurisdictional grounds should be controlling.

Re Lehigh Min. & Mfg. Co. 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; Scully v. Bird, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597.

As the court below decided the cause on the ground of jurisdiction, the appeal was properly taken directly to this court.

Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Kendall v. San Juan Silver Min. Co. 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779, 17 Mor. Min. Rep. 475; Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004.

This court, in case the certificate and other parts of the record are contradictory, can examine the opinion to find out whether the court below dismissed the bill for lack of jurisdiction.

Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

Mr. Arthur H. Van Brunt argued the cause and filed a brief for appellees the

†Suggestion of the death of Walter B. Lawrence. [illegible]pearance of Henry L. Bogart et al., executors of the last will and testament of Walter B. Lawrence, deceased.

Southern Pacific Company, the Houston & Texas Central Railroad Company, and the Central Trust Company:

The question of jurisdiction referred to in the act of 1891 is that of the jurisdiction of the district and circuit courts as Federal courts, and not of their general jurisdiction as judicial tribunals.

Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Illinois C. R. Co. v. Adams, 180 U. S. 28, 34, 45 L. ed. 410, 412, 21 Sup. Ct. Rep. 251; Mexican C. R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; Bien v. Robinson, 208 U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379; Scully v. Bird, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597; The Jefferson, 215 U. S. 131, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

Thus an appeal will lie to this court under the act of March 3, 1891, where the question to be determined is:

(a) Whether the requisite diversity of citizenship exists.

Mexican C. R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Venner v. Great Northern R. Co. 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328.

(b) Or has been collusively obtained.

Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286.

(c) Whether the amount in controversy exceeds $2,000.

Building & L. Asso. v. Price, 169 U. S. 45, 42 L. ed. 655, 18 Sup. Ct. Rep. 251; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Smithers v. Smith, 204 U. S. 632, 51 L. ed. 656, 27 Sup. Ct. Rep. 297.

(d) Or whether the subject-matter of the action is within the jurisdiction of the Federal court.

Giles v. Harris, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639; Venner v. Great Northern R. Co. 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328.

(e) Whether the suit is brought in the proper Federal district.

Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324; United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44.

(f) Whether the court ever acquired jurisdiction by the valid service of process.

Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; Kendall v. American Automatic Loom Co. 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; Herndon-Carter Co. v. James N. Norris, Son & Co. 224 U. S. 496, 56 L. ed. 857, 32 Sup. Ct. Rep. 550; Chase v. Wetzlar, 225 U. S. 79, 56 L. ed. 990, 32 Sup. Ct. Rep. 659.

(g) Or by proper proceedings upon removal from the state court.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

But where the necessary elements of Federal jurisdiction exist, the jurisdiction of the court attaches, and an exercise of that jurisdiction, as by a dismissal of the bill, does not involve any question of Federal jurisdiction which can be reviewed by this court under the act of March 3, 1891.

Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Illinois C. R. Co. v. Adams, 180 U. S. 28, 34, 45 L. ed. 410, 412, 21 Sup. Ct. Rep. 251; First Nat. Bank v. Klug, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Lucius

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as parties appellants herein, on April 1, 1912.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed. U. S. 894; and Paducah v. East Tennessee Teleph. Co. 108 C. C. A. 333.

v. Cawthon-Coleman Co. 196 U. S. 149, 49 L. ed. 425, 25 Sup. Ct. Rep. 214; United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; Bien v. Robinson, 208 U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379; Scully v. Bird, 209 U. S. 481, 485, 52 L. ed. 899, 901, 28 Sup. Ct. Rep. 597; Kansas City Northwestern R. Co. v. Zimmerman, 210 U. S. 336, 52 L. ed. 1084, 28 Sup. Ct. Rep. 730; Ford River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; United States v. Congress Constr. Co. 222 U. S. 199, 201, 56 L. ed. 163, 164, 32 Sup. Ct. Rep. 44.

This court is not concluded by the certificate of the court below, but will dismiss the appeal if it appears that the question of the jurisdiction of the court below as a Federal court is not in issue.

C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102; R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

There is no question but that the necessary elements of Federal jurisdiction exist in the present case.

(a) Diversity of citizenship.

Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 606; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Thayer v. Life Asso. of America, 112 U. S. 717, 28 L. ed. 864, 5 Sup. Ct. Rep. 355; Wilson v. Oswego Twp. 151 U. S. 56, 38 L. ed. 70, 14 Sup. Ct. Rep. 259; Frye v. Bank of Illinois, 11 Ill. 372; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Williams v. United States, 138 U. S. 516, 34 L. ed. 1028, 11 Sup. Ct. Rep. 457; Lake Street Elev. R. Co. v. Ziegler, 39 C. C. A. 431, 99 Fed. 120; Story, Eq. Pl. 10th ed. §§ 230, 231.

(b) Subject-matter and jurisdictional amount.

(c) Service of process upon defendants.

Cole Silver Min. Co. v. Virginia & Gold Hill Water Co. 1 Sawy. 470, Fed. Cas. No. 2,989, 7 Mor. Min. Rep. 503.

There is no question but that the case was properly removed from the state court.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Courtney v. Pradt, 196 U. S. 89, 92, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208.

The dismissal of the bill constituted an exercise of jurisdiction on the part of the circuit court.

R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Scully v. Bird, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Illinois C. R. Co. v. Adams, 180 U. S. 28, 36, 45 L. ed. 410, 413, 21 Sup. Ct. Rep. 251; First Nat. Bank v. Klug, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15; Lucius v. Cawthon-Coleman Co. 196 U. S. 149, 49 L. ed. 425, 25 Sup. Ct. Rep. 214; Bien v. Robinson, 208 U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379; Kansas City Northwestern R. Co. v. Zimmerman, 210 U. S. 336, 52 L. ed. 1084, 28 Sup. Ct. Rep. 730.

Mr. Tompkins McIlvaine filed a brief for appellee the Metropolitan Trust Company. It is only when the jurisdiction of a circuit or district court as a Federal tribunal is in issue that an appeal may be taken directly to this court.

Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 178, 179, 55 L. ed. 163, 164, 165, 31 Sup. Ct. Rep. 185; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

The only issue before or decided by the circuit court was whether or not the railway company was an indispensable party. This was a question of general law, applicable to any court of equity, and not peculiar to a Federal court as such, nor involving any issue as to the jurisdiction of the court. It was not a question of whether the circuit court had jurisdiction; it was a question of how it should exercise the jurisdiction that it had.

Shields v. Barrow, 17 How. 130, 141, 15 L. ed. 158, 161; Benner v. Great Northern R. Co. 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; Scully v. Bird, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597.

Mr. Frederick Geller for the Farmers Loan & Trust Company.

Mr. Justice Day delivered the opinion of the court:

This is a direct appeal from a decree of the United States circuit court for the eastern district of New York upon the ground that the jurisdiction of the circuit court is in issue under § 5 of the circuit court of appeals act (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), and a certificate to that effect has been sent to this court.

The suit was originally brought in the New York supreme court for the county of

Queens by Walter B. Lawrence, who has since died, and for whom the appellants have been substituted, against the Southern Pacific Company, Frederick P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company (which we will call the "railroad company"), and the Houston & Texas Central Railway Company (which we will call the "railway company"). Upon the pe-142]tition of the *Southern Pacific Company, Olcott, and the railroad company, the case was removed to the United States circuit court. Lawrence alleged in his complaint that he was a stockholder of the railway company, of which the Southern Pacific Company owned a majority of the stock; that the railway company became involved in various foreclosure suits, to which it set up certain defenses claimed by Lawrence to be valid and sufficient; that the Southern Pacific Company entered into a certain reorganization agreement, whereby, in consideration of the withdrawal of the defenses, which was procured by the Southern Pacific Company, the mortgages were foreclosed and all the property of the railway company bought in by defendant Olcott, who transferred the lines of railroad, rolling stock, etc., to the defendant railroad company, organized pursuant to the agreement; that new bonds were issued by the railroad company to retire the old bonds, and the lands of the railway company, purchased by Olcott, were conveyed to the three trust companies under the new mortgages, defendants herein, as further security for the bonds; and that under the plan the Southern Pacific was given more favorable terms than the minority stockholders in the matter of receiving the benefits of the reorganization agreement, and that consequently all the stock of the railroad company was taken over by the Southern Pacific Company. Lawrence prayed that the Southern Pacific Company be decreed trustee of all benefits received under the plan, and for an accounting, and prayed that the trust companies convey the surplus arising from the sale of land, after the bonds have been liquidated, to the railway company, and for certain other relief.

After the removal of the case to the circuit court, a motion was made to remand to the state court, which was overruled. Thereafter the defendants the Southern Pacific Company, Olcott, and the railroad company 143]filed *a plea in which it was set up that the railway company was a necessary and indispensable party to the suit; that it was beyond the jurisdiction of the court, and could not be brought in by process, and without its presence no decree could be rendered in the case, and therefore prayed that the bill be dismissed. Special pleas were filed by the Central Trust Company of New York, the Farmers' Loan & Trust Company, and the Metropolitan Trust Company of the City of New York.

Thereafter another motion to remand was made. This motion was based upon the ground that the circuit court could not get jurisdiction over the railway company, but that the state court from which it was removed could acquire jurisdiction over all the parties. This motion was also denied by the court.

The pleas to the jurisdiction were heard upon an agreed statement of facts, from which it appears that the railway company was incorporated under a special act of the state of Texas, which contained no limitation upon its corporate existence, and prior to 1885 had operated certain railroads in Texas; that the railway company's property was sold under the foreclosure decree for $7,000,000 less than the amount decreed to be due, and that the deficit was unpaid and uncollectible; that the reorganization had been accomplished; that since the foreclosure sale the railway company has owned no property and has had no place of business in the state of New York; that no meeting of the stockholders or directors has been held since 1890, and that while there are three surviving directors, none of them visit the state of New York upon the company's business. The circuit court held that the railway company was an indispensable party to the suit, and, unless it could be served with process within five days from the date of entering the order, a final decree should be entered dismissing the bill, which was thereafter done.

*The circuit court made a certificate[144 upon which to bring the case here, containing the following questions:

"1. Whether the circuit court had jurisdiction to proceed with the cause, and whether the circuit court had jurisdiction of the cause of action.

"2. Whether the Houston & Texas Central Railway Company was an indispensable party to the action.

"3. Whether, if the Houston & Texas Central Railway Company was an indispensable party to the action, and would not appear therein, and could not be served with process within the jurisdiction of the court, the court thereby lost jurisdiction of the cause of action so that it should dismiss the bill.

"4. Whether, if the Houston & Texas Central Railway Company was an indispensable party, and would not appear, and could

not be served with process within the jurisdiction of this court, the cause should have been remanded to the state court, from whence it was removed."

Appeals may be taken directly to this court from the circuit court under § 5 of the circuit court of appeals act in any case in which the jurisdiction of the circuit court is in issue, and it is provided that in such cases the question of jurisdiction alone shall be certified to this court for decision. The question intended to be thus brought to this court by direct appeal is well settled to be the jurisdiction of the court as a Federal Court. Questions of general jurisdiction, applicable as well to to state as Federal tribunals, are not included in such review. Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185.

The question cannot be brought into the record by certificate if not really presented, and whether so presented this court will determine for itself. R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

The question to be decided is whether the 145]case was dismissed *for the want of jurisdiction in the circuit court as a Federal court; for if it be found that the case was dismissed because of the decision of a question not peculiar to the Federal jurisdiction, and involving only a general question of procedure in equity, this court need not consider it. From what has been stated it is apparent that the case was duly removed because of diverse citizenship, and what was done afterwards was in pursuance of the jurisdiction thus acquired. The defendants, the Southern Pacific Company, Olcott, and the railroad company, by plea claimed that the cause should not proceed because the railway company was an indispensable party to the suit. This, it is contended, presented a question of the jurisdiction of the court as a Federal court, and the dismissal of the suit was the denial of such jurisdiction.

Section 737 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 587) provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are *properly before* it; but the judgment or *decree rendered therein shall* not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity rule 47 is to the same effect.

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the *parties before the court, the[146 court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

While the statute and rule just quoted, to the extent to which they go, are, of course, controlling, neither the rule nor the statute undertakes to define what is an indispensable party, but each merely undertakes to formulate principles already controlling in courts of equity, and applicable as well to other courts as to those of Federal origin. The statute was originally passed in 1839 (5 Stat. at L. 321, chap. 36, U. S. Comp. Stat. 1901, p. 587), and rule 47 of equity practice as adopted by this court, is only a declaration of the effect of the act of Congress. The statute and rule came before this court in Shields v. Barrow, 17 How. 130, 15 L. ed. 158, and, speaking of them, Mr. Justice Curtis, delivering the opinion of the court, said (p. 141):

"The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court in Mallow v. Hinde, 12 Wheat. 198, 6 L. ed. 600, when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'

"So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of Congress, and of

the previous decisions of the court, on the subject of that rule. Hagan v. Walker, 14 147] *How. 36, 14 L. ed. 315. It remains true, notwithstanding the act of Congress and the 47th rule, that the circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court in Elmendorf v. Taylor, 10 Wheat. 167, 6 L. ed. 294: 'If the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach,—as if such party be a resident of another state,—ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree."

In other words, it was declared by this court that the rule as to indispensable parties, without which the court could not proceed to a decree, is equally applicable to all courts of equity, whatever may be their structure as to jurisdiction, and rests upon the broad principle that no court can adjudicate directly upon a person's rights unless such person is actually or constructively before the court.

What the court really did in the present case was, first, to entertain jurisdiction of the suit upon the removal; and then, applying the general principle that a suit cannot be proceeded with in the absence of an indispensable party, to dismiss it because the railway company was an indispensable party to the present suit, and had not been served, and had not appeared or waived service, as would have been the requirement in any court of equity reaching the same conclusion.

Nor does the decision embodied in the fourth paragraph of the certificate and shown in the decision of the court make a question of jurisdiction of the court as a Federal court. As therein embraced the decision was that the cause should be dismissed for want of jurisdiction, and not 148] *that it should be remanded to the state court. This decision was to the effect that the court, having reached the conclusion, in the exercise of jurisdiction, that an indispensable party was not upon the record, ordered a dismissal of the action. This did not involve a decision of the jurisdiction of the court as a Federal tribunal.

We therefore are of the opinion that in no aspect in which the jurisdictional question was presented to this court is it reviewable by a direct appeal to this court from the circuit court. The present appeal is therefore dismissed.

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MANLEY ETTOR and Mary T. Ettor, Plffs. in Err.,
v.
CITY OF TACOMA and Chicago, Milwaukee, & St. Paul Railway Company. (No. 68.)

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EDWIN HOWARD and Emma Howard, Plffs. in Err.,
v.
CITY OF TACOMA and Chicago, Milwaukee, & St. Paul Railway Company. (No. 69.)

(See S. C. Reporter's ed. 148-158.)

**Constitutional law — vested rights — compensation for municipal injury to property.**

The right of abutting owners to compensation for consequential damages arising from an original street grading under municipal direction, given by Wash. Laws 1893, p. 189, and Laws 1907, p. 316, which are the sole legislative authority for the municipal action, is a vested property right protected by U. S. Const., 14th Amend., from destruction by a repeal of the compensatory provision after the damage is done.

[For other cases, see Constitutional Law, IV. e, in Digest Sup. Ct. 1908.]

[Nos. 68 and 69.]

Argued December 6, 1912. Decided April 7, 1913.

TWO WRITS OF ERROR to the Supreme Court of the State of Washington to review judgments which affirmed judgments of the Superior Court of Pierce County, in that state, directing verdicts in favor of a municipality in actions to recover damages for injuries to abutting property from an original street grading done under municipal authority. Reversed and remanded for further proceedings.

See same case below, No. 68, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; No. 69, 57 Wash. 698, 106 Pac. 481, 107 Pac. 1064.

The facts are stated in the opinion.

Mr. Stanton Warburton argued the cause, and, with Messrs. John M. Boyle, E. B. Brockway, and C. M. Boyle, filed a brief for plaintiffs in error:

Whenever rights growing out of a state

NOTE.—On damage to abutting owner by first grading and improvement of street—see note to Hickman v. Kansas City, 22 L.R.A. 658.

statute are alleged to be within the protection of the Federal Constitution, and to have been defeated by subsequent state action, the Supreme Court of the United States will determine for itself, and independently of the ruling of the state court, as to the nature of such rights conferred by the original statute, and as to whether or not such rights are in fact within the Federal Constitution.

Jefferson Branch Bank v. Skelly, 1 Black. 431, 17 L. ed. 173; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

The Supreme Court of the United States will accept the holding of the state court as to what the legislature intended by the amendatory act of 1909. If the legislative intent so determined involved a deprivation of property without due process of law, or the violation of a contract, then the amendment is void, though this court might not originally have adopted such interpretation of the amendment.

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755.

A vested right of action is property, and as much protected by the 14th Amendment as land or money.

Cooley, Const. Lim. 4th ed. p. 449; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240.

In discussing the question as to how far a right of action given by a statute can be affected by a subsequent repeal of the statute, it may be admitted that there is authority for the holding that penalties unrecovered when the statute giving them is repealed fall with the statute. But these cases are based on the theory that a penalty is a peculiar form of obligation or punishment imposed by the sovereign, and whether by virtue of the particular statute imposing the penalty, or by reason of the very fact that it is in the nature of a punishment, may be remitted by the sovereign which imposed it. Therefore, any right to the penalty prior to its actual collection from the wrongdoer must be necessarily inchoate, and subject to this power of remission. Furthermore, in the only case in which this court had upheld such doctrine, the court has deemed it necessary first to determine that *the particular* statute imposing the penalty itself contained authority for its remission by the government.

United States v. Morris, 10 Wheat. 246, 6 L. ed. 314; Confiscation Cases, 7 Wall. 454, 19 L. ed. 196.

But even if this rule is well founded, it has no application here, for whatever else the law of 1907 may have been, it certainly was not a statute imposing a penalty.

So, also, there are cases of curative statutes, held to violate no vested right, though they operate retrospectively. But these are cases of mere irregularity which might be cured by the state, and where the right claimed to be vested was inequitable in its nature, and became vested, as stated by Chancellor Kent, subject to the equity existing against them, and which the statutes recognized and enforced.

1 Kent. Com. 12th ed. pp. 456, 517.

And as further observed by the same eminent authority at the same place, such cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles. And surely no one can seriously contend that the act of 1909 is a curative or ratification statute, or that if it were, the rights already accrued and which it is claimed to devest, contain any element of inequity. On the contrary, they are most just and equitable.

Though the form of statute may be remedial, yet if the rights therein given are in truth substantive, the subsequent repeal or amendment of the statute will not affect rights existing under the statute.

Barnitz v. Beverly, 163 U. S. 119, 41 L. ed. 94, 16 Sup. Ct. Rep. 1042.

And this same rule applies where the statute repealed declares that one shall have a right of recovery. The substantive right involved persists after the repeal.

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805.

Under the best of authorities and reason even a right of action which exists solely because a statute declares it shall come into being on certain contingencies becomes, on the happening of such contingency, a vested right and "property" which cannot be taken away without due process of law. But when, as in the case at bar, the right of action exists, not merely because the statute declares it shall exist, but because the defendants have violated a statute to our damage, then such a right of action is "property" and protected by the 14th Amendment.

Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 291, 27 L. ed. 938, 3 Sup. Ct. Rep. 211; Kent, Com. 4th ed. pp. 455, 514, 515; Dash v. VanKleeck, 7 Johns. 477, 5 Am.

Dec. 291; Graham v. Chicago, M. & St. P. R. Co. 53 Wis. 473, 10 N. W. 609; Endlich, Interpretation of Statutes, § 481; Miller v. Union Mill Co. 45 Wash. 199, 88 Pac. 130.

In addition to the platting and annexation of the street while this statute was in force, there is the additional fact that these plaintiffs in error purchased the property while the statute was still the law, and were its owners when the annexation took place. And, taking this additional fact into account, we have a recent decision of this court exactly in point.

Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

Plaintiffs in error have a contractual right to compensation, growing out of the fact that the original statute was in force at the time of the authorization and completion of the grade.

Healey v. New Haven, 49 Conn. 394; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805.

The law as to compensation for street improvements is the law governing the property at the time the work is finally authorized and done, rather than the law governing the street when the negotiations concerning the improvement were commenced. And this regardless of whether the law became different by an annexation of the property pending the negotiations for the improvement, or by a change in the law itself.

Triest v. New York, 193 N. Y. 525, 86 N. E. 549; Healey v. New Haven, 49 Conn. 394; Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146; St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54; Gilpin v. Ansonia, 68 Conn. 72, 35 Atl. 777; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509.

Mr. **Heman H. Field** argued the cause, and, with Messrs. George W. Korte and T. L. Stiles, filed a brief for defendants in error:

The state of Washington, through the decision of its court of last resort, adheres to the doctrine that the dedication of land to public use for a street, as a plat, constitutes an agreement on the part of the dedicator that the public may thereafter do what is necessary in the way of grading or filling to make a passable street, without liability to abutting landowners for consequential damages.

Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843; Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

In taking that position it followed the principles announced by this court in Smith v. Washington, 20 How. 135, 15 L. ed. 858; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173, could only become applicable when it should be held that the 47th section of the act of 1893 made a contract between the state of Washington and all land holders and lot owners (which should be irrevocable) that no street grade could be made in front of their property without the payment of consequential damages.

The same remarks apply to Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; and Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. 199.

The repeal of a statute creating a right of action, without a saving clause, takes away all right to proceed, and the repealed act is considered as if it had never existed except for the purpose of those actions or suits which have been prosecuted and concluded while it was an existing law. This is axiomatic, so that it is held that a repeal after decision, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to a higher court charges the appellate court with the duty of declaring the litigation ended without right of further prosecution.

Vance v. Rankin, 194 Ill. 625, 88 Am. St. Rep. 173, 62 N. E. 807; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Cooley, Const. Lim. 7th ed. 544; 2 Sutherland, Stat. Constr. 2d ed. 285; Endlich, Interpretation of Statutes, ¶¶ 478–480; 22 Am. & Eng. Enc. Law, 745, 752; Hampton v. Com. 19 Pa. 329; Sumner v. Cummings, 23 Vt. 427; Taylor v. Strayer, 167 Ind. 23, 119 Am. St. Rep. 469, 78 N. E. 236; Anding v. Levy, 57 Miss. 58, 34 Am. Rep. 435; Reilly v. Ft. Dodge, 118 Iowa, 633, 92 N. W. 887; Cope v. Hampton County, 42 S. C. 17, 19 S. E. 1018.

Mr. Justice **Lurton** delivered the opinion of the court:

These were actions to recover for damage inflicted upon abutting property in consequence of an original street grading done by the railroad company under authority and direction of the city of Tacoma.

At the time the grading was done there was in force an act of the Washington legislature which required the city *to[150 make compensation for consequential damages due to an original street grading. Pending these suits, and while they were actually being heard, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage was amended so as to pro-

vide that the act should not apply to the original grading of any street. Laws of Washington, 1907, p. 316, and Laws of 1909, p. 151. When the attention of the trial court was called to this repealing act, it directed a verdict for the city upon the theory that the right of action was statutory and fell with the statute, there being no saving clause. This judgment, upon the same ground, was affirmed by the supreme court of the state.

For the plaintiffs in error the contention, shortly stated, is, that the act of 1907 was the sole legislative authority of the city for making the cuts and fills in front of their premises upon the public street, and that that act expressly required the city to make provision for compensating an owner so damaged; and that their right to such compensation, having accrued while the act was in force, cannot be destroyed by subsequent legislation without a violation of the rights guaranteed by the 14th Amendment.

In the absence of legislation requiring compensation for such damage the general rule of law is that a municipality, in making, grading, and improving streets, is the agent of the state, exercising in the performance of such work a governmental power, and is not liable for consequential injuries to property abutting, if it keep within the street, and use reasonable care and skill in doing the work. 4 Dill. Mun. Corp. 5th ed. §§ 1674, 1677; Smith v. Washington, 20 How. 135, 15 L. ed. 858; Northern Transp. Co. v. Chicago, 99 U. S. 635, 641, 25 L. ed. 336, 338; Humes v. Knoxville, 1 Humph. 403, 34 Am. Dec. 657. This was the general law as announced by the supreme court of Washington in its first opinion in the case of Fletcher v. 151]Seattle, 43 *Wash. 627, 86 Pac. 1046, 88 Pac. 843, and is the general law of the state, as announced by the court's opinion in the instant case. Where the benefits equaled the injury, there was, of course, no injustice in the application of the general rule. But where the damage exceeded the benefits, there was an apparent injustice in casting upon such an owner an undue share of the cost of an improvement for the public benefit. This was recognized in Northern Transp. Co. v. Chicago, supra, where municipal nonliability was said to be due to the fact that in improving its highways the municipality was but the agent of the state, and that, as the state could not be sued, its agents were equally immune for improvements authorized by the law of the state, without the consent of the state. But this equity which exists when the benefits are less than the damage affords a strong foundation for legislation requiring compensation in such circumstances. This consideration doubtless led to the legislation of the state, requiring compensation for such damage, under which the rights of the plaintiffs in error are asserted.

Whatever may have been the authority of the city of Tacoma under its charter or the general law of the state, to take or damage property for the purpose of opening, making, improving, or grading its public streets, and its immunity from liability for consequential damages in making an original grading, prior to the legislation found in the two acts of 1893 and 1907, Laws of Washington, 1893, p. 189, and Laws of 1907, p. 316, it is plain that the acts in question cover the whole subject of its authority and its liability for taking private property or "damaging" it, in either making, grading, or regrading its public streets. The two acts referred to are identical in every essential. The latter is a mere re-enactment of the first, by which its provisions are extended to a larger class of municipal corporations.

The act of 1893 was construed and applied by the *supreme court of the state in[152 Fletcher v. Seattle, supra. The action was by the owner of premises which had sustained damage while the act was in force, in consequence of an original grading. He recovered a judgment, which, upon a first hearing, was reversed by the supreme court, that court holding that consequential damages arising from an original grading, when the work had been done with due care, was neither a taking nor a damaging of private property within the meaning of the Constitution of the state, requiring compensation for taking or damaging private property for public purposes. But, upon a rehearing, the attention of the court was for the first time called to the act of 1893, and the contention advanced that the only authority of the city to take or damage the property of the plaintiff for the purpose of grading the street was under that act, and that, by its terms, the city was required to make compensation for damage arising from an original grading. The construction of that act upon facts like those in the present case was thereby directly involved. It was urged that the 47th section did not require compensation for consequential damages, but in answer to this, the court said:

"We think the word 'damages' used in the section [the 47th] has the same significance and meaning that it has in other sections of the same act, and that it was used in its broad sense and includes consequential damages. We see no reason

why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections; and if it does, the right of compensation is equally granted.

"It was said that the title of the act shows that it is legislation concerning the exercise of the right of eminent domain, but we think the title is sufficient to cover 153]the *section objected to equally as well as the other sections in the act, and it was evidently the intention of the legislature to pass an act covering the whole subject of opening streets, and of providing methods of making compensation for damages where damages followed. The title not only provides for the exercise of the right of eminent domain, but, also, the taking and damaging of land and property for public purposes; and § 1 of the act empowers the city to condemn and also empowers it to *damage* any land or other property for the purpose of opening streets. Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property, *or damage the same*, for any purpose authorized by this act, such city shall provide, etc. In this case the city had the power to damage the respondents' land, and it was found that it did damage it, and it damaged it in a way that it was authorized by § 47 of this act; namely, by establishing a grade on the street upon which their property abutted. And this idea is manifested throughout the act. That the section does not contemplate such damages as are caused by an encroachment or actual trespass upon the lands of the owner, as is suggested by the appellant, is manifest from the language of the section itself, which evidently contemplates that the work will be upon the street, and not upon the abutting property.

"We are unable to find any more ambiguity in this section than in any other provision of the act; and under its provisions the plaintiffs are entitled to such damages as they can show they have suffered. The question of public policy and expense to the city are questions which are purely legislative."

The judgment of the lower court was thereupon affirmed.

The opinion so construing the act of 1893 was filed in September, 1906. In March, 1907, the act of 1893, then in force, was extended to a larger class of cities and 154]re-enacted, *without any change in any material respect, the 1st, 2d, and 47th sections being re-enacted, the 47th section becoming in the later act § 48. While this act of 1907 was in force, the city directed the grading in question, and made or caused the railroad company to make cuts and fills in the street in front of the premises of the plaintiffs in error, which resulted in large injury to their property. The city did not provide for compensation for the damage so done by any special assessment upon the property benefited. This brought into effect the provision of the 2d section, requiring the payment of such damage to be made out of the general funds of the city. Payment not having been made as required, the plaintiffs in error brought these actions to recover compensation.

The defense of the city, that it was but the agent of the state in improving the highways of the city, and therefore immune, because the state was immune, vanishes in the face of the fact that the state had absolutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed an obligation. It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by subsequent legislation.

Neither of the acts provided any remedy for the enforcement of the obligation to make compensation. Both provided that the city might by ordinance arrange for the ascertainment of the damages, and for their collection by special assessment on the property benefited, or within a special assessment district. But the plain requirement of the 1st and 2d sections of both acts is that if the city does not so provide for special assessments, that it should make the compensation out of its general treasury. The repealing clause of the act of 1909 does not touch the *general[155 features of the law beyond the provision that the 48th section of the act, which extended the obligation of compensation to original gradings, should not apply to damage arising from such gradings. It is a mistake to say that the act of 1907 gave a remedy where none existed before. What it did was to impose an obligation to compensate abutters injured by an original grading,—an obligation which, however meritorious, had no sanction in positive law. The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. That was the remedy which was enforced by the Washington court in Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843.

Statutes concerning remedies are such as

relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislation does not exceed its authority. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So, also, a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. That the state court has treated the act of 1907 as merely giving a remedy where none existed before, and the act of 1909, as merely repealing the remedy so given, is plain.

The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the 156]city was as much under obligation *to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation. Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; Healey v. New Haven, 49 Conn. 394; Harrington v. Berkshire, 22 Pick. 263, 33 Am. Dec. 741; People ex rel. Fountain v. Westchester County, 4 Barb. 64, are cases arising under street or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law. Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Miller v. Union Mill Co. 45 Wash. 199, 88 Pac. 130; Grey v. Mobile Trade Co. 55 Ala. 388, 28 Am. Rep. 729; Stephens v. Marshall, 3 Pinney (Wis.) 203; Gorman v. McArdle, 67 Hun, 484, 22 N. Y. Supp. 479; Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Creighton v. Pragg, 21 Cal. 115; State Trust Co. v. Kansas City, P. & G. R. Co. 115 Fed. 367.

Certain cases have been cited in support of the action of the state court, among them Yeaton v. United States, 5 Cranch, 281, 3 L. ed. 101. But that was a case of a forfeiture to the United States. The repeal of the statute was held to end the proceeding, although a sentence had been pronounced and was pending upon appeal when the act under which it had been entered was repealed. No private right had *vested,[157 and the government could abandon its own proceeding, if it saw fit, at any stage. Another case cited is East Saginaw Salt & Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L. ed. 611. For the purpose of encouraging the manufacture of salt, the state of Michigan, by a general statute addressed to no particular person or corporation, offered a bounty upon salt produced, and exempted from taxation the property engaged in the business. After a time the act was repealed. The claim was that the exemption constituted a contract, and that it could not be repealed without impairing the obligation of the contract. But this court said that the exemption did not constitute a contract, and was nothing more nor less than a law dictated by public policy for the encouragement of an industry. So long as the law was in force, the state promised the exemption and bounty; but there was no pledge that it should not be repealed at any time. In Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 385, 387, 48 L. ed. 229-232, 24 Sup. Ct. Rep. 107, the case was said to point out the distinction between "an exemption in a special charter and general encouragement to all persons to engage in a certain enterprise;" and the same principle was applied to an act which provided an exemption to any corporation building a line of railroad north of certain lines of latitude. The court held that it was addressed to no one in particular, and constituted a mere announcement of policy not constituting a contract, and was therefore subject to repeal at any time. The case of Louisiana ex rel. Folson v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211, has been cited. That case merely held that a judgment against the city under a statute for damage to private property, inflicted by a mob, did not constitute a contract, the obligation of which had been impaired by the repeal of a statute under which the city might have been compelled to levy a special tax for its satisfac-

tion. The case turned upon the distinction between liability for a tort and liability under a contract.

In the instant case the action is neither 158]for a tort, nor *for a penalty, nor for a forfeiture, but for injury to property, actually accomplished before the repeal of the law under which the street was graded, which required compensation to be made. The right to compensation was a vested property right.

The judgments must be reversed and the cases remanded for further proceedings not inconsistent with this opinion.

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UNITED STATES, Appt.,
v.
READING COMPANY et al. (No. 198.)

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TEMPLE IRON COMPANY, Appt.,
v.
UNITED STATES. (No. 206.)

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READING COMPANY et al., Appts.,
v.
UNITED STATES. (No. 217.)

(See S. C. Reporter's ed. 158-160.)

**Appeal — judgment — mandate — modification.**

A mandate ordering the remand of the cause, with direction to enter a decree canceling every percentage coal contract referred to in the pleadings, held by any of the parties, modified so as to exclude from cancelation the contracts described in the petitions praying for such modification.

[For other cases, see Appeal and Error, IX. k, in Digest Sup. Ct. 1908.]

[Nos. 198, 206, and 217.]

Submitted January 28, 1913. Decided April 7, 1913.

PETITIONS for the modification of a mandate of the Supreme Court of the United States, which had affirmed in part and reversed in part a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, granting in part the relief sought by a bill seeking to enjoin an alleged combination of railroad and coal mining properties, as amounting to an unlawful restraint of interstate commerce. Mandate modified as prayed.

See ante, 243.

Mr. Adelbert Moot for the Hillside Coal & Iron Company.

Messrs. William S. Jenney and John G. Johnson for the Delaware, Lackawanna, & Western Railroad Company.

Messrs. Gilbert Collins and William H. Corbin for the New York, Susquehanna, & Western Coal Company.

Mr. George F. Brownell for the Pennsylvania Coal Company.

Mr. Frank H. Platt for the Elk Hill Coal & Iron Company.

Attorney General Wickersham and Messrs. J. C. McReynolds and G. Carroll Todd, Special Assistants to the Attorney General, for the United States.

Order announced by Mr. Justice Lurton:

This cause came on again to be heard upon five several petitions filed by the Pennsylvania Coal Company, the Elk Hill Coal & Iron Company, the New York, Susquehanna, & Western Coal Company, Hillside Coal & Iron Company, and the Delaware, Lackawanna, & Western Railroad Company, parties to the cause as alleged holders of 65 per cent coal contracts, praying that the direction in the opinion heretofore filed, that the cause should be remanded, with direction to enter a decree canceling each and every of the 65 per cent contracts referred to in the pleadings, held by any of the parties to the cause, and for a modification of the mandate so as to exclude from cancelation the five several contracts described and referred to in the said five separate petitions.

And it appearing that the United States, by its Attorney General, has answered the several petitions, and that in respect to that of the Pennsylvania Coal Company assents to the petition, and consents that such modification be made as to dismiss the bill in so far as it is thereby sought to cancel the contract between the Pennsylvania Coal Company and the Elk Hill Coal & Iron Company of March 1, 1902, referred to in the petition of the Pennsylvania Coal Company, upon the concession that the agreement "is substantially different from the series of agreements known as the 65 per cent contracts adjudged unlawful by this court," it is accordingly so ordered.

*As to the application of the four[160 other petitioners named above for like relief, the United States denies and contests the right of each; contending that in substance and principle the facts in respect of each of the contracts in respect of which relief is sought, are not similar to the contract between the Pennsylvania Coal Company and the Elk Hill Coal & Iron Company, but fall within the general series of the 65 per cent contracts condemned by the judgment of this court.

Upon this issue the transcript in confus

ing and the briefs inadequate. The court therefore deems it wise, in the exercise of its judgment, to decline any determination of the question upon the present record. It is therefore ordered that the mandate of this court be so modified as to exclude from the direction to cancel the 65 per cent contracts referred to in the pleadings the said contracts mentioned in the four petitions, namely, that of the Elk Hill Coal & Iron Company, the New York, Susquehanna, & Western Coal Co., Hillside Coal & Iron Company, and the Delaware, Lackawanna, & Western Railroad Company, and that the cause, so far as concerns the contracts of the said petitioners, be remanded to the District Court with direction to hear and determine the merits as presented by said petitioners, and make such decree as law and justice require.

Mr. Justice Day, Mr. Justice Hughes, and Mr. Justice Pitney did not participate in the original case, nor in the making of this order.

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161] *CHARLES S. HOUGHTON, Receiver, etc., Appt.,
v.
WILLIAM H. BURDEN.

(See S. C. Reporter's ed. 161-172.)

**Appeal — to circuit court of appeals — bankruptcy cases.**

1. A voluntary intervention in bankruptcy proceedings for the purpose of asserting a title or claim to property in the possession of the trustee in bankruptcy is an intervention in equity, and the decree thereon is reviewable by appeal to the circuit court of appeals in the exercise of its general appellate powers in equity cases, under the bankrupt act of July 1, 1898 (30 Stat. at. L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 24a, and upon such appeal the law and the facts are open for reconsideration.

[For other cases, see Appeal and Error, III. c; VIII. 1, 1, in Digest Sup. Ct. 1908.]

**Appeal — from circuit court of appeals — bankruptcy case — review of facts.**

2. An appeal to the Federal Supreme Court under the bankrupt act of July 1, 1898, § 24a, from a decree of the circuit court of appeals in a controversy arising in a bankruptcy proceeding, opens up the whole case, as in other equity cases, general orders in bankruptcy, No. 36, issued under § 25b of that act, requiring a finding of facts, having no application.

[For other cases, see Appeal and Error, V. o; VIII. 1, 1, in Digest Sup. Ct. 1908.]

**Usury — what constitutes — compensation for lender's services.**

3. A contract for a loan at the legal interest rate on the security of book accounts, the borrower agreeing to collect as agent for the lender, and to guarantee the payment of each account so assigned, is not usurious on its face because the lender is to be paid 1 per cent a month upon the amount of uncollected accounts at the end of each month, as compensation for his services in watching the shipping receipts and making monthly examination of the borrower's books, as he is required to do by an indemnity bond, guarantying the validity of the assigned accounts, and the payment over of the collections made by the borrower.

[For other cases, see Usury, I. a, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — usury.**

4. The defense of usury to a suit upon a contract fair on its face must be established by clear and satisfactory evidence.

[For other cases, see Evidence, II. k; XII. i, in Digest Sup. Ct. 1908.]

[No. 591.]

Argued January 7, 1913. Decided April 7, 1913.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the District Court for the Southern District of New York, dismissing a petition in intervention in bankruptcy proceedings. Affirmed.

See same case below, 113 C. C. A. 562, 193 Fed. 934.

The facts are stated in the opinion.

Mr. Jacob B. Engel argued the cause, and, with Mr. Jacob John Lazaroe, filed a brief for appellant:

The facts found by the special master and confirmed by the district judge were conclusive on the circuit court of appeals.

Campbell v. United States, 224 U. S. 99, 56 L. ed. 684, 32 Sup. Ct. Rep. 398; Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96.

Manifestly, if the appellee had commenced an action on the facts recited in his petition, as he had a right to do, his only remedy would be an action at law for trover or conversion. Under no circumstances appearing in this record did his cause of action lie in equity; had the appellee attempted to frame his complaint in equity, he would have been

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NOTE.—On the appellate jurisdiction of the Federal Supreme Court in bankruptcy cases, see note to James v. Stone & Co. ante, 573.

On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

*On evidence of usury—see note to Levy v. Gadsby, 2 L. ed. U. S. 404.*

defeated under the laws of the state of New York by the plea that he had an adequate remedy at law.

Bradley v. Aldrich, 40 N. Y. 510, 100 Am. Dec. 528.

Where the matters in controversy are of legal, as distinguished from equitable, cognizance, the right of the parties to a trial by jury is expressly preserved by the bankrupt act.

Re Baudouine, 41 C. C. A. 318, 101 Fed. 574; Re Russell, 41 C. C. A. 323, 101 Fed. 248.

In the matter at bar the appellee had the option of commencing suit either in a United States or state court to recover the moneys collected by the receiver. He elected to proceed by intervening in the bankruptcy proceedings, thus creating a controversy in a bankruptcy proceeding, which has been defined as those independent or plenary suits which concern the bankrupt's estate.

Knapp v. Milwaukee Trust Co. 216 U. S. 553, 54 L. ed. 613, 30 Sup. Ct. Rep. 412; Re Mueller, 68 C. C. A. 349, 135 Fed. 711; Re Farrell, 100 C. C. A. 63, 176 Fed. 505.

But the suit or matter in controversy retains its character of legal or equitable cognizance according to the nature of the controversy involved, and as the case at bar rests in law, it was triable in the district court by a jury; and not having been so tried, it was in the nature of a submission to an arbitrator, and not the mode of trial contemplated by law.

Campbell v. United States, 224 U. S. 99, 56 L. ed. 684, 32 Sup. Ct. Rep. 398.

The special master having found certain facts which were confirmed by the United States district court, the circuit court of appeals should not have reversed the judgment and order entered thereon unless the findings of fact were clearly erroneous, or clearly against the weight of evidence.

Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Ohio Valley Bank Co. v. Mack, 24 L.R.A.(N.S.) 184, 89 C. C. A. 605, 163 Fed. 155.

The preponderance of evidence was in favor of sustaining the findings of the master.

Quackenbos v. Sayer, 62 N. Y. 345.

It is not only apparent that parol evidence was properly admitted, but that appellee's claim was properly rejected.

Mercantile Trust Co. v. Gimbernat, 134 App. Div. 410, 119 N. Y. Supp. 103; Wilmarth v. Heine, 137 App. Div. 528, 121 N. Y. Supp. 677; Knickerbocker L. Ins. Co. v. Nelson, 7 Abb. N. C. 180; DeWolf v. Johnson, 10 Wheat. 385, 6 L. ed. 348; Vilas v. McBride, 62 Hun, 324, 17 N. Y. Supp. 171; Massa v. Dauling, 2 Strange, 1243; Scott v. Lloyd, 9 Pet. 418, 9 L. ed. 178; Tucker v. Wilamouicz, 8 Ark. 157; Train v. Collins, 2 Pick. 145; Denyse v. Crawford, 18 N. J. L. 325; Grayson v. Brooks, 64 Miss. 410, 1 So. 482.

The fact that the contract is in writing does not exclude oral evidence to show that though apparently innocent, it was usurious.

Koehler v. Dodge, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913; Rohan v. Hanson, 11 Cush. 44.

Take the ordinary promissory note, which is a contract or instrument to pay a certain sum of money for a consideration, or for value received, as therein expressed. The note itself is the written and binding obligation between the parties, and it has been repeatedly held that oral testimony could be introduced to show the relations between the parties and the agreement made with respect to the payment of usurious interest, even though the note on its face contained a provision for the payment of legal interest.

Roe v. Kiser, 62 Ark. 92, 54 Am. St. Rep. 288, 34 S. W. 534; McAleese v. Goodwin, 16 C. C. A. 387, 32 U. S. App. 650, 69 Fed. 759.

A contract may not necessarily be usurious on its face; the burden is on the one contesting it upon the ground of usury to prove the guilty intention and that the contract was a cover for usury and for the loan of money upon usurious interest.

Rosenstein v. Fox, 150 N. Y. 354, 44 N. E. 1027.

On these questions oral, extrinsic, and circumstantial evidence is freely received.

Thomas v. Murray, 32 N. Y. 605; Valentine v. Conner, 40 N. Y. 248, 100 Am. Dec. 476.

Mr. John J. Crawford argued the cause and filed a brief for appellee:

The case was a proceeding by intervention in the bankruptcy court, and it is well settled that in such a proceeding the case may be taken to the circuit court of appeals by an appeal (Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690), and an appeal opens both fact and law.

Duryea Power Co. v. Sternbergh, 218 U. S. 299, 302, 54 L. ed. 1047, 1048, 31 Sup. Ct. Rep. 25.

All of the testimony upon which the appellant relies to sustain his contention is incompetent and should be disregarded.

Thurston v. Cornell, 38 N. Y. 281; Matthews v. Coe, 70 N. Y. 239, 26 Am. Rep. 583; Bennett v. Ginsberg, 141 App. Div. 66, 125 N. Y. Supp. 650; Marvine v. Hymers, 12 N. Y. 223; Lossing v. Cushman, 195 N. Y. 390, 88 N. E. 649; Potter v. Tallman, 36 Barb. 183.

Even if the testimony as to the oral declarations of the appellee is deemed competent, the evidence was insufficient to meet the burden of proof.

White v. Benjamin, 138 N. Y. 624, 33 N. E. 1037; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Rosenstein v. Fox, 150 N. Y. 354, 44 N. E. 1027; Matthews v. Coe, 70 N. Y. 243, 26 Am. Rep. 583; Re Samuel Wilde's Sons, 133 Fed. 562; Klein v. Title Guaranty & Surety Co. 166 Fed. 365.

Whether or not the transaction was usurious depends upon Burden's intent.

Thurston v. Cornell, 38 N. Y. 281; Davis v. Marvine, 160 N. Y. 269, 54 N. E. 704.

Burden had the right to exact pay for his time and services in addition to the interest on the money advanced.

Thurston v. Cornell, 38 N. Y. 281; Bennett v. Ginsburg, 141 App. Div. 66, 125 N. Y. Supp. 650; Matthews v. Coe, 70 N. Y. 239, 26 Am. Rep. 583.

The presumption that the writing does express the true intent of the parties is always a strong one.

Nevius v. Dunlap, 33 N. Y. 680.

The rules respecting proof of usury are quite as strict as those respecting proof of fraud, if not more so.

White v. Benjamin, 138 N. Y. 624, 33 N. E. 1037.

Mr. Justice Lurton delivered the opinion of the court:

This is an appeal from a decree determining a controversy arising in a bankruptcy proceeding. The origin of the matter was this: Canfield, the bankrupt, was a merchant in New York. He borrowed from Burden the sum of $10,000, and as security assigned to him certain book accounts, aggregating the sum of $14,000, and agreed to act as agent for Burden in their collection. Shortly afterwards he was adjudicated a bankrupt. The receiver obtained possession of the bankrupt's books and held onto the assigned accounts, and proceeded to collect them upon the claim that the contract was usurious and void under the law of New York.

In this situation Burden intervened in the Bankruptcy case and filed a petition, in which he asserted his title to the assigned accounts and to any proceeds collected by the receiver. The district court, upon a final hearing, upheld the contention of the bankrupt's receiver, now the trustee, and dismissed the intervening petition. This decree was reversed by the circuit court of appeals, that court holding that the defense of usury had not been satisfactorily made out.

The appellant contends that the controversy having been heard by the district judge without a jury, the circuit court of appeals had no authority to review the facts. For this, § 566, Revised Statutes (U. S. Comp. Stat. 1901, p. 461), is cited, and also the case of Campbell v. United States, 224 U. S. 99, 56 L. ed. 684, 32 Sup. Ct. Rep. 398, which construes that section. But that provision only requires that the trial of issues of fact in the district court, except in cases in equity and admiralty, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. But the district court is, by § 2 of the bankrupt act of 1898 [30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1491], when sitting *as a bankrupt court, given ju- [165 risdiction in law and equity for the purpose of collecting and distributing the estate of a bankrupt, and for the purpose of determining controversies relating thereto, except as otherwise provided. The exception has no application here, as Burden voluntarily came into the bankrupt proceeding and submitted his claim to the adjudication of the bankrupt court. Such an intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an intervention in equity, and a decree is reviewable by appeal to the circuit court of appeals in the exercise of its general appellate powers in equity cases under § 24a of the bankrupt act. Loveland, Bankr. 4th ed. §§ 826 to 829; Hewit v. Berlin Mach. Works, 194 U. S. 296, 300, 48 L. ed. 986, 987, 24 Sup. Ct. Rep. 690; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412. Upon such an appeal the law and the facts are open for reconsideration, and from the decree of the circuit court of appeals, it not being final (§ 128, new Judicial Code [36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193]), an appeal may be taken under § 241 of the same Code.

Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore, an appeal under § 24a, and not under § 25b, general order 36, made under the latter section, and requiring a finding of facts, has no application, and the appeal opens up the whole case as in other equity cases. Hewit v. Berlin Mach. Works, supra; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008, and Knapp v. Milwaukee Trust Co. supra.

Coming now to the merits. The single question is one of usury in the contract. The lawful rate of interest in New York is 6 per cent. By § 373 of the general business law of New York it is provided:

"All . . . contracts . . . whatsoever . . . whereupon or whereby there

shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or for-
166 ]bearance of any money, *goods, or other things in action, than is above prescribed, shall be void."

Canfield was a reputable merchant engaged in business in New York. Burden was a retired merchant and an experienced accountant, who wished to secure light employment. To secure such employment he advertised that he would lend from $10,000, to $20,000, at 6 per cent, to a merchant whose rating was good, if the loan would secure such employment. Through a broker, compensated by Canfield, negotiations were opened with Burden, who proposed the loan provided he could get light employment in Canfield's office as a financial man. But the financial statement of Canfield exhibited to Burden was nearly a year old, and this did not satisfy Burden, and the negotiations fell through partly for that reason, and partly because the parties could not agree upon the position Burden desired. Some weeks later the negotiations were resumed, the broker saying that he might get additional security through an indemnity bond, by which the validity of the book accounts which were agreed to be assigned might be guaranteed as well as the payment of collections made by Canfield as agent. Canfield agreed to furnish such a bond. The proposed bond required the obligee to watch the shipping receipts and to make monthly minute examinations of Canfield's books, showing the several assigned accounts. Finding this requirement to be a condition of such a bond, Burden demanded that he should be compensated for the service he would be required to render to keep the bond in force, and a compensation of 1 per cent per month upon the amount of the uncollected accounts at the end of each month was agreed upon. Thereupon the contract in question was executed, a bond of indemnity was given to Burden, and something like 100 accounts, aggregating about $14,000, were duly assigned, upon which an advance of $10,000 was made.

The contract is elaborate and too lengthy
167 ]to be set out *in full. In substance it provided for a loan of $10,000 at 6 per cent upon assigned accounts against reputable merchants, the loan not to exceed 75 per cent of the face value of the accounts. Canfield agreed to act as burden's agent in collecting, and to guarantee the payment of each account so assigned. The contract also provided that after the payment of the money borrowed and interest, and costs and expense of collection, and the compensation to Burden for his services as required by the bond, the remaining accounts should be reassigned to Canfield. The clause in regard to this compensation gives rise to the claim of usury. It was in these words:

"The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity & Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing 1 per cent per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain uncollected."

The indemnity bond, styled an "assigned-accounts bond," is in the usual form, and is undoubtedly a device resorted to, to enable merchants to use book accounts as collateral for money advanced or loaned. The principal condition was in these words:

"The obligee shall require the principal to state in writing at the time of assigning each account the date when the payment of such account is due, and if the payment of any account is not made within twenty days of the date that such payment is due, the obligee shall immediately thereupon make demand by registered mail upon the debtor for the amount due. The obligee shall require the principal to file with the obligee in connection with each account a certificate signed by a responsible *official[168 or employee of the principal, stating that the account referred to in the certificate represents a bona fide sale, and that the merchandise concerned with the account has, prior to signing of the certificate, been shipped to the customer named in the account. The obligee, at least monthly, shall make an examination of the accounts of the principal, which shall embrace—(1) a complete examination of the books, accounts, and vouchers of the principal as respects the accounts covered under the said agreement; (2) a strict comparison between all unpaid accounts, as such accounts appear on the records of the obligee, and as such accounts appear in the books of original entry of the principal."

That this contract upon its face is absolutely legal there can be no serious doubt. A material part of the security which Canfield proposed to give was the bond by which the collection of 75 per cent of the face value of the assigned accounts was guaranteed, to the extent of $7,500, as well as that Canfield would promptly pay over any money and checks collected by him as agent for Burden. But a condition of this security was that the obligee should keep a watchful guard over the accounts assigned, and make monthly inspection of the books

of Canfield. That this would necessitate several days' work each month, if actually done with fidelity, is clearly shown. That little service was rendered under this provision, aside from the examination of the accounts and shipping receipts as they were assigned at different times, was due to the bankruptcy ensuing within a very short time, and the seizure of the bankrupt's books by his receiver.

The contention is that this provision for compensating Burden for the service required by the indemnity bond was a mere cover for unlawful interest, and that it was never intended or expected that any such service would be given. This is sought to be shown by alleged oral declarations of Canfield. Thus, Canfield says that 169]when *he was about to sign the contract, he asked Burden what the clause about services to be rendered meant, and that he replied, "that that was simply to get around the usury law; there were no services to be rendered at all." Canfield's bookkeeper, a Miss Herzog, after saying that, in the negotiations prior to the day the agreement was signed, that she had heard Burden say that he must have a bonus of 1 or 2 per cent a month as usury, testified as to what she overheard through an open window between her office and that occupied by Canfield at the time the bond was signed, as follows:

Q. Isn't it a fact that Mr. Canfield asked Mr. Burden what was meant in this agreement concerning services and charges for services to be rendered by Mr. Burden?

Mr. Crawford. Objected to as leading.

The Referee. Sustained.

Q. What did you hear Mr. Canfield say concerning this agreement shown you.

A. I don't remember.

Q. Well, did Mr. Canfield say anything about services, or did Mr. Burden say anything about services to be rendered?

A. Well, Mr. Burden said he would like to have about an hour's work to do in our establishment every day, and then Mr. Canfield told him we would not have any use for him there.

Burden, when recalled, testified to his good faith, and that the compensation agreed upon was to be for the service required by the contract and bond, and would be worth what he was to receive. He denied in most emphatic terms that he ever demanded a bonus or used the word "usury" in any of the negotiations, or that he had ever made any such statement or declaration as testified to by Canfield. *He was supported in* his denial by Koehler, *the broker who negotiated* the loan for Canfield. All of this evidence was excepted to as contradicting the written agreement and was admitted over objection. Where the inquiry is whether the contract is one forbidden by law, *it is[170 open to evidence *dehors* the agreement to show that, though legal upon its face, it was in fact an illegal agreement. Otherwise the very purpose of the law in forbidding the taking of usury under any cover or pretext would be defeated. The defense is one which the debtor may make even though it contradicts the agreement. Scott v. Lloyd, 9 Pet. 418, 9 L. ed. 178.

It has been suggested that there is a distinction between the admissibility of evidence *dehors* the contract which is intended to show the whole and true nature of the transaction, and mere declarations made by the lender in the nature of a confession that the agreement for services required to maintain the obligation of the indemnity bond was a mere scheme to cover usury, and that no service was to be rendered. We notice the distinction and pass it by, for the reason that, assuming the evidence to be competent, it is not so convincing as to justify a disagreement with the view of the circuit court of appeals that the defense of usury has not been satisfactorily made out.

The instrument upon its face is not usurious. Of course, if the service to be rendered should be made to appear trivial and of no real importance, the inference might be drawn that the agreement in that particular was a sham and device to cover a mere usurious contract, such as we are asked to believe Burden declared it to be. Burden's plan was that the loan should carry with it light work, such as a retired business man might do,—one or two hours of office work each day, as he explained. But he also requested security for his money. Open book accounts might answer if the borrower had a satisfactory business rating. The latter means everything to business men. Canfield's rating was not late enough to satisfy Burden and the negotiations fell through, and were not resumed for a month or more Then Koehler, who had before negotiated loans for Canfield, suggested that he should also *give Burden the indemnity bond.[171 Burden examined the form of such bond, and finding that one of its conditions was his own watchfulness over collections and minute inspections of Canfield's books, he proposed to make the loan upon the assigned accounts and the indemnity bond, provided he was compensated for the service the bond required from him. The amount agreed upon, Burden claims, was no more than a fair return for what Judge Hand, who, in the district court, sustained the defense, de-

scribes as "work which was undeniably substantial and vexatious."

To hold the agreement void would seem to require that we shall accept as true that there was no such service expected or required, and that the clause was inserted to cover a usurious bonus. But as the indemnity bond was conditioned upon Burden doing the very things which he is said to have declared were not to be done, of what value would that security become? The natural presumption is that Burden was endeavoring to put his contract in such shape that Canfield could not defeat his obligation by the defense of usury. Yet we are asked to believe that he deliberately declared to the debtor that the agreement as to services was a device to defeat the law, and that he was not to render any such service. The incredibility of such a declaration by Burden to Canfield, the debtor, seems obvious. Upon this point Judge Coxe, for the circuit court of appeals, said:

"Of course, bankruptcy was not contemplated at that time; at least by Burden. If Canfield did not enforce the usury law, Burden had nothing to fear. If the agreement did not bind Canfield, it did not bind anyone, and yet Burden, if this testimony be true, made it absolutely useless to accomplish the object for which he says it was signed.

"Why should Burden make an agreement to enable him to receive usurious interest, 172]and at the same time make it *impossible for him to take such interest without placing him absolutely at the mercy of Canfield?

"There is no pretense that Burden was *non compos mentis* at the time, and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law, and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words, 'void for usury.'

"We must assume that Burden is a man of ordinary common-sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary, and immediately send the 'combination' to the burglar whom he had most reason to dread." [113 C. C. A. 565, 193 Fed. 937.]

Canfield is supported by his bookkeeper, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. Stillman v. Northrup, 109 N. Y. 473, 478, 17 N. E. 379; White v. Benjamin, 138 N. Y. 623, 624, 33 N. E. 1037. In the case last cited, it was said:

"Usury is a crime; and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence."

This the appellant has not done.

Decree affirmed.

Mr. Justice Pitney dissents.

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*GULF, COLORADO, & SANTA FE[173 RAILWAY COMPANY, Plff. in Err.,
v.
MARY J. McGINNIS, Administratrix, etc.

(See S. C. Reporter's ed. 173-176.)

**Damages — for death — pecuniary benefit.**

The recovery under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), for the death of a railway employee while engaged in interstate commerce, must be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss; and a surviving child not dependent upon the decedent, and with no reasonable expectation of any pecuniary benefit from the continuation of the decedent's life, can have no share in such recovery.

[For other cases, see Damages, VI. j, in Digest Sup. Ct. 1908.]

[No. 762.]

Argued and submitted January 7, 1913.
Decided April 7, 1913.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Bell County, in that State, in favor of plaintiff in a suit under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, — Tex. Civ. App. —, 147 S. W. 1188.

The facts are stated in the opinion.

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NOTE.—On the measure of recovery for death caused by negligence—see note to Morgan v. Southern P. Co. 17 L.R.A. 71.

Mr. A. H. Culwell argued the cause, and, with Messrs J. W. Terry, Gardiner Lathrop, and A. B. Browne, filed a brief for plaintiff in error:

In actions of this character the sole basis of recovery is the pecuniary loss sustained, which is a question of fact, and the affirmative thereof must be sustained by evidence of the same degree as is necessary to sustain the right of action. The burden of proof is upon those asserting the right of recovery to establish fully the constituent elements thereof.

Galveston, H. & S. A. R. Co. v. Worthy, 87 Tex. 465, 29 S. W. 376; Fithian v. St. Louis & S. F. R. Co. 188 Fed. 843; Hirschkovitz v. Pennsylvania R. Co. 138 Fed. 438; Swift & Co. v. Johnson, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 869; Stewart v. Baltimore & O. R. Co. 168 U. S. 450, 42 L. ed. 539, 18 Sup. Ct. Rep. 105; Cain v. Southern R. Co. 199 Fed. 211; Baltimore & P. R. Co. v. Mackey, 157 U. S. 92, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; The Dauntless, 121 Fed. 420; Chicago, P. & St. L. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701.

Messrs. Winbourn Pearce and A. L. Curtis submitted the cause for defendant in error.

Mr. Justice Lurton delivered the opinion of the court:

This action was brought in a state court of Texas under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), by the administratrix of W. T. McGinnis, 174 ]to recover *damages for his negligent death while in the services of the plaintiff in error, and while engaged as engineer on an interstate passenger train. The cause of the death was a derailment which occurred while the train was passing over a switch. The defense of the company was that the derailment was caused by malicious tampering with the switch by a stranger, and that the company had not been guilty of any negligence in either providing a safe track and appliance, or in the inspection or maintenance of the track and appliances. There was a jury, verdict and judgment for the plaintiff, which, upon writ of error to the court of civil appeals for the third supreme judicial district of the state of Texas, was affirmed. A writ of error has been allowed to that court, it being the highest court to which the case could be carried under the law of the state.

It is assigned as error that the court misconstrued the character of the liability imposed by the act under which the suit was brought by a ruling that there might be a judgment for the benefit of one of the surviving children, although there was neither allegation nor evidence that that surviving child was either dependent upon, or had any reasonable ground for expecting, any pecuniary benefit from a continuance of the decedent's life.

The decedent left a widow and four children, and the suit was brought by the widow, as administratrix, for the benefit of herself and the four children named in the petition. One of the surviving children was Mrs. Nellie Saunders, a married woman, residing with and maintained by her husband. There was neither allegation nor evidence that Mrs. Saunders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. The court was requested to instruct the jury that it could not find any damage in favor of Mrs. Saunders, but this it declined to do.

*The jury was instructed if they found [175 for the plaintiff, to return a verdict for such a sum as would justly compensate the persons for whose benefit the suit was brought for such pecuniary benefits as they might believe from the evidence the beneficiaries had a reasonable expectation of receiving from the decedent, if his death had not been so occasioned. They were further told to find a round sum in favor of the plaintiff, and then apportion that sum among all the persons for whom the suit had been brought, stating in their verdict, "how much, if anything, you find for each of said persons." The jury returned a verdict for $15,000, and apportioned it, one half to the widow, and the remainder equally among the four children, including Mrs. Saunders.

The court of civil appeals upheld this ruling, saying that the Federal "statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him." 147 S. W. 1189. This construction of the character of the statutory liability imposed by the act of Congress was erroneous. In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the ad-

ministrator sues as are shown to have sustained some pecuniary loss. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, ante, 417, 33 Sup. Ct. Rep. 192; American R. Co. v. Didricksen, 227 U. S. 145, ante, 456, 33 Sup. Ct. Rep. 224. In the last-cited case, speaking of the employers' liability act, we said:

"The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death 176] *such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."

The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss.

It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge. In addition a number of special requests asked by the railroad company in respect to several aspects of the facts were given. The contention is that, upon all of the evidence in the case, there was no sufficient evidence of any negligence for which the company was chargeable, in law, and that in such case the death of the decedent must have been due to some assumed risk. We pass this by.

The judgment must be reversed upon the Federal question already considered. Upon another trial the facts may be altogether different, and we decline to express any opinion as to their legal effect. Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429.

For the cause indicated, the judgment will be reversed and the case remanded for further proceedings consistent with this opinion.

*SANTA FE, PRESCOTT, & PHOENIX RAILWAY COMPANY, a Corporation, and National Surety Company, Plffs. in Err., [177

v.

GRANT BROTHERS CONSTRUCTION COMPANY.

(See S. C. Reporter's ed. 177-194.)

**Railroads — construction contract — transportation of contractor's outfit.**

1. The hauling of the camp and grading outfit required by a construction company in grading a railway branch or extension to and from points as near as possible to the work, without regard to regular stations, must be regarded as contemplated by the contract between the railway company and the construction company, where the original proposals stated that the railway company hoped "to keep the end of the track within 4 miles of the nearest grading camp," and the contract itself provided that water and supplies should "be hauled to end of track, both in the usual manner of construction trains," and after providing for reduced rates for outfit, supplies, and employees to and from all points on the line of the railway company, stated that the railway company should secure similar rates for the contractor over its coast lines "on camp and grading outfit, in carload lots, both to and from the work," and by a supplemental contract it was provided that men and supplies should be hauled "to the end of track free."

[Construction of railroad, see Railroads, II., in Digest Sup. Ct. 1908.]

**Carriers — departure from published rates — transporting construction outfit.**

2. An arrangement between a railway company and a construction company for free or reduced-rate transportation of the men and materials required by the construction company in grading an extension or branch line, when a part of the contract and entered into in good faith, is not obnoxious to the provisions of law prohibiting departures from published tariffs.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

**Carriers — acts outside carrier's duties — contract exemption from negligence.**

3. A railway company, when transport-

NOTE.—On the general subject of contract exemptions from carrier's liability for negligence—see notes to New Jersey Steam Nav. Co. v. Merchant's Bank, 12 L. ed. U. S. 465; and Chicago, M. & St. P. R. Co. v. Solan, 42 L. ed. U. S. 688.

On the effect of statutory provisions against rebates upon contracts for transportation at less than the regular rates—see notes to Armour Packing Co. v. United States, 14 L.R.A.(N.S.) 400; and Armour Packing Co. v. United States, 52 L. ed. U. S. 681.

ing free or at a reduced rate the men, appliances, and supplies required by a construction company in grading an extension or branch line to and from the points where the work is done, conformably to the construction contract, is not acting as a common carrier, and may therefore exempt itself from liability for negligence.

[For other cases, see Carriers, II. b, 7, in Digest Sup. Ct. 1908.]

Carriers — contract exemption — construction.

4. The parties to a contract between a railway company and a construction company, under which the railroad agrees to transport free or at a reduced rate the camp outfit and supplies required by the construction company in grading an extension or branch line, must be deemed to have intended to exempt the railway company from all liability for loss during transportation, whether attributable to its negligence or not, where the contract contains such provisions as "all risk of loss or damage to be borne by the contractor," "all movements of goods at less than tariff rates to be at consignee's risk of loss and damage," "passengers carried at less than tariff rates will be required to assume all risk of accident to person and baggage," "the company shall assume no obligation or risk in case of accident or damage to men and supplies," since these reiterated statements evidence the intention to deal comprehensively with all risks incident to the transportation, not excluding the obvious risk of loss by reason of some neglect in the operation of the road.

[For other cases, see Carriers, II. b, 7, in Digest Sup. Ct. 1908.]

[No. 147.]

Argued January 24, 1913. Decided April 7, 1913.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Maricopa County, in that territory, in favor of plaintiff in an action against a carrier for the loss of property by fire while in course of transportation. Reversed and remanded for further proceedings.

See same case below, 13 Ariz. 186, 108 Pac. 467.

The facts are stated in the opinion.

Mr. Gardiner Lathrop argued the cause, and, with Messrs. Robert Dunlap and Paul Burks, filed a brief for plaintiffs in error:

Where one accepts and uses free transportation upon condition that it is to be at his risk, that includes necessarily any risk likely to be encountered, whether arising from the negligence of the carrier's servants or otherwise.

McCawley v. Furness R. Co. L. R. 8 Q. B. 59, 42 L. J. Q. B. N. S. 4, 27 L. T. N. S. 485, 21 Week. Rep. 140; Gallin v. London & N. W. R. Co. L. R. 10 Q. B. 216, 44 L. J. Q. B. N. S. 89, 32 L. T. N. S. 550, 23 Week. Rep. 308; Quimby v. Boston & M. R. Co. 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205, 3 Am. Neg. Cas. 859; Payne v. Terre Haute & I. R. Co. 157 Ind. 616, 56 L.R.A. 472, 62 N. E. 472.

The reason for the adoption of the rule of public policy forbidding carriers to contract for exemption from liability for negligence, outside of mere artificial technicalities, is the practical one reiterated by Mr. Justice Gray in Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 441, 32 L. ed. 792, 9 Sup. Ct. Rep. 469, as follows: The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.

But where the reason for the adoption of such an apparently harsh or restrictive rule ceases, the application thereof also ceases, and a different principle or rule of public policy comes into play.

Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 465, 44 L. J. Ch. N. S. 709, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; New York C. & H. R. R. Co. v. Difendaffer, 62 C. C. A. 1, 125 Fed. 895; McDermon v. Southern P. Co. 122 Fed. 671; Wilson v. Atlantic Coast Line R. Co. 129 Fed. 781; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 530, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 1 Ann. Cas. 42; Northern P. R. Co. v. Adams, 192 U. S. 440, 452, 453, 48 L. ed. 513, 517, 518, 24 Sup. Ct. Rep. 408; 4 Elliott, Railroads, 2d ed. §§ 1396, 1397; 1 Hutchinson, Carr. 3d ed. § 60.

If the railway company were to be held as acting in its capacity as common carrier, then it is apparent that the plaintiff below seeks to recover as a party to an illegal arrangement; and it would be contrary in such case to public policy to assist or permit it to recover under an agreement or arrangement under which it would be held to have deliberately violated provisions of the interstate commerce law.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648; Continental Wall Paper Co. v. Louis Voigt & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Ellison v. Adams Exp.

Co 245 Ill. 410, — L.R.A.(N.S.) —, 92 N. E. 277; United Shoe Machinery Co. v. LaChapelle, —Mass. —, 99 N. E. 289.

We are aware, of course, of a disposition in courts at times to grant relief where plaintiff's right is not dependent upon showing the illegal contract or arrangement, and where it would be apparently inequitable not to grant relief. They were generally cases in which the contract or transaction was not made criminal, and punishable as such under the laws.

Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; McMullen v. Hoffman, 174 U. S. 639, 656, 43 L. ed. 1117, 1124, 19 Sup. Ct. Rep. 839; Embrey v. Jemison, 131 U. S. 336, 348, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776.

If, for the sake of argument, it be assumed that the contract did not in law relieve plaintiff in error from liability for loss caused by its negligence, yet the burden was upon defendant in error to show by evidence that some negligence of plaintiff in error was the proximate cause of the loss. There was a total failure of proof in that respect.

Hutchinson, Carr. 3d ed. §§ 449, 1355; Charnock v. Texas & P. R. Co. 194 U. S. 432, 48 L. ed. 1057, 24 Sup. Ct. Rep. 671; Crary v. Lehigh Valley R. Co. 203 Pa. 525, 59 L.R.A. 815, 93 Am. St. Rep. 778, 53 Atl. 363.

It is apparent from the early common-law authorities that a common carrier might exonerate himself from liability for any loss not occasioned by his actual misfeasance or gross negligence even in cases where the carrier sought to exonerate himself from liability by a mere notice.

New York C. R. Co. v. Lockwood, 17 Wall. 372, 21 L. ed. 638, 10 Am. Neg. Cas. 624.

Indeed, it is held in England that a railway carrier may be relieved by the shipper from liability for damage except upon proof that it arose from wilful misconduct on the part of defendant's servants.

Forder v. Great Western R. Co. [1905] 2 K. B. 532, 74 L. J. K. B. N. S. 871, 53 Week. Rep. 574, 93 L. T. N. S. 344, 21 Times L. R. 625. See also Magnin v. Dinsmore, 70 N. Y. 417, 26 Am. Rep. 608.

It was plainly intended that the railway company should be at no risk of liability. The provision is found in the construction contract and in the supplementary letter. It was inserted by laymen, and the court should give effect to the obvious intent.

Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657.

Mr. Isidore B. Dockweiler argued the cause, and, with Mr. A. C. Baker, filed a brief for defendant in error:

The true test to determine whether a party is a common carrier is laid down in 1 Hutchinson, on Carriers, 3d ed. § 48, all the elements of which test are found and fully satisfied in the case at bar.

The plaintiff in error being a common carrier with respect to the goods shipped by defendant in error, then, though the carriage was by special contract, it still remained a common carrier.

New York C. R. Co. v. Lockwood, 17 Wall. 376, 21 L. ed. 639, 10 Am. Neg. Cas. 624; Liverpool & G. W. Steam Co. v. Phœnix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Mears v. New York, N. H. & H. R. Co. 75 Conn. 171, 56 L.R.A. 884, 96 Am. St. Rep. 193, 52 Atl. 610.

The plaintiff in error, having no right to refuse to carry the goods of defendant in error, could not contract for their carriage in any capacity except as a common carrier.

Liverpool & G. W. Steam Co. v. Phœnix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; 4 Elliott, Railroads, pp. 11, 12; 1 Hutchinson, Carr. § 44; Chicago, M. & St. P. R. Co. v. Wallace, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506.

The fact that the contract of carriage of the destroyed goods of defendant in error was incidental to a contract having for its principal object the construction of a subsidiary line of plaintiff in error cannot change the character of plaintiff in error to that of a private carrier.

Being a common carrier, plaintiff in error could not by contract absolve itself from liability to the defendant in error for its acts of negligence.

Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102.

To hold the railroad company (plaintiff in error) as a common carrier does not render the contract violative of the interstate commerce law.

The Interstate Commerce Commission has construed the statute as not preventing a carrier (common carrier) from giving free or reduced rate carriage over its lines to contractors for materials, supplies, and men.

Re Railroad Teleg. Cos. 12 Inters. Com. Rep. 11.

The object of the statute is to secure just and reasonable charges for transportation, and to prevent unjust discrimination in the rendition of services under similar conditions.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

The case at bar is an action *ex delicto*, and not *ex contractu*.

The contract of carriage did not in terms

exempt the plaintiff in error from liability for its acts of negligence, and therefore the exemption contracted for was from loss occasioned by the dangers naturally incident to the carriage, and not from damage brought about by the carrier's negligence.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; Mynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 183, 27 Am. Rep. 28; 4 Elliott, Railroads, § 1508; 1 Hutchinson, Carr. 3d ed. § 463; Monographic note to Chicago & N. W. R. Co. v. Calumet Stock Farm, 88 Am. St. Rep. 119.

The facts of the case at bar being such that reasonable men may fairly differ upon the question as to whether or not there was negligence, the determination of the matter was for the jury, and their verdict will not be disturbed on appeal.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659, 21 Am. & Eng. Enc. Law, 498; Marande v. Texas & P. R. Co. 184 U. S. 173, 46 L. ed. 487, 22 Sup. Ct. Rep. 340.

The negligence being found, the commission and omission of acts exposing the goods of the defendant in error to dangers of destruction or loss, and failure to safeguard the same from injury, the question of proximate cause became one of fact for the jury, and no independent, intermediate, efficient cause appearing, the original wrong must be considered as reaching to the effect and proximate to it.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 470, 24 L. ed. 257; Aetna F. Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; The G. R. Booth, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9; Hayes v. Williams, 17 Colo. 472, 30 Pac. 354; Pullman Palace Car Co. v. Laack, 143 Ill. 260, 18 L.R.A. 220, 32 N. E. 285, 14 Am. Neg. Cas. 291.

Mr. Justice Hughes delivered the opinion of the court:

The Grant Brothers Construction Company recovered judgment in the district court of the territory of Arizona for $9,-061 for the loss of its property by fire on June 6, 1907, between Bouse and Phœnix, Arizona, while in course of transportation on the railroad operated by the Santa Fe, Prescott, & Phœnix Railway Company, the plaintiff in error. The judgment was entered upon a verdict of a jury, a motion for a new trial was denied, and the judgment was affirmed by the supreme court of the territory.

The railway company had been engaged in building, westerly from its main line, a branch railroad known as the Arizona & California Railroad. For this purpose it entered into a contract with the construction company for the necessary grading. The property in question consisted of the camp and grading outfit and supplies, belonging to the construction company, which had been used by it in this work, and were being removed by reason of its completion. At the time in question the branch line was operated regularly only as far as Bouse, and the property was loaded on cars "at the front" or end of track, about 12 miles west of that station, to be carried to Phœnix. The superintendent, foremen, and about fifty workmen of the construction company, were taken on the cars at the same place for the same destination. The cars were hauled by the railway company to Bouse (where explosives and hay were unloaded), and were there attached to a regular train which brought them to a point known as the A. and C. Junction, where the Arizona & California line joined the main line of the *rail-[182 way company. At this junction (which was about 4 miles from Wickenburg, a station on the main line in the direction of Phœnix), all the cars containing the outfit of the construction company, save one, were cut out of the train and were put upon a side track. The rest of the train, with the employees of the construction company, went on to Wickenburg. This took place late in the evening of June 5, 1907, and about 10 o'clock in the morning of the next day, four of the cars left on the side track were destroyed by fire.

The A. and C. Junction is described as being in an open desert, without a station agent or inhabitants, and without water or fire apparatus. The cars were left without a watchman in charge. The reason given by the conductor for leaving them at this point was that there was no room for the cars at Wickenburg. There was no explanation of the cause of the fire, the only suggestion as to this being that before the fire occurred one train passed by, between 4 and 5 o'clock in the morning.

At the close of the evidence the railway company requested the trial court to direct a verdict in its favor. This request was refused and exception taken; and the sustaining of this ruling is assigned as error. It is contended by the railway company that, under its contract with the construction company, it was exempt from all liability; and, further, that even assuming it to be liable for negligence, there was a total failure of proof in that respect.

The principal question relates to the scope and validity of the provision of the contract between the parties as to the liability of the railway company.

The facts are these: In November, 1904, the railway company issued a call for proposals for the grading of the roadbed, clearing right-of-way, making necessary canals, etc., of the Arizona & California Railroad, for a distance of about 40 miles. The construction company made a 183]*bid, which was accepted, and a contract was executed accordingly on December 12, 1904.

This contract, after providing for the performance of the described work of grading, etc., contained the following terms with respect to the transportation of supplies, camp and grading outfit, and employees of the construction company, which were the same as those set forth in the call for bids:

"14. Water will be delivered in cars at the end of the track at the rate of one dollar and fifty cents ($1.50) per 1,000 gallons, and supplies will be hauled to end of track, both in the usual manner of construction trains, subject to delays, etc., incident thereto. All risk of loss or damage to be borne by the contractor.

"15. The company will furnish a rate of 1 cent per ton mile from all points on the S. F. P. & P. Road and leased roads for the contractor, on camp and grading outfit and supplies, corral supplies, etc., except explosives and commissary goods, and return to original shipping points at same rates, on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.

"16. The company will also furnish the contractor's employees . . . a rate of 1 cent per passenger mile, . . . and return those who have worked until the completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accident to person and baggage. The plan of movement of these employees and freight is to be according to rules of the general freight and passenger agent.

"17. The company will also secure for the contractor similar rates over the Santa Fe Company's coast lines, on camp and grading outfit, in carload lots, both to and from the work, and for workmen going to the work in lots of five (5) or more."

184] *After the work covered by the contract had been finished, it was agreed that the construction company should continue the grading of the road further to the west, upon the same terms and conditions as those stated in the former contract, save that the prices for the work were increased, and it was provided that water should be delivered at the *end of track free of cost*, except for car hire, and that men and supplies should be hauled free on the line of the Arizona & California Railroad, between the A. and C. Junction and the end of track. This supplementary agreement, which was evidenced by letters exchanged in November, 1905, also contained an express provision "that the company shall assume no obligation or risk in case of accident or damage to men and supplies."

It was under these conditions that in June, 1907, the railroad company—the grading having been done—took up the men, outfit, and supplies of the construction company at the end of the track for the purpose of transporting them to Phœnix.

It is alleged in the complaint that the transportation of the property was to be at the contract rate of 1 cent per ton mile, and it is undisputed that this was less than the tariff rates of the railway company accorded to the general public.

It is the established doctrine of this court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation. New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 507, 44 L. ed. 560, 565, 20 Sup. Ct. Rep. 385; Knott v. Botany Worsted Mills, 179 U. S. 69, 71, 45 L. ed. 90, 93, 21 Sup. Ct. Rep. 30; The Kensington, 183 U. S. 263, 268, 46 L. ed. 190, 193, 22 Sup. Ct. Rep. 102. The rule rests on broad grounds of public policy, justifying the restriction of liberty of contract because of the public ends to be achieved. The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the *community. A carrier[185 who stipulates not to be bound to the exercise of care and diligence "seeks to put off the *essential duties* of his employment." It is recognized that the carrier and the individual customer are not on an equal footing. "The latter . . . cannot afford to higgle or stand out and seek redress in the courts. . . . He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business." New York C. R. Co. v. Lockwood, 17 Wall. 378, 379, 21 L. ed. 639, 640. For these reasons, the common carrier, in the prosecution of its business as such, is not permitted to drop its character and transmute itself by contract into a mere

bailee, with right to stipulate against the consequences of its negligence.

Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385, and cases cited; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Long v. Lehigh Valley R. Co. (C. C. A. 2d C.) 65 C. C. A. 354, 130 Fed. 870.

Thus, in Baltimore & O. S. W. R. Co. v. Voigt, supra, it was held that an express 186]messenger in charge of *express matter in pursuance of the contract between the express company and the railroad company was not a passenger of the latter within the meaning of the rule of New York C. R. Co. v. Lockwood, supra; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him for its negligence; and that such a contract did not contravene public policy. His position was one "created by an agreement between the express company and the railroad company, adjusting the terms of a joint business,—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company." It was clear that although the messenger was actually carried on the train, and although the railroad company received compensation in connection with its contract for the express business, his relation to the railroad company was "widely different from that of ordinary passengers," and there was no justification for extending the doctrine restricting the freedom of contract to a case which lay entirely outside the reason which supported it.

In constructing, improving, or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but, of course, is not acting as such. It may do the work itself, if it chooses, or it may make it the subject of contract with another. In the latter case it simply employs an appropriate agency. The haulage by the railroad company of the men, appliances, and supplies, required by the contractor for the purpose of the construction or improvement, to or from the point on its line where the work is to be done, is merely incidental to the work itself. The cost of such haulage is obviously an item of expense which must be taken into account in fixing the *terms of the construc-[187 tion contract, and in providing for it over its own line the railroad company may adjust the matter with the contractor as it sees fit. If the railroad company did the work directly, it would have to take its employees and the necessary outfit to the place of work, and it may undertake to do the like for the contractor, either free of charge or at reduced rates, as they may agree.

Usually, necessity or proper convenience requires an undertaking by the railroad company, as to such transportation, which it would be under no obligation to assume in any event as a common carrier. Men and supplies must be put down and taken up at points on the line where there is no regular station, and where the railroad company would not be bound to accept or to discharge freight or passengers. In a case like the present one, of the grading of an extension or branch line, it is convenient that the track, laid as the roadbed is prepared for it, should be utilized for the hauling of men and materials to a point as near as possible to the work, although such track is not open to the public, and the railroad company as a common carrier has assumed, as yet, no obligation for general transportation over it. This was obviously contemplated in the contract in question; and a construction of the contract so as to make it apply only to the hauling of camp and grading outfit to stations to which the company was regularly doing business is wholly inadmissible. The original proposals stated that the railway company hoped "to keep the end of the track within 4 miles of the nearest grading camp." The contract itself provided that water and supplies should "be hauled to end of track, both in the usual manner of construction trains." And, after providing for the reduced rates for outfit, supplies, and employees from all points on the line of the railway company, and for the return of the same to original shipping points at the same rates on completion of the work, the intent is shown by the pro-

188]vision *immediately following, that the railway company should secure similar rates for the contractor over its coast lines "on camp and grading outfit, in carload lots, *both to and from the work*." In the supplementary contract it was provided that men and supplies should be hauled "to the end of track free," with the provision that this should only apply on the line of the Arizona & California Railroad; that is, "between A. and C. Junction and the end of the track." When the work was done, the men and outfit were actually taken up by the railway company some 12 miles beyond the last regular station on the branch line. The parties plainly intended that the camp and grading outfit should be transported for the benefit of the contractor as near to the work as it reasonably could be, and without regard to regular stations, and that it should be removed in the same way when the grading was completed.

It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See Re Railroad-Telegraph Cos. 12 Inters. Com. Rep. 10, 11.

The parties, then, were free to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but, on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was ac-189]tually made. Undoubtedly, it *is not to be lightly concluded that the railroad company has been relieved from liability for its neglect, but, on the other hand, if this was the agreement as fairly interpreted, it is not to be arbitrarily overridden. The parties were on an equal footing. The risk of loss or damage to the grading outfit or supplies from any cause, while being transported over the line of the railway company, could be assumed by one party or the other, as they saw fit. This risk was an item which naturally would enter into the calculations of the parties with respect to the rate to be charged by the railway company. We are not at liberty to revise the contract, and the question simply is whether the stipulation against liability, in view of the reduced rates, covered all losses,—those which might be due to the carrier's neglect, as well as others.

We entertain no doubt as to what the parties meant. The limitations upon the liability of the railway company were first fully stated in the call for proposals, and when the bid was accepted in accordance with the terms of the call, the same limitations were inserted in the contract. Thus, it was provided with respect to the supplies to be hauled to the end of track: "All risk of loss or damage to be borne by the contractor;" again, as to the camp and grading outfits and supplies: "All movements of goods at less than tariff rates to be at consignee's risk of loss and damage;" and with regard to the employees: "Passengers carried at less than tariff rates will be required to assume all risk of accident to person and baggage." Further, in the supplemental agreement, it was stipulated: "The company shall assume no obligation or risk in case of accident or damage to men and supplies." When we consider the circumstances of the parties and the objects of the contract, we cannot escape the conclusion that these reiterated statements evidence the intention to deal comprehensively with *all* the risks incident to the transportation, not excluding the obvious risk of loss by reason of some neglect in the *operation of the road.[190 The contract was between two corporations, and dealt with the familiar transactions of their everyday concerns. The stipulations are in the terse language of business men. The supplemental contract is contained in an informal letter. And, when "all risk of loss or damage" is spoken of, and it is provided that the railway company shall assume "no obligation or risk in case of accident or damage," it is evident that they are looking at the matter from a business standpoint, and are bargaining for a reduced rate to be charged by the railway company, on the one hand, and an assumption of the entire risk of the transportation by the construction company, on the other. It is true that general words of exemption have often been found insufficient to cover injuries due to negligence, and a rule imposing such a limitation upon their effect has manifest propriety in those jurisdictions where common carriers, acting as such, are allowed to stipulate against the consequences of their neglect if this is done in explicit terms. But here, to repeat, we are entirely out of the domain governed by the rule of public policy affecting common carriers, and the agree-

ment must be taken according to its actual intent.

It will be observed that the limitation from liability was to apply to the workmen as well as to the goods. We do not need to inquire as to the effect of such an exemption in the case of a workman who had not assented to it. But the provisions as to the workmen throw light upon the intent of the parties with respect to the property. In the supplemental contract both men and supplies were grouped in one stipulation for immunity. The railway company, however, would not have been liable in any event for injuries to the workmen save in case of negligence; and in bargaining for a limitation of liability as to the workmen, they evidently had negligence in view. The word "accident" in this connection was manifestly used in its popular sense, and not as limited to occurrences 191]beyond the *carrier's control. Further, it will be remembered that in the supplemental contract, free haulage was given over the branch line, and the stipulation, therein repeated, was certainly to protect the carrier from a liability, in the case of injury to the workmen, which otherwise would attach; that is, a liability for negligence.

This point was recognized by the court in New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, which involved the obligation of a common carrier. The contract for exemption from liability was general, but it related to a drover accompanying his cattle (who, notwithstanding that he had a pass, was held to be a passenger for hire), as well as to the cattle themselves; and with respect to the drover, it was assumed in the course of the opinion that the stipulation included immunity from liability for the company's negligence. And thus the court was brought to the decision of the question whether a common carrier could be permitted to make a stipulation of that sort. The court said: "It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded; namely, whether common carriers may excuse themselves from liability for negligence." (Id. pp. 362, 363.)

The question as to the fair interpretation of language such as is used in the present case, where the railroad company is acting outside the performance of its duty as a common carrier, was considered by the circuit court of appeals in the second circuit in Long v. Lehigh Valley *R. Co. 65 C. C. A. 354, 130 Fed. 870.[192 That was the case of an express messenger who was injured while employed as such in an express car on one of the defendant's trains, owing to the negligence of the defendant's employees. His contract with the express company contained a provision that he assumed "all risk of accidents and injuries" to himself "arising out of such employment," and that he released the express company and the transportation lines on which he was to render service from any claims "arising out of any such accidents or injuries" that might happen to him while so employed. Circuit Judge Wallace, in delivering the opinion of the court, after referring to Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385, said: "It is said that the contract in that case in terms included among the risks assumed by the express messenger accidents and injuries occasioned by negligence, while the contract here does not; and it is urged that, in the absence of such a stipulation, the contract should be construed not to extend to that class of accidents or injuries. This contention would doubtless be sound if the parties contracting had not been treating on terms of equality, as is the case between a common carrier and a shipper of goods or a passenger. But when this is not the case, and no rule of public policy forbids a contract by which one of the parties is exonerated from any risk arising from negligence, there is no reason why the ordinary rules of construction should not obtain, and the contract be given effect according to the intention of the parties. The observations of this court in McCormick v. Shippy, 59 C. C. A. 568, 124 Fed. 48, are appropriate: 'There is no question of public policy involved in this contract, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. . . . The clause must be interpreted to include loss through negligence, because for loss not arising from negligence he would not be liable.'

*"So, in this case, the defendant, be-[193 ing merely a private carrier in respect to the plaintiff, owed him merely the duty of ordinary care, and could only have been liable to him for injuries arising from negligence, and the release made in advance must have contemplated accidents and in-

juries of that character. In Bates v. Old Colony R. Co. 147 Mass. 255, 17 N. E. 633, the agreement between the express messenger and the express company was that the former 'will assume all risk and [of] accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding.' In Hosmer v. Old Colony R. Co. 156 Mass. 506, 31 N. E. 652, the plaintiff was an expressman, and had agreed that, in consideration of the company's allowing him to ride in baggage cars on its trains, he would 'assume all risk of accidents and injuries resulting therefrom.' In both cases the language of the contract, although not expressly including injuries or accidents by negligence, was construed to relieve the railroad company from liability for injuries by negligence. In Chicago, M. & St. P. R. Co. v. Wallace, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506, the language of the contract was as general as it is in the present case, and the railroad company was exonerated from liability." (Id. p. 357.)

We see no ground whatever for the conclusion that it was not the intention of the parties to give the railroad company immunity from negligence in the case of the workmen, and in view of the provisions and purpose of the contract it cannot be held that they had a different intention with respect to the camp and grading outfit and supplies. When they agreed that all movement of this property at less than tariff rates should be at the risk of the construction company, and later, in the supplemental contract, that the railway company 194]should *assume "no obligation or risk" in the case of damage to supplies, we think it clear that they meant to cover the entire transportation risk, with respect to this property, and that losses such as occurred in this case, whether or not attributable to the negligence of the railway company, were within the stipulated immunity.

It is therefore unnecessary to discuss the assignments of error which are based upon the ruling of the court with respect to the submission to the jury of the question of negligence. Our conclusion is that, upon the facts disclosed at the trial, the railway company was entitled to a direction of a verdict in its favor, and the judgment sustaining the recovery of the construction company must therefore be reversed.

The judgment is reversed and the case remanded to the Supreme Court of the State of Arizona as the successor of the Territorial Supreme Court, for such further proceedings as may not be inconsistent with this opinion.

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GEORGE A. FULLER COMPANY, Plff. in Err.,
v.
WILSON A. McCLOSKEY.

(See S. C. Reporter's ed. 194–204.)

**Appeal — question not raised below — defective pleading.**

1. The declaration will not be held insufficient on writ of error, for the asserted lack of a sufficient averment of the negligence of one of the two codefendants, where it is manifest that the plaintiff intended to, and did, charge negligence on the part of both defendants, and the attention of the trial court was not called to any particular in which the declaration was deemed to be insufficient as against that particular defendant, and no mention was made of the specific point sought to be raised.

[For other cases, see Appeal and Error, VIII. j, 4, in Digest Sup. Ct. 1908.]

**Appeal — prejudicial error — modifying requested instruction.**

2. Modifying a requested instruction to the effect that an employee riding on the top of an elevator, who was caught in the weights which passed the car at the fifth floor, could not recover if he had unnecessarily placed himself in a dangerous position, by requiring the jury to take into consideration the fact that he intended to go only as high as the second floor, and had signaled the elevator operator accordingly, is not prejudicial error, where the court, in other portions of the charge, correctly instructed the jury on the subject of contributory negligence, and there is no room for doubt as to the court's meaning.

[For other cases, see Appeal and Error, VIII. m, 3, c, in Digest Sup. Ct. 1908.]

**Master and servant — which of two persons is master of third.**

3. An elevator operator is the servant of a building contractor, so as to render him liable for the former's negligence in operating the car, resulting in injury to a workman employed by a subcontractor in painting the elevator shaft, where the contractor, having obtained the use of the elevator and the operator from the company installing the elevator, agreed to furnish the subcontractor elevator, power, and operator at any time that the contractor or elevator company did not want them, the subcontractor having no other control over the

NOTE.—As to which of two or more persons is the master of another, who is conceded to be the servant of one of them—see note to Hardy v. Shedden Co. 37 L.R.A. 33.

On the responsibility of owner or occupier of building where operation of elevator is let to independent contractor—see note to Sciolaro v. Asch, 32 L.R.A.(N.S.) 945.

operator than to signal him when to start and when to stop the elevator while in use as a temporary staging.

[For other cases, see Master and Servant, I. a, in Digest Sup. Ct. 1908.]

[No. 176.]

Submitted March 7, 1913. Decided April 7, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, in favor of plaintiff, in a personal-injury action. Affirmed.

See same case below, 35 App. D. C. 595.

The facts are stated in the opinion.

Mr. Edward S. Duvall, Jr., submitted the cause for plaintiff in error:

It was error in the trial court to decide, as a matter of law, under all the evidence, that Locke was the servant of the Fuller Company.

Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 53 L. ed. 480, 483, 29 Sup. Ct. Rep. 252; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 609; Powell v. Virginia Constr. Co. 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; The Elton, 73 C. C. A. 467, 142 Fed. 367; Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, 36 L. T. N. S. 49, 25 Week. Rep. 263; Murray v. Currie, L. R. 6 C. P. 24, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104; Donovan v. Laning W. & D. Constr. Syndicate, [1893] 1 Q. B. 629, 4 Reports, 317, 68 L. T. N. S. 512, 41 Week. Rep. 455, 57 J. P. 583; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; McInerney v. Delaware & H. Canal Co. 151 N. Y. 411, 45 N. E. 848, 1 Am. Neg. Rep. 153; Delory v. Blodgett, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078, 15 Am. Neg. Rep. 581; Delaware, L. & W. R. Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986; Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620; Anderson v. Boyer, 156 N. Y. 93, 50 N. E. 976; Connor v. Koch, 63 App. Div. 257, 71 N. Y. Supp. 836; Chesapeake & O. R. Co. v. Howard, 178 U. S. 153, 44 L. ed. 1015, 20 Sup. Ct. Rep. 880; Guy v. Donald, 203 U. S. 399, 51 L. ed. 245, 27 Sup. Ct. Rep. 63.

It is an important test of liability whether the company reserves the power not only to direct what shall be done, but how it shall be done.

New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21 L. ed. 220; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Casement v. Brown, 148 U. S. 622, 37 L. ed. 585, 13 Sup. Ct. Rep. 672; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Geer v. Darrow, 61 Conn. 220, 23 Atl. 1087; Charlock v. Freel, 125 N. Y. 357, 26 N. E. 262; Bailey v. Troy & B. R. Co. 57 Vt. 252, 52 Am. Rep. 129; Johnston v. Ott Bros. 155 Pa. 17, 25 Atl. 751.

If an independent contractor is employed to do a lawful act, and in the course of the work his servants commit some casual act of wrong or negligence, the employer is not answerable.

2 Kent, Com. p. 260; Reedie v. London & N. W. R. Co. 4 Exch. 244, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, 19 Eng. Rul. Cas. 411; Overton v. Freeman, 11 C. B. 867, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65; Gayford v. Nicholls, 9 Exch. 707, 2 C. L. R. 1066, 23 L. J. Exch. N. S. 205, 2 Week. Rep. 453; Peachey v. Rowland, 13 C. B. 182, 22 L. J. C. P. N. S. 81, 17 Jur. 764; Forsyth v. Hooper, 11 Allen, 419; Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Pack v. New York, 8 N. Y. 222; De Forrest v. Wright, 2 Mich. 368; Painter v. Pittsburgh, 46 Pa. 213; Eaton v. European & N. A. R. Co. 59 Me. 520, 8 Am. Rep. 430; McCarthy v. Second Parrish, 71 Me. 318, 36 Am. Rep. 320; Cunningham v. International R. Co. 51 Tex. 503, 32 Am. Rep. 632; King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37; Schnurr v. Huntington County, 22 Ind. App. 188, 53 N. E. 425; Sullivan v. New Bedford Gas & Edison Light Co. 190 Mass. 288, 76 N. E. 1048; Hooe v. Boston & N. Street R. Co. 187 Mass. 67, 72 N. E. 341; Laugher v. Pointer, 5 Barn. & C. 560, 8 Dowl. & R. 550, 4 L. J. K. B. 309; Clark v. Hannibal & St. J. R. Co. 36 Mo. 202; Hauser v. Metropolitan Street R. Co. 27 Misc. 538, 58 N. Y. Supp. 286; Casement v. Brown, 148 U. S. 622, 37 L. ed. 535, 13 Sup. Ct. Rep. 672; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Hill v. Schneider, 13 App. Div. 299, 43 N. Y. Supp. 1, 1 Am. Neg. Rep. 141; Uppington v. New York, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Boomer v. Wilbur, 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246; Francis v. Johnson, 127 Iowa, 391, 101 N. W. 878, 17 Am. Neg. Rep. 507.

It was McCloskey's duty while on the elevator to exercise proper care for his own safety; and the court erred in refusing to grant the defendant's third prayer in that behalf.

Baltimore & P. R. Co. v. Jones, 95 U. S. 443, 24 L. ed. 507.

Assuming that there was any evidence

tending to show that Locke was the servant of the Fuller Company, the question should have been submitted to the jury to decide under all the evidence, under proper instruction.

Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Delaware, L. & W. R. Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986; Daley v. Boston & A. R. Co. 147 Mass. 101, 16 N. E. 690; Connor v. Koch, 63 App. Div. 257, 71 N. Y. Supp. 836.

Mr. S. V. Hayden and Hayden Johnson submitted the cause for defendant in error:

The claim of variance is made either, first, by objection to the evidence when offered on the ground that the foundation for it has not been laid in the declaration (Sheehy v. Mandville, 7 Cranch, 208, 3 L. ed. 317; United States v. Denicke, 35 Fed. 407); second, by motion to strike out testimony already offered upon the same ground (22 Enc. Pl. & Pr. 633); third, by motion to strike out all the testimony offered on behalf of the plaintiff, and direct a verdict for the defendant on the ground that the testimony offered does not support the averments of the declaration.

No suggestion was ever made of any supposed defect in the declaration, or that the proof offered at the trial was variant from its allegations. The wording of the motion in no way implies that such an objection was ever in the mind of counsel.

Gerding v. Haskin, 141 N. Y. 514, 36 N. E. 601.

It is the duty of a plaintiff in error affirmatively to show that error has been committed by the trial court, and it is not to be presumed and will not be inferred from a doubtful statement in the record.

Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 35 L. ed. 961, 12 Sup. Ct. Rep. 181; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; Mercantile Trust Co. v. Hensey, 205 U. S. 298, 51 L. ed. 811, 27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572.

The objection of variance, not taken at the trial, cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below; nor can it avail him on the motion for a new trial.

Mosher v. Lawrence, 4 Denio, 421; Lawrence v. Barker, 5 Wend. 305; McMicken v. Brown, 6 Mart. N. S. 86; Roberts v. Graham, 6 Wall. 578, 18 L. ed. 791; Goslin v. Corry, 7 Mann. & G. 347, 8 Scott N. R. 21; Doe ex dem. Phillips v. Benjamin, 9 Ad. & El. 644, 1 Perry & D. 440, 2 W. W. & H. 96, 8 L. J. Q. B. N. S. 117; Westville Coal Co. v. Schwartz, 177 Ill. 278, 52 N. E. 276; Chicago & W. M. R. Co. v. Hull, 76 Ill. App. 408.

The trial court correctly held as matter of law upon admitted facts that Locke was the servant of the George A. Fuller Company.

Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252.

Locke, at the time of the accident, was willingly engaged in doing the work of the plaintiff in error, with its consent, and whether he was employed by it or at all to do so is immaterial. He is, in law, as to the defendant in error, who was injured through his negligence, to be considered the servant of the plaintiff in error.

Cooley, Torts, 3d ed. pp. 1006–1009; Union R. & Transit Co. v. Kallaher, 114 Ill. 325, 2 N. E. 77; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Oil Creek & A. River R. Co. v. Keighron, 74 Pa. 316.

Although the Otis Elevator Company in the first instance paid Locke's wages, the fact that it was afterwards reimbursed by the Fuller Company is tantamount to the Fuller Company paying him in the first instance.

Missouri P. R. Co. v. Jones, 75 Tex. 151, 16 Am. St. Rep. 879, 12 S. W. 972.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought by Wilson A. McCloskey, the defendant in error, to recover damages for personal injuries caused by alleged negligence in the operation of an *elevator in the Hibbs Building in[198 this District. At the time of the accident McCloskey, who will be called the plaintiff, was engaged in painting the elevator shaft, and for this purpose was riding on top of the elevator. The action was brought against the Otis Elevator Company and the plaintiff in error, George A. Fuller Company. Without objection, a verdict was directed in favor of the Otis Elevator Company, but the case against the George A. Fuller Company was submitted to the jury, who found a verdict in favor of the plaintiff. The judgment on this verdict was affirmed by the court of appeals of the District, and the case comes here on writ of error. 35 App. D. C. 595.

The facts appearing upon the trial are succinctly stated in the opinion of the court below, in which the George A. Fuller Company is described as the defendant, as follows:

"The defendant company contracted with William B. Hibbs to erect for him an office building on 15th street in this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the

completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employee of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an arrangement with the elevator company by which it became entitled to use this elevator in the prosecution of its work, paying to the elevator company $3 per day, which was to cover the wages of the care taker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under [199]this arrangement the defendant *company was to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

"The defendant company entered into a subcontract with the Robert E. Mackay Company, of New York, for the painting required by its contract with Mr. Hibbs. The plaintiff was an employee of the Mackay Company. The elevator shaft was included in this subcontract. To paint this it was, of course, necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft, elevator, power, and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

"Upon the day of the accident plaintiff and another workman were on the roof of the elevator, touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the [200]center of the car. He had *a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about 6½ inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped, the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car had reached the fifth floor, where he was caught in the weights which passed the car at that point."

The contention based upon the asserted insufficiency of the declaration is without merit. So far as appears, the evidence was received without any objection upon this ground, and the assignment of error rests solely upon the refusal of the trial court to grant a general prayer that the court should instruct the jury that. "under the pleadings and all the evidence," their verdict should be for the Fuller Company. It is urged that there is no sufficient averment of the negligence of this company, and attention is directed to the allegation of the declaration that the plaintiff "requested the said defendant, Otis Elevator Company, its servants and employees, to stop said elevator at the second floor, so that he might get off and alight therefrom." It is manifest, however, from the other allegations of the declaration, that the plaintiff intended to charge, and did charge, negligence on the part of both defendants. The attention of the trial court was not called to any particular in which the declaration was deemed to be insufficient as against the Fuller Company, and no mention was made of the specific point now raised. If this point had been suggested, it is apparent that, in view of the allegations contained in the declaration, such variance as there was between pleading and proof could properly have been met by an immediate amendment, and the case could *then have been submitted[201 to the jury precisely as it was submitted.

It is also assigned as error that the trial court improperly modified one of the requests of the Fuller Company for instruction upon the subject of contributory negligence. The requested instruction, with the modification made by the trial court, which appears in the words italicized, was as follows: "If the jury find from all the evidence that the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on *the ledge around* the top of the elevator car, *with reference to obeying the signals to stop at the second floor, if you find such signals* were given, when he might readily have

placed himself in a safe and secure position, the verdict should be for the defendant, the George A. Fuller Company, regardless of any supposed negligence on the part of the elevator operator, and regardless of whether the operator was a servant of the Fuller Company or not." The court undoubtedly added these words because the evidence showed that the plaintiff had asked the operator to stop at the second floor, and there was no danger from the weights until the elevator reached the fifth floor. The fact that the plaintiff intended to go only to the second floor, and had signaled accordingly, was properly to be taken into consideration in passing upon the question whether, in the circumstances, he acted with reasonable prudence. The court, in other portions of the charge, correctly instructed the jury on the subject of contributory negligence, and there is not the slightest ground for the conclusion that there was any doubt as to the meaning of the court in the words used in modifying the defendant's request, or that any prejudicial error was committed.

The principal argument for reversal is based on the ruling of the trial court that Locke, the operator of the elevator, was the servant of the Fuller Company. The 202] *court below approved this ruling and we find no error in its conclusion. So far as Locke's employment was concerned, there was no dispute as to any matter of fact, and the question of the liability of the Fuller Company for his negligence, if he was negligent in the operation of the elevator, was one of law. It cannot be said that, under the arrangement between the Fuller Company and the Mackay Company, Locke was transferred to the employment of the latter. The Fuller Company had contracted for the construction of the building. It had made a subcontract with the Mackay Company which covered the painting of the elevator shaft. It was convenient in doing this that the top of the elevator should be used as a movable platform. But the Fuller Company needed the elevator from time to time for other purposes; and it was important to it that the elevator shaft should be kept free of obstructions and that the elevator should continue to be at its command. Accordingly, the Fuller Company agreed to furnish to the Mackay Company the use of the elevator and the service of the operator, for a specified sum per hour, when the elevator was not otherwise required. The Fuller Company was thus aiding in the prosecution of the work which it had contracted with the owner of the building to perform, and in providing the use of a facility to a subcontractor it secured the doing of the work at the smallest inconvenience to itself. It must be concluded that the operating of the elevator under this arrangement with the Mackay Company was an operating of it by the Fuller Company. It is true that the employees of the Mackay Company were to give the signals for starting and stopping the elevator, but this did not make the operator who received them the servant of the Mackay Company. These signals simply notified him as to what was required from time to time in the course of the service which the Fuller Company had agreed to provide.

*The court below followed the de-[203 cision of this court in the case of Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252. There the plaintiff was employed as a longshoreman by a master stevedore, who was acting under a contract with the defendant, the Standard Oil Company, in loading a ship with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck by a load of cases containing oil which was unexpectedly lowered. The ship was alongside a dock belonging to the defendant, and the cases of oil were conveyed from the dock to the hatch by means of tackle, guy ropes and hoisting ropes furnished and rigged by the stevedore. The motive power was supplied by a winch and drum owned by the defendant and placed on its dock. The work of loading was done by employees of the stevedore, except that the winch was operated by a winchman in the general employ and pay of the defendant. The stevedore paid the defendant an agreed sum for the hoisting. The winch was placed where it was impossible to determine the proper time for hoisting and lowering the cases of oil, and the winchman necessarily depended upon signals from an employee of the stevedore stationed on the deck of the ship. The negligence consisted in lowering a draft of cases before the signal was received. The court held that the winchman remained the servant of the defendant, and affirmed a judgment recovered against the defendant for his negligence. With respect to the argument based on the fact that the winch was to be operated for the stevedore, according to the orders of his employees, Mr. Justice Moody, in delivering the opinion of the court, said: "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. *The giving of the signals un-[20

der the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters." (Id. p. 226.)

In the present case, the Fuller Company obtained the use of the elevator and the operator from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction, and to the employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger. The Fuller Company, having obtained the use of the elevator, agreed to supply it to the Mackay Company, and undertook to furnish that company the necessary service in operating it; it asserted control for this purpose, and assumed the duty of operating with proper care.

Judgment affirmed.

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J. M. HEBERT, B. C. Hebert, M. S. Hamshire, L. Hamshire, J. A. Bordages, and J. E. Broussard, Appts.,
v.
W. J. CRAWFORD, Trustee, and E. J. Le Blanc.

(See S. C. Reporter's ed. 204–211.)

**Bankruptcy — conflicting state and Federal jurisdiction — physical possession.**

1. The physical possession of a crop, first by the bankrupts and later by the trustee, brought the property within the exclusive jurisdiction of the bankruptcy court to administer it as assets of the estate, and such jurisdiction was not lessened because the trustee, after gathering the crop, delivered it into the possession of persons claiming to have acquired title prior to the bankruptcy proceedings.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

**Judgment — conclusiveness — collateral attack.**

2. A finding in a summary proceeding in a court of bankruptcy that the trustee had received as such certain property as assets of the bankrupt estate was conclusive against him, and not subject to collateral attack by third persons.

[For other cases, see Judgment, III. 1, 2; III. j, 4, in Digest Sup. Ct. 1908.]

**Bankruptcy — conflicting jurisdiction — power of state court.**

3. A trustee in bankruptcy, who has been charged by the bankruptcy court in a summary proceeding with the value of certain property which that court found had come into his possession as an asset of the bankrupt estate, and had been improperly delivered by him to a firm of which he was a member, may be enjoined by a state court, at the instance of the other partners, from using the partnership assets to satisfy the judgment against himself.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

**Bankruptcy — conflicting jurisdiction — power of state court.**

4. A state court, as an incident of its jurisdiction to enjoin a trustee in bankruptcy from using the assets of the firm of which he was a member to satisfy a judgment of a court of bankruptcy, charging him with the value of property which came into his hands as trustee, and which he is found to have improperly delivered to his firm, may determine the liability of his successor as trustee, who received the money of the firm with notice that it had been taken in violation of that injunction, his representative capacity not exempting him from liability for wrongfully receiving or retaining funds thus tortiously paid, since they did not become a part of the *res* within the exclusive control of the bankruptcy court.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 83.]

Submitted December 9, 1912. Decided April 7, 1913.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Texas, enjoining the prosecution of an action in a state court. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. A. D. Lipscomb and Frederick S. Tyler submitted the cause for appellants:

As between courts having concurrent jurisdiction for plenary trial the one whose jurisdiction for such trial has been first called into exercise should be left untrammeled in the exercise of its jurisdiction for adjudication of the ultimate rights, leaving the processes of execution to be looked after in the court having control of the property or fund in litigation.

Orton v. Smith, 18 How. 263, 15 L. ed.

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NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

393; Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Byers v. McAuley, 149 U. S. 620, 37 L. ed. 873, 13 Sup. Ct. Rep. 906.

It may be conceded that if the bankruptcy court had a general jurisdiction and proper machinery for trial of title to property, and there had been begun in it, before the state court suit was filed, proceedings for a plenary trial, its jurisdiction would have been exclusive, irrespective of whether it had custody of the fund in question or not.

Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 259, 54 L. ed. 1037, 31 Sup. Ct. Rep. 11.

But there was here no conflict of the kind arising between courts of concurrent jurisdiction; for whatever proceeding existed in reference to this crop in the bankruptcy court was of a wholly different kind from that in the state court. It was a proceeding *in rem* where all persons who participated had common claim, and whose interest, at least in the capacity in which they participated, was to have the estate include the property; while the proceeding in the state court was for determination of an adversary claim as between the estate and persons not participating in the proceedings in bankruptcy. Where there is such difference there is no conflict unless the first court to act has taken the property into its custody, and then only to the extent that the second court attempts to interfere with possession.

Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Re Russell, 41 C. C. A. 325, 101 Fed. 248.

Declarations apparently to the contrary occur only in those cases in which the one court has attempted to interfere with the custody of the other.

Murphy v. John Hofman Co. 211 U. S. 562, 53 L. ed. 327, 29 Sup. Ct. Rep. 154; Palmer v. Texas, 212 U. S. 125, 53 L. ed. 438, 29 Sup. Ct. Rep. 230.

If it should, for argument's sake, be conceded that the bankruptcy court had custody of the property, yet the state court, having jurisdiction of a wholly different kind from that in which LeBlanc and the fund were being summarily dealt with, could have proceeded to due and orderly adjudication, leaving the court of administrative powers to respect its orders as its spirit of comity should prompt, as had been done in situations where the reverse conditions prevailed; *i. e.*, where the state court was the court of administrative powers, having the fund in custody, while the appropriate court for adjudication had been the Federal court.

Yonley v. Lavender, 21 Wall. 272, 22 L. ed. 536; Byers v. McAuley, 149 U. S. 620, 37 L. ed. 873, 13 Sup. Ct. Rep. 906.

Notwithstanding declarations in the extreme cases involving conflict of custody, to the effect that "possession carries with it the exclusive jurisdiction to determine all judicial questions concerning the property" (Wabash R. Co. v. Adelbert College, 208 U. S. 46, 52 L. ed. 382, 28 Sup. Ct. Rep. 182; Murphy v. John Hofman Co. 211 U. S. 569, 53 L. ed. 330, 29 Sup. Ct. Rep. 154), it is too plain for argument that the jurisdiction of the court having possession may be limited, or be devoid of the machinery necessary to afford a constitutional trial, and in such cases it is necessary to preserve the ordinary jurisdiction of the other courts over the property, exclusive for the purpose of determining title, and there is no principle which requires one court's temporary possession of property to exclude another's exercise of power to determine title to it, even where its jurisdiction is only concurrent.

Yonley v. Lavender, 21 Wall. 272, 22 L. ed. 536; Orton v. Smith, 18 How. 263, 15 L. ed. 393.

In cases like this the jurisdiction of the bankruptcy court must depend wholly upon actual or constructive custody of the fund (Murphy v. John Hofman Co. 211 U. S. 569, 53 L. ed. 330, 29 Sup. Ct. Rep. 154), or upon such voluntary subjection of the adverse claim to its jurisdiction as was done in Coder v. Arts, 213 U. S. 233, 53 L. ed. 777, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008, or suggested in Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

The pendency of proceedings in a Federal court which had previously had specific property in its grasp did not prevent a state court from taking the same property into its control after the Federal court had released its grasp; and a new order of the Federal court, then made, attempting to extend its grasp to the property, would be just as improper as if it had never had the property in custody.

Shields v. Coleman, 157 U. S. 178, 39 L. ed. 663, 15 Sup. Ct. Rep. 570; Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257.

The state court having rightfully assumed control, none but a court of revisory powers should have caused or sanctioned interference with its control.

Orton v. Smith, 18 How. 263, 15 L. ed. 393; Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 62, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; Palmer v. Texas, 212 U. S. 125, 53 L. ed. 438, 29 Sup. Ct. Rep. 230; Peck v. Jenness, 7 How. 625, 12 L. ed. 847; Dietzsch v. Huidekoper (Kern v. Huidekoper) 103 U. S. 494, 26 L. ed. 497; Prout v. Starr, 188 U. S. 544, 47 L. ed. 588, 23 Sup. Ct. Rep. 398; Gumbel v. Pitkin, 124 801

U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; Metcalf Bros. v. Barker, 187 U. S. 175, 47 L. ed. 127, 23 Sup. Ct. Rep. 67; Ex parte Royall, 117 U. S. 254, 29 L. ed. 872, 6 Sup. Ct. Rep. 742.

The *ex parte* action against LeBlanc could not, as against these appellants, even give character to the proceedings, contrary to the truth, so as by estoppel to determine the forum for subsequent proceedings.

Smith v. Mason, 14 Wall. 432, 433, 20 L. ed. 752, 753; Re Chase, 59 C. C. A. 629, 124 Fed. 753; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 132, 53 L. ed. 733, 29 Sup. Ct. Rep. 466; Peck v. Jenness, 7 How. 625, 12 L. ed. 846.

Controlling force should be accorded to plenary judicial proceedings over mere summary orders in those that are ministerial.

Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 132, 53 L. ed. 733, 29 Sup. Ct. Rep. 466.

Bankruptcy courts are not proper tribunals to try adverse claims of right to property which is not admitted to be part of the *res*.

Harris v. First Nat. Bank, 216 U. S. 382, 54 L. ed. 528, 30 Sup. Ct. Rep. 296; Bush v. Elliott, 202 U. S. 479, 480, 50 L. ed. 1115, 1116, 26 Sup. Ct. Rep. 668; Bardes v. First Nat. Bank, 178 U. S. 531, 44 L. ed. 1179, 20 Sup. Ct. Rep. 1000; Bryan v. Bernheimer, 181 U. S. 197, 45 L. ed. 820, 21 Sup. Ct. Rep. 557; Smith v. Mason, 14 Wall. 419, 20 L. ed. 748; Louisville Trust Co. v. Comingor, 184 U. S. 24, 46 L. ed. 415, 22 Sup. Ct. Rep. 293; United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055, 32 Sup. Ct. Rep. 620.

When one is in position to give or withhold the basis of a claim of right, then the restrictions imposed by law, which ordinarily limit his dealings with the possessors of such basis, may be abolished as one of the conditions of his granting the basis of the claim of right.

Sexton v. Kessler, 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Red River County Bank v. Higgins, 72 Tex. 66, 9 S. W. 745; Texas Western R. Co. v. Gentry, 69 Tex. 633, 8 S. W. 98; Richardson v. Washington, 88 Tex. 345, 31 S. W. 614; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; Moore-Cortes Canal Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S. W. 350.

Mr. Horace Chilton submitted the cause for appellee Crawford. Mr. U. F. Short was on the brief:

Appellee maintains the right of the bankrupt court to protect him by injunction *against the action* brought by appellants in *the state district court of* the state of Tex-

as, to recover the funds in his hands, or to interfere in any manner with his possession thereof.

Murphy v. John Hofman Co. 211 U. S. 562, 53 L. ed. 327, 29 Sup. Ct. Rep. 154; White v. Schloerb, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 1007; Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Clarke v. Larrimore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363; Metcalf Bros. v. Barker, 187 U. S. 175, 47 L. ed. 127, 23 Sup. Ct. Rep. 67; Cleminshaw v. International Shirt & Collar Co. 165 Fed. 797; Bray v. United States Fidelity & G. Co. 96 C. C. A. 9, 170 Fed. 689; Re Mertens, 131 Fed. 507; Loveland, Bankr. 3d ed. p. 105, § 22; Watkin, Trustees in Bankr. p. 70, § 52; Re Gutman & Wenk, 8 Am. Bankr. Rep. 255, 114 Fed. 1009; Re Russell, 41 C. C. A. 323, 101 Fed. 248.

Mr. Justice Lamar delivered the opinion of the court:

This conflict of jurisdiction between state court and bankrupt court, with injunction and counter injunction, grew out of a controversy as to who was in possession of a crop of rice when Moore & Bridgeman, who had planted it, filed their petition on July 16, 1906, to be adjudged bankrupts. If the rice was then in their possession the bankrupt court had jurisdiction to administer it as assets of the estate, and to determine all claims to the property. Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969; Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

The firm of Beaumont Mills claimed, however, that for value and in good faith, they had acquired the title and possession of the rice on June 15, 1906, thirty days before the petition in bankruptcy was filed; that they had *employed Moore &[206 Bridgeman to harvest and deliver it, and that LeBlanc, who was soon thereafter elected trustee, used labor, teams, and machinery of the bankrupts in harvesting and threshing the crop. The Beaumont Mills paid him, as trustee, for these services and for hauling and delivering the rice to them at their warehouse. This they claim did not affect the jurisdiction of the state court of any controversy as to the ownership and possession of the crop.

Creditors of the bankrupts, on the other hand, denied the title of the Beaumont Mills, insisting that the crop belonged to Moore & Bridgeman, and that the delivery

by LeBlanc, trustee, was a conversion to his own use and that of the Beaumont Mills, of which firm he was a member. These creditors thereupon instituted summary proceedings in the bankrupt court to charge him with its value. On that hearing two members of the firm of Beaumont Mills were sworn and testified as witnesses in his behalf. The district court found in favor of the creditors, and on December 17, 1907, entered an order reciting that the rice was the property of Moore & Bridgeman; that it came into the possession of LeBlanc, as trustee; that he improperly delivered it to the Beaumont Mills, and was chargeable with $11,651, its value. The court thereupon directed that he pay that sum into the registry of the court within ten days. That judgment was affirmed (92 C. C. A. 285, 166 Fed. 689).

LeBlanc was without funds with which to comply with this order, and claimed that, under the circumstances, he had the right to withdraw $11,651—the value of the rice—from the funds of the Beaumont Mills, and deposit it in the registry of the court. The other members of the firm resisted this claim and accordingly instituted proceedings against him in the state court to prevent his carrying his threat into execution. On March, 1909, a temporary injunction was issued, restraining him from with-[207]drawing *partnership assets for the purpose of paying the money into the bankrupt court.

The creditors of Moore & Bridgeman contended that they were not concerned with the suit betwen the partners, or the source from which LeBlanc secured the money to pay the judgment rendered against him on December 17, 1907. They therefore pressed for a compliance with that order, and to avoid attachment for contempt, LeBlanc, in disobedience of the injunction, drew $11,651 from the bank account of the Beaumont Mills, paid the firm's money to the clerk of the bankrupt court, who deposited it with the Gulf Bank and Crawford, elected to succeed LeBlanc as trustee of Moore & Bridgeman.

The Beaumont Mills at once filed a supplemental petition in the state court, making the bank and Crawford, trustee, defendants, and praying judgment against both of them for the partnership money in their hands, and for other and further relief. Crawford, in turn, immediately brought this bill, in the bankrupt court, to enjoin the Beaumont Mills from prosecuting their suit against him in the state court. He insisted that the bankrupt court had jurisdiction of the *res* and was, alone, authorized to determine his right to retain the $11,651 paid over to him as trustee. He contended also that the order of December 17, 1907, in the summary proceedings, was not only conclusive that the bankrupt court had jurisdiction of the *res*, but he also insisted that, as the Beaumont Mills had taken part in that litigation, they were bound by the finding that the crop belonged to Moore & Bridgeman. A decree was rendered in Crawford's favor by the district court. It was affirmed by the court of appeals, and is brought here by the Beaumont Mills for review.

Crawford's contention must, in part, be sustained. For whatever may have been the legal or equitable rights of the Beaumont Mills under their contracts with Moore & Bridgeman, and under the bill of sale of June 15, 1906, it *still appears that,[208 first, Moore & Bridgeman, and, later, LeBlanc, as trustee, engaged in gathering, threshing, hauling, and delivering the rice. This physical possession, under the decision in Murphy v. John Hofman Co. 211 U. S. 562, 53 L. ed. 327, 29 Sup. Ct. Rep. 154, and cases cited, gave the bankrupt court control of the *res*, and authority to administer it along with all other property in their physical possession when their petition was filed. That petition operated as an attachment, and brought the rice into the custody of the bankrupt court.

"Where property was in the possession of the bankrupt at the time of the appointment of a receiver . . . the bankruptcy court had jurisdiction to determine the title to it [569]. . . . When the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of the *res* . . . it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court." Murphy v. John Hofman Co. 211 U. S. 562, 569, 570, 53 L. ed. 327, 330, 331, 29 Sup. Ct. Rep. 154, and authorities. Nor was this jurisdiction lessened because LeBlanc, trustee, after gathering the crop, delivered the rice into the possession of Beaumont Mills at their warehouse. "The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof. . . . This jurisdiction can [not] be ousted by a surrender of the property by the receiver, without authority of the court." Whitney v. Wenman, 198 U. S. 553, 49 L. ed. 1161, 25 Sup. Ct. Rep. 778.

Under these decisions the physical possession of the crop brought the property within the exclusive jurisdiction of the bankrupt court. The finding in the summary proceeding that LeBlanc had received possession, as trustee, was conclusive against

him, and was not subject to collateral attack by third persons. Noble v. Union Pacific Logging Co. 147 U. S. 173, 174, 37 L. ed. 126, 127, 13 Sup. Ct. Rep. 271, and cases cited.

209] *But that decision was not entered in a suit, in its nature plenary, to try title, and was not binding upon the Beaumont Mills, even though two members of the firm testified as witnesses. It was an order in bankruptcy finding that LeBlanc, having been in possession of the property as trustee, was accountable for its value. But it did not determine what was to be done with the rice, or who owned it, or whether the Beaumont Mills had a title thereto or a lien thereon. All these matters were left open for adjudication by the bankrupt court when plenary suits were filed by any person having a claim to the property. Or, since the rice had been withdrawn from the custody of that court, the trustee could institute therein a suit for the rice or its proceeds. He would hold the same when recovered for the benefit of whosoever might be determined to be entitled thereto in whole or in part.

None of these issues could be settled by LeBlanc. The fact that he was trustee, and at the same time a member of the firm of Beaumont Mills, did not give him the right to use partnership assets of any sort for the purpose of satisfying the judgment rendered against himself, and by a wrongful conversion of firm money rectify what had been held to be a wrongful conversion of the bankrupt's rice. There is no claim that the $11,651 had been earmarked, or had been set apart as a specific fund to represent that property, or that what LeBlanc delivered to Crawford was the same money that had been received from the sale of the rice two years before. On the contrary, Crawford, in his bill, insists that the Beaumont Mills "still have the rice or its proceeds," and the answer of the Beaumont Mills avers that the money was checked out by LeBlanc from the firm's bank account and deposited with Crawford.

That being so, LeBlanc was not authorized to draw out this partnership money and hand the same over to Crawford, trustee, even though the latter may have had a 210] *claim against that firm for an equal amount. When LeBlanc threatened to misapply their assets, whether $11,651 in money or corn or anything else of equal value, the other partners were entitled to apply for equitable relief, and the state court had jurisdiction to restrain him from using money of the Beaumont Mills to satisfy his personal obligation. As an incident of that jurisdiction the state court could determine the liability of Crawford, trustee, who received such money of the firm with notice that it had been taken in violation of that injunction. Re Kanter, 58 C. C. A. 260, 121 Fed. 984; Re Spitzer, 66 C. C. A. 35, 130 Fed. 879; Re Mertens, 77 C. C. A. 473, 147 Fed. 182. Cf. Act of 1888 (25 Stat. at L. 436, chap. 866). For his representative capacity did not exempt him from liability for wrongfully receiving or retaining these funds paid over in disobedience of an injunction, —since money thus tortiously paid and held did not thereby become a part of the res within the exclusive control of the bankrupt court.

The fact that the jurisdiction of the two courts is limited, as a result of the bankrupt act, makes it impossible for either, without the consent of both parties, to determine the whole controversy in one suit. The state court has the right to try the question as to whether Crawford and the bank received the money with notice that it was partnership assets, and if so, to enter judgment in favor of the Beaumont Mills. But it could not determine who was in possession of the rice on July 16, 1906, or who was entitled to the property or its proceeds. That matter had been drawn within the jurisdiction of the bankrupt court by the order of December 17, 1907, and that decision was not subject to review by the state court. The decree must therefore be reversed in so far as it enjoins the Beaumont Mills from suing Crawford, trustee, for partnership assets paid into his hands in violation of the state injunction; but without prejudice to the right of Crawford, trustee, to proceed in the district court of *the[211 United States against the Beaumont Mills for the recovery of the rice, its proceeds or its value, and without prejudice to the right of the Beaumont Mills, in such suit, to make any defense or to assert any claim, lien, or title to the property by reason of contracts and transactions with Moore & Bridgeman, Moore or others, before the petition in bankruptcy was filed.

The decree is reversed and remanded for further proceedings in conformity with this opinion.

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ROSCOE LYLE, Appt.,
v.
GEORGE W. PATTERSON, T. H. Smith, W. M. Smith, et al.

(See S. C. Reporter's ed. 211-216.)

**Public lands — entry on occupied land — trespass.**

A homestead right cannot be initiated by an entry on land which was then in the possession of one who had bought from those who, having acquired the property in good faith from the apparent owner of the equitable title, had cultivated the land and

made valuable and permanent improvements thereon, since such prior possessory title was good against all except the United States, and the so-called entry was but a naked, unlawful trespass.

[For other cases, see Public Lands, I. e, 2, in Digest Sup. Ct. 1908.]

[No. 167.]

Argued and submitted March 5, 1913. Decided April 7, 1913.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Iowa, dismissing the bill in a suit to charge the holders of the title to real property with a trust for the benefit of complainant. Affirmed.

See same case below, 100 C. C. A. 379, 176 Fed. 909.

Statement by Mr. Justice Lamar:

By the act of May 12, 1864 (13 Stat. at L. 72, chap. 84), Congress made a land grant to the state of Iowa to aid in the construction of a railroad from Sioux City to the Minnesota line,—a distance of about 80 miles. It was provided that the road should be completed within ten years, but that as each 10 miles was completed, a patent for one hundred sections should be issued by the Secretary of the Interior to the state, for the benefit of the company building the road. In 1866 the state passed an act under which the Sioux City & St. Paul Railroad was to receive the benefit of the congressional land grant. That company began construction in 1872. Several 10-mile sections were completed. Patents were accordingly issued to the state, and it, in turn, made a number of grants to the railroad company. But, because of a controversy as to what had been earned, the state of Iowa refused to convey to the railroad company those sections which contained the land involved in this controversy.

This particular tract was sold on May 12, 1887, by the railroad company to Pasco, who bought in good faith, believing that the company had earned the right to receive a title thereto. He paid part of the purchase price, promised to pay the balance in ten annual instalments, entered into possession, and made valuable improvements. In 1889 he sold his interest to Patterson, who agreed to pay the balance of the purchase money due to the railroad. Patterson, by himself and tenants, remained in possession until January, 1901. He then sold to Smiths, and the latter, in March, 1901, conveyed to Thomas Beacom. In May, 1901, the appellant, Lyle, claiming that he had a homestead right in the premises, brought *the present suit against Pat-[213 terson, Smiths, and Thomas Beacom, to charge them as trustees holding title for his use.

On the trial it appeared that in 1874, 56 miles of the railroad had been constructed, after which the company ceased to build. The road not having been fully constructed within ten years, as required by Congress in the act of 1864, the state of Iowa refused to issue grants for land claimed by the railroad company, and, by appropriate legislation, the state resumed all the unearned land and relinquished the same to the United States. In 1889 the government filed in the circuit court a bill against the Sioux City & St. Paul Railroad Company, asking the court to quiet the title of the United States to land therein described, included in which was the quarter section sold, in 1887, to Pasco. That suit resulted in a decree in favor of the United States. It was affirmed October 21, 1895 (159 U. S. 354, 40 L. ed. 179, 16 Sup. Ct. Rep. 17).

On October 22, 1895, the day following the decision in favor of the government, and for the purpose of initiating a homestead right, James Beacom entered upon the land, and in the afternoon of the same day Lyle did likewise. He hauled a small hut upon the land, did a little plowing, and slept on the place one or two nights. He left, intending to return, but was prevented from doing so by James Beacom, who, with a drawn pistol and threats of violence, kept him from coming on the land. Subsequently, Lyle did re-enter and remained until he was again forced to leave.

On November 18, 1895, shortly after the decision that the land did not belong to the railroad, but to the United States, notice was given by the Department of the Interior that all the land included in the decree would be restored to the public domain and be subject to entry ninety days after publication. Those having rights under the act of 1887 (24 Stat. at L. 557, chap. 376) were required to file their claims *within ninety days following. In Feb-[214 ruary and again in March, 1896, Lyle made his homestead application, tendering the necessary fees. Similar applications were made by James Beacom, Hoffman, and others. Patterson made his claim under the act of 1887. It was rejected on the ground that after the passage of that act, and with notice of the defective title, he had made a new contract with the railroad company as to what should be paid him in the event the government succeeded in the suit. Hoff-

man was held to be entitled to the patent. On appeal, that decision was reversed by the Commissioner of the Land Office, who ruled in favor of James Beacom. On a further appeal the Secretary of the Interior held that nothing had been done under the new contract to deprive Patterson of the priority given to good-faith purchasers under the act of March 3, 1887, and a patent was accordingly issued to him on March 23, 1901. Thereupon Lyle, on May 24, 1901, brought this bill against Patterson, Smiths, and Thomas Beacom, to cancel the patent, or to have the holders of the legal title decreed to hold the land in trust for him. The circuit court dismissed the bill, and the decree was affirmed (100 C. C. A. 379, 176 Fed. 909) by the circuit court of appeals.

Mr. Madison B. Davis submitted the cause for appellant. Mr. Alfred Pizey was on the brief:

The possession of George W. Patterson and James A. Beacom was not such as the homestead law requires.

Whaley v. Northern P. R. Co. 167 Fed. 669.

The entry, and not the settlement, is the main factor in determining rights under the general homestead law.

St. Paul, M. & M. R. Co. v. Donohue, 210 U. S. 21, 29–31, 52 L. ed. 941, 944, 945, 28 Sup. Ct. Rep. 600, affirming 101 Minn. 239, 112 N. W. 413.

While the right to acquire title under the homestead laws might be initiated by settlement after the act of 1880, the entry must be applied for within the limited statutory time after settlement, or after survey if the tract was unsurveyed when settlement was made. In other words, the entry must be applied for in due course, otherwise the right acquired by settlement may be lost by other disposition of the land, either by Congress or by the Land Department.

Nelson v. Northern P. R. Co. 188 U. S. 108, 122, 127, 132, 133, 47 L. ed. 406, 412, 414, 416, 417, 23 Sup. Ct. Rep. 302, reversing 22 Wash. 521, 61 Pac. 703; Southern P. R. Co. v. Lopez, 3 Land Dec. 130; United States v. Bagnell Timber Co. 102 C. C. A. 243, 167 Fed. 798; Maddox v. Burnham, 156 U. S. 544, 39 L. ed. 527, 15 Sup. Ct. Rep. 448; Sjoli v. Dreschel, 90 Minn. 110, 95 N. W. 764, reversed on other grounds in 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154.

If the settlement of appellant was wrongful because of the prior occupancy, so was that of James A. Beacom. But such prior occupancy was without any legal basis and was also wrongful; and so far as the respective rights of appellant and appellees are concerned, no question of prior possession of the land should be now considered.

Logan v. Davis, 147 Iowa, 441, 127 N. W. 812; United States v. Chicago, M. & St. P. R. Co. 195 U. S. 524, 537, 49 L. ed. 306, 311, 25 Sup. Ct. Rep. 113, affirming 54 C. C. A. 545, 116 Fed. 969.

The case made by appellant falls within the reasoning and logic of the decisions of the courts in favor of claimants whose applications have been wrongfully rejected by the Department.

Ard v. Brandon, 156 U. S. 537, 541–544, 39 L. ed. 524, 525, 526, 15 Sup. Ct. Rep. 406, reversing 43 Kan. 425, 23 Pac. 646. See also Brandon v. Ard, 211 U. S. 11, 53 L. ed. 68, 29 Sup. Ct. Rep. 1, affirming 74 Kan. 424, 118 Am. St. Rep. 321, 84 Pac. 366; Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549, affirming 69 Minn. 552, 72 N. W. 794; Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302, reversing 22 Wash. 521, 61 Pac. 703; Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154, reversing 90 Minn. 110, 95 N. W. 763; Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, 30 Sup. Ct. Rep. 420, affirming 107 Minn. 568, 119 N. W. 1133; Osborn v. Froyseth, 105 Minn. 16, 116 N. W. 1113; Maddox v. Burnham, 156 U. S. 544, 547, 39 L. ed. 527, 528, 15 Sup. Ct. Rep. 448.

Mr. George C. Scott argued the cause, and, with William Milchrist and W. D. Boies, filed a brief for appellees:

The appellant, never having taken lawful possession of the land in controversy, but having done acts which constituted a mere trespass thereon at a time when defendant Patterson was in possession under claim of right, with full knowledge upon appellant's part of such possession and claim of right, he cannot now maintain this suit.

Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Quimby v. Conlan, 104 U. S. 423, 26 L. ed. 801; Hosmer v. Wallace, 97 U. S. 575–579, 24 L. ed. 1130, 1131; Trenouth v. San Francisco, 100 U. S. 251–257, 25 L. ed. 626–628; Tustin v. Adams, 87 Fed. 377; Rourke v. McNally, 98 Cal. 291, 33 Pac. 62; United States v. Williams, 30 Fed. 314; Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200; Carmichael v. Campodonico, 7 Cal. App. 597, 95 Pac. 164; Short v. Read, 30 Nev. 373, 96 Pac. 1060; Harvey v. Holles, 160 Fed. 531.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The Sioux City & St. Paul Railroad, claiming to have earned the land under the

act of 1864 (13 Stat. at L. 72, chap. 84), sold a quarter section in 1887, to Pasco, 215]who *bought in good faith, believing that the company was entitled to a grant from the state. He conveyed his interest to Patterson, who, pending the litigation between the United States and the railroad company, in reference to the land, made a contract as to the amount to be paid him in the event the company lost the suit. The government prevailed, and the land being specially valuable because of its having been cultivated and improved, there was a race to acquire the pre-emption right. Lyle and others, claiming to have entered into possession, made applications for a homestead. Patterson, relying on the rights of a good-faith purchaser under the act of March 3, 1887, filed his claim. After a lengthy contest in the Land Department he received a patent. Lyle insists that the action of the Secretary of the Interior was based upon a misconstruction of the law, and that Patterson and his assignee should be decreed to hold the title in trust for Lyle as the first entryman.

In the lengthy briefs filed in this court various arguments are presented to show that the benefit of the act of March 3, 1887 (24 Stat. at L. 557, chap. 376), was confined to those who bought before that date, and that Patterson's subsequent contract with the railroad company deprived him of the priority he otherwise might have had. It is not necessary to consider these contentions, for even if they were sound, it could not avail Lyle in the present suit, since he can only recover on the strength of his equity, and not on the defects in defendant's title.

When, on October 22, 1895, he made the so-called entry and settlement, the quarter section was not an open and unoccupied part of the public domain, but in the possession of Thomas Beacom, who had bought from those who, having acquired the property in good faith, cultivated the land and made valuable and permanent improvements thereon. This prior possessory title was good as against all except the United 216]States, and Lyle's entry was *a trespass which neither gave nor initiated any right in the property. The fact that by the threats and violence of another trespasser, he was prevented from continuing his forcible entry and detainer, deprived him of no right in the land, though it does illustrate what would be the result if possession secured by violence and maintained with force and arms could furnish the basis of a right enforceable in law.

Such a claim, originating in trespass, cannot be recognized; for "to create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor,—conditions which cannot be met when land is in the possession of another." Hosmer v. Wallace, 97 U. S. 579, 24 L. ed. 1131. This is equally true of the initiation of a homestead right by settlement. The land here had been cultivated and improved by those who were in possession under a purchase from the railroad, the apparent owner of the equitable title. Lyle's entry, though made under a pretense of effecting a homestead settlement, was but a naked unlawful trespass which could not initiate a right. Atherton v. Fowler, 96 U. S. 516, 24 L. ed. 733; Swanson v. Sears, 224 U. S. 182, 56 L. ed. 724, 32 Sup. Ct. Rep. 455. He therefore had no standing in court, and the bill was properly dismissed.

Decree affirmed.

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*MARY ELEANOR WILSON, Amelia[217 Maria Wilson, William Harris Wilson, John Aquila Wilson, Adelaide Bury Brown, Plffs. in Err.,

v.

CHESTER A. SNOW.

(See S. C. Reporter's ed. 217-225.)

**Evidence — ancient document — authority of grantor.**

1. A deed more than thirty years old, purporting to have been signed by the executrix nominated in a will, and containing a recital that it was executed under the power of sale conferred by the will, proves itself where the possession of the land has been consistent with its terms, although, the original records having been lost, there is nothing to show that the testatrix ever qualified as such.

[For other cases, see Evidence, IV. b, 4, in Digest Sup. Ct. 1908.]

**Executors and administrators — power of sale — interest — sale by survivor.**

2. The power of sale given the executors by a will must be deemed to have been so coupled with an interest that, even if not mandatory, it may be exercised by the survivor, where to such power was added the active and continuing duty of managing the property, making disposition thereof, and changing investments, the will providing that debts were to be paid, and that the executors were to care for the slaves, and that if, in their discretion, it became necessary, they were to sell and reinvest the pro-

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NOTE.—On proof of ancient documents generally—see note to Coulson v. Walton, 9 L. ed. U. S. 51.

On the necessity of calling subscribing witness to prove ancient document—see note to Garrett v. Hanshue, 35 L.R.A. 321.

ceeds, and were to exercise a sound discretion in the management, disposition, and investment of the estate for the benefit and advantage of the testator's wife and children.

[For other cases, see Executors and Administrators, IV. g; Powers, I. c, in Digest Sup. Ct. 1908.]

[No. 187.]

Argued March 13 and 14, 1913. Decided April 7, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, in favor of defendant in an action of ejectment. Affirmed.

See same case below, 35 App. D. C. 562.

Statement by Mr. Justice Lamar:

John H. A. Wilson, of Washington county, District of Columbia, by his will, probated March 20th, 1858, after providing for the payment of his debts, devised all of his property, real and personal, to his wife, 218]Adelaide Wilson, *during her life of widowhood, for the support of herself and his five minor children. In case of her death or marriage the property was bequeathed to the testator's brother, Thomas O. Wilson, in trust for the use of the children.

"And I 'authorize and empower my said brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him; and it is my wish and desire that my executrix and executor hereinafter named shall and may, at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in goods, stocks, or otherwise, as they may consider best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition, and investment of my said estate for the purpose aforesaid; to wit, for my wife and children.'"

There was a provision requiring the executrix and executor to care for his servants; . . . "lastly, I do hereby constitute and appoint my dear wife, Adelaide Wilson, executrix, and my affectionate brother, Thomas O. Wilson, executor, of this my last will and testament."

The will was probated March 20th, 1858. Thomas O. Wilson, one of the executors, died September 21st, 1858. On March 8th, 1865, Adelaide Wilson made a deed, in which, after referring to the will and its *probate*, and the authority conferred upon herself and her deceased brother-in-law as executrix and executor, to sell for the benefit of the wife and children of the testator, she, by virtue of the authority vested in her by said will, sold the land to Leonard Huyck, his heirs and assigns forever.

After eight mesne conveyances, duly recorded, the property, in February, 1905, was sold to the defendant, Chester A. Snow, he and his predecessors in title having held continuous possession of the property since 1865. *Adelaide Wilson died March 28,[219 1906, and on October 23, 1906, the children brought this action of ejectment against Snow. He claimed under the deed of the executrix, but was not able to prove that she had ever qualified as such. A witness who was familiar with the records in the register of wills' office, testified that he had found therein the will of John H. A. Wilson, with an indorsement that it had been approved by the register of wills, and an entry in a book that the will had been approved and filed, out that he found no other entries or papers to indicate that either Adelaide Wilson or Thomas O. Wilson had ever qualified as executors or received letters testamentary; that the bond book for December 30th, 1856, to April 20th, 1861, was missing, and that in that book the bond of the executors would have been recorded if one had been given; that the books containing the returns of executors from 1856 to 1861 are missing; that he is unable to say whether the qualification of executors would be shown by the bond book alone or not; that he finds no docket entry relating to the case. Another witness who had frequent occasion to examine the records of the probate office between 1857 and 1860 testified that, during that period, the probate office was conducted in a negligent manner; that the witness during that period, in searching for original papers which had not been recorded found them in a mass of others piled together in an empty fireplace in the building.

There was a verdict for the defendant. A motion for a new trial was overruled. The case was taken to the court of appeals, error being assigned on the refusal to charge that the burden was on the defendant to prove that the executrix had qualified; that there was no evidence that she had qualified; that the recitals in the deed were not evidence against the plaintiffs and on the further ground that the court erred in refusing to direct a verdict for the plaintiffs. The judgment of the supreme court of the District was affirmed by the court of appeals of *the District of Columbia,[220 and the case brought here by writ of error.

Mr. Charles F. Carusi argued the cause, and, with Mr. Eugene A. Jones, filed a brief for plaintiffs in error:

In determining the question whether or not a given power survives, that "pole star of construction," the intention of the testator, should first be ascertained.

Smith v. Bell, 6 Pet. 68, 8 L. ed. 322.

A power given to two or more persons must be executed by all, and does not survive the death of one.

Gutman v. Buckler, 69 Md. 7, 13 Atl. 635; Gray v. Lynch, 8 Gill, 403; Lane v. Debenham, 11 Hare, 188, 17 Jur. 1005; Peyton v. Bury, 2 P. Wms. 626; Atty. Gen. v. Gleg, 1 Atk. 356; Brassey v. Chalmers, 16 Beav. 231; Montefiore v. Browne, 7 H. L. Cas. 241; O'Brien v. Battle, 98 Ga. 766, 25 S. E. 780; Wardwell v. McDowell, 31 Ill. 364; Robertson v. Gaines, 2 Humph. 367; Marks v. Tarver, 59 Ala. 335; Kerr v. Verner, 66 Pa. 326, 10 Mor. Min. Rep. 134; Clinefelter v. Ayres, 16 Ill. 333; 1 Sugden, Powers, 3d ed. 143, Co. Litt. 113a; Coleman v. Connolly, 242 Ill. 574, 134 Am. St. Rep. 347, 90 N. E. 278.

A power involving the exercise of personal discretion in the donee does not survive.

Re Bierbaum, 40 Hun, 504; Security Co. v. Snow, 70 Conn. 288, 66 Am. St. Rep. 107, 39 Atl. 153; Simmons v. McKinlock, 98 Ga. 738, 26 S. E. 88; Young v. Young, 97 N. C. 132, 2 S. E. 78; Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061; Hinson v. Williamson, 74 Ala. 180; Proctor v. Scharpff, 80 Ala. 227; Hawkins v. Hawkins, 13 B. Mon. 245; Tarver v. Haines, 55 Ala. 503; Towler v. Towler, 142 N. Y. 371, 36 N. E. 869; Tainter v. Clark, 13 Met. 220; Larned v. Bridge, 17 Pick. 339; Greenough v. Welles, 10 Cush. 571; Edwards v. Maupin, 7 Mackey, 47.

To these two general propositions there are two exceptions: (a) a power coupled with an interest or trust will survive; (b) a power given to executors *ratione officii* will survive because the gift is to the office, and not to the individuals, and as the office survives, the power survives.

Peter v. Beverly, 10 Pet. 565, 9 L. ed. 535; Taylor v. Benham, 5 How. 267, 12 L. ed. 146; Ferre v. American Bd. of Comrs. 53 Vt. 164; Bartlett v. Sutherland, 24 Miss. 395; Davis v. Christian, 15 Gratt. 11; Chanet v. Velleponteaux, 3 M'Cord, L. 30; Fitzgerald v. Standish, 102 Tenn. 383, 52 S. W. 294; Jackson ex dem. Hunt v. Ferris, 15 Johns. 346; Forbes v. Peacock, 11 Sim. 152, 9 L. J. Ch. N. S. 367, 6 Jur. 476; Robinson v. Allison, 74 Ala. 254; Gould v. Mather, 104 Mass. 283; Gaines v. Fender, 82 Mo. 497; Osgood v. Franklin, 14 Johns. 527; Simpson v. Simpson, 93 N. C. 373; O'Rourke v. Sherwin, 156 Pa. 285, 27 Atl. 43; Terrell v. McCown, 91 Tex. 231, 43 S. W. 2; Parsons v. Boyd, 20 Ala. 118; Hannah v. Carrington, 18 Ark. 104; Smith v. Winn, 27 S. C. 598, 4 S. E. 240; Dick v. Harby, 48 S. C. 530, 26 S. E. 900; Dexter v. Sullivan, 34 N. H. 478; Gregg v. Currier, 36 N. H. 200; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522; Den. ex dem. Elle v. Young, 23 N. J. L. 478; Hoyt v. Day, 32 Ohio St. 101; Chambers v. Tulane, 9 N. J. Eq. 146; Wooldridge v. Watkins, 3 Bibb, 349; Moores v. Moores, 41 N. J. L. 440; Dominick v. Michael, 4 Sandf. 374; Williams v. Conrad, 30 Barb. 524; Egerton v. Conklin, 25 Wend. 230; Newton v. Bronson, 13 N. Y. 589, 67 Am. Dec. 89; Bolton v. Jacks, 6 Robt. 166; Hoffman v. Hoffman, 66 Md. 568, 8 Atl. 466; Moody v. Fulmer, 3 Grant, Cas. 17.

No words of survivorship are used in the will. Not only is there no language in the will justifying the inference that he intended the wife to act alone, but the contrary is strongly deducible from the lack of confidence indicated by the provision for a forfeiture of her life estate in case of her remarriage, the appointment of his brother as trustee for his children, the devise to them of the remainder in the property, the expressions of affection and confidence in his brother, and the specific injunction laid upon him to exercise his own judgment and freedom in the discharge of the duties confided to him.

Clarke v. Boorman (Clarke v. Johnston) 18 Wall. 493, 21 L. ed. 904.

By the terms of the will, the widow took an estate for life or widowhood only; the children took (under the statute of uses, the trust being dry) a vested remainder in fee. (See Young v. Bradley, 101 U. S. 782, 25 L. ed. 1044.) There could not, therefore, be any survivorship of the estate upon which could be predicated a survival of the power. The power, so far as Thomas O. Wilson was concerned, was a power "simply collateral," he having no estate at all in the property subject to the power.

Reid v. Gordon, 35 Md. 174; 31 Cyc. 1042.

So far as the estate of the widow is concerned, it has been held in the District of Columbia (Kennedy v. Alexander, 21 App. D. C. 424) that a power to a life tenant to sell and convey in fee certain parts of the estate, for purposes of support and maintenance, does not enlarge her estate; so that in this case the existence of the power in her after the death of Thomas O. Wilson cannot be predicated upon any estate she had in the land.

Smith v. Bell, 6 Pet. 68, 8 L. ed. 322.

To render a power one coupled with an interest, it is essential that the donee have an interest in the subject-matter of the power;

the fact that the donee may have an interest in that which is produced by the exercise of the power does not render it a power coupled with an interest.

Taylor v. Burns, 203 U. S. 120, 51 L. ed. 116, 27 Sup. Ct. Rep. 40; Crowe v. Trickey, 204 U. S. 228, 51 L. ed. 454, 27 Sup. Ct. Rep. 275; Missouri ex rel. Walker v. Walker, 125 U. S. 339, 31 L. ed. 771, 8 Sup. Ct. Rep. 929; Hall v. Gambrill, 34 C. C. A. 190, 63 U. S. App. 740, 92 Fed. 32; 22 Am. & Eng. Enc. Law, 1093.

The power was not mandatory.

Fitzgerald v. Wynne, 1 App. D. C. 119; 28 Am. & Eng. Enc. Law, 2d ed. 902.

Some cases make the solution of the question whether a power is given to the office or to the individual depend upon whether or not its exercise involves a duty ordinarily connected with the office.

Ferre v. American Bd. of Comrs. 53 Vt. 164; Evans v. Chew, 71 Pa. 47; Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621; Hamilton v. Clarke, 3 Mackey, 428; Waters v. Margerum, 60 Pa. 42.

In each case it is a question of intention, whether the power is given to the person or to the office.

Farwell, Powers, p. 372; Robinson v. Allison, 74 Ala. 254; Tarver v. Haines, 55 Ala. 503; O'Brien v. Battle, 98 Ga. 769, 25 S. E. 780; Den. ex dem. Cain v. McCann, 3 N. J. L. 438, 4 Am. Dec. 384; Catton v. Taylor, 42 Barb. 578; Bergen v. Bennett, 1 Cai. Cas. 15, 2 Am. Dec. 281; Ferre v. American Bd. of Comrs. 53 Vt. 162; Bartlett v. Sutherland, 24 Miss. 401; Hall v. Irwin, 7 Ill. 176; Nicoll v. Scott, 99 Ill. 529; Brown v. Hobson, 3 A. K. Marsh. 380, 13 Am. Dec. 187; Naundorf v. Schumann, 41 N. J. Eq. 14, 2 Atl. 609.

Mr. John C. Gittings also argued the cause for plaintiffs in error:

Messrs. Hugh H. Obear and J. J. Darlington argued the cause, and, with Messrs. William F. Mattingly and Charles A. Douglas, filed a brief for defendant in error:

The will in controversy created a trust, notwithstanding the fact that the executors were not named as trustees, and that no express words of trust were used.

Tobias v. Ketchum, 32 N. Y. 329; Pom. Eq. Jur. § 1011; Meek v. Briggs, 87 Iowa, 617, 43 Am. St. Rep. 410, 54 N. W. 456; Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303; Ward v. Ward, 105 N. Y. 74, 11 N. E. 373; Toronto General Trust Co. v. Chicago, B. & Q. R. Co. 123 N. Y. 37, 25 N. E. 198.

Any interest, however slight, or any duty to be performed under the will, with the proceeds, if only to pay legacies or make distribution, will give life to the power and enable it to be executed by the survivor of several to whom it was originally given.

Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522; Taylor v. Benham, 5 How. 233, 12 L. ed. 130; Robertson v. Gaines, 2 Humph. 376; Magruder v. Peter, 11 Gill & J. 217; Parsons v. Boyd, 20 Ala. 117; Re Cooke, L. R. 4 Ch. Div. 454; May v. Brewster, 187 Mass. 524, 73 N. E. 546.

When a power is given to executors *virtute officii*, or, as it is often expressed, *ratione officii*, or *qua executors*, upon the death of one, the power survives to the survivor or survivors, and may be executed by him or them.

Sugden, Powers, 144; Davis v. Christian, 15 Gratt. 12; Gould v. Mather, 104 Mass. 286; Chandler v. Rider, 102 Mass. 268; May v. Brewster, 187 Mass. 524, 73 N. E. 546; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522; Dick v. Harby, 48 S. C. 516, 26 S. E. 900; Smith v. Winn, 27 S. C. 598, 4 S. E. 240; Fitzgerald v. Standish, 102 Tenn. 383, 52 S. W. 294; Zebach v. Smith, 3 Binn. 69, 5 Am. Dec. 352; Williams v. Conrad, 30 Barb. 524; Golder v. Bressler, 105 Ill. 433; Gaines v. Fender, 82 Mo. 497; Weimar v. Fath, 43 N. J. L. 1; Houell v. Barnes, Cro. Car. 382; Brassey v. Chalmers, 16 Beav. 233; Brassey v. Chalmers, 16 Beav. 231, 4 De G. M. & G. 527, 537; Story, Eq. Jur. § 1062; Terrell v. McCown, 91 Tex. 242, 43 S. W. 2; Muldrow v. Fox, 2 Dana, 75; Simpson v. Simpson, 93 N. C. 373; Evans v. Chew, 71 Pa. 47; Robinson v. Gaines, 2 Humph. 376.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The plaintiffs, in this action of ejectment, claimed under the will of their father, John H. A. Wilson. The defendant, Charles Snow, claims under a deed executed in 1865 by Adelaide Wilson, the nominated executrix. On the trial there was proof that the will had been probated in 1858, but no record evidence that the executrix had ever taken the oath of office and qualified as such. After showing the loss of certain books and the negligent manner in which the probate office was conducted from 1855 to 1861, the defendant insisted that the recital that the deed had been executed under the power of sale conferred by the will was sufficient to show that the nominated executrix had taken the oath and qualified as such.

The deed was more than thirty years old. The possession of the land had for forty years been consistent with its terms, and it was therefore admissible as an ancient deed, proving itself on the theory that the witnesses were supposed to be dead, and

that it was impossible to produce testimony to show the signing, sealing, and delivery by the grantor. This rule has been extended so as to admit ancient deeds purporting to have been signed by agents without the production of the power of at-221]torney,—the same reason *that justified the introduction of an ancient deed, without proof of the signature of the witnesses or grantor, authorizing its admission without proof of the capacity in which, or the power under which, it purported to have been executed. For in many cases it would be quite as impossible to prove the due execution by him as agent as by himself as owner. So that where the other necessary facts are present, and the possession of the land has been consistent with its terms, the ancient deed proves itself, whether it purports to have been signed by the grantor in his own right, as agent under power of attorney, or—the original records having been lost—by an administrator under a power of sale given by order of court, not produced, but recited in the deed itself. There are cases which support plaintiffs' contention (Fell v. Young, 63 Ill. 110), but the weight of authority sustains the ruling of the court below. In Baeder v. Jennings, 40 Fed. 200 (14), 216, 217, Justice Bradley, at circuit, held that, other things concurring, the recitals in an ancient deed were some evidence of the facts recited, and he accordingly admitted the administrator's deed forty years old, which purported to have been made in pursuance of an order of court which was not produced. A similar ruling was made in Williams v. Cessna, 43 Tex. Civ. App. 315, 95 S. W. 1106, where an administrator's deed, executed more than thirty years before the trial, was admitted on the faith of its recitals, proof being made that probate records had been destroyed by fire. In Willetts v. Mandlebaum, 28 Mich. 521, a deed reciting that it was made in pursuance of an order in a partition suit was admitted on proof that the records had been lost, the court holding that the same strict proof was not required of ancient probate proceedings as where they were of recent date.

See also Mumford v. Wardwell, 6 Wall. 433, 18 L. ed. 760; Davis v. Gaines, 104 U. S. 386 (4), 398, 26 L. ed. 757, 762; 222]Fulkerson v. Holmes, 117 *U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780; Taylor v. Benham, 5 How. 272, 12 L. ed. 149; Carver v. Jackson, 4 Pet. 83, 7 L. ed. 790; Crane v. Morris, 6 Pet. 611, 8 L. ed. 519; Reuter v. Stuckart, 181 Ill. 540-542, 54 N. E. 1014; Buhols v. Boudousquie, 6 Mart. N. S. 153.

2. The plaintiff, however, insists that, even if the recitals are sufficient to show that Mrs. Wilson had qualified as executrix, her deed could not operate to convey the fee, inasmuch as she could not, by herself, execute the power conferred upon herself and her brother-in-law jointly. It was urged that, in this respect, as in all others relating to the construction of wills, the testator's intention must govern; that he had indicated special confidence in the discretion of his brother, and while contemplating that it might be necessary to sell the property, had expressly provided that this could not be done unless both the wife and the brother joined in the deed. It was further argued that this particular testamentary requirement, for the combined discretion of the two, coincided with the general rule that a joint power cannot be exercised by the survivor.

This is true where the power has been given A and B by name, and according to some cases, it is true also where given to A and B, executors. It is not so where the power has been conferred upon A and B, as executors, or where the power is coupled with an interest. These distinctions have given rise to endless controversies and conflicting decisions,—a result naturally to be expected where an official title has been treated as a mere means of describing the persons instead of designating the capacity in which they were to act. It is, of course, true that the same persons may be referred to in different capacities in the same will. A and B may be donees of a naked power; or A and B, who are the executors, may be donees of such a naked power; or A and B, executors, may be given a power to be exercised in their official capacity. In Sugden on Powers, 3d. Am. ed. vol. 1, p. 146, it was said "that the liberality of modern times will probably induce the courts to hold that in every *case where the power is given to exec-[223 utors, as the office survives, so may the power." This prediction has not been altogether fulfilled, though the tendency is to hold that the words "A and B, executors," "A and B, hereinafter named as executors," "my said executors," is not a roundabout means of designating the individuals who are to act, but confer power upon them in their official capacity which may be exercised by the survivor.

The plaintiffs, insisting that the rule contended for by them is a rule of property, argue that the authority to "my executor and executrix hereinafter named" conferred power upon Adelaide Wilson and Thomas O. Wilson *nominatim* and as individuals only,—the words executrix and executor being merely descriptive of the persons later referred to by name, rather

than designating the capacity in which they were to act. Numerous cases referred to in Robinson v. Allison, 74 Ala. 254, are relied on to sustain the contention. Many authorities to the contrary are cited by the defendant in error,—among which are Brassey v. Chalmers, 4 De G. M. & G. 528; Davis v. Christian, 15 Gratt. 12; Smith v. Winn, 27 S. C. 598, 4 S. E. 240, where the power was given "executors hereinafter named." Weimar v. Fath, 43 N. J. L. 1. See also Gould v. Mather, 104 Mass. 286; Zebach v. Smith, 3 Binn. 69, 5 Am. Dec. 352; Clay v. Hart, 7 Dana, 1; Wolfe v. Hines, 93 Ga. 329, 20 S. E. 322; Wood v. Sparks, 18 N. C. (1 Dev. & B. L.) 389.

3. It is unnecessary to attempt to reconcile the authorities or to determine which rule obtains in the District of Columbia. For, reading this will as a whole, it is clear that the power survived because coupled with an interest. It is true that the will did not specifically give the executors any interest in the land, nor was the word "trust" used by the testator. But the power to sell was coupled with the active and continuing duty of managing the property, making disposition thereof, and changing investments for the advantage of his 224]family. Debts were to be paid *and the executors were to care for the slaves. If, in their discretion, it became necessary, "my executor and executrix hereinafter named" were to sell all of the property and reinvest the proceeds in good stocks or otherwise; "in fact, to exercise a sound discretion in the management, disposition, and investment of my said estate [for the benefit and advantage of] my wife and children." This was not a mere naked power to sell, but created an interest or raised a trust which would preserve the power to sell without regard to whether the interest was beneficial to the executors or not. For it is "the possession of a right in the subject over which the power is to be exercised that makes the interest" or creates "an authority coupled with an interest" which "survives for the purpose of effecting the object of the power." Peter v. Beverly, 10 Pet. 532, 564, 9 L. ed. 522, 535; Taylor v. Benham, 5 How. 233, 12 L. ed. 130; Pom. Eq. Jur. 3d ed. § 1011.

And even if, as claimed, the power to sell was not mandatory, it was coupled with duties which, though to be exercised at their discretion, could not be arbitrarily disregarded by the executors. The duty of management raised the obligation to care for the property, keep it insured, pay the taxes, and collect the rents. Adelaide Wilson and Thomas O. Wilson, whether acting as executors, or as trustees by implication, having accepted the appointment were bound also to appropriate the income from the land or the dividends from the stock to the maintenance of the family and the education of the minor children. For neglect so to do any one of the *cestui que trust* would have been entitled to maintain a bill against the executors or trustees, to compel them to discharge the duties for the performance of which full power had been conferred. The rights of the beneficiary would not cease upon the death of either of the representatives; and as the duty to manage survived, and followed the land, so did the coupled power of sale, which was "manifestly subservient and auxiliary *to the execu-[225 tion of the trusts which the testator had seen fit to connect with the administration of his will." Gould v. Mather, 104 Mass. 286; Tobias v. Ketchum, 32 N. Y. 319. For "where the duties imposed upon the executors are active and render the possession of the estate convenient and reasonably necessary, [they] . . . will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms." Ward v. Ward, 105 N. Y. 68, 11 N. E. 373; Toronto General Trust Co. v. Chicago, B. & Q. R. Co. 123 N. Y. 44, 25 N. E. 198; Gray v. Lynch, 8 Gill, 404, 423; Weimar v. Fath, 43 N. J. L. 1.

The duties imposed by the will continued after the death of Thomas O. Wilson, and the power to sell was lawfully exercised by Adelaide Wilson, surviving executrix, when she executed the deed to Huyck, the predecessor in title of the plaintiff. The judgment is affirmed.

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JUAN PICO, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 225-232.)

**Homicide — with treachery — intent — mitigation of punishment.**

1. The absence of a specific intent to kill on the part of a person who, having himself ordered another to be bound, consciously and intentionally and repeatedly beat him with an instrument likely to produce death, does not prevent a conviction under P. I. Pen. Code, art. 403, of murder with treachery, which is declared by art. 10, § 2, to exist "when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make," but effect may

be given to the absence of such intent by a mitigation of the punishment.

[Matters as to homicide, see Homicide, in Digest Sup. Ct. 1908.]

**Appeal — objection not raised below — criminal complaint.**

2. The objection that a complaint charging murder with treachery, contrary to P. I. Pen. Code, art. 403, by killing a bound and defenseless person, is defective in failing to allege that the victim had been tied for the purpose of making defense impossible, so that he might be killed without risk to the accused, comes too late when not made in the supreme court of the Philippine Islands, nor in the trial court, where amendments could have been made if necessary.

[For other cases, see Appeal and Error, VIII. j, 4, in Digest Sup. Ct. 1908.]

[No. 319.]

Argued February 25 and 26, 1913. Decided April 7, 1913.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which modified the sentence imposed by the Court of First Instance of the Province of Isabela upon a conviction of murder with treachery, and affirmed the judgment as modified. Affirmed.

See same case below, 15 Philippine, 549.

The facts are stated in the opinion.

Mr. Clement L. Bouvé argued the cause and filed a brief for plaintiff in error:

The mere fact that a person is killed—even intentionally—by another when he is defenseless (as when he is attacked from behind, or when he is held so that he cannot move) does not *ipso facto* constitute murder with treachery. There must be a conscious taking advantage of the deceased's defenseless condition.

Sent. Supreme Court of Spain, April 2, 1884, May 6, 1884, Feb. 19, 1879; United States v. Ricafor, 1 Philippine, 175.

The intent to kill is a necessary element of murder with *alevosia*.

Sent. Supreme Court of Spain, June 13, 1887, May 6, 1884, Jan. 27, 1887, Oct. 8, 1877; United States v. Mercoleta, 17 Philippine, 317; United States v. Balagtas, 19 Philippine, 164.

Although the findings of fact of the supreme court of the Philippines and the court of first instance are in a sense concurrent, and thus entitled to great respect, this court will, under the rule laid down in Wiborg v. United States, 163 U. S. 652, 41 L. ed. 296, 16 Sup. Ct. Rep. 1127, 1197, and followed in Clyatt v. United States, 197 U. S. 207, 222, 49 L. ed. 726, 731, 25 Sup. Ct. Rep. 429, examine the record for the purpose of determining whether or not there is any evidence to sustain the conviction (Diaz v. United States, 223 U. S. 442, 56 L. ed. 500, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138), even where the question was not properly raised, and is presented as a plain error unassigned.

Solicitor General Bullitt argued the cause, and, with Mr. Loring C. Christie, filed a brief for defendant in error.

Mr. Justice Lamar delivered the opinion of the court:

Juan Pico, claiming the right as patrol to arrest suspicious persons in the Hacienda of Malunó, within the municipality of Hagan, province of Isabela, Philippine Islands, on March 1, 1909, entered the house of Eugenio Castellanes in the nighttime, and inquired if there was anyone else on the premises. He was told that there was a Chinaman asleep in the next room, and, going there with several attendants, ordered him to get up. Receiving no answer, Pico struck him with a gun. The Chinaman arose and seized the gun as Pico again attempted to strike him. After some altercation, he was overpowered, and Pico ordered his attendants to bind him. This they did, putting a rope around his neck, tying his arms behind *his back, and, in this [229 condition, he was ordered out of the house for the purpose or being taken to the nearby Hacienda, of which Pico was manager. Whether through unwillingness or physical inability resulting from the blow previously inflicted, does not clearly appear, but the Chinaman refused to walk, and Pico again struck him several times with the gun. Partly dragged and partly carried, the Chinaman was in a state of collapse when he reached the Hacienda, where, a few hours later, he died. The next morning at 8 o'clock he was buried,—a medical employee on the estate giving a certificate that he had died of heart failure. The suspicion of the authorities having been aroused, the body was disinterred; and, as it exhibited signs of external violence, Pico and two of his attendants were arrested, Pico being charged "with the crime of murder, with the qualifying circumstances of alevosia (treachery), as defined and penalized in article 403 of the Penal Code,† in that . . . he feloniously ordered his two serv-

†Art. 403. The crime of murder is committed by any person who, not falling within the terms of the next preceding article [relating to parricide], shall kill another under any of the following circumstances:

1. With alevosia.
2. For a price or promise of reward.
3. By means of inundation, fire, or poison.
4. With evident premeditation.

ants to seize and tie the Chinaman, Go-Siengco, and thus tied and unable to defend himself, the said Pico, with the intention of killing the said Chinaman, struck him several blows with a shotgun, as the result of which blows the Chinaman subsequently died."

230] *The evidence for the government was direct and positive, and left no reasonable doubt as to the guilt of the defendant, unless the witnesses for the prosecution were unworthy of belief. Their credibility, though attacked, was sustained by the trial judge, who found the defendant guilty and sentenced him to cadena temporal, to be confined in the Bilibid Prison for the term of his natural life, with accessories named in art. 54 of the Code, and to pay the heirs of the Chinaman 1,000 pesos. A motion for a new trial was overruled, and on appeal the supreme court stated that only a question of fact was involved, and that the testimony for the government, being direct and without elements of untruth, fully supported the findings of the trial court:

"We have only one criticism of the judgment below. We are convinced that the court, in imposing the penalty, should have taken into consideration in favor of the accused the extenuating circumstance described in art. 9, subdiv. 3, of the Penal Code, namely, that 'the delinquent had no intention of committing so grave an injury as that which he inflicted.' There not having been present any aggravating circumstance, the penalty should have been imposed in its minimum degree." [15 Philippine, 549.]

1. It is claimed that this finding was in legal effect an acquittal; and several decisions of the Supreme Court of Spain are cited to support the argument that there can be no "murder with alevosia" unless there was a specific intent to kill the person bound. We cannot so construe the Philippine Code. Under it the killing of a human being is parricide, murder, or homicide, depending, not always on the intent, but upon the relation of the parties and the circumstances under which and the means by which life was taken. On the trial of a charge of "murder with premeditation," there might be call for proof of a specific intent, but even then that could usually *be established only by external cir-[231 cumstances capable of proof. But in the case of murder with cruelty or with alevosia, the intent would be immaterial, although the accused might claim that he thought that the cruelty would not cause death, or that the beating would punish, and not destroy, the person who was bound. Under the Penal Code of the Philippines, as at common law, men are presumed to intend the natural consequences of their act, and cannot escape punishment for taking life on the claim that they had not intended or expected that such consequence would result from what they purposely did.

In this case Pico was not charged with "murder with evident premeditation." As the Chinaman was, at the time, bound and defenseless, Pico was guilty of "murder with the aggravating circumstances of alevosia," punishable by the minimum, medium or maximum penalty, depending on the presence or absence of mitigating or aggravating circumstances, as defined by the Code,† which permitted effect to be given to the absence of a specific intent by a mitigation of the punishment. This we understand to be the effect of the decision of the supreme court of the Philippine Islands, and not, as claimed, an acquittal of the charge on which Pico was tried. United States v. Brobst, 14 Philippine, 310; United States v. Candelaria, 2 Philippine, 104.

The decisions cited by plaintiff in error do not require a reversal, for none of them relate to a case like this, where the accused, having himself ordered his victim to be bound, consciously, intentionally, and repeatedly beat him with an instrument likely to produce death.

2. It was also contended that the complaint was defective in failing to allege that the Chinaman had been tied *for the[232 purpose of making defense impossible, and so that he might be killed without risk to the accused. This objection comes too late. It was not made in the supreme court nor in the trial court, where amendments could have been made even if necessary under the liberal system of criminal pleading authorized by §§ 6, 8, 9, and 10 of the Appendix to the Penal Code of the Philippine Islands.

3. Pico was sentenced by the supreme court to seventeen years, four months, and 1 day of cadena temporal, to the accessories

5. With cruelty, by deliberately and inhumanly increasing the suffering of the offended party.

Art. 10, ¶ 2. There is treachery (alevosia) when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its *execution* without risk to himself arising *from the defense which the offended party might make.*

†Art. 78. Aggravating circumstances which, in themselves, constitute a crime specially punishable by law, or which are included by the law in defining a crime and prescribing the penalty therefor, shall not be taken into account for the purpose of increasing the penalty.

provided by law, and to indemnify the heirs of the deceased by the payment of 1,000 pesos. In the record there is an assignment of error that this was cruel and unusual punishment (Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705); but on the argument the contention was abandoned in open court, and the point will therefore not be considered. In other assignments complaint was made that Pico was deprived of his liberty without due process of law,—because the evidence was insufficient to prove beyond a reasonable doubt that the Chinaman died as a result of the blows inflicted by Pico; because the supreme court refused to pass upon the credibility of witnesses in the trial court; because he was refused a new trial on the ground of newly discovered evidence; and because one of the witnesses admitted to have given false testimony. We find no error of law. The evidence fully sustained the conviction, and the judgment is affirmed.

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233] *ANNE SWEENEY, Plff. in Err.,
v.
WILLIAM G. ERVING.

(See S. C. Reporter's ed. 233–243.)

**Trial — instructions — request in mass — wrong in part.**

1. No legal error is committed by the trial court in refusing a requested instruction which couples together two propositions, one of which is not well founded in law.

[For other cases, see Trial, 765–767, in Digest Sup. Ct. 1908.]

**Evidence — presumption — res ipsa loquitur — burden of proof.**

2. The doctrine of *res ipsa loquitur* does not have the effect, when applied, of shifting the burden of proof so as to make it necessary for defendant to overcome the presumption of negligence by a preponderance of evidence that there was an absence of negligence on his part.

[For other cases, see Evidence II. h, in Digest Sup. Ct. 1908.]

**Trial — requested instruction — contradictions.**

3. The self-contradictory and confusing terms of a requested instruction in an action to recover damages for personal injuries, which inseparably combines the idea of a possibility of injury to the plaintiff "which could not be foreseen" by the defendant with the hypothesis that "such possibility was known to the defendant, or by proper inquiry or study should have been known to him," justifies its rejection by the trial court.

[For other cases, see Trial VII. d, in Digest Sup. Ct. 1908.]

**Trial — requested instruction — evidence of facts assumed.**

4. The absence of evidence on which the jury might properly base a finding that the facts were as assumed in a requested instruction justifies its rejection by the court.

[For other cases, see Trial, 768–787, in Digest Sup. Ct. 1908.]

[No. 60.]

Argued February 28, 1913. Decided April 7, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of defendant in an action to recover damages for personal injuries. Affirmed.

See same case below, 43 L.R.A.(N.S.) 734, 35 App. D. C. 57.

The facts are stated in the opinion.

Mr. Lorenzo A. Bailey argued the cause and filed a brief for plaintiff in error:

The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned.

Vaughan v. Menlove, 3 Bing. N. C. 468, 475, 4 Scott, 244, 3 Hodges, 51, 6 L. C. P. 92, 1 Jur. 215; Oceanic Steam Nav. Co. v. Aitken, 196 U. S. 589, 596, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317.

The injury to plaintiff was caused by an agency in the possession of the defendant, and under his exclusive management and control. From this arises the presumption of negligence on his part, and the burden then devolves upon him to overcome that presumption, if he can, by evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part.

Kohner v. Capital Traction Co. 22 App. D. C. 187, 62 L.R.A. 875; Shockley v. Tucker, 127 Iowa, 458, 103 N. W. 360; Henslin v. Wheaton, 91 Minn. 222, 64 L.R.A. 126, 103 Am. St. Rep. 504, 97 N. W. 882, 1 Ann. Cas. 19, 15 Am. Neg. Rep. 352; Wigmore, Ev. § 2509; Hicherson v. Neely, 21 Ky. L. Rep. 1257, 54 S. W. 842; 29 Cyc. 590; 30 Cyc. 1587; Sauers v. Smits, 49 Wash. 557, 17 L.R.A.(N.S.) 1242, 95 Pac. 1097; Gannon v. Laclede Gaslight Co. 145 Mo. 502, 43 L.R.A. 505, 46 S. W. 968, 47 S. W. 907;

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NOTE.—On the relation of the doctrine of *res ipsa loquitur* to the burden of proof—see note to Cleveland, C. C. & St. L. R. Co. v. Hadley, 16 L.R.A.(N.S.) 527.

On the liability of a physician for injuries resulting from electrical or X-ray treatment—see note to the decision of the District of Columbia court of appeals in this case as reported in 43 L.R.A.(N.S.) 734.

Von Treba v. Laclede Gaslight Co. 209 Mo. 648, 108 S. W. 559; Brown v. Consolidated Light, Power & Ice Co. 137 Mo. App. 718, 109 S. W 1032; Moglia v. Nassau Electric R. Co. 127 App. Div. 243, 111 N. Y. Supp. 70; Gurdon & Ft. S. R. Co. v. Calhoun, 86 Ark. 76, 109 S. W. 1017; Mitchell v. Chicago & A. R. Co. 132 Mo. App. 143, 112 S. W. 291; Eaton v. New York C. & H. R. R. Co. 125 App. Div. 54, 109 N. Y. Supp. 419; Anderson v. McCarthy Dry Goods Co. 49 Wash. 398, 16 L.R.A.(N.S.) 931, 126 Am. St. Rep. 870, 95 Pac. 325; Stokes v. Saltonstall, 13 Pet. 181, 10 L. ed. 115; Benedick v. Potts, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067, 4 Am. Neg. Rep. 484; Shearm. & Redf. Neg. § 59; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336.

If the plaintiff's condition was such as to predispose her to dangerous consequences from the operation, that fact does not relieve the defendant from liability for his negligent act which produced such consequences.

Missouri, K. & T. R. Co. v. Byrd, 40 Tex. Civ. App. 315, 89 S. W. 991; Sauers v. Smits, 49 Wash. 557, 17 L.R.A.(N.S.) 1242, 95 Pac. 1098; Mullin v. Flanders, 73 Vt. 95, 50 Atl. 813; Baute v. Haynes, 31 Ky. L. Rep. 876, 12 L.R.A.(N.S.) 752, 104 S. W. 272.

The defense was in substance that in the use of the X-ray, accidents may happen despite the utmost care. That is not a good defense in law; and if it were so, the burden would surely be upon the defendant to establish it.

Kohner v. Capital Traction Co. 22 App. D. C. 187, 62 L.R.A. 875.

Messrs. Charles L. Frailey and A. S. Worthington argued the cause and filed a brief for defendant in error:

Neither an accident alone, nor an injury, furnishes occasion for applying the doctrine *res ipsa loquitur*, but only an accident and its attending circumstances, together with the injury resulting therefrom.

Benedick v. Potts, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067, 4 Am. Neg. Rep. 484; Griffen v. Manice, 166 N. Y. 193, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; Eaton v. New York C. & H. R. R. Co. 109 N. Y. Supp. 419; Mitchell v. Chicago & A. R. Co. 132 Mo. App. 143, 112 S. W. 219; Hedrick v. Missouri P. R. Co. 195 Mo. 104, 93 S. W. 268, 6 Ann. Cas. 793; Sullivan v. Capital Traction Co. 34 App. D. C. 358.

The great weight of authority in cases of malpractice of physicians and surgeons requires that a plaintiff must affirmatively *show the negligence of the* practitioner.

*Wood v. Barker, 49 Mich. 295,* 13 N. W. 597; Sims v. Parker, 41 Ill. App. 284; Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120; Leighton v. Sargent, 31 N. H. 136, 64 Am. Dec. 328; Ewing v. Goode, 78 Fed. 443; Pettigrew v. Lewis, 46 Kan. 81, 26 Pac. 458; Neifert v. Hasley, 149 Mich. 232, 112 N. W. 705; Smith v. Dumont, 3 Silv. Sup. Ch. 358, 6 N. Y. Supp. 242; Piles v. Hughes, 10 Iowa, 579; Georgia Northern R. Co. v. Ingram, 114 Ga. 641, 40 S. E. 708.

The degree of skill required by a physician is that ordinarily possessed and exercised by members of his profession in the same line of practice in that neighborhood.

Henslin v. Wheaton, 91 Minn. 219, 64 L.R.A. 126, 103 Am. St. Rep. 504, 97 N. W. 882, 1 Ann. Cas. 19, 15 Am. Neg. Rep. 352; Rich v. Pierpont, 3 Fost. & F. 35; Patten v. Wiggin, 51 Me. 594, 81 Am. Dec. 593; Sheldon v. Wright, 80 Vt. 298, 67 Atl. 807; State use of Janney v. Housekeeper, 70 Md. 162, 2 L.R.A. 587, 14 Am. St. Rep. 340, 16 Atl. 382; McDonald v. Harris, 131 Ala. 359, 31 So. 548; Pike v. Honsinger, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760; Ely v. Wilbur, 49 N. J. L. 687, 60 Am. Rep. 668, 10 Atl. 358, 441; Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032; Gore v. Brockman, 138 Mo. App. 236, 119 S. W. 1082.

Such, also, is the rule applied to those practising osteopathy (Wilkins v. Brock, 81 Vt. 332, 70 Atl. 572), and to veterinary surgeons (Barney v. Pinkham, 29 Neb. 350, 26 Am. St. Rep. 389, 45 N. W. 694).

Of the foregoing decisions, the following are cases involving the operation of the X-ray machine:

Henslin v. Wheaton, 91 Minn. 219, 64 L.R.A. 126, 103 Am. St. Rep. 504, 97 N. W. 882, 1 Ann. Cas. 19, 15 Am. Neg. Rep. 352; Gore v. Brockman, 138 Mo. App. 231, 119 S. W. 1082.

Whatever the result of an operation or other effort of a physician may be, it follows that there must be some affirmative proof of the lack on his part of the standard of skill required as above. And this standard of skill is applicable also to the judgment of physicians.

Brydges v. Cunningham, 69 Wash. 8, 124 Pac. 131.

The plaintiff cannot recover for any diseased condition existing prior to his treatment, but defendant was liable only for injury attributable to his fault.

Mullin v. Flanders, 73 Vt. 95, 50 Atl. 813.

An attendant or physician using chloroform as an anesthetic is not answerable for negligence because of results arising from the peculiar temperament of the patient, of which he had no knowledge.

Bogle v. Winslow, 5 Phila. 136.

Mr. Justice Pitney delivered the opinion of the court:

The plaintiff in error, who was likewise the plaintiff below, sued the defendant in error in the supreme court of the District of Columbia to recover damages for personal injuries, sustained, as was alleged, through his negligence in the making of cer-[235]tain X-ray tests upon her *body with the use of apparatus owned and operated by him. The defendant pleaded the general issue—"not guilty." Upon the trial, plaintiff adduced evidence tending to prove that she was under treatment by Dr. Kerr, a surgeon of the city of Washington, for the fracture of a rib, claimed by her to have been caused by the negligence of a railway company; that the company denied the existence of such fracture, and, at its request, she submitted to an X-ray diagnosis by Dr. Grey, a specialist; that his diagnosis and the radiograph made by him failed to disclose a fracture; that thereupon Dr. Kerr arranged with the defendant, Dr. Erving, a specialist in the use of the X-ray for diagnostic purposes, for an X-ray diagnosis to be made by him; that in pursuance of this arrangement she went four times to the defendant's office, the first time at Dr. Kerr's request, and on three subsequent occasions at defendant's request; that on the occasion of each visit, defendant subjected her to several exposures to the X-ray in the effort to obtain a satisfactory picture; that upon her first visit, and before any exposure, she told defendant that her employer had told her that the X-ray was dangerous, in reply to which defendant assured her that there was no more danger to her than to himself, and defendant's wife, who was his assistant in the X-ray work, and who was then present, assured the plaintiff that the defendant and his wife had never had an accident in all their experience, and had no more reason to have one in her case than in the thousand and more exposures previously made by them; that plaintiff felt no bad effects from the operation by Dr. Grey, nor from the operations by the defendant until her fourth visit; that during one of the exposures at the fourth visit, she felt bad effects and a sense of faintness, and about five hours later her back, which was the portion exposed to the X-ray in all the operations by the defendant, was red and irritated; that in the operation by Dr. [236]Grey it was the *front part of the body that was exposed to the X-ray; that about two weeks after her fourth visit to the defendant, finding that her back was burned and the injury developing, she returned to him and informed him of it; that he was the first physician who saw the burn, and he treated it from that time for two or three weeks; that since then, although treated by other physicians and in hospitals, the injury has not been cured, in consequence of which the plaintiff had not been able to work; that the injury is an X-ray burn, and caused and continues to cause much suffering. Plaintiff having rested, the defendant introduced evidence tending to prove that both he and his wife had had long experience in the use of the X-ray machine; that the machine to which the plaintiff was exposed by defendant was an excellent machine, in good condition; that on plaintiff's first visit she was told by defendant's wife, in the hearing of defendant, that while she and her husband had subjected many persons to X-ray exposures, and had never had any ill results, it was impossible, by the use of any degree of care, to prevent occasional X-ray burns from the use of the apparatus; that at none of the visits of the plaintiff to the office of defendant for the purpose of being exposed to the X-ray apparatus did she make any complaint of ill effects from the exposure. Defendant himself testified fully respecting the character of his machine and the manner in which it has been used at each of the plaintiff's visits, and the length of each exposure and the result thereof. Thereupon several practising physicians of experience testified as experts (having qualified by showing an acquaintance with the literature of the subject and also some practical experience in the use of the X-ray apparatus). Upon the basis of the defendant's testimony respecting the character of his X-ray apparatus and the manner of its use upon the plaintiff and the duration of the several exposures to which she was subjected, the experts testified that the machine *was a good one of its kind, and[237 that the manner in which it had been used upon the plaintiff was in accordance with the practice of careful and prudent X-ray operators, and was as safe as exposures to the X-ray apparatus could be made; and each of these witnesses further testified that according to his experience and reading it was not possible in the use of the X-ray apparatus to guard absolutely against a resultant burn.

The case was submitted to the jury under instructions from the court, and they rendered a verdict in favor of the defendant. The plaintiff appealed to the court of appeals, where there was an affirmance (43 L.R.A.(N.S.) 734, 35 App. D. C. 57), and she sued out this writ of error.

The assignments of error present in effect but two questions—

1. The plaintiff requested the trial court to instruct the jury as follows:

"If you believe upon the evidence that in the course of the operation of the X-ray apparatus by the defendant the plaintiff was burned, that fact is of itself evidence of negligence on his part, and casts upon him the burden of proving, if he can, by a preponderance of evidence, that the plaintiff's injury was not caused, in whole or in part, by his negligence, and in such case, unless you find by a preponderance of the evidence that said injury was not caused in whole or in part by the defendant's negligence, your verdict should be for the plaintiff."

The trial judge refused this request, and, on the contrary, instructed the jury: "That the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray."

The contention in behalf of the plaintiff is that, since the injury to the plaintiff was 238]caused by an agency in the *possession of the defendant, and under his exclusive management and control, there arises from this, coupled with the fact that personal injury resulted therefrom to the plaintiff, a presumption of negligence on defendant's part, upon the doctrine of *res ipsa loquitur*, and that the burden is thereby imposed upon him to overcome that presumption by a preponderance of evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part. As will be seen, this contention includes two propositions; the first, that the case is a proper one for the application of the doctrine *res ipsa loquitur;* the second, that the application of this doctrine relieves the plaintiff from the burden of proof, and imposes that burden upon the defendant. These two propositions were coupled together in the requested instruction, and, upon familiar principles, no legal error was committed by the trial court in refusing the request, if either part of it was not well founded in law.

In the view we take of the matter, it is not necessary to pass upon the question whether the evidence presented a case for the application of the rule *res ipsa loquitur;* for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof.

The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*,—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, *it may fairly be found to[239 have been occasioned by negligence.

The doctrine has been so often invoked to sustain the refusal by trial courts to nonsuit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part.

In Stokes v. Saltonstall (1839) 13 Pet. 181, 190, 10 L. ed. 115, 121, which was an action against a stagecoach owner to recover damages for an injury sustained by a passenger through the upsetting of the coach, the trial court instructed the jury that "the facts that the carriage was upset and the plaintiff's wife injured are prima facie evidence that there was carelessness or negligence, or want of skill on the part of the driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault;" and also, that it was incumbent on the defendant to prove that the driver was a person of competent skill and good habits, and that he acted on the occasion in question "with reasonable skill, and with the utmost prudence and caution." The judgment was sustained by this court against the contention (p. 193) that, although the facts of the overturning of the coach and the injury sustained were prima facie evidence of negligence, they did not throw upon the defendant the burden of *proving that the overturning and in-[240

jury were not occasioned by the driver's default but only that the coachman was a person of competent skill in his business, that the coach was properly made, the horses steady, etc. A reading of the report shows that the case turned upon the high degree of care owing by carrier to passenger, and that the court did not rule that the circumstances of the occurrence shifted the burden of proof upon the main issue. Such is the effect that has uniformly been given to the decision. New Jersey R. & Transp. Co. v. Pollard, 22 Wall. 341, 346, 350, 22 L. ed. 877, 879; Pennsylvania Co. v. Roy, 102 U. S. 451, 455, 26 L. ed. 141, 143; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 554, 555, 35 L. ed. 270–272, 11 Sup. Ct. Rep. 653; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 443, 444, 35 L. ed. 458, 463, 11 Sup. Ct. Rep. 859; Patton v. Texas & P. R. Co. 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275.

In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the the question for the jury is whether the preponderance is with the plaintiff.

Such, we think, is the view generally taken of the matter in well-considered judicial opinions.

Kay v. Metropolitan Street R. Co. 163 N. Y. 447, 57 N. E. 751, was an action by passenger against carrier, and the New York court of appeals said (p. 453): "In the case at bar the plaintiff made out her cause of action prima facie by the aid of a legal presumption [referring to *res ipsa loquitur*], but when the proof was all in, 241]the burden of proof had not *shifted, but was still upon the plaintiff. . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and, in determining the weight to be given to the former as against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption, and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof." The rule thus declared has since been adhered to in the courts of New York. Hollahan v. Metropolitan Street R. Co. 73 App. Div. 164, 169, 76 N. Y. Supp. 751; Adams v. Union R. Co. 80 App. Div. 136, 139, 80 N. Y. Supp. 264; Dean v. Tarrytown, W. P. & M. R. Co. 113 App. Div. 437, 439, 99 N. Y. Supp. 250. A similar view appears to be entertained in New Hampshire. Hart v. Lockwood, 66 N. H. 541, 23 Atl. 367; Boston & M. R. Co. v. Sargent, 72 N. H. 455, 466, 57 Atl. 688. The same rule has been followed in a recent series of cases in the North Carolina Supreme Court. Womble v. Merchants' Grocery Co. 135 N. C. 474, 481, 485, 47 S. E. 493; Stewart v. Van Deventer Carpet Co. 138 N. C. 60, 66, 50 S. E. 562; Lyles v. Brannon Carbonating Co. 140 N. C. 25, 27, 52 S. E. 233; Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 120, 1 L.R.A.(N.S.) 298, 301, 52 S. E. 121. In the Stewart Case the court said (138 N. C. 66): "The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator, attributable to the defendant's negligence. The law attaches no special weight as proof to the fact of an accident, *but simply holds it to be[242 sufficient for the consideration of the jury, even in the absence of any additional evidence."

2. The sole remaining question is raised by the refusal of the trial court to instruct the jury, as prayed by the plaintiff, in the following terms: "If you believe upon the evidence that in the ordinary and careful operation of the X-ray apparatus upon a woman by an operator having the requisite knowledge and skill, enabling him to operate it with the utmost degree of safety, there is a possibility, which could not be foreseen by such an operator, of injury to the woman by reason of her condition or of any matter tending to predispose her to injury in consequence of such operation, and that such possibility was known to the defendant, or by proper inquiry or study should have been known to him, it was his duty to inform the plain-

tiff of such possibility before he operated upon her; and if you further believe upon the evidence that he failed to perform such duty, or that, in the performance of the operation, he failed to exercise the skill and care required of him as such operator, and that the plaintiff was thereby injured, your verdict should be for the plaintiff." The terms of this request are self-contradictory and confusing,—dealing, as i does, with a possibility of injury to the plaintiff "which could not be foreseen" by the defendant, and combining inseparably with it the hypothesis that "such possibility was known to the defendant, or by proper inquiry or study should have been known to him," and for this reason alone it was properly rejected by the trial court. But, besides this, it does not appear that there was any evidence on which the jury could properly base a finding that there was danger of injury to the plaintiff by reason of her condition or of any other matter tending to predispose her to such injury; nor to sustain a finding that such possibility was known to the defendant, or by proper study or inquiry should have been known 243]to him. Nor could it be *said, as matter of law, that defendant had undertaken any duty requiring him to make special study or inquiry respecting plaintiff's condition or the possibility of injury to her, or to advise her of such possibility of injury; for there was testimony, already referred to, that would have warranted a finding that Dr. Kerr had assumed the responsibility of advising the plaintiff respecting the propriety of her submitting to the operation.

No error being found in the record, the judgment is affirmed.

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JAMES DONNELLY, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 243–278.)

**Indians — reservation — extending boundaries.**

1. The creation by President Grant of the Hoopa Valley Indian Reservation by Executive order dated June 23, 1876, did not exhaust the authority conferred upon the Executive by the act of April 8, 1864, (13 Stat. at L. 39, chap. 48), § 2, to establish Indian reservations in California, but such authority was a continuing one, which authorized President Harrison's order of October 16, 1891, extending the boundaries of such reservation so as to include the original Klamath River Reservation.

[For other cases, see Indians, V., in Digest Sup. Ct. 1908.]

**Indians — reservation — boundaries — river bed.**

2. The bed of the Klamath river, if owned by the United States, was included in the extension of the Hoopa Valley Indian Reservation established by Executive order as embracing "a tract of country 1 mile in width on each side of the Klamath river, and extending from the present limits of the said Hoopa Valley Reservation to the Pacific ocean."

[For other cases, see Indians, VI., in Digest Sup. Ct. 1908.]

**Waters — title to bed of stream.**

3. What shall be deemed a navigable water within the meaning of the local rules of property in the bed of a stream is for the determination of the several states.

[For other cases, see Waters, I. d, 2, in Digest Sup. Ct. 1908.]

**Waters — riparian rights — title to bed of stream.**

4. The state of California, admitted into the Union by the act of September 9, 1850 (9 Stat. at L. 452, chap. 50), on an equal footing with the original states, may, if it sees fit, confer upon riparian owners the title to the bed of any navigable stream within its borders.

[For other cases, see Waters, I. d, 2, in Digest Sup. Ct. 1908.]

**Waters — relative rights of state and United States — title to bed of stream.**

5. Title to the bed of the Klamath river, whether such river be, as a matter of fact, navigable or non-navigable, has been vested in the United States as riparian owner by Cal. act of April 13, 1850, adopting the common law, and thereby transferring to all riparian proprietors, or confirming in them, the ownership of the non-navigable streams and their beds, and by Cal. acts of February 24, 1891, and March 11, 1891, declaring in effect that the Klamath river is a non-navigable stream.

[For other cases, see Waters, I. b, 2, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — right to mining claim.**

6. A certified copy of the location of a placer mining claim, filed October 20, 1888, together with evidence that there was a mine in that vicinity, were insufficient to furnish support for a finding that valid

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NOTE.—On the title to land under water—see note to Goff v. Cougle, 42 L.R.A. 161.

As to what waters are navigable—see note to Willow River Club v. Wade, 42 L.R.A. 305.

As to state and Federal ownership of waters—see note to Smith v. Deniff, 50 L.R.A. 737.

On the jurisdiction to punish crimes committed by or against Indians—see note to State v. Campbell, 21 L.R.A. 169.

On the admissibility in behalf of accused of extrajudicial confession of stranger—see note to Brown v. State, 37 L.R.A. (N.S.) 345.

rights had attached to such claim within the meaning of the proviso of the Executive order of October 16, 1891, extending the boundaries of an Indian reservation, that any land "included within the above-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended."

[For other cases, see Evidence, 2329–2351, in Digest Sup. Ct. 1908.]

**Indians — Federal control — state acts affecting reservation.**

7. The creation and maintenance of a school district by the state of California, including public lands other than school sections or lieu lands granted to the state by the acts of March 3, 1853 (10 Stat. at L. 246, chap. 145), § 6, and of July 23, 1866 (14 Stat. at L. 220, chap. 219), § 6, could not in any way impair the title of the United States to those lands, or limit the authority of the United States over them, when set apart for an Indian reservation.

[For other cases, see Indians, 29, 44, in Digest Sup. Ct. 1908.]

**Indians — Federal control — crimes in Indian country.**

8. The term "Indian country," as used in U. S. Rev. Stat. § 2145, which extended to that country certain general laws of the United States as to the punishment of crime, is not confined to lands to which the Indians retained their original right of possession, but includes a tract of land lawfully set apart for an Indian reservation out of the public domain, and not previously occupied by the Indians.

[For other cases, see Indians, 23–28, 45–50, in Digest Sup. Ct. 1908.]

**Federal courts — jurisdiction — crime on Indian reservation.**

9. The killing of an Indian by a person not of Indian blood, when committed upon an Indian reservation within the limits of a state, is cognizable in the Federal courts under U. S. Rev. Stat. § 2145, which extended to the Indian country certain general laws of the United States as to punishment of crime, and § 5339, which enacts that any person who commits murder in any place under the exclusive jurisdiction of the United States shall suffer death.

[For other cases, see Courts, 1468–1471, in Digest Sup. Ct. 1908.]

**Indians — Federal control — criminal legislation.**

10. No implied repeal of U. S. Rev. Stat. § 2145, which extended to the Indian country certain general laws of the United States as to the punishment of crimes, can be inferred from the provisions of the act of March 3, 1885 (23 Stat. at L. 385, chap. 341), § 9, for the punishment of certain enumerated crimes when committed by Indians within the territories, and for the punishment of the same crimes when committed by an Indian on an Indian reservation within a state.

[For other cases, see Indians, 45–50, in Digest Sup. Ct. 1908.]

**Indians — Federal control — criminal legislation.**

11. The admission of California into the Union under the act of September 9, 1850, "on an equal footing with the original states," without any express reservation by Congress of governmental jurisdiction over the public lands contained within her borders, did not qualify the former Federal jurisdiction over the Indian country included therein, so as to withdraw from the United States and confer upon the state authority to punish offenses committed by or against Indians upon an Indian reservation.

[For other cases, see Indians, 45–50, in Digest Sup. Ct. 1908.]

**Evidence — hearsay — confession of third person.**

12. The extrajudicial confession of a third person, since deceased, that he had committed the murder with which the accused is charged, is not admissible in evidence in behalf of the accused.

[For other cases, see Evidence, X. 1, in Digest Sup. Ct. 1908.]

[No. 97.]

Argued December 18, 1912. Decided April 7, 1913.

IN ERROR to the Circuit Court of the United States for the Northern District of California to review a conviction of murder. Affirmed.

The facts are stated in the opinion.

Mr. John F. Quinn argued the cause, and, with Mr. W. F. Clyborne, filed a brief for plaintiff in error:

If an Indian reservation within the limits of a state is a place within the sole and exclusive jurisdiction of the United States, the Federal courts would have jurisdiction of the crime of murder committed by any person, whether white or Indian, against another person, whether white or Indian. This, however, has never been conceded to be the law, either by the state or the United States courts, and the rule is well established that the state, and not the United States, has jurisdiction of the crime of murder committed within the limits of an Indian reservation within the boundaries of a state, by a white person against a white person.

United States v. McBratney, 104 U. S. 621, 26 L. ed. 869; Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; United States v. Kagama, 118 U. S. 385, 30 L. ed. 231, 6 Sup. Ct. Rep. 1109.

In order to be Indian country the Indians must retain their original title to the soil; and this extension does not include any land to which the original Indian title has never been extinguished.

Bates v. Clark, 95 U. S. 204–208, 24 L. ed. 821.

471–473; United States v. Celestine, 215 U. S. 285, 54 L. ed. 197, 30 Sup. Ct. Rep. 93.

An Indian reservation is neither a place within the sole and exclusive jurisdiction of the United States nor Indian country.

United States v. McBratney, 104 U. S. 621, 26 L. ed. 869; Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; United States v. Kagama, 118 U. S. 385, 30 L. ed. 231, 6 Sup. Ct. Rep. 1109; Westmoreland v. United States, 155 U. S. 547, 39 L. ed. 255, 256, 15 Sup. Ct. Rep. 243.

It is essential to allege in the indictment and prove on the trial that the accused is an Indian.

United States v. Hadley, 99 Fed. 437; United States v. Logan, 105 Fed. 240.

The state of California was admitted into the Union upon the condition that the navigable rivers should be public highways as to the citizens of all states.

Lux v. Haggins, 69 Cal. 335, 10 Pac. 674.

The court will take judicial notice that the tide ebbs and flows on the Klamath near its mouth.

United States v. La Vengeance, 3 Dall. 297, 1 L. ed. 610; The Apollon, 9 Wheat. 374, 6 L. ed. 114; Peyroux v. Howard, 7 Pet. 341, 8 L. ed. 706.

The banks of a river are just as much a part of the river, and are as necessary to the existence of the river, as the water itself.

Ventura Land & Power Co. v. Meiners, 136 Cal. 291, 89 Am. St. Rep. 128, 68 Pac. 818; Ravenwood v. Fleming, 22 W. Va. 52, 46 Am. Rep. 485.

The title to lands under navigable waters in the state, including the shore or space between high and low water marks, is held by the state in trust for the use of the inhabitants, such title being essential to the sovereignty of the state, to the proper exercise of the police power, and to the welfare of the people of the state.

State ex rel. Ellis v. Gerbing, 56 Fla. 603, 22 L.R.A.(N.S.) 337, 47 So. 353.

There was error in excluding the confession of Joe Dick.

Wigmore, Ev. §§ 1476, 1477.

Assistant Attorney General Denison argued the cause and filed a brief for defendant in error:

The murder of an Indian by a white within Indian country, and within a state, falls under the jurisdiction of the Federal courts.

United States v. Bridleman, 7 Fed. 898; United States v. Martin, 8 Sawy. 473, 14 Fed. 817; United States v. Barnhart, 22 Fed. 285; United States v. Ewing, 47 Fed. 809; United States v. Logan, 105 Fed. 240; United States v. Hadley, 99 Fed. 437; United States v. Ward, 42 Fed. 320.

The organization of states was held in United States v. McBratney, 104 U. S. 621, 26 L. ed. 869, and Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107, to modify the Federal jurisdiction over Indian country by withdrawing from it the control of crimes there committed by whites against whites, and passing that control to the states,—of course, in the absence of specific provision to the contrary. As to crimes, however, not exclusively among the whites, but by or against Indians, both these cases (if we understand them aright) reserved the question.

The interrelations between the two races have from the first been the very subject-matter of Federal control.

Worcester v. Georgia, 6 Pet. 515, 557–560, 8 L. ed. 483, 499–501.

The government, instead of being, as at first, the guardian of the whites against the menace of the Indians, has become in large measure the guardian of the Indians against the menace of the whites. The protection of the Indians in their relations with the surrounding whites is probably the chief remaining duty of the United States within this field of its powers.

United States v. Kagama, 118 U. S. 375, 384, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; United States v. Rickert, 188 U. S. 432–437, 47 L. ed. 532–536, 23 Sup. Ct. Rep. 478; Jones v. Meehan, 175 U. S. 10, 44 L. ed. 53, 20 Sup. Ct. Rep. 1; Re Heff, 197 U. S. 488–498, 49 L. ed. 848–852, 25 Sup. Ct. Rep. 506; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 837.

A large number of cases have involved the protection of the Indians against invasions of their property rights by the whites; and this court has held that, by reason of the function of the United States as guardian, it can itself, as plaintiff, maintain such suits on their behalf.

Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; United States v. Sutton, 215 U. S. 291–295, 54 L. ed. 200–202, 30 Sup. Ct. Rep. 116.

The existence of the state government did not imply a repeal of the Federal liquor laws, passed for the protection of Indians in their country.

Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; United States v. Sutton, 215 U. S. 291–295, 54 L. ed. 200–202, 30 Sup. Ct. Rep. 116.

The obligation assumed by the United States in assuring to Indians a reservation implies a duty of the United States to pro-

tect them from injurious intrusions therein by the neighboring whites.

Worcester v. Georgia, 6 Pet. 556, 557, 8 L. ed. 499, 500; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835.

In general, the organization of a state has not been held to operate to repeal the criminal and penal sections in the titles of the Revised Statutes which regulate the "government and protection of Indians" and the "government of Indian country."

United States v. Hunter, 21 Fed. 615; United States v. Loving, 34 Fed. 715; United States v. Mullin, 71 Fed. 682; United States ex rel. Gordon v. Crook, 179 Fed. 391; United States v. Payne, 22 Fed. 426; United States v. Bridleman, 7 Fed. 894; McKnight v. United States, 65 C. C. A. 37, 130 Fed. 659; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; United States v. Howard, 9 Sawy. 155, 17 Fed. 638; United States v. Stocking, 87 Fed. 857; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; Ex parte Crow Dog, 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396.

The purpose of the act of 1885 was to reverse (as to the major crimes) the former policy by which all crimes between Indians were excepted by U. S. Rev. Stat. § 2146 from § 2145.

Gon-shay-ee, 130 U. S. 343–350, 32 L. ed. 973–975, 9 Sup. Ct. Rep. 542; Re Wilson, 140 U. S. 575–578, 35 L. ed. 513–515, 11 Sup. Ct. Rep. 870; United States v. Whaley, 37 Fed. 145; United States v. Ewing, 47 Fed. 809; Ex parte Hart, 157 Fed. 130; Re Blackbird, 109 Fed. 139; Goodson v. United States, 7 Okla. 126, 54 Pac. 423.

Incidentally we may notice that the former policy of noninterference with crimes of Indians against Indians has in some cases been perpetuated by special enactment even since the act of 1885.

Talton v. Mayes, 163 U. S. 376, 41 L. ed. 196, 16 Sup. Ct. Rep. 986; Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939.

And also that the crimes not specified by the act of 1885 are considered to be still excepted by U. S. Rev. Stat. § 2146, from § 2145, which are assumed to be still existing law.

Ex parte Hart, 157 Fed. 130; United States v. King, 81 Fed. 625.

An "Indian reservation" is "Indian country."

Re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870; United States v. Thomas, 151 U. S. 577–582, 38 L. ed. 276–278, 14 Sup. Ct. Rep. 426; United States v. Lathers, 6 Sawy. 17, Fed. Cas. No. 15,581; United States v. Martin, 8 Sawy. 473, 14 Fed. 821; United States v. Bridleman, 7 Sawy. 243, 7 Fed. 898.

The extension of the Hoopa Valley Reservation was lawful.

Re Wilson, 140 U. S. 575, 35 L. ed. 17, 11 Sup. Ct. Rep. 870; Spalding v. Chandler, 160 U. S. 394–403, 40 L. ed. 469–472, 16 Sup. Ct. Rep. 360; United States v. Leathers, 6 Sawy. 17, Fed. Cas. No. 15,581; United States v. Grand Rapids & I. R. Co. 154 Fed. 131; Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 41; United States v. Martin, 8 Sawy. 473, 14 Fed. 821; United States v. Payne, 2 McCrary, 289, 8 Fed. 887; 14 Ops. Atty. Gen. 181; 17 Ops. Atty. Gen. 258; 26 Ops. Atty. Gen. 92; 28 Ops. Atty. Gen. 143.

In any event, ever since President Harrison's proclamation, this land has been *de facto* an Indian reservation, reserved exclusively for their use, and, irrespective of any possible question of the President's original power to create it, is *de facto* Indian country, and to be treated as such.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Fellows v. Blacksmith, 19 How. 366, 15 L. ed. 684; United States v. Kagama, 118 U. S. 375–384; 30 L. ed. 228–231, 6 Sup. Ct. Rep. 1109; Spalding v. Chandler, 160 U. S. 394, 403, 404, 40 L. ed. 469, 472, 473, 16 Sup. Ct. Rep. 360.

The point that the place of the crime was covered by a valid mining claim is not properly raised by the bill of exceptions.

Allis v. United States, 155 U. S. 117, 39 L. ed. 91, 15 Sup. Ct. Rep. 36; People v. Bristol, 23 Mich. 118; Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; Holder v. United States, 150 U. S. 91, 37 L. ed. 1010, 14 Sup. Ct. Rep. 10; Hicks v. United States, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144; Hickory v. United States, 151 U. S. 303–316, 38 L. ed. 170–176, 14 Sup. Ct. Rep. 334; Thiede v. Utah, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62; United States v. Hough, 103 U. S. 71, 26 L. ed. 305; Edgington v. United States, 164 U. S. 361, 41 L. ed. 467, 7 Sup. Ct. Rep. 72; Brown v. United States, 164 U. S. 221, 41 L. ed. 410, 17 Sup. Ct. Rep. 33; Richards v. United States, 99 C. C. A. 401, 175 Fed. 911; Ball v. United States, 78 C. C. A. 126, 147 Fed. 32.

The record indicates that all the requests to charge submitted by defendant were submitted in a lump, and not separately and seriatim, and that only a general exception was taken. Under such circumstances the court's ruling is not error if any one proposition was erroneous and properly rejected.

Thiede v. Utah, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62; United States v.

Hough, 103 U. S. 71, 26 L. ed. 305; Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. Rep. 534; Shelp v. United States, 26 C. C. A. 570, 48 U. S. App. 376, 81 Fed. 694; Richardson v. United States, 104 C. C. A. 69, 181 Fed. 1.

Even if, however, the court is to pass the technical defect on the theory of Wiborg v. United States, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197, and Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705, there was no merit in the contention, and the court was justified in ignoring the alleged mining claim as immaterial.

Black v. Elkhorn Min. Co. 163 U. S. 445-450, 41 L. ed. 221-223, 16 Sup. Ct. Rep. 1101, 18 Mor. Min. Rep. 375; Belk v. Meagher, 104 U. S. 279, 282, 26 L. ed. 735, 736, 1 Mor. Min. Rep. 510; Spalding v. Chandler, 160 U. S. 394-405, 40 L. ed. 469, 473, 16 Sup. Ct. Rep. 360; Missouri, K & T. R. Co. v. Roberts, 152 U. S. 114, 116, 118, 38 L. ed. 377, 379, 380, 14 Sup. Ct. Rep. 496; Gillis v. Downey, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483, 19 Mor. Min. Rep. 253.

The place of the crime was not excluded from the extension because of the existence of a state school district.

United States v. Thomas, 151 U. S. 577-583, 38 L. ed. 276-278, 14 Sup. Ct. Rep. 426; Beecher v. Wetherby, 95 U. S. 517-525, 24 L. ed. 440, 441.

The state of California appears to have abandoned any claim that it may have had to the bed of this stream, and surrenderd such rights to the riparian proprietors,—in this case the United States,—for the benefit of the Indians.

Cardwell v. Sacramento County, 79 Cal. 349, 21 Pac. 763.

Declarations against penal interests are not admissible, by analogy, to the declarations against pecuniary or proprietary interest.

United States v. Mulholland, 50 Fed. 413.

**Mr. Justice Pitney** delivered the opinion of the court:

Plaintiff in error was convicted in the circuit court of the United States for the northern district of California, upon an indictment for murder; and, having been sentenced to life imprisonment, sues out this writ of error. The indictment charged him with the murder of one Chickasaw, an Indian, within the limits of an Indian reservation known as the Extension of the Hoopa Valley Reservation, in the county of Humboldt, in the state and northern district of California. The evidence tended to show that Chickasaw, who was an Indian and a member of the Klamath Tribe, was shot through the body and mortally wounded while he was in or near the edge of the water of the Klamath river, at a place within the exterior limits of the Extension.

The trial proceeded upon the theory that the crime was committed within the river bed and below ordinary high-water mark, —a theory favorable to the plaintiff in error, in that it furnishes the basis for one of the principal contentions made in his behalf. The indictment does not allege, nor did the government undertake to prove, that plaintiff in error was of Indian blood; there was evidence tending to show that he was a white man; and the trial judge instructed the jury in effect that this question was immaterial. It was contended that the circuit court was without jurisdiction, first, because the place of the commission of the alleged offense was not within the limits of the Extension, of the Hoopa Valley Reservation, but was upon the Klamath river, and therefore outside of those limits; and, secondly, because it did not appear that the defendant was an Indian. These contentions, having been overruled below, are renewed here, and some other *jurisdictional questions are raised. In [253 addition, it is contended that the circuit court erred in refusing to permit the plaintiff in error to introduce evidence tending to show that one Joe Dick, a deceased Indian, had confessed just before his death that it was he who had shot and killed the Indian Chickasaw.

The bounds of the Hoopa Valley Reservation were first established by executive order of President Grant, dated June 23, 1876, made under authority of "An Act to Provide for the Better Organization of Indian Affairs in California," approved April 8, 1864 (13 Stat. at L. 39, chap. 48). The reservation, as thus delimited, comprised a tract of country in Humboldt county, about 89,000 acres in extent, lying on both sides of the Trinity river, above its junction with the Klamath. Exec. Ord. Ind. Reserv. 1912 ed. p. 38; 1 Kappler, 815.

What is known as the Extension of the Hoopa Valley Reservation was made by executive order of President Harrison, dated October 16, 1891, and included "a tract of country 1 mile in width on each side of the Klamath river, and extending from the present limits of the said Hoopa Valley Reservation to the Pacific ocean," with a proviso to be mentioned hereafter. Exec. Ord. Ind. Reserv. 1912 ed. p. 39; 1 Kappler, 815. The extension as thus described took in the original Klamath River Reservation (established by President Pierce in 1855; Ex. Ord. Ind. Reserv. 1912, p. 41), that extended along the river for a distance of 20 miles from the ocean. This por-

tion was, by act of June 17, 1892 (27 Stat. at L. 52, chap. 120), opened to settlement, entry, and purchase. The *locus in quo* is not within the part thus opened, but is at a point higher up the river.

The indictment and conviction are based upon § 2145, Rev. Stat., providing that certain general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive 254]jurisdiction of *the United States, except the District of Columbia, "shall extend to the Indian country," and upon § 5339, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3627), which enacts that any person who commits murder in any place under the exclusive jurisdiction of the United States shall suffer death. These sections, together with § 2146, Rev. Stat., and § 9 of an act of March 3, 1885 (23 Stat. at L. 385, chap. 341), being all pertinent to the discussion that follows, are set forth in the margin.† 255] *The record presents the following questions, and it will be assumed that, in view of the course taken at the trial, they must all be answered favorably to the government in order that the conviction may be sustained.

(1) Was the Extension of the Hoopa Valley Reservation lawfully established?

(2) Does it include the bed of the Klamath river?

(3) Is the place of the homicide, for particular reasons to be mentioned, not a part of the reservation?

(4) Is the Extension (if lawfully established) "Indian country" within the meaning of § 2145, Rev. Stat?

(5) Is the killing of an Indian by one who is not of Indian blood, when committed upon an Indian reservation within the state of California, punishable in the Federal courts?

(6) Was the evidence offered to show an alleged confession by Joe Dick properly excluded?

1. It is contended in behalf of the plaintiff in error that the authority conferred upon the Executive by Congress in the act of April 8, 1864 (13 Stat. at L. 39, chap. 48), was exhausted in the creation by President Grant of the Hoopa Valley Reservation in 1876. Section 2 of that act provides as follows:

"Sec. 2. And be it further enacted. That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian Reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended; Provided, That at least one of said tracts shall be located *in what has heretofore[256 been known as the northern district; . . . and Provided, further, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the In-

†Extracts from Revised Statutes.

Sec. 2145. Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Sec. 2146. The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country, who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Sec. 5339. Every person who commits murder . . . within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death.

Act of March 3, 1885, § 9.

That immediately upon and after the date of the passage of this act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

dians to be provided for, include any of the Indian Reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as, in the opinion of the President, may be necessary, in order to its complete adaptation to the purposes for which it is intended."

The terms of this enactment show that Congress intended to confer a discretionary power, and from an early period Congress has customarily accorded to the Executive a large discretion about setting apart and reserving portions of the public domain in aid of particular public purposes. Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 688, 18 L. ed. 689, 691; Grisar v. McDowell, 6 Wall. 363, 381, 18 L. ed. 863, 868; Re Wilson, 140 U. S. 575, 577, 35 L. ed. 513, 514, 11 Sup. Ct. Rep. 870; Spalding v. Chandler, 160 U. S. 394, 404, 40 L. ed. 469, 473, 16 Sup. Ct. Rep. 360. See also United States v. Leathers, 6 Sawy. 17, 21, Fed. Cas. No. 15,581; United States v. Martin, 8 Sawy. 473, 14 Fed. 817, 821; McFadden v. Mountain View Min. & Mill. Co. 38 C. C. A. 354, 97 Fed. 670, 673; Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 39, 41; United States v. Grand Rapids & I. R. Co. 154 Fed. 131, 135; 17 Ops.-Atty. Gen. 258; Act of February 8, 1887 (24 Stat. at L. 388, chap. 119), referred to in Re Wilson, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870.

We have made a somewhat exhaustive examination of the history of the Indian reservations of California, and what has been done by the executive and legislative departments of the Federal government respecting them, and as a result we are convinced, first, that the situation of Indian affairs in that state in the year 1864 was such that Congress could not reasonably have supposed that the President would be able to accomplish the beneficent purposes of the enactment if he were obliged to act, once for all, with respect to the establishment of the several new reservations that were 257]provided for, and were left *powerless to alter and enlarge the reservations from time to time, in the light of experience. To mention but one obstacle that must have been within the contemplation of Congress: the Klamath and Hoopa or Trinity Indians were at war with the forces of the United States at the time of the passage of the act of 1864, and had been so for some years. Indian Report, 1864, pp. 123, 127, 130, 133–138. Secondly, beginning shortly after its passage, and continuing for a period of at least thirty years thereafter, *Congress and the* Executive practically *construed the act of 1864* as conferring a continuing authority upon the latter, and a large discretion about exercising it.

Congress itself recognized the Hoopa Valley Reservation as lawfully existing, at least as early as July 27, 1868 (15 Stat. at L. 221, chap. 248), when it appropriated money "to pay the settlers of Hoopa Valley for their personal property left upon the Hoopa Valley Reservation at the time the government took possession;" and also "for removing the Indians from Smith's River Reservation to Hoopa Valley and Round Valley Reservations . . . and the Smith River Reservation is hereby discontinued;" and again, in the following year (act of April 10, 1869, 16 Stat. at L. 37, chap. 16), when it appropriated money for the pay of a miller upon the Hoopa Valley Reservation, and "to supply a deficiency for removing the Indians from Smith's River Reservation to Hoopa Valley and Round Valley Reservations." Yet no formal executive order had as yet been made setting aside the Hoopa Valley Reservation or fixing its bounds; and its status as a reservation rested upon a mere public notice given by the superintendent of Indian affairs for California, under date August 21, 1864, to the effect that under the act of April 8, 1864, and under instructions from the Interior Department, he had located a reservation in the Hoopa Valley, and that settlers should not make further improvements upon their *places (Rep. Ind.[258 Comm'r, 1864, p. 123, 138; Exec. Ord. Ind. Reserv., 1912, p. 38; 1 Kappler, 815).

In the year following President Harrison's order, the Extension was reported upon by the Indian agent to the Commissioner of Indian Affairs as being occupied by the Lower Klamath Tribe. House Executive Documents, 2d Sess., 52d Cong., 1892–1893, vol. 13 (Indian Report), p. 230. And a similar report was made in the year 1894. House Executive Documents, 3d Sess., 53d Cong., 1894–1895, vol. 15 (Indian Report) p. 117. These reports were officially communicated by the Secretary of the Interior to Congress, and there is nothing to show any disapproval of the status of the Extension as an Indian reservation.

But, further, the Hoopa Valley Reservation was only one of four that were authorized by the act of 1864. Other reservations established thereunder were known as the Tule River, Round Valley, and Mission Reservations. Upon the question of practical construction, the action taken by the Executive and by Congress respecting these is as significant as that taken with respect to the Hoopa Valley Reservation itself. A sufficient summary of their history is given in Crichton v. Shelton, 33 Land Dec. 205, 209, 213. The executive

orders respecting them are to be found in Exec. Ord. Ind. Reserv. 1912, pp. 43, 55, 61, etc. It will be seen that Presidents Grant, Hayes, Garfield, Arthur, Cleveland, and Harrison, successively, acted with respect to one or more of these reservations upon the theory that the act of 1864 conferred a continuing discretion upon the Executive; orders were made for altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made, and establishing others in their stead; and in numerous instances Congress in effect ratified such action. In view of all this, we feel bound to hold that President Harrison's order of October 16, 1891, 259] *extending the Hoopa Valley Reservation, was within the authority of the act of 1864.

2. Does the reservation include the bed of the Klamath river? The descriptive words of the order are "a tract of country 1 mile in width on each side of the Klamath river and extending," etc. It seems to us clear that if the United States was the owner of the river bed, a reasonable construction of this language requires that the river be considered as included within the reservation. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of 1 mile on each side of the river, and at the same time to exclude the river. As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing. The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. (Indian Reports 1856, p. 238; 1857, p. 391; 1858, p. 286–287; 1859, p. 437; 1861, p. 147; 1864, p. 122; 1866, p. 238; 1885, p. 264; 1888, p. 10; 1892, p. 230; 1894, p. 117; and see Re Klamath River Reservation, 33 Land Dec. 216.)

Upon the question of government ownership, it is a matter of history that the entire territory in question was a part of the public domain that was transferred by Mexico to the United States in the year 1848 by the treaty of Guadalupe Hidalgo. 9 Stat. at L. 922; United States v. Kagama, 118 U. S. 375, 381, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109.

By act of September 9, 1850 (9 Stat. at L. 452, chap. 50), California was admitted into the Union "on an equal footing with the original states in all respects whatever." By § 3 of the same act it was provided "that the said state of California is admitted into the Union upon the express *condition that the people of said[260 state, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same, shall be impaired or questioned; . . . and that all the navigable waters within the said state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor."

It is insisted that the Klamath is a navigable river; and there is evidence in the record tending to show that the stream is navigable in fact, at certain seasons, from Requa (near its mouth) up to and above the *locus in quo*. But, in the view we take of the present case, the question of its navigability, in fact or in law, is immaterial except as it bears upon the title of the United States to the bed of the stream. The present question is whether that bed was a part of an Indian reservation, and that depends upon the question of ownership. The jurisdiction to punish the plaintiff in error for the murder of an Indian upon the reservation depends upon other considerations, as will appear hereafter.

In passing upon the effect of the act admitting Alabama into the Union, this court held, in Pollard v. Hagan, 3 How. 212, 11 L. ed. 565, that the state had the same rights, sovereignty, and jurisdiction over the navigable waters as the original states, and could exercise all the powers of government which belong to and may be exercised by them, excepting with respect to control over public lands owned by the United States; and that the title of the navigable waters, and the soil beneath them, was in the state, and subject to its sovereignty and jurisdiction. In The Geneses Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058, it was settled that for purposes of admiralty jurisdiction the tidal test, prevailing in England for determining what is navigable *water, is not applicable[261 to this country. In Barney v. Keokuk, 94 U. S. 324, 338, 24 L. ed. 224, 228, it was held that it is for the states to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto. The court, speaking through Mr. Justice Bradley, said (94 U. S. 338): "The confusion of navigable with tide water, found

in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.* In our view of the subject, the correct principles were laid down in Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; and Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471, 13 L. ed. 220. These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It prop-*
262] *erly belongs *to the states by their inherent sovereignty,* and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

The doctrine thus enunciated has since been adhered to. Packer v. Bird, 137 U. S. 661, 669, 34 L. ed. 819, 820, 11 Sup. Ct. Rep. 210; Hardin v. Jordan, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; Shively v. Bowlby, 152 U. S. 1. 40, 58, 38 L. ed. 331, 346, 352, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 358, 42 L. ed. 497, 501, 18 Sup. Ct. Rep. 157; Scott v. Lattig, 227 U. S. 229, 243, ante, 490, 33 Sup. Ct. Rep. 242.

*The* question of the navigability in fact *of nontidal streams is* sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of the act of Congress, in contradistinction to the navigable waters of the states, depends upon whether the stream in its ordinary condition affords a channel for useful commerce. The Montello, 20 Wall. 430, 22 L. ed. 391; Leovy v. United States, 177 U. S. 621, 632, 44 L. ed. 914, 919, 20 Sup. Ct. Rep. 797; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 698, 43 L. ed. 1136, 1139, 19 Sup. Ct. Rep. 770; South Carolina v. Georgia, 93 U. S. 4, 10, 23 L. ed. 782, 783; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 28, 48 L. ed. 73, 78, 24 Sup. Ct. Rep. 8.

But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states. Thus, the state of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders.

Now, a California statute of April 23, 1880, chap. 122, declared the Klamath river to be navigable from its mouth to the town of Orleans Bar, which is above the *locus in quo.* But this was repealed by act of February 24, 1891, chap. 14; and by an act of March 11, 1891, chap. 92 (Political Code, § 2349), an enumeration was made of all *the navigable rivers of the state.[263 This is held by the supreme court of that state to be exclusive, so that no other rivers are navigable under the laws of California. Cardwell v. Sacramento County, 79 Cal. 347, 349, 21 Pac. 763. The Klamath river is not among those thus enumerated, and it must therefore be treated as not navigable in law. And it will be observed that it was thus placed in the category of non-navigable streams prior to President Harrison's order of October 16, 1891, by which the Extension of the Hoopa Valley Reservation was established.

In the important case of Lux v. Haggin (1886) 69 Cal. 255, 335, 337, 10 Pac. 674, the supreme court of California, after pointing out that upon the admission of that state into the Union "upon an equal footing" with the original thirteen states, she became seised of all the rights of sovereignty, jurisdiction, and eminent domain which those states possessed, and that under § 3 of the act of admission (9 Stat. at L. 452, chap. 50) the lands of the United States not reserved or purchased for fortifications, etc., are held as are held the lands of private persons, with the exception that the state cannot interfere with the primary disposal of them nor tax them,

and that the navigable waters are common highways, free to the inhabitants of the state and to citizens of the United States, —proceeded to declare that whether this act did or did not operate as an immediate transfer of the property in non-navigable rivers to the Federal government, the legislature of the state, on April 13, 1850, passed an act adopting the common law of England, so far as not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of the state of California, as the rule of decision in all courts of the state, and that in view of the subsequent judicial history of the state this act must be held to have operated, at least from the admission of the state into the Union, as a transfer to all riparian proprietors, including the United 264]States, of the property of the state, *if any she had, in the non-navigable streams and the soil beneath them. The authority of this decision was recognized in Packer v. Bird, 137 U. S. 669, 34 L. ed. 820, 11 Sup. Ct. Rep. 210. We are not able to find that the doctrine declared in it has since been departed from by the courts of the state.

It thus appears, from the course of legislation and adjudication by the appropriate authorities of California, not only that the Klamath river has been placed in the category of non-navigable streams, but that the title of the United States to the bed of it where it runs through the public lands has been distinctly recognized. In short, by the acts of legislation mentioned, as construed by the highest court of the state,—(a) the act of 1850, adopting the common law, and thereby transferring to all riparian proprietors (or confirming in them) the ownership of the non-navigable streams and their beds, and (b) the acts of February 24 and of March 11, 1891, declaring in effect that the Klamath river is a non-navigable stream,—California has vested in the United States, as riparian owner, the title to the bed of the Klamath, if in fact it be a navigable river. If in fact it be non-navigable, it is obvious that the same result flows from the mere adoption of the common law.

From this it results that whether the river be or be not navigable in fact, the river bed is to be deemed as included within the Extension of the Hoopa Valley Reservation.

3. But the order establishing the Extension as a reservation (Exec. Ord. Ind. Reserv. 1912, p. 39, 1 Kappler, 815) contained the proviso—"That any tract or tracts included within the above described boundaries, to which valid rights have attached under the laws of the United States, are hereby excluded from the reservation as hereby extended."

Upon the trial a certified copy of a notice of the location of a "mining claim" filed October 20, 1888, in the recorder's office of Humboldt county, was introduced in *evidence, wherein notice was given by[265 eight persons named therein—"that the undersigned, having complied with the requirements of chapter 6 of title 32 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1422), and the local customs, laws, and regulations, have located 20 acres each of placer mining ground situated in the county of Humboldt and state of California, and described as follows." Then followed a description showing exterior limits conforming to legal subdivisions of the public lands; and from other evidence it appeared that the land thus claimed bordered upon, but did not include, the river at the *locus in quo*. There is no other evidence respecting this mining claim or location excepting the testimony of a witness to the effect that there was "a mine" in the vicinity of the Indian village where the crime occurred; the character or location of the mine not being otherwise described.

It is doubtful whether there is any evidence that would have supported a finding that the crime was committed elsewhere than within the river bed. Waiving this point, however, we will consider the effect of the mining location, upon the theory that the crime may have occurred within the limits of the claim.

By § 2329, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1432), placer claims are "subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." By § 2330, "two or more persons, or associations of persons, having contiguous claims . . . may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys." By § 2331, placer claims upon surveyed lands, and conforming to legal subdivisions, require no further survey or plat, and no such location shall include more than 20 acres for each individual claimant. By § 2332, where such persons *or associations have held and worked[266 their claims for a period equal to the time prescribed by the statute of limitations for mining claims by the local law, evidence of such possession and working shall establish a right to a patent, in the absence of adverse claim. The circumstances, condi-

tions, and proceedings referred to in § 2329 are those set forth in the preceding sections, beginning with § 2318 (U. S. Comp. Stat. 1901, p. 1423). The chief requirements are,—the discovery of a valuable mineral deposit within the limits of the claim (§§ 2318-2320); the claimants must be citizens of the United States, or must have declared their intention to become such (§§ 2319, 2321); "the location must be distinctly marked on the ground, so that its boundaries can be readily traced" (§ 2324); and a certain amount of work must be done in accordance with local regulations, and "on each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year" (§ 2324).

The prime requisites are, the discovery of a valuable mineral deposit, an actual taking possession thereof, and the performance of the requisite amount of development work. Erhardt v. Boaro, 113 U. S. 527, 535, 28 L. ed. 1113, 1116, 5 Sup. Ct. Rep. 560, 15 Mor. Min. Rep. 472; Black v. Elkhorn Min. Co. 163 U. S. 445, 450, 41 L. ed. 221, 223, 16 Sup. Ct. Rep. 1101, 18 Mor. Min. Rep. 375; Chrisman v. Miller, 197 U. S. 313, 321, 49 L. ed. 770, 773, 25 Sup. Ct. Rep. 468.

The history of the legislation of Congress upon the subject, and the effect thereof, are referred to in numerous decisions of this court, among them: Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 737, 1 Mor. Min. Rep. 510; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 649, 26 L. ed. 875, 879, 11 Mor. Min. Rep. 673; Gwillim v. Donnellan, 115 U. S. 45, 50, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 75, etc. 43 L. ed. 72, 80, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370. See also Jennison v. Kirk, 98 U. S. 453, 457, 25 L. ed. 240, 242, 4 Mor. Min. Rep. 504; Chambers v. Harrington, 111 U. S. 350, 353, 28 L. ed. 452, 453, 4 Sup. Ct. Rep. 428; Hammer v. Garfield Min. & Mill. Co. 130 U. S. 291, 299, 32 L. ed. 964, 967, 9 Sup. Ct. Rep. 548, 16 Mor. Min. Rep. 125; Dahl v. Raunheim, 132 U. S. 260, 33 L. ed. 324, 10 Sup. Ct. Rep. 74, 16 Mor. Min. Rep. 214; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 227, 48 L. ed. 944, 950, 24 Sup. Ct. Rep. 632.

267] *Of course, under this legislative scheme, a mining claim may be abandoned by failure to do the required development work. Chambers v. Harrington, 111 U. S. 350, *253, 28 L. ed. 452, 453, 4 Sup. Ct. Rep. 428; Black v. Elkhorn Min. Co. 163 U. S. 445, 450, 41 L. ed. 221, 223, 16 Sup. Ct. Rep. 1101, 18 Mor. Min. Rep. 375; Erhardt v. Boaro, 113 U. S. 527, 535, 28 L. ed. 1113, 1116, 5 Sup. Ct. Rep. 560, 15 Mor. Min. Rep. 472.

The evidence in the record is altogether too meager and indefinite to furnish support for a finding that at the time of the executive order of October 16, 1891, or at anytime, valid rights had attached to the placer claim above referred to.

Next, it appears from the evidence that prior to October, 1891, the board of supervisors of Humboldt county created a school district which included within its bounds the place where the homicide occurred, and that after October, 1891, the county created, out of the district mentioned, a second school district, which included the place in question. It was in evidence that this school district was maintained by the county, and not by the government, down to the time of the trial herein. From this it is argued that the state and county had assumed jurisdiction over the land on each side of the Klamath river for school purposes before the enlargement of the Hoopa Valley Reservation, and that the state still exercises the right to maintain a school there.

But we are clear that the creation and maintenance of such a school district by the state could not in anywise impair the title of the United States to the lands included in such district, or limit the authority of the United States over such lands when set apart for an Indian reservation. The act of admission (act of September 9, 1850; 9 Stat. at L. 452, chap. 50, § 3) provided: "That the said state of California is admitted into the Union upon the express condition that the people of said state, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of *the United[268 States to, and right to dispose of, the same, shall be impaired or questioned;" etc. By act of March 3, 1853 (10 Stat. at L. 246, chap. 145, § 6), Congress granted to the state for the purposes of public schools sections 16 and 36 in each township. And by act of July 23, 1866 (14 Stat. at L. 220, chap. 219, § 6), Congress gave to the state "the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims," etc. It affirmatively appears, however, that the *locus in quo* was not within either the 16th or the 36th section, and it does not appear

that it was selected by the state as "lieu" lands. Therefore the existence of the state school district is without present significance. For, as was pointed out in the Wilson Case, 140 U. S. at p. 578, 35 L. ed. 514, 11 Sup. Ct. Rep. 870, the words "sole and exclusive jurisdiction," as employed in § 2145, Rev. Stat., do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that section may apply to it; the words are used in order to describe the laws of the United States, which, by that section, are extended to the Indian country.

4. It is contended for plaintiff in error that the term "Indian country" is confined to lands to which the Indians retain their original right of possession, and is not applicable to those set apart as an Indian reservation out of the public domain, and not previously occupied by the Indians.

Secs. 2145 and 2146 are found in title 28 of the Revised Statutes, which title relates to Indians, and within chap. 4, the subtitle of which is "Government of Indian Country." Section after section in that chapter contains provisions of law applicable only to Indian country, and yet the act contains no definition of that term. In the 269]Indian intercourse act of 1834 (4 *Stat. at L. 729, chap. 161), the 1st section defined the "Indian country" for the purposes of that act. But this section was not reenacted in the Revised Statutes, and it was therefore repealed by § 5596, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3750). Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 561, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396; United States v. LeBris, 121 U. S. 278, 280, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; Clairmont v. United States, 225 U. S. 551, 557, 56 L. ed. 1201, 1203, 32 Sup. Ct. Rep. 787. Under these decisions the definition as contained in the act of 1834 may still "be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." [225 U. S. 557.] With reference to country that was formerly subject to the Indian occupancy, the cases cited furnish a criterion for determining what is "Indian country." But "the changes which have taken place in our situation" are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed "Indian country," within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.

5. Is the killing of an Indian by a person not of Indian blood, when committed upon an Indian reservation within the limits of a State, cognizable in the Federal courts?

It is insisted by plaintiff in error that § 9 of the act of March 3, 1885 (set forth in full in the marginal note, above), which declares that "all such Indians committing any of the above crimes [including murder] against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be *subject to the[270 same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States,"—constitutes the only legislation of Congress providing for punishing the crime of murder when committed upon an Indian within the limits of an Indian reservation. The argument is that this act operated to repeal § 2145, Rev. Stat., which extended to the Indian country certain general laws of the United States as to the punishment of crimes. This argument is plainly untenable. The act of 1885, of itself, provides for the punishment of crimes committed by Indians only. So far from impliedly repealing § 2145, Rev. Stat., it manifestly repeals in part the limitation that was imposed by § 2146 upon the effect of § 2145.

It was pointed out by this court in Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) (1883) 109 U. S. 556, 571, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396, that "the provisions now contained in §§ 2145 and 2146 of the Revised Statutes were first enacted in § 25 of the Indian intercourse act of 1834 (4 Stat. at L. 733, chap. 161). Prior to that, by the act of 1796 (1 Stat. at L. 469, chap. 30), and the act of 1802 (2 Stat. at L. 139, chap. 13), offenses committed by Indians against white persons, and by white persons against Indians, were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform." The point decided was that certain general expressions in the treaty with the Sioux Indians made in

1868 [15 Stat. at L. 635] had not the effect of impliedly repealing the express limitation contained in § 2146. As a result, Crow Dog went unpunished by the Federal authority for the murder of Spotted Tail, another Indian. And this no doubt was one of the causes that led to the enactment of § 9 of the act of March 3, 1885 (23 Stat. at L. 385, chap. 341), as was pointed out in United States v. Kagama, 118 U. S. 375, 383, 30 L. ed. 228, 231, 6 Sup. 271]Ct. Rep. 1109, *where the 9th section was sustained as valid and constitutional in both its branches; namely, that which provides for the punishment of the crimes enumerated when committed by Indians within the territories, and that which provides for the punishment of the same crimes when committed by an Indian on an Indian reservation within a state of the Union; and see Re Wilson, 140 U. S. 575, 578, 35 L. ed. 513, 514, 11 Sup. Ct. Rep. 870.

Section 2145, Rev. Stat., in connection with § 5339 (U. S. Comp. Stat. 1901, p. 3627), plainly includes within its terms the offense of murder committed against the person of an Indian within an Indian reservation by a person not of Indian blood, but it is contended that the admission of California into the Union "on an equal footing with the original states," without any express reservation by Congress of governmental jurisdiction over the public lands contained within her borders, conferred upon the state undivided authority to punish crimes committed upon those lands, even when set apart for an Indian reservation, excepting crimes committed by the Indians. Reference is made to the cases of United States v. McBratney, 104 U. S. 621, 26 L. ed. 869, and Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107, where it was held, in effect, that the organization and admission of states qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the states the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary. In both cases, however, the question was reserved as to the effect of the admission of the state into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves. 104 U. S. 624; 164 U. S. 247. Upon full consideration, we are satisfied that offenses committed by or against Indians are not within the principle of the McBratney and Draper *Cases*. This was in effect held, as to crimes *committed by the Indians*, in the Kagama *272]Case, 118 *U. S. 375, 383, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109, where the constitutionality of the second branch of § 9 of the act of March 3, 1885 (23 Stat. at L. 385, chap. 341), was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.

The result is that, in our opinion, the offense with which the plaintiff in error was charged was punishable in the Federal courts under §§ 2145 and 5339, Rev. Stat.

6. The only remaining question arises out of the exclusion by the trial judge of testimony offered by the plaintiff in error for the purpose of showing that one Joe Dick, an Indian, since deceased, had confessed that it was he who had shot Chickasaw. Since the circumstances of the crime, as detailed in the evidence for the government, strongly tended to exclude the theory that more than one person participated in the shooting, the Dick confession, if admissible, would have directly tended to exculpate the plaintiff in error. By way of foundation for the offer, plaintiff in error showed at the trial that Dick was dead, thereby accounting for his not being called as a witness, and showed in addition certain circumstances that, it was claimed, pointed to him as the guilty man, *viz.*, that he lived in the vicinity and therefore presumably knew the habits of Chickasaw; that the human tracks upon a sand bar at the scene of the crime led in the direction of an acorn camp where Dick was stopping at the time, rather than in the direction of the home of the plaintiff in error; and that beside the track there was at one point an impression as of a person sitting down, indicating, as claimed, a stop caused by shortness of breath, which would be natural to Dick, who was shown to have been a sufferer from consumption.

*Hearsay evidence, with a few well-[273 recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in

court to the extrajudicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction, and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice.

One of the exceptions to the rule excluding it is that which permits the reception, under certain circumstances and for limited purposes, of declarations of third parties, made contrary to their own interest; but it is almost universally held that this must be an interest of a pecuniary character; and the fact that the declaration alleged to have been thus extrajudicially made would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule against hearsay evidence. So it was held in two notable cases in the House of Lords,—Berkeley Peerage Case (1811) 4 Campb. 401; Sussex Peerage Case (1844) 11 Clark & F. 85, 103, 109, 8 Jur. 793, recognized as of controlling authority in the courts of England.

In this country there is a great and practically unanimous weight of authority in 274]the state courts against admitting *evidence of confessions of third parties, made out of court, and tending to exonerate the accused. Some of the cases are cited in the margin.† A few of them (West v. State, 76 Ala. 98; Davis v. Com. 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585; and People v. Hall, 94 Cal. 595, 599, 30 Pac. 7), are precisely in point with the present case, in that the alleged *declarant was[275 shown to be deceased at the time of the trial. In West v. State the defendant offered to prove by a witness that he heard one Jones say on his deathbed that he had killed Wilson, the deceased. The supreme court sustained the ruling of the trial judge, excluding the evidence. In Davis v. Com. the offer excluded was to prove by a witness that one Pearl confessed to him on his deathbed that he had killed the person for whose murder Davis was on trial. The court of appeals of Kentucky affirmed the conviction. In People v. Hall it appeared that defendant and one Kingsberry were arrested together for an alleged burglary, attempted to escape, were fired upon and wounded by one of the captors; that a physician was sent for to treat them, and that Kingsberry died from the effects of his wound before any complaint was filed against either of the parties. "In his own behalf the defendant offered to prove that after a careful examination the physician was satisfied that Kingsberry's wounds were necessarily fatal, and that he so informed him at the time; that Kingsberry admitted to the physician that he fully realized 'that he was mortally wounded and was on the point of death, and had given up all hope of ever getting well; that he was conscious of death, and that thus having a sense of impending death, and without hope of reward, he made a full, free, and complete

†Alabama: Smith v. State, 9 Ala. 990, 995; Snow v. State, 54 Ala. 138; Snow v. State, 58 Ala. 372, 375; Alston v. State, 63 Ala. 178, 180; West v. State, 76 Ala. 98; Owensby v. State, 82 Ala. 63, 64, 2 So. 764.

California: People v. Hall, 94 Cal. 595, 599, 30 Pac. 7.

Georgia: Lyon v. State, 22 Ga. 399, 401; Daniel v. State, 65 Ga. 199, 200; Kelly v. State, 82 Ga. 441, 444, 9 S. E. 171; Delk v. State, 99 Ga. 667, 671, 26 S. E. 752; Lowry v. State, 100 Ga. 574, 28 S. E. 419; Robison v. State, 114 Ga. 445, 447, 40 S. E. 253.

Indiana: Bonsall v. State, 35 Ind. 460, 463; Jones v. State, 64 Ind. 473, 485; Hauk v. State, 148 Ind. 238, 262, 46 N. E. 127, 47 N. E. 465; Siple v. State, 154 Ind. 647, 650, 57 N. E. 544.

Kansas: State v. Smith, 35 Kan. 618, 621, 11 Pac. 908.

Kentucky: Davis v. Com. 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585.

Louisiana: State v. West, 45 La. Ann. 928, 931, 13 So. 173.

Maryland: Munshower v. State, 55 Md. 11, 19, 39 Am. Rep. 414.

Massachusetts: Com. v. Chabbock, 1 Mass. 144; Com. v. Felch, 132 Mass. 22; Com. v. Chance, 174 Mass. 245, 251, 75 Am. St. Rep. 306, 54 N. E. 551.

Missouri: State v. Evans, 55 Mo. 460; State v. Duncan, 116 Mo. 288, 311, 22 S W. 699; State v. Hack, 118 Mo. 92, 98 23 S. W. 1089.

New York: Greenfield v. People, 85 N Y. 75, 87, 39 Am. Rep. 636; People v. Schooley, 149 N. Y. 99, 105, 43 N. E. 536.

North Carolina: State v. May, 15 N. C. (4 Dev. L.) 328, 332; State v. Duncan, 28 N. C. (6 Ired. L.) 236, 239; State v. White, 68 N. C. 158; State v. Haynes, 71 N. C. 79, 84; State v. Bishop, 73 N. C. 44, 46, 1 Am. Crim. Rep. 594; State v. Beverly, 88 N. C. 632.

Oregon: State v. Fletcher, 24 Or. 295, 300, 33 Pac. 575.

Tennessee: Wright v. State, 9 Yerg. 342, 344; Rhea v. State, 10 Yerg. 258, 260; Peck v. State, 86 Tenn. 259, 267, 6 S. W. 389.

Texas: Wood v. State, — Tex. Crim. — Rep. —, 26 S. W. 625.

Vermont: State v. Marsh, 70 Vt. 288, 40 Atl. 836; State v. Totten, 72 Vt. 73, 76, 47 Atl. 105.

confession to said physician in relation to this alleged crime, stating that he himself had planned the entire scheme, and that said Hall had nothing to do with it and was not connected with the guilt, and was in all respects innocent of any criminal act or intent in the matter.'" This evidence was excluded, and the supreme court of California sustained the ruling, saying: "The rule is settled beyond controversy that in a prosecution for crime, the declaration of another person that he committed the crime is not admissible. Proof of such declaration is mere hearsay evidence, 276]and is always excluded, whether *the person making it be dead or not" (citing cases that are among those included in the note).

We do not consider it necessary to further review the authorities, for we deem it settled by repeated decisions of this court, commencing at an early period, that declarations of this character are to be excluded as hearsay.

Queen v. Hepburn (1813) 7 Cranch, 290, 295, 3 L. ed. 348, 349, was a suit in which the petitioners claimed freedom, and certain depositions were rejected by the trial court as hearsay. This court, speaking through Chief Justice Marshall, said: "These several opinions of the court [meaning the trial court] depend on one general principle, the decision of which determines them all. It is this: that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. . . . It was very justly observed by a great judge† that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible. . . . The danger of admitting hearsay evidence is sufficient to admonish courts of justice against 277]lightly yielding to the *introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all. If the circumstance that the eyewitnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained. . . . This court is not inclined to extend the exceptions further than they have already been carried."

This decision was adhered to in Davis v. Wood (1816) 1 Wheat. 6, 8, 4 L. ed. 22, 23; Scott v. Ratliffe (1831) 5 Pet. 81, 86, 8 L. ed. 54, 55; Ellicott v. Pearl (1836) 10 Pet. 412, 436, 437, 9 L. ed. 475, 485, 486; Wilson v. Simpson (1850) 9 How. 109, 121, 13 L. ed. 66, 71; Hopt v. Utah (1884) 110 U. S. 574, 581, 28 L. ed. 262, 265, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417. And see United States v. Mulholland, 50 Fed. 413, 419.

The evidence of the Dick confession was properly excluded.

No error appearing in the record, the judgment is affirmed.

Mr. Justice Van Devanter concurs in the result.

Mr. Justice Holmes, dissenting:

The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make anyone outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive *law. There is no decision by this court[278 against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man (Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50); and when we surround the accused with so many safeguards, some of which seem to me excessive; I think we ought to give him the benefit of a fact that, if proved, commonly would have

†*The reference* is to the opinion of Lord *Kenyon, Ch. J., in Rex* v. Eriswell (1790) *3 T. R. 721.*

such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length. 2 Wigmore, Ev. §§ 1476, 1477.

Mr. Justice Lurton and Mr. Justice Hughes concur in this dissent.

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McLAUGHLIN BROTHERS, a Copartnership (John R. McLaughlin and James B. McLaughlin, Sole Members of the Copartnership), Plffs. in Err.,

v.

L. A. HALLOWELL et al.

(See S. C. Reporter's ed. 278–294.)

**Error to state court — questions reviewable — order remanding cause to state court.**

1. An order of a Federal circuit court, remanding a cause to a state court, is not reviewable in the Federal Supreme Court by writ of error bringing up the final judgment of the highest state court.

[For other cases, see Appeal and Error, 2096–2097, in Digest Sup. Ct. 1908.]

**Error to state court — decision of Federal question — removal of causes.**

2. The denial by a state court of a second petition to remove a cause to a Federal court does not deny any Federal right within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing the appellate jurisdiction of the Federal Supreme Court over state courts, where the state court did no more than bow to the decision and order of the Federal court in the first removal proceedings remanding the cause to the state court.

[For other cases, see Appeal and Error, 1412–1416, in Digest Sup. Ct. 1908.]

**Removal of causes — remanding — construction of order.**

3. The remanding by a Federal circuit court of a suit against a partnership to the state court whence it had been removed, upon a petition asserting diversity of citizenship, must be deemed to have been ordered upon the ground that, because, under the local practice, the firm had been sued as an entity without joining individual partners as parties, there was no diversity of citizenship, although the remanding order states that the court is without jurisdiction "by reason of lack of evidence in the transcript filed herein that said defendant had been served with notice of said proceedings," since this clause should be regarded as inserted in order to enable the partners to apply to the state court to be substituted as defendants in the place of the firm, and then raise the question whether the action in its changed form is removable.

[For other cases, see Removal of Causes, XI., in Digest Sup. Ct. 1908.]

**Error to state court — decision of Federal question — removal of cause.**

4. A judgment of a state court denying a second petition to remove a suit against a partnership to a Federal circuit court for diversity of citizenship, after refusing to substitute the partners in place of the firm as the sole defendants, or to join them with the firm as codefendants, is not reviewable in the Federal Supreme Court, where the Federal circuit court had previously remanded the cause to the state court in the first removal proceedings, apparently, upon the ground that, because, under the local practice, the firm had been sued as an entity without joining the individual partners as parties, there was no diversity of citizenship, since, under the circumstances, the same grounds being set up as the basis alike for the motion for substitution and the second removal petition as were alleged in the first removal proceedings, if any Federal right was denied, it was denied by the Federal court, and not by the state court.

[For other cases, see Appeal and Error, 1412–1416, in Digest Sup. Ct. 1908.]

[No. 149.]

Argued January 27, 1913. Decided April 7, 1913.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the District Court of Pocahontas County, in that state, in favor of plaintiffs in an action brought against a partnership in the firm name, which was sought to be removed to a Federal court. Dismissed for want of jurisdiction.

See same case below, first appeal, 136 Iowa, 279, 111 N. W. 428; second appeal, — Iowa, —, 121 N. W. 1039.

The facts are stated in the opinion.

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On error to state court where removal to Federal court was sought—see note to Williams v. First Nat. Bank, 54 L. ed. U. S. 625.

Mr. Edgar A. Morling argued the cause, and, with Messrs. Charles A. Clark and William H. Morling, filed a brief for plaintiffs in error:

The judgment from which this writ of error is taken is the only final judgment in the supreme court of the state from which the plaintiffs in error could prosecute a writ of error, and the intermediate proceedings are not a bar to the present writ.

Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 214, 53 L. ed. 765, 768, 29 Sup. Ct. Rep. 430; Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

The plaintiffs in error excepted to the denial of the petition for removal, and in their answer insisted on absence of jurisdiction of the state court, and all the time protested against remaining in the state court. They had the right to do this, and to rely upon their right to this writ of error in case they were finally defeated in the state court.

Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564.

Mr. Denis M. Kelleher argued the cause, and, with Messrs. William S. Kenyon and Maurice O'Connor, filed a brief for defendants in error:

The order of the United States circuit court, remanding the cause to the state court, is conclusive that the cause was not removable, and such order of the United States circuit court is binding upon the parties and the state court as an adjudication.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

The state court is given no right to review or control the exercise of the jurisdiction of the Federal court, and the decision of the Federal court upon a petition for removal cannot be ignored in the state court. The state court is bound to give the effect of a judgment to the order of the United States circuit court upon the motion to remand. It is not necessary to determine whether the case is removable or not; the Federal court is given jurisdiction to determine that question, and its judgment is conclusive.

Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; 18 Enc. Pl. & Pr. 385.

There was no right to file a second petition for removal; the Federal court having passed upon the first petition, the state court was absolutely bound by its decision.

St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 27 L. ed. 703, 2 Sup. Ct. Rep. 498; Smith v. Travelers' Ins. Co. 73 Fed. 513.

The fact that the first petition may have been defective does not alter this rule.

Johnston v. Donovan, 30 Fed. 396; Overman Wheel Co. v. Pope Mfg. Co. 46 Fed. 580; Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514, 25 S. W. 578, 27 S. W. 613; Texas v. Day Land & Cattle Co. 49 Fed. 595.

Even if the court had ordered, over the objections of the plaintiffs in the case, the substitution of defendants, as prayed for by the plaintiffs in error, this would not have given a right to a second removal of the case.

Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248.

The sole question which was passed upon or presented to the state court, as shown by the record and the decision, was the right to substitution of parties. This involved no Federal question, and there is nothing properly presented for review in this court.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; First Nat. Bank v. Estherville, 215 U. S. 341, 54 L. ed. 223, 30 Sup. Ct. Rep. 152; Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S. 78, 54 L. ed. 390, 30 Sup. Ct. Rep. 230.

Mr. Justice Pitney delivered the opinion of the court:

This writ of error is sued out under § 709, Rev. Stat., U. S. Comp. Stat. 1901, p. 575, and brings up a judgment of the supreme court of Iowa, affirming a judgment of the district court of one of the counties of that state in an action brought by the defendants in error against "McLaughlin Brothers, a Copartnership," named among the plaintiffs in error. The individual plaintiffs in error, John R. McLaughlin and James B. McLaughlin, who allege themselves to be "sole *members [280 of the copartnership," were not named as defendants at the inception of the action. Their relation to it will appear from what follows.

It is claimed by the plaintiffs in error that they were entitled to remove the cause to the appropriate Federal circuit court on the ground of diversity of citizenship (there being no question that the matter in dispute, exclusive of interest and costs, exceeded $2,000), and that the decision of the state court deprived them of the right of removal. The cause was once removed to the Federal court and by that court remanded. A subsequent petition for removal was refused by the county district court. It is the decision of the supreme court, in affirming the judgment of the district court, notwithstanding such refusal, that is now assigned for error. The

circumstances of the case are peculiar and require a somewhat particular recital.

The action was commenced by petition filed by defendants in error in the district court, naming as defendant "McLaughlin Brothers, a copartnership," and claiming $3,000 damages for breaches of warranty in the sale of certain horses. The petition alleged (*inter alia*) that defendant was a nonresident of the state of Iowa, and that it was a partnership, with headquarters at Columbus, Ohio, and with a branch at Emmetsburg, Iowa. The transactions out of which the alleged causes of action arose were stated to have occurred in Iowa, and the alleged contracts to have been made in that state. At the same time the plaintiffs filed in the district court an attachment bond, and caused a writ of attachment to be issued to the sheriff of the county, who, according to the record, "thereunder garnisheed the United States Express Company, by serving on such garnishee notice of garnishment, and made return of such service."

Thereafter the defendants filed a petition and bond for removal of the cause into 231]the United States circuit court *for the northern district of Iowa, upon the ground of diversity of citizenship. The opening words of the petition were: "Come now the above-named defendants, and respectfully show to the court that they are a copartnership composed of John R. McLaughlin and James B. McLaughlin, sole partners in and members of said copartnership, doing business at the city of Columbus, in the state of Ohio. That at the time of the commencement of this action, and ever since, and now, the said copartnership, McLaughlin Brothers, and the said James B. McLaughlin and John R. McLaughlin, and each of them, were and are residents, citizens, and inhabitants of the state of Ohio; . . . that the plaintiffs hereinabove named, and each of them, at the time of the commencement of this action, were and still are residents, citizens, and inhabitants of the state of Iowa, and not of the state of Ohio." The remaining averments were in the usual form. The cause was removed accordingly.

After some time the Federal court made an order remanding it, the substance of which is as follows, *viz.:* "The court, being advised in the premises, finds that this court has not jurisdiction of said cause, and sustains said motion (for a remand). It is ordered and adjudged that said cause be and the same is hereby remanded to the district court of Iowa in and for Pocahontas county, from whence the same came, this court not having jurisdiction by reason of lack of evidence in the transcript filed herein, that said defendant had been served with notice of said proceedings."

The record shows that after a duly authenticated copy of this order had been filed in the district court, "John R. McLaughlin and James B. McLaughlin appeared in said cause,"—but without previous leave of the court,—and filed a written motion setting up—"That they are the sole members and partners in the abovementioned firm of McLaughlin Brothers and the sole parties defendant *in interest[232 herein, and that they are the parties and the sole parties that are sued under the firm name of McLaughlin Brothers;" and then, after averring diversity of citizenship, and that the matter in dispute exceeded $2,000, the motion proceeded as follows: "That these parties are entitled to have this action tried in the circuit court of the United States in and for the northern district of Iowa; that the only effect of maintaining this action against these defendants in their partnership name is to prevent a removal of the action to the said United States circuit court; wherefore the said John R. McLaughlin and James B. McLaughlin move the court, (1), for an order herein substituting these defendants in their individual names as sole parties defendant herein, and permitting them to appear herein and answer and defend in their said individual names; (2) if the foregoing is overruled, then that an order be made joining the said John R. McLaughlin and James B. McLaughlin as parties defendant herein, in their individual names, and permitting them to appear, answer, and defend in their individual names."

Upon the same date, "The said defendants, McLaughlin Brothers, appeared in said cause and filed therein their application for substitution of parties," etc., adopting the statements and allegations contained in the motion of the individuals as above quoted, and thereupon moving the court that the said individuals be either substituted in place of the defendants, McLaughlin Brothers, as sole defendants, or else joined as codefendants with the firm.

And at the same time the partnership and the individuals filed a petition, in the name of the individuals, for the removal of the cause to the United States circuit court, upon the same ground of diversity of citizenship that was set up in the first petition for removal. A proper bond was also filed.

To this second petition for removal and to the accompanying *motions for substi-[233 tution, etc., the plaintiffs in the action filed written objections, based in part upon the ground that the individual partners were not parties to the action, and not entitled

to make a motion for substitution, or to be joined as parties; that the plaintiffs were entitled to bring their action against the copartnership without joining as defendants the members of the firm, and they having exercised this option, the members of the firm were not, as against the plaintiffs' objection, entitled to be either substituted or joined as parties; and that the individual partners were not entitled to have the action tried in the circuit court of the United States. The district court sustained these objections, and denied the several motions and the petition for removal.

Thenceforward the action appears to have proceeded in the district court as against the partnership alone. "A Plea to Jurisdiction and Answer" was filed, which repeated the averments upon which the petitions for removal had been based, set up the filing of those petitions and bonds and the several applications for substitution or joinder of the individuals as parties defendant, and averred that, by reason of the premises, the state court had no jurisdiction to proceed further. Answer was at the same time made to the merits, and the action was thus brought to an issue.

There appears to have been a trial, resulting in a directed verdict for the defendants and a judgment thereon, from which the plaintiffs appealed to the supreme court of Iowa, where there was a reversal and award of a new trial. The transcript of the record as presented here is silent on the subject, but we are referred to the report of the case on the first appeal (136 Iowa, 279, 111 N. W. 428).

Upon the second trial the defendants offered evidence to support the averments of the plea to the jurisdiction, which was overruled as irrelevant. A motion to direct a verdict in favor of defendants on the 284] ground that, because *of the proceedings for removal, the district court had no jurisdiction, was likewise overruled. There was a verdict and consequent judgment for the plaintiffs for $3,755.02, which, upon appeal, was affirmed by the supreme court of Iowa (121 N. W. 1039), and the present writ of error was sued out.

Except for the opinion delivered by the supreme court upon the second appeal there is nothing in the record to show what questions were raised in that court. After referring to the first appeal, as reported in 136 Iowa, 279, which admittedly raised no question of Federal right, the opinion proceeds as follows: "But one new question is here presented, and that arises on the *following* facts: This action was com*menced in December, 1903.* It was trans*ferred to the United States* circuit court upon the defendants' application, where it was remanded to the state court, because of want of jurisdiction of the Federal court. In January, 1905, the defendants filed an application in the district court for the substitution of John R. and James B. McLaughlin as defendants. This was denied, and since such denial both trials have taken place and more than three years elapsed, and the defendants now appeal from the order denying substitution. There was no right of substitution. The statute (Code, § 3468) expressly provides that a partnership may sue or be sued as a distinct legal entity. [Citing cases.] Under this statute the plaintiffs had the absolute right to sue the partnership alone, or to join in such suit the individual members of the partnership. They chose the former course, and they cannot be deprived of such right upon the application of the partnership, or of the individual members thereof. [Citing cases.] The plaintiffs clearly had the right to sue McLaughlin Brothers, the partnership, alone. This they could not do in the Federal court, and the case was therefore not removable. Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150."

*It is contended here that the state[285 court deprived the plaintiffs in error of a Federal right by giving such effect to the local Code as to cut off the right of removal.

The statute under which plaintiffs brought their action is as follows:

"Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought against the members not made parties, on the original cause of action." Code 1897, § 3468.

The gist of the argument for the plaintiffs in error is that this section, whatever its effect upon the practice of the state courts, cannot interfere with a right of removal to the Federal courts given by the act of Congress; that the real parties in interest as defendants in the state court were the individual partners, and since they were citizens of Ohio, while the plaintiffs in the state court were citizens of Iowa, the defendants had the right of removal although sued in the partnership name; that the order of the Federal circuit court remanding the cause after the first removal was limited in its effect, because based upon lack of evidence in the transcript that plaintiffs in error had been served with no-

tice of the proceedings; and that the defendants, on thereafter appearing and filing motions for substitution, etc., were entitled to renew the application for removal, and, since they did this, the state court ought to have admitted the individual partners as defendants in order to enable them to assert the right of removal that is alleged to result from their interest in the suit and the diversity of citizenship between them as individuals and the plaintiffs; and that in denying the applications of the plaintiffs in error, made in this 286]behalf after the remanding *order was filed, the state court deprived them of a Federal right.

We are confronted, at the outset, with the question of the jurisdiction of this court to review the action of the state court in the premises.

That the order of the United States circuit court remanding the cause to the state court is not reviewable here is settled by Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389. In that case this court declared (at p. 582): "If the circuit court remands a cause, and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment. A state court cannot be held to have decided against a Federal right when it is the circuit court, and not the state court, which has denied its possession. The supreme court of Nebraska rightly recognized the courts of the United States to be the exclusive judges of their own jurisdiction, and declined to review the order of the circuit court. As, under the statute, a remanding order of the circuit court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on a writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of the circuit court, remanding such cause, shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under § 709 in respect of such an order, where the state court has rendered no decision against a Federal right, but simply accepted the conclusion of the circuit court."

It is fundamental that plaintiffs in error, being debarred from bringing the remanding order under the review of this court, cannot accomplish the same object by indirection. And if the state court, in denying the second petition for removal, did no more than bow to the decision and order of the Federal court when it remanded the 287] *record, it did not deny any Federal right of the plaintiffs in error within the meaning of § 709, Rev. Stat., U. S. Comp. Stat. 1901, p. 575. That it was proper to deny the second petition if it presented no different question from that presented by the first is plain. St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 217, 27 L. ed. 703, 704, 2 Sup. Ct. Rep. 498; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 217, 53 L. ed. 765, 769, 29 Sup. Ct. Rep. 430.

This brings us to the question whether, between the filing of the first petition for removal and the second, there had been any change in the situation, presenting the right of removal upon a better ground than that which was overruled by the United States circuit court when it remanded the cause. As already mentioned, the insistence is that the remanding order was based upon the fact that the defendants had not been served with notice of the proceedings; and it is insisted that this difficulty was obviated by the subsequent appearances and motions. In order to pass upon this contention we should first examine the state practice.

Under the Iowa Code 1897, § 3514, action in a court of record is commenced by serving the defendant with a notice, informing him of the name of the plaintiff, that a petition is, or by a date named therein will be, filed in the office of the clerk of the court wherein action is brought, naming it, and stating in general terms the cause of action, and that unless the defendant appears and defends before a stated time his default will be entered and judgment or decree rendered against him. The sections following provide the method of making personal and substituted service, and, in case of absent defendants, service by publication in certain cases. By § 3541 it is prescribed that the mode of appearance may be by delivering to the plaintiff or the clerk of the court a written memorandum of appearance, signed by the defendant or his attorney; or by entering an appearance in the appearance docket or judge's calendar, or by announcing to the court an *appearance, which shall be entered of[288 record; or "by an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice; and an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance," etc.

By §§ 3876 to 3878 it is provided that the plaintiff in a civil action may cause the property of the defendant, not exempt from execution, to be attached at the commencement or during the progress of the proceedings, but if this be done subsequent to the

commencement of the action, a separate petition must be filed, and "in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings, and only auxiliary thereto." The grounds upon which an attachment may be procured are, that the defendant is a foreign corporation, or acting as such, or is a nonresident of the state, or is about to remove his property out of the state, or has disposed or is about to dispose of his property with intent to defraud his creditors, etc., etc. By § 3897, property of defendant in the possession of another, or debts due to defendant, may be attached by garnishment. By § 3924, if judgment is rendered for the plaintiff in any case in which an attachment has been issued, the court is to apply in satisfaction thereof any money seized by or paid to the sheriff under the attachment, and the proceeds of sales of other attached property. Subsequent sections provide for the mode of giving notice to a garnishee, and for obtaining a judgment against him. By § 3947 such judgment shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings. Sec. 3948 permits the defendant in the main action to set up by a suitable pleading filed in the garnishment proceedings, facts 289] *showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution, or, for any other reason, is not liable for plaintiff's claim.

The state courts have held that the effect of § 3541 is to subject a defendant who comes into court for any purpose connected with the cause (even under a "special" appearance) to the general jurisdiction of the court. Des Moines State Bank v. Van, 12 Iowa, 523; Robertson v. Eldora R. & Coal Co. 27 Iowa, 245, 248; McFarland v. Lowry, 40 Iowa, 467; Johnson v. Tostevin, 60 Iowa, 46, 14 N. W. 95; Lesure Lumber Co. v. Mutual F. Ins. Co. 101 Iowa, 514, 519, 70 N. W. 761; Locke v. Chicago Chronicle Co. 107 Iowa, 390, 395, 78 N. W. 49; Rummelhart v. Boone, 147 Iowa, 390, 126 N. W. 338, 339. As to whether this is "due process of law" in the state courts within the meaning of the 14th Amendment, see York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; Kauffman v. Wootters, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298. As to the applicability of the rule of practice to the Federal courts under the conformity act (Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684), see Southern P. Co. v. Denton, 146 U. S. 202, 208, 36 L. ed. 943, 945, 13 Sup. Ct. Rep. 44; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 203, 37 L. ed. 699, 702, 13 Sup. Ct. Rep. 859.

With respect to § 3468, permitting actions to be brought against a partnership as such, or against all or either of the individual members thereof, or against the partnership and all or any of the members thereof, and declaring that a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice, the courts of Iowa have construed this as dealing with the partnership as an entity distinct from the individual members, and as conferring upon the plaintiffs the option of suing the partnership alone instead of joining in the suit the individual members of the firm. In so holding in the present case, the supreme court of Iowa did but follow previous decisions of the same court. Brumwell v. Stebbins, 83 Iowa, 425, 428, 49 N. W. 1020; Ruthven v. Beckwith, 84 Iowa, 715, 717, 45 N. W. 1073, 51 N. W. 153; Baxter v. Rollins, 110 Iowa, 310, 81 N. W. 586.

*The United States circuit court, in [290 remanding the cause, followed its previous decision in Ralya Market Co. v. Armour & Co. 102 Fed. 530. This likewise was an action brought under § 3468 of the Code of Iowa against a copartnership, without service upon the individual partners. It was remanded on the ground that in that form the cause was not removable, for the reason that it was not an action of which the Federal court could have taken jurisdiction originally if brought in the first instance in that court; and this because citizenship within the meaning of the Federal Constitution could not be predicated of a partnership, and so there could be no diversity of citizenship. Two decisions of this court were relied upon as authority for this view: Chapman v. Barney, 129 U. S. 677, 682, 32 L. ed. 800, 801, 9 Sup. Ct. Rep. 426; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 454, 44 L. ed. 842, 844, 20 Sup. Ct. Rep. 690. (And see Thomas v. Ohio State University, 195 U. S. 207, 211, 49 L. ed. 160, 164, 25 Sup. Ct. Rep. 24.) At the same time the court said (102 Fed. at p. 534): "If the partners had applied to the state court to be substituted as defendants in place of the firm, so that the suit would then have been only against the individuals, partners doing business under the firm name, the case might possibly then have been removable, as it would have been then pending against the individuals only, and the citizenship of the defendants could then have been shown to be different from that of the plaintiff." And see H. L. Bruett &

Co. v. F. C. Austin Drainage Excavator Co. 174 Fed. 668, 672.

It is clear, therefore, that the Federal court, in remanding the present case, did so upon the ground that the individual members of the firm had not been joined as parties, and that, under the Iowa practice of suing the partnership as a separate entity, there was, within the meaning of the removal act, no diversity of citizenship. And it is equally plain that the clause—"This court not having jurisdiction by reason of lack of evidence in the transcript filed herein that said defendant had been served 291] *with notice of said proceedings"—was inserted in order to enable the partners to apply to the state court to be substituted as defendants in the place of the firm, and then raise the question whether the action in its changed form was removable, as the opinion just cited intimated that it might be. Of this opportunity the defendants availed themselves, as already shown.

The construction we have placed upon the qualifying clause quoted from the remanding order is evidently correct, from what has already been said. Such was the construction placed upon it by the subsequent conduct of the defendants in the state court. And the same construction is, in effect, conceded in their briefs in this court, which state that "the order remanding the cause upon the first removal was upon the specific ground of lack of evidence in the transcript that plaintiffs in error had been served with notice of the proceedings." And again,—"The case having been remanded solely because of absence of notice, the defendants, on appearing and filing motions for a substitution, were entitled to renew their applications for removal." And still again,—"The plaintiffs in error sought by motion for substitution, in accordance with the suggestion in Ralya Market Co. v. Armour & Co. 102 Fed. 530, to eliminate this question,"—referring to the question of "the supposed inability of the Federal court to entertain an action against a partnership, which has been the constant claim of the defendants in error in the lower courts, and which plaintiffs in error sought to obviate."

The clause quoted from the remanding order hardly admits, we think, of the construction that the reason for denying the jurisdiction was that the copartnership defendant (as distinguished from the individual partners) had not been served with notice of the suit or of the attachment proceedings; for such nonservice, if it rendered the proceedings defective, was not waived 292]by the presentation *of a petition for removal, but, on the contrary, was one of the very matters that might be adjudicated upon by the circuit court (Goldey v. Morning News, 156 U. S. 518, 523, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559; Wabash Western R. Co. v. Brow, 164 U. S. 271, 279, 41 L. ed. 431, 434, 17 Sup. Ct. Rep. 126; Clark v. Wells, 203 U. S. 164, 171, 51 L. ed. 138, 141, 27 Sup. Ct. Rep. 43; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 441, 54 L. ed. 272, 275, 30 Sup. Ct. Rep. 125; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 174, 54 L. ed. 708, 718, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.) And it is unreasonable to construe the remanding order as meaning that service of notice upon the copartnership defendant was necessary to initiate the proceeding so as to make it a "suit" within the meaning of § 3514 of the state Code, as distinguished from an "independent" or "auxiliary" proceeding by attachment, within the meaning of § 3877 (see Re Iowa & M. Constr. Co. 2 McCrary, 178, 6 Fed. 799, 801; Long v. Long, 73 Fed. 369, 372; First Nat. Bank v. Turnbull & Co. 16 Wall. 190, 195, 21 L. ed. 296, 297), because it would seem clear that notice to the copartnership, as such, sufficient, at least, to constitute the proceeding a suit or controversy within the meaning of the state practice, and so as to bring it within the reach of the removal act, was evidenced by the filing of the first petition for removal, which, as above stated, was made in the name of the copartnership, and set forth an appearance by the copartnership for the purpose of asserting the right of removal; and, as we have seen, such an appearance, under § 3541 of the Code, rendered further notice unnecessary, so far as the requirements of the state practice were concerned.

Having, as already pointed out, no jurisdiction to review the remanding order, we intend no expression of opinion upon the correctness of the grounds upon which it was based, and have dealt thus at length with the construction of its language only because we are concerned with the effect that was given and ought properly to have been given to it by the state court.

Whatever construction may be placed upon it, we *cannot see that the plaintiffs in[293 error by the subsequent proceedings gave themselves any better right to removal than that which was asserted by the first petition, was then acceded to by the state court, and was overruled by the circuit court in remanding the cause.

Reliance is placed upon Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 100, 42 L. ed. 673, 676, 18 Sup. Ct. Rep. 264, and Fritzlen v. Boatmen's Bank, 212 U. S. 364, 372, 53 L. ed. 551, 557, 29 Sup. Ct. Rep. 366. But those cases dealt with a change

in the situation in the state court after an order of remand had been made, and resulting from subsequent dealings or conduct of the parties, in which the opposing party participated. They are not pertinent here, where there was no change in the situation of the parties on the record, and merely an unsuccessful application to change it, made by the parties asserting the right of removal, and opposed, and successfully opposed, by the other parties.

The mere entry of appearances in the state court, after the filing of the remanding order, made no substantial change in the situation, for reasons that have been indicated. And whether the state court, at the instance of the defendants, should have admitted the individual members of the partnership as additional parties, or should have substituted them in place of the firm as sole defendants, is a question of local law and practice, the decision of which by the state court does not concern us, saving so far as it may affect the right of the defendant firm or the individual partners thereof to have the cause heard and determined in the Federal court. If, therefore, the action of the state court in refusing to allow the substitution is reviewable upon the present writ of error, it is only because the application for such substitution was made as a step towards the assertion of the right of removal. But, from what has been said, it is sufficiently clear that the grounds, and the only grounds, set up as the basis alike for the motion for substitution and the second petition for removal, are the same grounds that 294] were *alleged in the first petition for removal; that is to say, that John R. McLaughlin and James B. McLaughlin were the sole members and partners of the firm of McLaughlin Brothers, and the sole parties interested as defendants, and that they and their firm were citizens, residents, and inhabitants of the state of Ohio, while the plaintiffs were citizens, residents, and inhabitants of the state of Iowa. In short, if the defendants were entitled to have the proceedings molded in aid of their asserted right of removal, they were entitled to have the cause removed without any modification of the proceedings. The state court having refused to change the character of the action, the situation was precisely the same as when the first petition for removal was filed, and the court properly held itself bound by the remanding order.

Therefore, if any Federal right of the plaintiffs in error was denied, it was denied by the United States circuit court, and not by the state court.

*In discussing* the matter we have assumed, *in favor of* the plaintiffs in error, that the question here dealt with was raised by them in the supreme court of Iowa,—a matter that is not entirely clear, since the opinion makes no reference to the second petition for removal, and, aside from the opinion, the record does not disclose what questions were raised.

We have also assumed that the second petition for removal was filed in due season, and was not subject to certain other objections raised against it by the defendants in error. We must not be understood as having passed upon these questions.

Writ of error dismissed.

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*WILLIAM McCOACH, Collector of [295
Internal Revenue, Petitioner,
v.
MINEHILL & SCHUYLKILL HAVEN RAILROAD COMPANY.

(See S. C. Reporter's ed. 295-312.)

**Internal revenue — excise on corporation — doing business.**

1. A railroad company which, under legislative authority, has leased its entire railroad, with all its rights, powers, privileges, and franchises (except the franchise of being a corporation), for a term of years, at an annual rental, the lessees agreeing to keep the road in good order and repair, keep it in public use, and efficiently operate it and return it to the lessor company at the expiration or other determination of the lease, is not, with respect to the railroad, "engaged in business," within the meaning of the Federal corporation tax law of August 5, 1909 (36 Stat. at L. 11, 112-117, chap. 6, U. S. Comp. Stat. Supp. 1911, pp. 741, 946-951), § 38, imposing an excise tax upon corporations doing business in any state, although it retains the franchise of corporate existence, maintains its organization, and holds itself ready to exercise its franchise of eminent domain or other reserved powers if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease.

[For other cases, see Internal Revenue, III, in Digest Sup. Ct. 1908.]

**Internal revenue — excise on corporation — doing business.**

2. The mere receipt by a lessor railway company of the income from its leased railway property (the property being used in business by the lessee, and not by the lessor), and the receipt of interest and dividends from invested funds, bank balances, and the like, and the payment of organization and administration expenses incidental to the receipt of such moneys, and their distribution among the stockholders, do not constitute such a business as is taxable under the Federal corporation tax law of August 5, 1909, § 38, imposing an excise

tax upon the doing or carrying on of business in a corporate capacity.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

[No. 670.]

Argued January 14 and 15, 1913. Decided April 7, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania for the recovery back of certain taxes exacted under the Federal corporation tax law. Affirmed.

The facts are stated in the opinion.

Solicitor General Bullitt argued the cause and filed a brief for petitioner:

If a corporation exercises its privilege to do any business in a corporate capacity, no matter how small such business is, it is subject to the tax.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312.

The doctrine of Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361, will have to be considerably extended in order to include the case at bar.

Mr. George Wharton Pepper argued the cause, and, with Messrs. Eli Kirk Price and William B. Bodine, Jr., filed a brief for respondent:

To be a corporate landlord is not equivalent to doing business.

Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361.

Messrs. E. Parmalee Prentice, George Welwood Murray, and Charles P. Howland filed a brief as *amici curiæ* for the Albany & Susquehanna Railroad Company:

The Federal corporation tax is imposed not upon franchises of the corporation irrespectively of their use in business, nor upon the property of the corporation, but upon the doing of corporate business, and with respect to the carrying on thereof; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described.

Flint v. Stone Tracy Co. 220 U. S. 145, 55 L. ed. 411, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312.

The corporation tax cannot be measured by so much of the rental of leased property as is paid by the lessee to stockholders of the lessor, and probably the same argument would apply to the portion of rental paid as interest to bondholders; for here, too, so far as relates to the present question, there has been a novation.

Humphreys v. McKissock, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779.

No corporation makes money by stockholders' meetings, election of officers, and preservation of franchises,—necessary as these and many other acts may be.

Pennsylvania Steel Co. v. New York City R. Co. 193 Fed. 286, 117 C. C. A. 556, 198 Fed. 774; Albany & S. R. Co. v. Durey (N. D. C. N. Y.) April, 1912; Morris & E. R. Co. v. Anderson (S. D. C. N. Y.) March, 1912; Mine Hill & S. H. R. Co. v. McCoach, 192 Fed. 670, affirmed (C. C. 3d. C.) March Term, 1912.

*Mr. Justice Pitney delivered the[297 opinion of the court:

The Minehill & Schuylkill Haven Railroad Company, the respondent herein (called for convenience the Minehill Company), sued the petitioner, who is collector of internal revenue at Philadelphia, to recover certain taxes for the years 1909 and 1910, paid under protest by that company under the corporation tax act of 1909. [36 Stat. at L. 11, chap. 6, U. S. Comp. Stat. Supp. 1911, p. 741.] The United States circuit court held that the company was not "engaged in business" within the meaning of the act, and that therefore the taxes had been illegally assessed, and rendered judgment for their recovery. 192 Fed. 670. The circuit court of appeals affirmed the judgment, and the case comes here upon certiorari.

The facts appear from the plaintiff's statement of claim and the defendant's affidavit of defense, which latter was overruled as insufficient. They may be summarized as follows: The Minehill Company was incorporated by an act of the legislature of the state of Pennsylvania, approved March 24, 1828 (P. L. p. 205), for the purpose of constructing and operating a railroad, with appropriate powers, including the power of eminent domain. Under this charter a railroad was built and for many years operated. Under the authority of general acts of the legislature, approved respectively April 23, 1861 (P. L. p. 410), and February 17, 1870 (P. L. p. 31), the Minehill Company, in the year 1896, leased its entire railroad, with all side tracks, extensions, and appurtenances of every kind, and all rolling stock and personal property of every description, in use or adapted for use in, upon, or about the railroad (excepting some property intended to have been described in a schedule annexed to the lease, but which is not described, no such schedule having been annexed), and also

—"All the rights, powers, franchises (other than the franchise of being a corporation), and privileges which may now, or 298] at any time *hereafter during the time hereby demised, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises, or any of them," unto the Philadelphia & Reading Railway Company for a term of nine hundred and ninety-nine years from January 1, 1897, at a yearly rental of $252-612, that being equivalent to 6 per centum upon the capital stock of the Minehill Company.

The lessee agreed to keep the road in good order and repair, keep it in public use and efficiently operate it, and return it to the lessor company at the expiration or other determination of the lease. The Minehill Company agreed during the term of the lease to maintain its corporate existence and organization, and that when requested by the lessee it would "put in force and exercise each and every corporate power, and do each and every corporate act, which the Minehill Company might now, or at any time hereafter, lawfully put in force or exercise, to enable the railway company (the lessee) to enjoy, avail itself of, and exercise, every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, etc., of the property demised, and of the business to be there carried on." It was provided that upon default in the payment of the rent reserved, or in the performance of certain other covenants, the lessor might declare the lease forfeited, and re-enter and repossess the demised premises. The lease further provided that the lessee might, under certain circumstances, abandon certain railway lines "whenever it shall be found legally practicable to abandon so much of the said lines of railroad, without working a forfeiture or any impairment of the chartered rights and franchises of the Minehill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Minehill Company or the railway company, to the public or the commonwealth, for 299] *the nonuser of such portions of the railroad lines." In the event thus provided for the abandoned rails, machinery, etc., are to be sold and the proceeds turned over to the Minehill Company, and the annual rental proportionately reduced.

Pursuant to this lease the entire railroad and all property connected therewith was turned over to the Reading Company, and since then has been operated by that company, and the Minehill Company has not carried on any business in connection with the operation of it. It has, however, maintained its corporate existence and organization by the annual election of a president and board of managers, and this board has annually elected a secretary and treasurer. It receives annually from the Reading Company the fixed rental called for by the lease, and it receives annually sums of money as interest on its bank deposits, and also maintains a "contingent fund," from which it receives annual sums as interest or dividends. And it annually pays the ordinary and necessary expenses of maintaining its office and keeping up the activities of its corporate existence, including the payment of salaries to its officers and clerks. It keeps and maintains at its offices, stock books for the transfer of its capital stock, and this stock is bought and sold upon the market. The annual income from the contingent fund appears to be about $24,000, its annual payments for state taxes about as much, and its expenditures for corporate maintenance about $5,000.

The corporation tax law (act of August 5, 1909, § 38, 36 Stat. at L. chap. 6, pp. 11, 112–117, U. S. Comp. Stat. Supp. 1911, pp. 741, 946–951) provides:

"That every corporation . . . organized for profit and having a capital stock represented by shares . . . and engaged in business in any state . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the *entire net income over and above 300] $5,000, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations . . . subject to the tax hereby imposed. . . .

"Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, . . . received within the year from all sources: (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, . . ."

In Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312, the question of the constitutionality of this act was presented here for decision. Upon the preliminary

question of interpretation the court said (p. 145):

"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 2 per centum upon the entire net income over and above $5,000, received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. . . . The income 301]is not limited *to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000, from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source."

In discussing the constitutional question, reference was first made to the case of Pollock v. Farmers Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, which held the income tax provisions of the act of August 27, 1894 (28 Stat. at L. chap. 349, pp. 509, 553, §§ 27, etc. U. S. Comp. Stat. 1901, p. 2260), to be unconstitutional because amounting to a direct tax within the meaning of the Constitution, and because not apportioned according to population, as required by that instrument. Attention was called (220 U. S. 148) to the expressions used by Mr. Chief Justice Fuller, speaking for the court in the Pollock Case, upon the rehearing, as to the distinction between a tax upon the income derived from real estate and from invested personal property, on the one hand, and an excise tax upon business privileges, employments, and vocations, upon the other. Reference was also made to the interpretation put upon the decision in the Pollock Case in Knowlton v. Moore, 178 U. S. 41, 80, 44 L. ed. 969, 985, 20 Sup. Ct. Rep. 747, and in Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376, and it was held that the corporation tax law of 1909 "does not impose direct taxation upon property, solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under art. 1, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts, and excises, upon which the limitation is that they shall be uniform throughout the United States."

*In applying this principle to the sev-[302 eral cases then *sub judice*,—in some of which the validity of the tax was challenged by the stockholders of certain real estate companies whose business was principally the holding and management of real estate,—the court dealt, among others (220 U. S. 170), with the Park Realty Company, organized to "work, develop, sell, convey, mortgage, or otherwise dispose of real estate; to lease, exchange, hire, or otherwise acquire property; to erect, alter, or improve buildings; to conduct, operate, manage, or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange, or otherwise deal with lands, buildings, and other property, real or personal," etc. At the time the bill was filed in that case the business of the Park Realty Company related only to the management and leasing of one hotel. Others of the realty companies that were before the court were engaged in more extensive business transactions. The court held (p. 171):

"We think it clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

Another case argued and decided at the same time, but separately reported, is Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361. In this case the court held that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909, because, while originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor, it had afterwards *made[302 a lease of all lands belonging to it to certain trustees for a term of 130 years, and then had caused its articles of incorporation,

which had been those of a corporation organized for profit, to be so amended as to confine the purpose of the corporation to the ownership of the lands in question, subject to the lease, and "for the convenience of its stockholders to receive, and to distribute among them, from time to time, the rentals that accrue, under said lease, and the proceeds of any disposition of said land." The court said:

"The corporation involved in the present case, as originally organized, and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land, if it should be sold. The corporation had practically gone out of business in connection with the property, and had disqualified itself by the terms of reorganization from any activity in respect to it."

The precise question presented by the present record is whether the Minehill Company is "doing business" in the sense in which the realty companies concerned in Flint v. Stone Tracy Co. 220 U. S. 107, 170, 55 L. ed. 410, 421, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312, were doing business, or had gone out of business in substantially the same sense that the Minneapolis Syndicate had done so.

From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the 304] prime object of its *incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor; or, at least, the lessor held estopped to deny such agency. But the lease was made by the express authority of the state that created the Minehill Company, conferred upon it its franchise, and imposed upon it the correlative public duties. The effect of this legislation and of the lease made thereunder was to constitute the Reading Company the public agent for the operation of the railroad, and to prevent the Minehill Company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Minehill Company, that is "doing business" as a railroad company upon the lines covered by the lease, and is taxable because of it. The corporation tax law does not contemplate double taxation in respect of the same business.

The government points out that by the terms of the act the Reading Company is allowed to deduct from its gross income the $252,612 paid annually to the Minehill Company for rentals under the lease, with the result that, unless the latter company is held to be "doing business" as a railroad company, both lessor and lessee entirely escape from taxation on $252,612 of income. But an examination of the act shows that this is the precise result intended by Congress. "Net income shall be ascertained by deducting from the gross amount of the income . . . (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, *including all charges, such as rentals or franchise payments*, required to be made as a condition to the continued use or possession of property." The deduction of rentals is not confined *to such as are paid to companies [305 that are subject to the tax imposed by the act; and yet the suggestion that it might be so confined was present in the mind of the draftsman, for below there is a provision for deducting "(fifth) all amounts received . . . as dividends upon stock of other corporations . . . *subject to the tax hereby imposed*." In short, Congress said, and intended to say, as to rentals paid for the use or possession of property and franchises employed by the lessee company in a business taxable under the act, —let there be a deduction by the lessee of the amount of such rentals, whether the lessor is within the reach of the taxing scheme or not.

We conclude that the Minehill Company was not taxable with respect to the railroad business.

It should be mentioned that there is nothing in the record to show that during the taxing years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee. We therefore do not pass upon the question whether, if it should do so, it would be taxable under the act in question. We cannot, however, agree with the contention

made in behalf of the government, that because the Minehill Company retains its franchise of corporate existence, maintains its organization, and holds itself ready to exercise its franchise of eminent domain, or other reserved powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore to be treated as doing business, in respect of the railroad, within the meaning of the corporation tax law. As to these matters the case is governed by what was said by the court in Flint v. Stone Tracy Co. 220 U. S. 145, 55 L. ed. 411, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312: "It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon 306]the doing of corporate or *insurance business, and with respect to the carrying on thereof." And again, p. 150,—"The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed."

There remains to be considered the fact that the Minehill Company has a considerable amount of personal assets known as its "contingent fund," in the form of investments (the amount and particulars are not specified), from which it derives an annual income of about $24,000; that it keeps a deposit in bank, receives and collects interest upon such deposit, and distributes the income thus received, as well as the rentals received from the Reading Company (after payment of expenses and taxes), to its stockholders in the form of dividends.

In our opinion the mere receipt of income from the property leased (the property being used in business by the lessee, and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders of the Minehill Company, amount to no more than receiving the ordinary fruits that arise from the ownership of property. The ground of the decision in the Pollock Case was that a tax upon income received from real estate and invested personal property (as distinguished from income received from the transaction of business) was in effect a direct tax upon the property itself, and therefore invalid unless apportioned according to population. In the Flint Case, in sustaining the act of 1909 as a tax upon the privilege of doing business in corporate form, against the objection that it includes within its reach the income of real estate and personal property not used in the business, and not the subject of taxation, the court said (220 U. S. 163): "The measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself nontaxable." *And again, after referring to[307 previous decisions (220 U. S. 165): "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which, of itself considered, is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed. . . . The tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige."

In short, the inclusion of income derived from property in arriving at the measure of the tax to be imposed with respect to the doing of corporate business was sustained largely because the property not used in the business, and the income from such property, have a fair relation to the business itself, and may contribute materially to its proper and economical conduct. But that reasoning furnishes *no[308 support for the contention that the mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof, constitute such a business as is taxable within the meaning of

the act of 1909. The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business; in which event the investment income may be added to the business income in order to arrive at the measure of the tax; and (b) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income, and dividing it among its stockholders. In the former case the tax is payable; in the latter not.

And so, upon the whole, we think the court below correctly held that the present case is governed by Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361, and that the taxes under consideration were unlawfully imposed.

Judgment affirmed.

Mr. Justice Day, dissenting:

I am unable to concur in the opinion of the majority of the court. It seems to me that, applying the principles laid down in the Corporation Tax Cases (Flint v. Stone Tracy Co.) 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312, the Minehill & Schuylkill Haven Railroad Company is a corporation doing business within the meaning of the law, and subject to the tax.

We are advised by a brief filed by an *amicus curiæ* that the decision in this case will affect a number of cases now pending, and, owing to its importance as affecting the public revenue, I feel justified in briefly stating the grounds of my dissent.

The corporation tax is imposed under the 309]terms of the *law upon every corporation organized for profit, having a capital stock represented by shares, and engaged in business in any state. Every such corporation is subject to a special excise tax with respect to the carrying on or doing of business, equivalent to 1 per cent upon the entire net income over and above $5,000, received by it from all sources during the taxing year. This tax, it was held in 220 U. S., was constitutionally imposed, and rests upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization. As was said in that case, doing business is a very comprehensive term, embracing about everything in which a person can be employed, and the definition of business as "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit" was adopted and approved. As is said in the majority opinion, the precise question in this case is, Was the Minehill Company doing business in the sense in which the term is employed in the law, or had it gone out of business in such substantial sense that it was no longer subject to the law?

I do not care to restate the facts, which are developed fully in the majority opinion. It therein appears that the Minehill Company, while it has leased its railroad for a term of years, still maintains corporate organization, keeps an office and an office force, and collects the rentals from the lessee company, and distributes the sums among its shareholders. It has also agreed to keep up its corporate organization, and, if necessary, to use its corporate powers for the benefit of the lessee. And its activities do not stop here. The affidavit in defense, filed by the collector, which I understand the Pennsylvania practice takes as true, shows that the company receives annually sums of money as interest on deposits, and maintains a contingent fund from which it also receives annual sums as dividends. The return discloses that the amount of dividends received *for the year ending December 31,[310 1909, as interest on deposits, and from its contingent fund, was $24,471.07. The nature and amount of the investments are not specified in the record, but they must be very considerable, in view of the annual income derived.

We are therefore brought to the direct question, Is a live corporation which, though it has leased its railroad property for a term of years, maintains and has agreed to maintain its corporate organization, collects and distributes an annual rental of $252,612, keeps and maintains an office and an office force at large expense, deposits money upon interest, and receives and distributes the earnings thereof, invests a large fund which, together with interest on deposits, yields over $24,000 a year, doing business within the meaning of the corporation tax act? The amount of business done is utterly immaterial. The doing of any business with the advantages which inhere in corporate organization brings the corporation within the terms of the act. Such was the ruling in the Flint Case, after full consideration by this court of the terms and scope of the law.

It is said, however, that this case is controlled by the ruling in the Zonne Case, which was decided at the same time as the Flint Case (220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361). It seems to me that the present case is quite unlike that one. There the corporation, which owned a piece of real estate, had leased it for

a term of 130 years at an annual rental of $61,000, and had, at the same time, amended its corporate organization so as to limit its powers to the sole purpose of holding the title to the lands leased, and of receiving and distributing among its stockholders the rentals that accrued under the lease, and the proceeds from any disposition of the land. This was the whole extent of its activity, and the amounts derived therefrom represented its entire income. In that case the court held that the corporation had practically gone out of business and had disqualified 311] *itself from any activity in respect thereof, and therefore did not come within the scope of the act.

In the present case the corporation has not disqualified itself from business activity. It maintains a considerable force in active employment, and, entirely apart from the receipts from the railroad lease, so deposits and invests its funds as to create, in these days of low interest upon good investments, an annual income of over $24,000, as appears by its return. The amount derived from investments depends upon the exercise of judgment and the efficiency of management. If business includes everything that occupies the time, attention, and labor of men for profit, it seems to me that these facts show that the Minehill Company is carrying on business in the present instance.

I am unable to agree that a corporation whose officers and agents are engaged in its behalf in selecting banks in which to deposit large sums of money, in passing upon and choosing securities in which corporate funds are to be invested, and then in distributing the interest and profits accruing therefrom among its stockholders, is not engaged in doing business in the sense that the corporation in the Zonne Case was not.

I think the present case is much nearer the ruling made by this court in the Corporation Tax Cases in the matter of the realty companies therein involved. Take, for instance, the Park Realty Company. That corporation was organized to work, develop, sell, and convey real estate; to lease, exchange, hire, or otherwise acquire property; to erect, alter, or improve buildings; to conduct, operate, manage, or lease hotels, etc. It appeared that at the time of the imposition of the tax the sole business or property owned by the Realty Company was the Hotel Leonori. It was leased for twenty-one years at an annual rental of $55,000. The corporation was engaged in no business, except the management and 312]lease of that hotel property, *and was in receipt of no other income than that derived from its rental, and had no assets other than that property and the income thereof. It was held to be doing business within the meaning of the act. The Minehill Company, it seems to me, is doing more and a greater variety of business than was attributed to the Park Realty Company as the basis of the assessment upon it. Others of the realty companies held taxable in the Corporation Tax Cases, it seems to me, were engaged in as little business activity as is the corporation herein involved.

With deference to the majority opinion, I think the Minehill Company, upon the facts here adduced, is engaged in business and ought to be held liable to the tax.

Mr. Justice Hughes and Mr. Justice Lamar concur in this dissent.

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JOSEPHINE P. McGOWAN, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire,

v.

EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased.

(See S. C. Reporter's ed. 312-318.)

**Appeal — from District of Columbia court of appeals — construction of Federal statute.**

An appeal from a decree of the court of appeals of the District of Columbia which reversed a decree below, enforcing an alleged contract lien of attorneys upon a fund realized from a claim against the United States, allowed by the Federal Supreme Court over the objection that the question raised concerning the construction of U. S. Rev. Stat. § 3477, U. S. Comp. Stat. 1901, p. 2320, regulating assignments of claims against the United States, has been so explicitly foreclosed that the construction of the statute was not drawn in question, in view of the difference between the two lower courts as to the operation and effect of an interlocutory consent decree, and of the question which necessarily arose as to the effect of the statute upon the rights of the parties to make the agreement, irrespective of its operation upon the United States, and of the application of the statute to the idiosyncrasies of the case as presented.

[For other cases, see Appeal and Error, III. d, 6, in Digest Sup. Ct. 1908.]

[No. —.]

Submitted January 13, 1913. Decided April 14, 1913.

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NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

IN THE MATTER of the application for the allowance of an appeal from a decree of the Court of Appeals of the District of Columbia, which reversed a decree of the Supreme Court of the District, enforcing an alleged contract lien of attorneys upon a fund realized from a claim against the United States. Appeal allowed.

See same case below, 40 Wash. L. Rep. 726.

The facts are stated in the opinion.

Messrs. Nathaniel Wilson and J. J. Darlington for petitioners.

Messrs. Holmes Conrad and Leigh Robinson opposed.

Mr. Chief Justice White delivered the opinion of the court:

In a controversy with the United States, the executrix of Joseph W. Parish ultimately recovered a judgment for a large sum of money. United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556. Claiming to be entitled to a lien or liens upon the proceeds of the claim, and to be the equitable owners of one tenth of the amount awarded, because of services rendered as attorneys at law, under express contracts made with Joseph W. Parish, a suit in equity was commenced in the supreme court of the District of Columbia, by Jonas H. McGowan and Elijah V. Brookshire, against the executrix of Parish and the then Secretary of the Treasury and the Treasurer of the United States, to enforce said alleged lien or liens. A restraining order issued, but before answer an interlocutory decree was entered by consent of the defendant executrix, by which the restraining order was dissolved and $41,000 of the sum owing by the United States to the Parish estate was collected and deposited with a trustee "to the credit of this cause, and subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount, and if so, what amount, is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for or in respect of the matters de-[314]scribed in the bill of complaint." *The case thereafter proceeded solely against the executrix of Parish. Soon afterwards McGowan died and his executrix was substituted. The defendant executrix answered, and the objections therein raised to the case made by the plaintiff were thus summarized by the judge before whom the case was ultimately heard:

"(1) That the plaintiffs' claims, if any, are barred by their failure to have the same passed and approved by the probate court within the time limited by the statute.

"(2) That the lien asserted by the plaintiffs is in violation of the Revised Statutes, § 3477, U. S. Comp. Stat. 1901, p. 2320.

"(3) That even taking the contract of McGowan as it read, he had not fulfilled its condition and is therefore entitled to nothing.

"(4) That the plaintiffs totally abandoned the prosecution of the claim, and voluntarily relinquished all rights they may have had under their contracts.

"(5) That in any view of the case, the plaintiffs are entitled to nothing more than the reasonable value of their services."

The section of the Revised Statutes referred to is in the margin.†

*The trial judge disposed of the case[315] in an elaborate opinion. Considering whether the lien asserted by the plaintiff was in conflict with Rev. Stat. § 3477, it was held that all question on that subject had been waived by the consent to the interlocutory decree, which reserved only the question of indebtedness and the amount thereof. The case was deemed to be analogous to that presented in Price v. Forrest, 173 U. S. 410, 423, 424, 43 L. ed. 749, 753, 754, 19 Sup. Ct. Rep. 434, where the scope and effect of Rev. Stat. § 3477, was considered; and it was in effect decided that the statute would not be contravened by adjudicating upon the alleged contract rights of the parties in respect to the fund on deposit. On appeal, the court of appeals reversed the decree of the supreme court, and among other things explicitly decided that the contracts relied upon were repugnant to § 3477, and were absolutely void. It was, however, also held that, putting aside the question of contract

†All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

lien, and assuming that there was an agreement to pay a contingent fee, no lien operative upon the fund existed for such fee, because the judgment for the claim against the United States had been recovered by other attorneys acting independently of the complainants. Thus reaching the conclusion that, as the result of the provisions of the statute, there could be no lien, and there was, moreover, none, viewing the case independently of the statute, and hence, no valid ground of equity jurisdiction, it was substantially decided that from the point of view of the alleged contract and the right to the fund asserted to arise from it, the court was without power to interfere. Considering the interlocutory decree and the agreement by which it was rendered, it was in effect determined that it must be treated as having been entered subject to the right of the defendant to challenge, in virtue of the statute, the existence of the alleged lien, and therefore as the result of the construction given to the statute at the instance of the defendant the interlocutory decree could have no greater effect to establish the lien asserted 316] *than did the contract itself. Although it was thus concluded that as, by virtue of the statute invoked by the defendant, there was no lien and no jurisdiction, it was nevertheless decided that, in view of the recitals in the answer, that the agreement leading up to the interlocutory decree was equivalent to the consent by the parties that the court decide the case, not upon a question of contract or the right to a lien arising from it, since that was disposed of by the statute, but by way of *quantum meruit*. Coming to examine that question, it was held that by inaction or neglect the plaintiffs had lost their rights, if any, to recover on a *quantum meruit*, as the result of the inaction or neglect, as other attorneys had been employed and had recovered the judgment upon which the money had been collected. 40 Wash. L. Rep. 726. A decree of reversal was entered and the cause was remanded, with directions to dismiss the bill. Application was then made to the court of appeals for the allowance of an appeal to this court "upon the ground that the construction of a law of the United States is drawn in question by the defendant." The appeal was refused, the court in a memorandum opinion, after reciting the fact of the making of the application, saying:

"The defendant relied upon § 3477, Rev. Stat., as prohibiting the lien claimed by the plaintiffs, and on that rests the contention that the construction of a law of the United States is drawn in question.

"The right to appeal is one of substance, and not of mere form. The question of the validity of the lien is one that had been settled by the Supreme Court of the United States in construing § 3477, and was no longer an open one. The construction of the act could not, therefore, be drawn in question. Kansas v. Bradley, 26 Fed. 289; Harris v. Rosenberger, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449-452.

"We are constrained to refuse the allowance of the appeal."

*This application was then made.[317 The section of the Judicial Code relied upon by the applicants reads as follows:

"Sec. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: . . .

"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant." [36 Stat. at L. 1159, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 231.]

This section came under consideration in American Secur. & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553, where it was held that the words "any law of the United States" embraced only laws of the United States of general operation, and did not therefore include laws of the United States local in their application to the District of Columbia. It follows that, in the nature of things, there exists a large class of cases which involve the construction of a law of the United States in one sense, although not the construction of such law in the sense of the statute, the line of distinction being whether the law whose construction was involved was of general application or merely local in character. The duty in every case, therefore, arises where the right to appeal under the section is invoked, to ascertain whether the case substantially involves the construction of a law in the appealable sense. The fact that the court below, in the nature of things, must be constantly called upon to apply and enforce laws of the United States, local in character, admonishes us that when called upon to determine whether the right to an appeal exists, to be more than usually circumspect to see to it that the authority to review, conferred in one class of cases, be not permitted to embrace the other and large class of cases to which it does not extend.

Undoubtedly Rev. Stat. § 3477, is a law of the United *States of general applica-[318 tion, and its construction was drawn in question by the defendant, and was considered and passed upon, and hence we think the right to appeal existed. Indeed, the court

below did not rest its refusal to allow the appeal upon the theory that the construction of a statute of the United States, of general operation, had not been called in question by the defendant, but upon the conception that the questions concerning the construction of the statute, which were raised, had been so explicitly foreclosed as to exclude the possibility of allowing an appeal upon the theory that the case substantially involved a controversy concerning the construction of the statute. But in view of the difference between the trial court and the court below as to the operation and effect of the interlocutory consent decree, of the question which necessarily arose as to the effect of the statute upon the rights of the parties to make the agreement, irrespective of its operation upon the United States, and the application of the statute to the idiosyncrasies of the case as presented, we cannot say that the case arising on the record is of so frivolous a character as to deprive of the right of appeal which otherwise is obviously conferred by the statute.

The penalty of the bond to be given to operate as a supersedeas will be the sum of $3,000.

Appeal allowed.

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319] *TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
MRS. AMANDA HARVEY.

(See S. C. Reporter's ed. 319-325.)

**Trial — instructions — assumed risk.**

1. An instruction to the effect that whether a hostler's helper assumed the risk of being crushed between the cab window of the engine in which he was riding and a post in the roundhouse depended upon the question whether a person of ordinary care would have continued in the service with knowledge of the dangerous proximity of the post to the track is as favorable to the railway company as it could properly be under Tex. act of April 24, 1905, qualifying the rule of assumed risk in actions against railway companies by limiting it to cases where a man of ordinary prudence would not continue to work with knowledge of the defect or dangers.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

**Master and servant — contributory negligence — railroad case.**

2. A hostler's helper riding on a seat in the cab window of a railway engine with his hips protruding somewhat over the sill is not, as a matter of law, guilty of such contributory negligence as will defeat a recovery for his death when caused by contact with a post in a roundhouse which the engine would clear only by some 4 or 5 inches.

[For other cases, see Master and Servant, II. c, 2, in Digest Sup. Ct. 1908.]

**Master and servant — acting outside employment — volunteer.**

3. A servant cannot be said to be acting outside the line of his duties as a hostler's helper and as a mere volunteer in seating himself beside the regular helper in the cab window of a railway engine which is about to be moved out of the roundhouse to be coaled and otherwise prepared for a run, where it is customary for hostler's helpers to get upon an engine and to look out of the cab window, to give and receive signals, and for one helper to lend aid to another.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

[No. 204.]

Argued and submitted March 20, 1913.
Decided April 14, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the Circuit Court for the Eastern District of Texas in favor of plaintiff in an action for death. Affirmed.

See same case below, 106 C. C. A. 668, 184 Fed. 990.

The facts are stated in the opinion.

Mr. F. H. Prendergast argued the cause, and, with Mr. W. L. Hall, filed a brief for plaintiff in error:

The stall in the roundhouse for an engine may be likened to a stall for a horse; the door need be only sufficient for the horse to pass in, and the stable boy cannot claim that he has the right to pass through the

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NOTE.—On servant's assumption of risk generally—see notes to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161; and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

As to whether servant may assume risk of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.), 1215.

*On the liability for* injuries received by a *servant in the performance of duties outside* the scope of his original contract—see note to Olson v. Minneapolis & St. L. R. Co. 48 L.R.A. 796.

On liability of master for injury to volunteer—see notes to Evarts v. St. Paul, M. & M. R. Co. 22 L.R.A. 663; Grissom v. Atlanta & B. Air Line R. Co. 13 L.R.A.(N.S.) 561; and Hunter v. Corrigan, 43 L.R.A. (N.S.) 187.

door alongside of the horse, although he may have the right to be in the stable.

New York, N. H. & H. R. Co. v. Dailey, 102 C. C. A. 660, 179 Fed. 291.

The mischief of the old law was that employees were sometimes precluded from recovering for injuries because they had knowledge of some defect in instrumentalities furnished by the employer. The Texas statute intended to say in those cases that if the employer knew of the defect also, and did not remedy it, he was presumed to take the risk upon himself instead of visiting it upon the employee.

Dresser, Employer's Liability, §§ 103, 104, pp. 487–489, 516.

The servant as well as the master must exercise ordinary care, and what constitutes such care varies with the circumstances. If the servant knows that the master has been negligent in regard to a matter which increases the danger to the servant, then, if the servant remains, he must use an increased degree of caution, as called for by the known negligence of the master.

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 303.

In determining whether the given act of the railroad was negligence, it is necessary to consider the relationship between the company and the person injured. An act of omission might be negligence with reference to one person, and not negligence with reference to some other person.

Houston & T. C. R. Co. v. Richards, 59 Tex. 376, Cooley, Torts, p. 60.

The clause of the law providing that if the servant is not guilty of a want of ordinary care in remaining in the service of the road, then he is not precluded from recovery, does not import any new rule in the law of Texas, for that has been the rule since the decision of Houston & T. C. R. Co. v. Gorbett, 49 Tex. 573, 6 Am. Neg. Cas. 472.

The statute by its terms applies to all railroad employees, but it would be wholly unconstitutional, as being discriminating against one class of persons, unless we restrict its application to the character of work that is peculiar to railroads; and unless it is so restricted it is wholly inoperative.

Pearson v. Chicago, M. & St. P. R. Co. 47 Minn. 9, 49 N. W. 302; Mitchell v. Northern P. R. Co. 70 Fed. 15; Reinke v. Northern P. R. Co. 145 Fed. 991.

The servant's care must be commensurate with the known defects and dangers.

Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506, 7 Am. Neg. Cas. 340; Houston & T. C. R. Co. v. Clemmons, 55 Tex. 91, 40 Am. Rep. 799.

Messrs. S. P. Jones, Cone Johnson, and James M. Edwards submitted the cause for defendant in error:

The railway company had the burden of establishing the facts which would make deceased guilty of contributory negligence in taking the position he occupied in the cab window at the time and in the circumstances, or would make him assume the risk arising from the post being maintained by the company so near to the track and the cabs of passing engines as to endanger an employee on the engine who might have a portion of his body extended out from the cab a few inches while passing the post.

International & G. N. R. Co. v. Harris, 95 Tex. 349, 67 S. W. 315, 11 Am. Neg. Rep. 350; Galveston, H. & S. A. R. Co. v. Hanson, — Tex. Civ. App. —, 125 S. W. 63; Texas Mexican R. Co. v. Higgins, 44 Tex. Civ. App. 523, 99 S. W. 200.

Even under the common-law rule, a servant does not assume the risk arising from the master's negligence unless he knows of the failure of duty on the part of the master, and of the danger attending the same, or, in the ordinary discharge of his own duty, must necessarily acquire this knowledge and appreciation of the danger. It is the risk that he must know in order to assume it. Many different engines were stored in this roundhouse, and were taken from it as required for use by the company. Some of them were larger and wider than others, and the engine in question was one of the larger. The evidence made an issue for the jury, whether the deceased knew and appreciated the danger arising from the proximity of the post to the passing cab or any engine, or to the engine on which he was riding when injured; and the court submitted this issue in a manner that was favorable to plaintiff in error.

Harvey v. Texas & P. R. Co. 92 C. C. A. 237, 166 Fed. 395; Missouri, K. & T. R. Co. v. Hannig, 91 Tex. 347, 43 S. W. 508; Peck v. Peck, 99 Tex. 10, 87 S. W. 248; St. Louis & S. F. R. Co. v. McClain, 80 Tex. 85, 15 S. W. 789; St. Louis & S. W. R. Co. v. Bryant, 46 Tex. Civ. App. 601, 103 S. W. 237; Galveston, H. & S. A. R. Co. v. Hanson, — Tex. Civ. App. —, 125 S. W. 63.

If it be assumed that deceased was not intent on suicide, but desired to live, the fact that, as George did, he sat in the cab window with his body slightly protruding, waiting for the engine to be backed out of the roundhouse, and while it was being moved to and beyond the post, affords evidence that he did not know and realize the dangerous proximity of the post to the passing cab of the particular engine.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U.S.

U. S. 1, 14, 51 L. ed. 681, 687, 27 Sup. Ct. Rep. 407.

Even if deceased was aware of the post being too near the track and the passing cab of the particular engine, still, he cannot be held to have assumed the risk arising from that condition, or to have been guilty of contributory negligence, unless the danger of his sitting in the window was so apparent as to preclude belief by a reasonably prudent person, in the same circumstances, that he could safely occupy that position.

Northern P. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; New Jersey & N. Y. R. Co. v. Young, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723; Southern P. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 441; Mason & O. R. Co. v. Yockey, 43 C. C. A. 228, 103 Fed. 265; James B. Clough & Sons v. Boltz, 34 C. C. A. 550, 92 Fed. 572; O'Rorke v. Union P. R. Co. 22 Fed. 189.

The language of the Texas statute, allowed its ordinary import, means that the employer must bear the risks to his servants resulting from his negligence, where he knows of the defect causing the injury or death, and also where (whether he knows of the defect or not) a person of ordinary prudence would remain in the service with knowledge of the defect and danger.

El Paso & S. W. R. Co. v. Foth, 45 Tex. Civ. App. 275, 100 S. W. 171; Missouri, K. & T. R. Co. v. Bailey, 53 Tex. Civ. App. 295, 115 S. W. 606; International & G. N. R. Co. v. Clark, — Tex. Civ. App. —, 125 S. W. 959.

This statute is applicable in cases involving defects in places of work or other defects.

Texas & P. R. Co. v. Johnson, 48 Tex. Civ. App. 135, 106 S. W. 773; St. Louis & S. W. R. Co. v. Holt, 57 Tex. Civ. App. 19, 121 S. W. 581; Rice v. Lewis, — Tex. Civ. App. —, 125 S. W. 961.

The plaintiff in error was not entitled to either of the peremptory instructions requested, in any proper view of the case.

Harvey v. Texas & P. R. Co. 92 C. C. A. 237, 166 Fed. 392; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 62, 63, 49 L. ed. 382, 387, 388, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64–68, 48 L. ed. 96–100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230.

It was the master's continuing duty to exercise ordinary care to make and maintain deceased's place of work reasonably safe for him, and he was entitled at all times to assume that his place of work was reasonably safe until or unless the contrary became actually known to him, or so obvious that he would necessarily observe it in the ordinary discharge of his duties, he was not required to exercise ordinary care or make "reasonable use of his senses" to ascertain whether the master had discharged its duty.

Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 62, 63, 49 L. ed. 382, 387, 388, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Peck v. Peck, 99 Tex. 14, 87 S. W. 248; Missouri, K. & T. R. Co. v. Hannig, 91 Tex. 350, 43 S. W. 508; Texas & N. O. R. Co. v. Bingle, 91 Tex. 287, 42 S. W. 971; Bonnet v. Galveston, H. & S. A. R. Co. 89 Tex. 72, 33 S. W. 334; Texas & P. R. Co. v. Johnson, 89 Tex. 523, 35 S. W. 1042.

A court of the United States, in submitting a case to the jury, may, at its discretion, whenever it is thought necessary to assist the jury in arriving at a just conclusion, express its opinion upon the facts, if no rule be incorrectly stated; but this is entirely in the court's discretion, and all questions of fact on which reasonable minds might differ must be ultimately submitted for decision by the jury.

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545–553, 30 L. ed. 257, 258, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433; Van Ness v. Pacard, 2 Pet. 137, 7 L. ed. 374; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745.

Where a question of fact depends on the effect or weight of testimony, it should never be withdrawn from the jury unless the evidence is so conclusive that a verdict in opposition to it would be set aside.

Phœnix Mut. L. Ins. Co. v. Doster, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18.

An instruction which requires the court to give an opinion upon a matter of evidence proper for the consideration of the jury, and which might be fairly open to controversy before them, is properly refused.

Clarke v. Courtney, 9 Pet. 319, 8 L. ed. 140.

It is proper to refuse an instruction which singles out and comments upon a particular circumstance or phase of the evidence, and omits all reference to others of importance.

Rio Grande Western R. Co. v. Leak, 163 U. S. 280, 41 L. ed. 160, 16 Sup. Ct. Rep. 1020.

The question of Harvey's contributory negligence in taking the position he occupied for the brief interval and in the circumstances was fully submitted to the jury in a manner of which no complaint is made; and the evidence did not require a peremptory instruction upon this issue.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64–68, 48 L. ed. 96–100, 24 Sup. Ct.

Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 62, 63, 49 L. ed. 382, 387, 388, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422.

320] *Mr. Justice Day delivered the opinion of the court:

This case comes to this court from the circuit court of appeals for the fifth circuit because the Texas & Pacific Railway Company is a Federal corporation. The action was brought by Amanda Harvey to recover for the death of her son, W. S. Harvey, occasioned by the negligence of the railway company while he was in its employ. The judgment against the railway company, entered by the United States circuit court for the eastern district of Texas, to which court the case had been removed, was affirmed by the circuit court of appeals.

The railway company maintained a roundhouse at Marshall, Texas, which was constructed in a crescent form, having near the entrance a turntable. Numerous tracks coming from the roundhouse converged at the turntable, the narrowest point within the roundhouse being at the entrance. A number of posts, serving to support the roof, were located at the entrance to the roundhouse, and the locomotives, in going into and coming from the roundhouse, passed between such posts, a large locomotive, the testimony tends to show, passing within 4 or 5 inches of the posts. It appears that on the day of the injury one McGilvery served as hostler in and about the roundhouse; that Harvey, the deceased, was employed as a hostler's helper, the regular helper of one Rix, and that one George was also a hostler's helper regularly of one Adams, but on that day serving with McGilvery, who was taking the place of Adams in his temporary absence. It also appeared that a hostler took the place of an engineer, and that it was customary for a hostler's helper to get upon an engine, to give and receive signals, and for that purpose to look out of the cab window, to throw and set switches, to accompany the engine to the coal chute and water tank, to supply it with coal and water with a view to its going upon the road, and to 321]otherwise *assist the hostler in his work; and, further, that frequently one helper would assist another helper because the appliances at the chute were heavy and difficult for one man to operate. On the day of the accident, the testimony discloses, Harvey got upon the engine and took a seat in the cab window on the left side, his hips protruding somewhat over the sill; and George took a similar position beside Harvey, and on the latter's right, on the same side of the engine. McGilvery got upon the engine on the other side, where he could not be seen by Harvey because of the boiler. All three having got upon the engine to coal and otherwise prepare it for the road, McGilvery started the engine out of the roundhouse. It had gone but a few feet when Harvey was crushed between the post and the casing of the cab window in such manner that he was fatally injured and shortly died. George, sitting in the same posture, but less exposed, passed the post unhurt.

The negligence charged is the failure of the railway company to provide a safe place to work, and that the posts were so placed as to make it dangerous to use the locomotive in passing them. The question of the railway company's negligence was submitted to the jury in a charge to which no objection in this respect was taken, and the case is brought here because of the rulings made in the trial court and affirmed in the circuit court of appeals, concerning the defenses, on the railway company's behalf, of assumed risk and contributory negligence.

At the common law a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective *appli-[322 ance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561.

In Texas, however, where this accident happened, the rule of assumed risk has been qualified by statute. The statute of April 24, 1905, is as follows:

"That in any suit against a person, corporation, or receiver operating a railroad or street railway for damages for the death or personal injury of an employee or servant, caused by the wrong or negligence of such person, corporation, or receiver, that the plea of assumed risk of the deceased or injured employee, where the ground of the plea is knowledge or means of knowledge of

the defect and danger which caused the injury or death, shall not be available in the following cases.

. . . . . .

"Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, and in such case it shall not not be necessary that the servant or employee give notice of the defect, as provided in subdivision 1 hereof."

The above statute was construed in Houston & T. C. R. Co. v. Alexander, 102 Tex. 497, 119 S. W. 1135. In that case the supreme court of Texas held that the effect of the act was "to deny to the railroad company the defense of assumed risk in case 'the defect or danger' which caused the injury was such that a person of ordinary 323]prudence, *under like circumstances, 'would have continued in the service.'" In concluding its discussion of the statute the court said (p. 505):

"The purpose of the law under consideration was to secure the servant against the injustice of being denied reparation for injuries which he received while in the faithful performance of his duties, and arising out of the circumstances and conditions over which he could not possibly have control, and under circumstances which would authorize him, in the exercise of ordinary care, to continue in the service by using the defective machinery or implements."

This view of the statute was given in the charge of the trial court in the present case, and the jury was also instructed as follows:

"Then on the question of assumed risk only, you will determine whether or not a man of ordinary prudence and caution would have continued in the employ of the defendant knowing the position of the post and the circumstances there,—that is, if that post was too close to the track, it was open and visible to anybody using the track, and its proximity to the track could be seen. The question, then, is whether or not, under subdivision 2 of this act, a person of ordinary care would have continued in the service with the knowledge of the defect and danger. If you find from the evidence that the post was too close to the track, and that the danger was obvious, then you will determine whether or not Mr. Harvey, in continuing in the employ of the defendant, exercised the care that a person of ordinary prudence would have exercised under the circumstances,—that is, whether a person of ordinary prudence would have continued in the service. If you find that a person of ordinary care would have continued in the service under those circumstances, then you are charged that he would not assume the risk of injury. But, if you find from the evidence that a person of ordinary *care[324 would not have continued in the service of the defendant, then you are charged that he would assume the risk of injury, and could not recover. That is a question for you to determine from all the evidence."

On the branch of the case dealing with assumption of risk, we think the charge of the trial court was as favorable to the railroad company as it could properly have been under the statute. If the doctrine of assumed risk applied to this case, it was because the alleged defect was so palpable and visible that Harvey was presumed to know of it, although there was no direct proof upon that subject, and, by continuing to work, to have taken upon himself the hazard of injury from that source. The Texas statute, as we have said, qualified the rule of assumed risk by limiting it to cases where a man of ordinary prudence would not continue to work with such knowledge, real or imputed.

The question principally argued concerns the alleged contributory negligence of the deceased under the circumstances shown. It has often been held in this court that, ordinarily, negligence or contributory negligence is not a question of law, but of fact, to be settled by the finding of the jury. Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fairminded men might honestly draw different conclusions therefrom, the question is not one of law. Richmond & D. R. Co. v. Powers, 149 U. S. 43, 45, 37 L. ed 642, 643, 13 Sup. Ct. Rep. 748, and cases there cited.

The charge of the court as to contributory negligence was distinctly and clearly that the plaintiff could not recover if the negligence of the deceased contributed to the injury resulting in his death; and at the close of the charge the court gave a special request, made by the defendant, in which the jury was again told that the plaintiff could not recover if Harvey at the time was not acting with *the care of[325 an ordinarily prudent man when he protruded his hips beyond the window in the manner stated.

There is little dispute as to the facts in this case. We have stated them as the evidence tends to show them. Can it be said that the inference of negligence is so plain that all fairminded men would be compelled to that conclusion upon a consideration of the facts? The appellate court is not a jury for the trial of a case, nor do we have the powers of a court to grant a new trial, which, in the Federal practice, is a matter resting in the sound discretion of the trial

court. The question and the sole question is, Was the contributory negligence so evident, applying the rules we have already stated, that it became a question of law, requiring the court to take the case from the jury by direction to return a verdict for the railway company because of the contributory negligence of the deceased? We are not prepared to answer this question in the affirmative. Under all the circumstances, as we have related them, we cannot say, as an appellate court, that the trial court was wrong in leaving the question to the jury under the fair and full instructions given.

The other errors assigned concern the requests of the defendant below for a peremptory instruction in its favor because Harvey had placed himself in the window where none of his duties required him to be; but the record discloses that it was customary for a hostler's helper to get upon an engine and to look out of the cab window for the reasons we have stated, and for one helper to lend aid to another. We do not think that the testimony shows that Harvey was not in the line of his duties when he got upon the engine, or was a mere volunteer in going to help George in his work under the circumstances.

We find no error in the record requiring the reversal of the judgment of the Circuit Court of Appeals, and it is therefore affirmed.

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326] *CONSOLIDATED TURNPIKE COMPANY et al., Plffs. in Err.,
v.
NORFOLK & OCEAN VIEW RAILWAY COMPANY.

(See S. C. Reporter's ed. 326–335.)

**Error to state court — Federal question — due process of law.**

1. The asserted right to just compensation for improvements in eminent domain proceedings does not necessarily present a question under U. S. Const., 14th Amend., so as to sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state, denying such right, where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and Constitution, and the case might well have been litigated wholly upon local law.

[For other cases, see Appeal and Error, 1168–1248, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — raising on rehearing.**

2. The words "maturely considered," in the judgment entry of the denial without opinion by the highest state court of a petition for rehearing, do not import a decision of the Federal question first raised by such petition, so as to sustain a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1292–1310, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — certificate of chief justice.**

3. A certificate of the chief justice of the highest state court, never made the order of the court or a part of the record, to the effect that that court, in denying a rehearing, decided the Federal question then raised for the first time, cannot in itself confer jurisdiction of a writ of error from the Federal Supreme Court, but, at the utmost, can do no more than aid to the understanding of the record.

[For other cases, see Appeal and Error, 2317–2339, in Digest Sup. Ct. 1908.]

[No. 152.]

Argued January 28 and 29, 1913. Decided April 14, 1913.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which, reversing a judgment of the Circuit Court of Norfolk County, in that state, held that in awarding compensa-

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to Home for Incurables v. New York, 63 L.R.A. 329.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

On certificate of state court as showing presence of Federal question—see note to Cincinnati, P. B. S. & P. Packet Co. v. Bay, 50 L. ed. U. S. 428.

tion for the mortgagee interest in eminent domain proceedings improvements should not be taken into consideration. Dismissed for want of jurisdiction.

See same case below, 111 Va. 131, 68 S. E. 346, Ann. Cas. 1912A, 239.

Statement by Mr. Justice Lurton:

327] *Certain facts essential to the presentation of the questions of law upon which the judgment must turn will be preliminarily stated.

The Consolidated Turnpike Company, a corporation of the state of Virginia, acquired and united two or more toll roads, extending from Norfolk to Ocean View, on the seashore. The land acquired was somewhat more than was needed for a turnpike, and so the turnpike company, by warranty deed, conveyed a strip 18 to 25 feet wide to the Bay Shore Terminal Company, also a Virginia corporation, upon which the latter company constructed a line of electric railway, with the necessary power houses and stations. This conveyance was made subject to two prior mortgages. These mortgages were for the purpose of securing bonds, and the plaintiff in error Taylor is trustee in both, and the plaintiff in error Depue a holder of some of the bonds.

The Bay Shore Company in time became insolvent, and a creditors' bill was filed in the circuit court of the United States at Norfolk, and its road and assets of every kind placed in the hands of a receiver. In that proceeding it appeared that its property was encumbered by the two mortgages before referred to and other liens. To clear the title before sale, the circuit court directed its receiver to file a proper proceeding in a court of the state for the purpose of condemning any adverse title and all outstanding claims or liens against the land occupied by its tracks and appliances. Such a proceeding was accordingly filed, and Taylor, as trustee under the two deeds in trust, was made a defendant, together with certain others claiming other interests or liens. Depue, as a holder of bonds secured by the deeds in trust, intervened in behalf of himself as a beneficiary. The final decree in that proceeding is the decree here under review. Pending the condemnation proceedings, the property of the Bay Shore Terminal Company was sold 328]under a decree made in the *original winding up suit in the United States circuit court, and purchased by the defendant in error, the Norfolk & Ocean View Railway Company, and conveyed to that company, "with *the benefit of and* subject to all suits and *proceedings which have* been or may be in*stituted by said receiver.*"

Pending this condemnation proceeding, Taylor, as trustee, and Depue, as a beneficiary, although parties to the pending condemnation case, began, in a state court, a proceeding against the turnpike company to foreclose the mortgages referred to. The Ocean View Company, as purchaser of the property of the Bay Shore Company under the decree of sale made by the circuit court of the United States, applied to that court by petition and supplemental bill to enjoin the foreclosure suit until the proceeding to condemn the mortgagee interest pending in another state court should be decided. It was accordingly enjoined, and upon appeal by Taylor, trustee, to the circuit court of appeals, the injunction decree was upheld. 89 C. C. A. 338, 162 Fed. 452.

Recurring now to the condemnation proceeding: Commissioners were appointed and directed to ascertain "a just compensation for the interest of all persons or corporations having any interest in or claim against or lien upon said land, either by deed in trust or mortgage." They were directed to report the present value of the land with and without improvements and the value thereof on May 1, 1902, the date of the conveyance of same by the Consolidated Company to the Bay Shore Company. The Commissioners' report was as follows:

| | |
|---|---|
| "If valued as of the 1st day of May, 1902 | $5,000 |
| Will be a just compensation. | |
| If valued as of the date of this report, without improvements | 6,200 |
| Will be a just compensation. | |
| *For the land, with improvements [329 | 7,200 |
| For the steel rails | 15,000 |
| For the railroad ties | 1,250 |
| For the poles | 1,250 |
| For the overhead construction | 2,500 |
| For the machinery in power house | 25,000 |
| For the buildings on tract No. 2 | 5,000 |
| Making a total of | $57,200 |
| Will be a just compensation." | |

Later the report came on to be heard upon exceptions filed thereto by Depue, as representing the beneficiaries under the Taylor mortgages. Taylor, as trustee, had all along been a party, and when Depue waived and withdrew nine of his exceptions to the report, Taylor joined him in such waiver of exceptions. The exceptions which remained included exceptions to the valuation reported as of May 1902, and the valuation reported as of the date of the report, May 15, 1906.

As the report was in the alternative, the question was whether that part of the report which fixed the value without improvements, or that part which fixed the value

with improvements, should be adopted. The trial court fixed the just compensation at $57,200, which included the value added by the railway and stations which had been placed thereon by the Bay Shore Company, the predecessor in title of the Ocean View Company, and directed the latter company to deposit that sum in bank, subject to the court's order.

From this decree an appeal was taken to the supreme court of appeals of Virginia, where it was held that the compensation for the mortgagee interest should have been limited to the present value of the property without improvements placed thereon by the Bay Shore Company.

Mr. Charles H. Burr argued the cause and filed a brief for plaintiffs in error:

Condemnation proceedings may be nominally adverse to the interests of a party standing in the position of Walter H. Taylor, trustee; but in reality when his property has been taken already, he often desires to have the proceedings upheld, so that he may receive just compensation. Therefore, Walter H. Taylor, trustee, was necessarily in position of acquiescence in the actions of the court, until suddenly those actions were reversed and a judgment foreign to the issues raised by any of the parties was suddenly entered. All that he could have said and did say as to the proper measure of damages, with respect to the constitutional questions involved, was necessarily *arguendo*. Inasmuch as that Federal constitutional question was directly and necessarily involved in the decision, and inasmuch as that decision sustained "an authority exercised under" a state, it falls within the second class of cases above cited, and this court has jurisdiction to determine it.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Examining the cases in which the state supreme court reversed the decision of the lower court, and in which therefore the appealing party here was either the defendant in error or appellee in the state supreme court, one observes that in all of these cases the constitutional question raised in the petition for rehearing was considered by this court. In not a single case was the writ of error or appeal dismissed.

Illinois C. R. Co. v. Kentucky, 218 U. S. 551, 54 L. ed. 1147, 31 Sup. Ct. Rep. 95; Forbes v. State Council, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295; Smithsonian Inst. v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Disconto v. Gesellschaft v. Umbreit, 208 U. S. 570, 52 L. ed. 625, 28 Sup. Ct. Rep. 337; Sullivan v. Texas, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215; Barrington v. Missouri, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76; McMillen v. Ferrum Min. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Wabash R. Co. v. Flannigan, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224; Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Eastern Bldg. & L. Asso. v. Welling, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Turner v. Richardson, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Miller v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Butler v. Gage, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; Texas & P. R. Co. v. Southern P. Co. 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; Susquehanna Boom Co. v. West Branch Boom Co. 110 U. S. 57, 28 L. ed. 69, 3 Sup. Ct. Rep. 408; Steines v. Franklin County, 14 Wall. 15, 20 L. ed.

846; Lagrange v. Chouteau, 4 Pet. 287, 7 L. ed. 861.

In no case where the certificate was made by order of the court, and made part of the record, has it been held by this court that the Federal constitutional question involved would not be considered.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; Louisville & N. R. Co. v. Smith, H. & Co. 204 U. S. 551, 51 L. ed. 612, 27 Sup. Ct. Rep. 401; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Yazoo & M. R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; Henkel v. Cincinnati, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; Butler v. Gage, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; Felix v. Scharnweber, 125 U. S. 54, 31 L. ed. 687, 8 Sup. Ct. Rep. 759; Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; Brown v. Atwell. 92 U. S. 327, 23 L. ed. 511; Caperton v. Bowyer, 14 Wall. 216, 20 L. ed. 882; Parmelee v. Lawrence, 11 Wall. 36, 20 L. ed. 48; Messenger v. Mason, 10 Wall. 507, 19 L. ed. 1028; Home for the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381; Lawler v. Walker, 14 How. 149, 14 L. ed. 364; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965.

Mr. Henry W. Anderson argued the cause, and, with Mr. E. Randolph Williams, filed a brief for defendant in error:

It is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision.

*Forbes v. State Council*, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146.

A certificate of the state court cannot confer jurisdiction on this court.

McMillen v. Ferrum Min. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; Henkel v. Cincinnati, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221.

It is never the province of the certificate to give jurisdiction, but it is merely for the purpose of making more certain and specific what is too general and indefinite in the record.

Parmelee v. Lawrence, 11 Wall. 36, 20 L. ed. 48; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

There is no doubt but that this court may, upon an appeal, properly presented, review proceedings had in the state courts, under state authority, in the appropriation of private property for public uses, to determine whether there has been the due process of law guaranteed under the 14th Amendment to the Federal Constitution. This is recognized and affirmed in Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; but it has been nowhere declared by this court, and it is hardly to be conceived that it will declare, that the mere existence of the issue as to the amount of the award to be paid in the appropriation of property will give the court jurisdiction.

Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; Osborne v. Clark, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:

The case comes here under § 709, Revised Statutes (U. S. Comp. Stat. 1901, p. 575), now § 237 of the new Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]. It must therefore appear that some right, privilege, or immunity was claimed under the Constitution, or some statute of the United States, and that the decision was against the right, privilege, or immunity so claimed and specially set up by the plaintiff in error.

The error assigned here is that, in permitting the condemnation of the interest of the mortgagees in the strip of land condemned without including the value of the permanent improvements placed thereon by the predecessor in title of the defendant in error, the Virginia court has authorized

the taking of the property of the mortgagee plaintiff in error "without due process of law, in violation of the Constitution of the United States."

Just compensation for private property taken for public use is an essential element of due process of law as guaranteed under the 14th Amendment. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. The argument is that, if, therefore, just compensation required that the compensation awarded for the interest condemned should include the value of the land with improvements, and the value of such improvements be not so included, due process is lacking; that it would not in such case be a mere claim of inadequate compensation, but a denial of all compenastion for an element of value actually existing as a part of the property taken. Chicago, B. & Q. R. Co. v. Chicago, supra; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699.

331] *Before considering whether this is a case for the application of the principle invoked, however, the preliminary question is whether any such claim or right, under the 14th Amendment was "specially set up" in the state court, and whether the record shows that the right so specially set up was denied.

It is contended that the right to just compensation was the whole substance of the litigation in the state court, and that this right arose under the Constitution of the United States. This latter assertion does not necessarily follow, since, under the law and Constitution of the state, the plaintiffs in error were equally entitled to due process of law, including just compensation for property taken for public purposes, and the case might well have been litigated wholly upon local law. Just such a contention was held ineffectual in Osborne v. Clark, 204 U. S. 565, 569, 51 L. ed. 619, 626, 27 Sup. Ct. Rep. 319, when it was said:

"If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Crowell v. Randell, 10 Pet. 368, 398, 9 L. ed. 458, 470; Simmerman v. Nebraska, 110 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; Hagar v. California, 154 U. S. 639, and 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186; Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605."

The ground upon which the claim was asserted to compensation for the improvements placed upon the land by the Bay Shore Company was the common-law principle that permanent structures placed upon the realty of another by a trespasser become the property of the owner and pass under any encumbrance created by the owner. Therefore, it was contended, if the Bay Shore Company saw fit to construct upon land subject to the deeds of trust represented by the plaintiffs in error, with no other authority than that of a deed from the mortgagor in possession, the structures placed thereon passed under the mortgage, *and any decree condemning the land[332 which denied compensation for the value of the land thus enhanced operates to deprive the mortgagees of a part of their security without due process of law.

This view of the law of the state was the view which the trial court accepted, upon the authority of the case of Newport News & O. P. R. & Electric Co. v. Lake, 101 Va. 334, 43 S. E. 566. The supreme court of the state upon appeal reversed this conclusion and held that, "where a corporation clothed with the power of eminent domain lawfully enters into the possession of land for its purposes, and places improvements thereon, and afterwards institutes condemnation proceedings to cure a defective title, or to extinguish the lien of a deed of trust, it is not proper, in ascertaining 'just compensation' for such land, to take into consideration the value of such improvements.

"The commissioners in their report ascertained the value of the land, as of the date of their report, without considering the improvements, at $6,200. This sum, we think, should have been fixed as the just compensation for the land taken, and the trial court erred in not so holding." [111 Va. 142, 143, 68 S. E. 346, Ann. Cas. 1912A, 239.]

The case of Newport News & O. P. R. & Electric Co. v. Lake, supra, relied upon by the trial court, was distinguished, the supreme court saying that in that case, "the premises had been sold under the deed of trust, and the purchaser, who was the defendant in the condemnation proceedings, had recovered the premises in an action of ejectment after the improvements had been placed upon the premises by the railway company under the authority of the grantors in the deed of trust," and was therefore not limited to the value of the land as it was before the improvements.

Up to the filing of this opinion by the supreme court of the state, no right or claim to due process of law under the 14th Amendment was anywhere specially set up upon the record. Nor is there any mention of the *Constitution of the United[333 States aside from that found in the 15th exception to the report of the commissioners

to assess compensation. The exception referred to was in these words:

"15. Said report is also excepted to by said Arthur W. Depue on the ground that if it is held that the proper interpretation of the present statute of eminent domain is that this property can be taken, and that in the measure of damages the value of the land alone is to be considered, without improvements, then that such interpretation impairs the obligation of a contract within the Constitution of the United States, because it is a different interpretation from what the court of appeals of Virginia, prior to this new statute, has placed upon the statute law relative to such improvements."

At most that is a vague claim that if the Virginia eminent domain statute shall be construed as excluding damage for improvements, there would result a change of decision which would impair the obligation of a contract.

No question of the impairment of the obligation of a contract was decided in the trial court nor in the supreme court; nor is any such question assigned as error here, nor presented in argument. Upon a petition for a rehearing filed in the supreme court, one of several grounds stated was, that a decree taking the land in question without compensation for the improvements thereon would be "a taking without due process of law, in violation not only of the Constitution of Virginia, but of the 14th Amendment to the Constitution of the United States." This application was refused, without opinion, the judgment entry being in these words:

"The court having maturely considered the petition aforesaid, the same is denied."

The words "maturely considered" do not import any decision of the question made. 334]Just such an entry has *been held to be no more than a refusal to rehear the case. Forbes v. State Council, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295.

Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort. If, however, the state court actually entertains the petition and decides the Federal question, and this appears by the record, the requirement of § 709, that the right shall be specially set up and denied, is complied with. McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; McMillen v. Ferrum Min. Co. 197 U. S. 343, 347, 49 L. ed. 784, 787, 25 Sup. Ct. Rep. 533.

*Having* neglected to raise any Federal *ation before the final* judgment in the state supreme court, and having failed to obtain a rehearing that the question might thereby be raised and a decision obtained upon it, the plaintiffs in error have endeavored to show that in fact the supreme court of Virginia did rehear the case upon their petition, and did decide the Federal question, therein for the first time raised, adversely, by obtaining the certificate of the chief justice of the court, months after the court had handed down its final opinion, that the court "refused the said petition for a rehearing on the ground, *inter alia*, that the decree or decision of this court . . . did not constitute a taking of the property of the defendants in error without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and that the defendants in error were not thereby deprived of any rights under said Amendment." This certificate was never made the order of the court and a part of the record, as in Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31, where it was held "perhaps sufficient" to show what Federal question was decided in a case where no opinion was filed. But that such a certificate can do no more than make more definite and certain that which otherwise may be insufficiently shown by the record proper is the settled *rule of [335 this court. That in itself it cannot confer jurisdiction is too plain for controversy. Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84. At the utmost it may aid to the understanding of the record. Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

For the reasons stated, the writ of error must be dismissed.

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SY JOC LIENG et al., Appts.,
v.
GREGORIO SY QUIA et al.

(See S. C. Reporter's ed. 335–339.)

**Evidence — sufficiency — marriage.**

A Philippine marriage, followed by forty years of uninterrupted marital life, should not be impugned and discredited, after the

NOTE.—On presumption flowing from marriage ceremony—see notes to Megginson v. Megginson, 14 L.R.A. 540; Smith v. Fuller, 16 L.R.A.(N.S.) 98; and Vreeland v. Vreeland, 34 L.R.A.(N.S.) 940.

On presumption as to validity of former marriage in prosecution for bigamy—see note to McCombs v. State, 9 L.R.A.(N.S.) 1036.

death of the husband and administration of his estate, through an alleged prior Chinese marriage, save upon proof so clear, strong, and unequivocal as to produce a moral conviction of the existence of such impediment.

[For other cases, see Evidence, XII. f; II. e, 2, in Digest Sup. Ct. 1908.]

[No. 177.]

Argued March 7 and 10, 1913. Decided April 14, 1913.

APPEAL from the Supreme Court of the Philippine Islands to review a judgment which, reversing a judgment of the Court of First Instance of Manila, in a suit involving conflicting claims to a decedent's estate, held that an alleged prior Chinese marriage of the decedent was not adequately proved. Affirmed.

See same case below, 16 Philippine, 137.

The facts are stated in the opinion.

Mr. Jackson H. Ralston argued the cause, and, with Messrs. W. Morgan Shuster, Clement L. Bouvé, Frederick L. Siddons, and William E. Richardson, filed a brief for appellants.

Messrs. James H. Blount and Antonio M. Opisso argued the cause and filed a brief for appellees.

Mr. Justice Van Devanter delivered the opinion of the court:

This appeal brings under review a decree of the supreme court of the Philippines in a suit involving conflicting claims to the estate of a Chinese merchant domiciled in those islands, and there known as Vicente Romero Sy Quia, who died intestate at Manila in 1894. The appellants, who were plaintiffs in the court of first instance, claim as descendants of a marriage between the intestate and Yap Puan Niu, a Chinese woman, said to have been contracted in 1847 at Am Thau, in the province of Amoy, China. The appellees claim as the descendants of a marriage with Petronila Encarnación, a Filipino woman, celebrated in 1853 at Vigan, in the Philippines. The principal question here, as in the insular courts is whether the proof sufficiently established the Chinese marriage. On this the insular courts differed, the court of first instance finding the marriage adequately proved, and the supreme court, one justice dissenting, holding the other way. 16 Phil. Rep. 137. Before coming to the evidence directly addressed to this question it will be well to state the facts about which there is no dispute.

Sy Quia was born at Am Thau, China, in 1822, and went to the Philippines at the age of twelve. At first he was located in Manila, but at some time before 1852 went to Vigan and entered the service of a merchant at an annual salary of 200 pesos. During that year he was converted to the Catholic faith and was baptized in the parish church. The next year he married Petronila, the banns being regularly published and the marriage publicly solemnized according to the rites of the church, as a preliminary to which he affirmed under oath, and the civil and ecclesiastical *au-[337 thorities certified after inquiry, that he was then unmarried. Shortly after the marriage he and Petronila took up their permanent home in Manila. They were then without any particular property other than 5,000 pesos which she received from her mother and brought into the conjugal society. He became a merchant, and through their united efforts they accumulated real and personal property amounting at the time of his death to upwards of 600,000 pesos. They lived in a manner becoming the marital state and were universally recognized as husband and wife. Three sons and two daughters were born of the marriage. One of the daughters married and predeceased her father, leaving a son surviving. The other died after the father, leaving the mother as her only heir. Following Sy Quia's death the widow administered the estate, with the aid of the sons until 1900, when through appropriate judicial proceedings the property was distributed among the widow, sons, and grandson as the persons rightly entitled thereto. The present suit was brought in 1905, more than half a century after the marriage, and then for the first time was its validity or its good faith as to either spouse brought in question,—a fact which is of particular significance, first, because Yap Puan Niu, the alleged Chinese wife, visited in Manila at the home of a brother of Sy Quia twice during the life of the latter, and, second, because two of the plaintiffs were adults living in Manila at the time of Sy Quia's death and during the eleven years intervening before the suit was brought.

There was testimony, taken by way of depositions in China, tending to show that Sy Quia returned from the Philippines to Am Thau in 1847, when he was twenty-five years old; that during that year he married Yap Puan Niu, the marriage being properly arranged and celebrated; that he remained at Am Thau three or four years, during which two sons were born of this marriage; that he then returned to the Philippines and Yap Puan Niu continued to reside *at Am Thau, dying there in[338 1891; that the four plaintiffs are the only living descendants of this marriage, two

being grandsons, one a granddaughter, and one a great-grandson. Six of the witnesses in China testified directly to the marriage, and their testimony, if standing alone, would be quite persuasive of its occurrence, notwithstanding some discrepancies in their statements. But this testimony did not stand alone. It was met and contradicted by that of several Philippino witnesses, taken mostly by deposition, to the effect that they had known Sy Quia in Vigan for some years before his marriage to Petronila in 1853, and that he was living there during the period when, according to the opposing testimony, he married Yap Puan Niu and remained in China. One of these witnesses was an aged man, who testified with certainty that he was a student at Manila between 1839 and 1845 and knew Sy Quia there; that he, the witness, was married at Vigan in 1847, and that Sy Quia was living there then. Others of these witnesses give kindred reasons for their ability to speak with precision concerning Sy Quia's presence at Vigan during the period in question. Still other witnesses gave testimony more or less corroborative of these opposing theories, but it was less direct and was also contradictory.

In addition to this conflicting testimony there was this situation, as before indicated: The Philippine marriage and the forty years of uninterrupted marital life following it were not only established but conceded. While Sy Quia lived the validity of that marriage passed unchallenged and no right was asserted under the one alleged to have occurred in China. More than this, the right of the widow and children of the Philippine marriage to the property acquired during its existence went unquestioned for eleven years after his death and for five years after the judicial distribution of the property.

In these circumstances every presumption 339] was in favor *of the validity and good faith of the Philippine marriage, and sound reason required that it be not impugned and discredited through the alleged prior marriage save upon proof so clear, strong, and unequivocal as to produce a moral conviction of the existence of that impediment. The conflicting testimony, isolatedly considered, did not measure up to this standard, and clearly it did not do so if proper regard was had for the probative force of the conduct of all the parties concerned during the many intervening years. Then, too, the lips of Sy Quia and Yap Puan Niu had been sealed by death, and this, with the long interval of time, gave unusual opportunity for the use of fabricated testimony, the *untruth of which it* would be difficult to expose.

Giving due effect to these considerations, we cannot say that the Supreme Court of the Philippines erred in holding that the Chinese marriage was not adequately proved. Indeed, we regard the evidence as not producing a moral conviction of the existence of that marriage, but as leaving the issue in serious doubt. The decree is accordingly affirmed.

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C. H. REXFORD, Petitioner,
v.
BRUNSWICK-BALKE-COLLENDER CO.

(See S. C. Reporter's ed. 339–346.)

**Judges — disqualification — previous connection with the case.**

1. The Federal district judge who heard and denied a motion to remand the cause to the state court whence it had been removed is disqualified to sit in the circuit court of appeals upon the hearing of an appeal from the final decree of the circuit court in such case by the provision of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 548), § 3, that "no justice or judge before whom a cause or question may have been tried or heard in a district court or existing circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals."

[For other cases, see Judges, III., in Digest Sup. Ct. 1908.]

**Judges — disqualification — previous connection with the case.**

2. The voluntary declaration of counsel for the appellant before the hearing is begun, that he will not insist upon the objection to the removal of the cause from a state court, founded upon the time when the removal petition was filed, as he now believes the case was properly removed, so far eliminates that question from the case as to remove the disqualification of the Federal district judge, who had heard and denied the motion to remand, to sit in the circuit court of appeals on appeal from the final decree of the circuit court, which would otherwise result from the provision of the act of March 3, 1891, § 3, that "no justice or judge before whom a cause or question may have been tried or heard in a district court or existing circuit court

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NOTE.—On disqualification of judge from having tried case before—see note to William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co. post, 1003.

As to what judgments or decrees are final for purposes of review—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S 1001.

shall sit on the trial or hearing of such cause or question in the circuit court of appeals."

[For other cases, see Judges, III., in Digest Sup. Ct. 1908.]

**Appeal — finality of judgment.**

3. A decree of a Federal circuit court is not final for the purpose of an appeal to a circuit court of appeals, where it disposes of a part only of the issues, the court retaining the case for further orders, and subsequently making an order of reference to a special master to take the remaining proof.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

[No. 188.]

Argued March 14, 1913. Decided April 14, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of North Carolina, in favor of defendant on some of the issues involved in a suit to cancel certain deeds and to enjoin entries on the premises conveyed. Reversed and remanded to the District Court for final disposition.†

See same case below, 104 C. C. A. 210, 181 Fed. 462.

The facts are stated in the opinion.

Mr. Julius C. Martin argued the cause and filed a brief for petitioner.

Mr. James H. Merrimon argued the cause, and, with Messrs. S. W. Black and T. D. Bryson, filed a brief for respondent.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit by the owner of a large body of lands in two counties in North Carolina, to cancel certain deeds under which the defendant was claiming several thousand 341] *growing trees on the lands, to enjoin the defendant from entering on the premises and cutting or interfering with any of the trees thereon, and to recover damages for trees alleged to have been wrongfully cut and removed before the suit. The bill charged, in effect, that the deeds were utterly void; that if they were not originally void, all rights under them had been exhausted by the felling and removal of all the trees covered by them; and that, if those rights had not been thus exhausted, they had been lost by abandonment and lapse of time. The answer asserted the validity of the deeds, alleged that such cutting and removal as occurred prior to the suit was done in the lawful exercise of the rights acquired under the deeds, denied that those rights had been lost by abandonment, lapse of time, or otherwise, and asserted that most of the trees covered by the deeds were still standing, and the defendant was entitled to cut and remove them without any restriction in point of time. It appeared from the pleadings that the deeds had been executed twenty-four years before the suit, and did not purport to cover all the trees, but only a designated number of pine and poplar trees 2 feet in diameter at the butt, all marked with the letter "L." After the issues were framed, the circuit court, with the acquiescence of the parties, entered the following order:

"And it appearing to the court that the rights of the defendant in this action depend primarily on several questions of law based on documentary evidence of its title to the trees in question;

"And it further appearing to the court that it would facilitate the hearing of said cause if such documentary evidence were offered and such preliminary question of title first disposed of by the court;

"Now, therefore, it is ordered that these questions of law and the documentary evidence bearing thereon be first presented to the court for argument, and all questions *of fact in this cause be held in abey-[342 ance until said preliminary questions are disposed of by the court."

A partial hearing pursuant to that order resulted in the rendition of a decree to the effect that through the deeds in question the defendant acquired an absolute and indefeasible title in fee simple to the trees therein described, as also a right of ingress and egress for the purpose of cutting and removing them; and that under a proper construction of the deeds the defendant was not restricted to a reasonable time within which to fell and remove the trees, but was entitled to do so whenever it chose. The decree concluded: "And this cause is retained for further orders." Shortly thereafter an order was entered reciting that "there is much other proof touching the matters in issue necessary to be heard, looking to a final judgment," and appointing a special master "to take proofs of all and singular the issues herein (except the evidence in the cause heretofore heard by this court), especially to take evidence concern-

†Ordered by the court on June 16, 1913, that the mandate heretofore issued in this cause be recalled, and that the decree entered herein on April 14, 1913, in so far as it provides that the petitioner recover costs in this court, be, and the same is hereby, vacated and set aside. Further ordered that each party pay their own costs in this court.

ing the identity of certain marked trees described in the pleadings, and to report the number and identity of such trees, and to ascertain and report his findings to this court."

Without awaiting the incoming of the report of the special master, or the action of the court thereon, the plaintiff prayed and was allowed an appeal from the decree before described to the circuit court of appeals, and the decree was there affirmed. 104 C. C. A. 210, 181 Fed. 462. The plaintiff then petitioned this court for a writ of certiorari, which was allowed.

The first question that claims our attention is whether one of the judges who sat at the hearing in the circuit court of appeals was disqualified under the statutory provision (26 Stat. at L. 826, chap. 517, § 3, U. S. Comp. Stat. 1901, p. 548) which declares "that no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the 343]circuit *court of appeals." The facts bearing on this question are these: The suit was begun in a state court, and was removed to the circuit court by the defendant on the ground of diverse citizenship. The amount in controversy and the citizenship of the parties were concededly such as to admit of the removal, but the plaintiff, conceiving that the right of removal was not seasonably asserted, moved on that ground alone that the suit be remanded to the state court. The motion was denied, and the plaintiff excepted. When the cause came on for hearing in the circuit court of appeals the district judge, who had heard and denied the motion to remand (but had done nothing else in the case), was sitting as one of the judges of that court in virtue of an assignment under the court of appeals act. Counsel for the plaintiff thereupon suggested the question whether the district judge was disqualified to sit on the hearing of the appeal, and the court inquired whether the objection to the removal would be insisted upon. Counsel for the plaintiff answered that "it would not," and that he "believed the case had been properly removed." The hearing then proceeded, the district judge sitting as one of the judges and participating in the decision, which made no mention of the objection to the removal, doubtless because it was regarded as expressly withdrawn. In the petition for certiorari and in the supporting brief the plaintiff, although admitting the above colloquy, insisted that the district judge was nevertheless disqualified.

*Unless what was said* by counsel for the *plaintiff in that colloquy* completely relieved the circuit court of appeals from considering and deciding the question relating to the removal, there can be no doubt of the disqualification of the district judge. The terms of the statute, before quoted, are both direct and comprehensive. Its manifest purpose is to require that the circuit court of appeals be composed in every hearing of judges none of whom will be *in[344 the attitude of passing upon the propriety, scope, or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the circuit court of appeals to consider and pass upon. American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 387, 37 L. ed. 486, 492, 13 Sup. Ct. Rep. 758; Moran v. Dillingham, 174 U. S. 153, 43 L. ed. 930, 19 Sup. Ct. Rep. 620. That the question may be easy of solution, or that the parties may consent to the judge's participation in its decision, can make no difference, for the sole criterion under the statute is, does the case in the circuit court of appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below?

Whether such a question was involved in this instance turns upon the effect to be given to the declaration of counsel for the plaintiff, made before the hearing was begun in the circuit court of appeals, that the objection to the removal would not be insisted upon, because he believed the case was properly removed. If that operated to eliminate the question relating to the removal, and to relieve the court from considering or deciding it, it seems plain that the statute did not apply. On the other hand, if counsel's declaration amounted only to a consent that the court as then composed might proceed to a hearing and decision of that question, it seems equally plain that the statute did apply, and that the consent given was of no effect whatever. We think the former is the correct view. Whether the removal was taken within the time designated in the removal act was a question which the plaintiff could raise and insist upon, or waive, at his option. It was not jurisdictional in the sense that the circuit court or the circuit court of appeals was required to notice it *sua sponte*. As was said by this court in Powers v. Chesapeake *& O. R. Co. 169 U. S. 92, 98, 42[345 L. ed. 673, 675, 18 Sup. Ct. Rep. 264; "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken no-

tice of by the court of its own motion, and cannot be waived by either party. Manchester, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel." (Citing cases.)

Of course, to be of any effect, the withdrawal of the question which the judge has tried or heard in the lower court must be purely voluntary. The record shows that it was so in this instance, and counsel for the plaintiff has not suggested the contrary. But that our ruling may not be misapprehended, we deem it well to observe that the court should avoid such an inquiry as was made of counsel in this case, lest it be mistaken for an invitation to withdraw the question. Our ruling rests on the ground that there was no such mistake here.

With the question arising on the removal proceedings eliminated, as we think it was by counsel's declaration, there was left no ground for regarding the district judge as disqualified.

The plaintiff advances several arguments to show that the decision of the circuit court of appeals should have been one of reversal, rather than of affirmance, but it will not be necessary to state or consider them. In the Federal courts an appeal, as a general rule, lies only from a final decree. It is otherwise in the exceptional instances specified in § 7 of the court of appeals act as amended April 14, 1906 (34 Stat. at L. 116, chap. 1627), and in two or three similar enactments, but none of these includes the present case. What we have said of the decree of the circuit court shows that it was not final, but interlocutory only. It did not dispose of all the issues, and was 346] but a step toward *a final hearing and decree. Further proofs were yet to be taken, and not until that was done could the entire controversy presented by the pleadings be adjudicated. This was recognized by the retention of the case for further orders and by the subsequent reference to a special master to take the remaining proofs. Plainly such a decree is not appealable. If it were, the case could be taken to the appellate court in fragments by successive appeals. But this the law wisely prevents by postponing the right of appeal until there is a final decree disposing of the whole case. Perkins v. Fourniquet, 6 How. 206, 12 L. ed. 406; Grant v. Phœnix Mut. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Covington v. First Nat. Bank, 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645; Ex parte National Enameling & Stamping Co. 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404.

As the circuit court of appeals erred in entertaining the appeal, its decision is vacated and the case is remanded to the district court, as successor to the circuit court, with directions to proceed to a final disposition of the case in regular course.

Reversed.

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MICHIGAN TRUST COMPANY, Petitioner,
v.
EDWARD P. FERRY.

(See S. C. Reporter's ed. 346-356.)

**Judgment — of court of sister state — jurisdiction of person.**

1. An executor who has removed from the jurisdiction is bound by a personal judgment for a devastavit, rendered in the administration proceedings upon constructive service by the probate court appointing him, in favor of an administrator *de bonis non*, if the local law permits such

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NOTE.—As to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

As to judgments of another state or country, rendered against an executor or administrator—see note to Braithwaite v. Harvey, 27 L.R.A. 101.

As to state decisions and laws as rules of decision in Federal courts—see notes to Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; and United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

As to insanity as affecting judgments—see note to Cooper v. Greenleaf, 35 L.R.A. (N.S.) 1090.

As to the validity of personal judgments rendered upon constructive service of process—see note to Moyer v. Bucks, 16 L.R.A. 231.

practice, since if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of the state to bind him by every subsequent order in the cause.

[For other cases, see Judgment, III. b, 1; VI. b, in Digest Sup. Ct. 1908.]

**Courts — jurisdiction of probate court — judgment for devastavit.**

2. A state may invest its probate courts with jurisdiction to render a personal judgment for a devastavit against an executor, in favor of an administrator *de bonis non*.

[For other cases, see Courts, II. b, 2, in Digest Sup. Ct. 1908.]

**Federal courts — following decisions of state courts.**

3. A decree of an inferior state court will be assumed by the Federal court to be within its powers, in the absence of statute or decision to the contrary.

[For other cases, see Courts, VII. c, 19, in Digest Sup. Ct. 1908.]

**Courts — jurisdiction of probate court — judgment for devastavit.**

4. A judgment *in personam* for a devastavit, rendered against an executor and in favor of an administrator *de bonis non* by a Michigan probate court, will be assumed to have been within its powers until the state supreme court decides otherwise, in view of Mich. Comp. Laws 1857, §§ 2977, 2984, Comp. Laws 1897, §§ 9428, 9435, which provide for charging an executor in his account with all the goods of the deceased that come to his possession, and with waste in case of neglect to pay over the money in his hands, or of loss to the persons interested, with liability on the bond as an alternative, and of decisions of the highest state court that money received by an administrator, and unjustifiably paid out, is still in his hands in contemplation of law, and that parties interested may surcharge or falsify his account, and that the assets of an estate are not regarded as administered until they have been collected and applied as required by law or by the will, until which time the jurisdiction of the probate court remains.

[For other cases, see Courts, II. b, 2, in Digest Sup. Ct. 1908.]

**Writ and process — sufficiency of notice — probate proceedings.**

5. Notice to an executor of a petition to a probate court that he be ordered to account is notice that the accounting will cover all his accounts as executor, and not merely an account of the assets in his hands, where the jurisdiction of the probate court extends to requiring him to account for and distribute all that comes to his hands.

[For other cases, see Writ and Process, III. d, in Digest Sup. Ct. Rep. 1908.]

**Incompetent persons — suits against.**

6. The insanity of an executor does not affect the power of the probate court to remove him, and to require the settlement of his account.

***Constitutional law — due process of law — judgment of sister state.***

*7. There is no infirmity* under U. S. Const., 14th Amend., in a personal judgment for a devastavit, rendered by the probate court conformably to the local practice, in favor of an administrator *de bonis non*, against the executor, who, having removed to another jurisdiction, and having been adjudged incompetent there, can only be served constructively, where the steps taken were concurred in by both the court that controlled the cause and the court that controlled his person.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

[Nos. 200 and 201.]

**Argued March 20, 1913. Decided April 21, 1913.**

ON WRITS of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review judgments which affirmed judgments of the Circuit Court for the District of Utah, sustaining demurrers to the complaints in suits upon a decree of the Probate Court of Ottawa County in the State of Michigan. Reversed.

See same case below, No. 200, 99 C. C. A. 221, 175 Fed. 667; No. 201, 99 C. C. A. 235, 175 Fed. 681.

The facts are stated in the opinion.

Messrs. **Willard F. Keeney** and **Charles S. Thomas** argued the cause, and, with Messrs. Edward B. Critchlow, Henry C. Hall, and Walter I. Lillie, filed a brief for petitioner:

Full faith and credit should be accorded by the courts of the United States to the final decree rendered in Michigan, which should be construed in the light of the statutes and decisions of Michigan, and should be given the same effect in other states as it has by law and usage in Michigan.

Mills v. Duryee, 7 Cranch. 481, 3 L. ed. 411; Smithsonian Inst. v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415; Claiborne County v. Brooks, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. Rep. 489; Burgess v. Seligman, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Lamb v. Powder River Live Stock Co. 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100.

The probate decree in question falls under the general rule. It meets every require-

ment of that rule, as will be noted in the following particulars:

(1) Probate court jurisdiction of person and subject-matter.

Munger v. Probate Judge, 86 Mich. 369, 49 N. W. 47; Spencer v. Houghton, 68 Cal. 82, 8 Pac. 679; Trumpler v. Cotton, 109 Cal. 250, 41 Pac. 1033, 1036; Vallee v. Dumergue, 4 Exch. 290, 18 L. J. Exch. N. S. 398; Pennoyer v. Neff, 95 U. S. 714, 735, 24 L. ed. 565, 573; Becquet v. McCarthy, 2 Barn. & Ad. 951; Copin v. Adamson, L. R. 9 Exch. 345, 43 L. J. Exch. N. S. 161, 31 L. T. N. S. 242, 22 Week. Rep. 658; L. R. 1 Exch. Div. 17, 45 L. J. Exch. N. S. 15, 33 L. T. N. S. 560, 24 Week. Rep. 85; Wilson v. Seligman, 144 U. S. 46, 36 L. ed. 340, 12 Sup. Ct. Rep. 541; Usry v. Usry, 82 Ga. 198, 8 S. E. 60; Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Moore v. Fields, 42 Pa. 473; Martin v. Martin, 214 Pa. 394, 63 Atl. 1026; Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477.

(2) Finality of its decree.

Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; Erwin v. Ottawa Circuit Judge, 138 Mich. 271, 101 N. W. 537; Benedict v. Thompson, 2 Dougl. (Mich.) 299; Shepherd v. Rice, 38 Mich. 556; Austin v. Austin, 132 Mich. 453, 93 N. W. 1045; Barbour v. Patterson, 145 Mich. 461, 108 N. W. 973; Lewis v. Campau, 14 Mich. 460, 90 Am. Dec. 245; Barry v. Briggs, 22 Mich. 204; Damouth v. Klock, 28 Mich. 163; Brown v. Bronson, 35 Mich. 419; Taylor v. Sweet, 40 Mich. 736; Morey v. Grant, 48 Mich. 326, 12 N. W. 202; Goss v. Stone, 63 Mich. 319, 29 N. W. 735; Hodges v. McDuff, 69 Mich. 76, 36 N. W. 704; Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859; Hake v. Coach, 105 Mich. 431, 63 N. W. 306; Mardian v. Wayne Circuit Judge, 118 Mich. 353, 76 N. W. 497; Devine v. Wayne Circuit Judge, 118 Mich. 354, 76 N. W. 1134; Cole v. Cole, 125 Mich. 655, 85 N. W. 113; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; Lewisburg Bank v. Sheffey, 140 U. S. 452, 35 L. ed. 496, 11 Sup. Ct. Rep. 755; Wheeling & B. Bridge Co. v. Wheeling Bridge Co. 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; Hill v. Chicago & E. R. Co. 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; Wabash & E. Canal Co. v. Beers, 1 Black. 54, 17 L. ed. 41; Bronson v. LaCrosse & M. R. Co. 2 Black, 524, 17 L. ed. 347; Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; Edgell v. Felder, 39 C. C. A. 540, 99 Fed. 324; Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 552; Washington, G. & A. R. Co. v. Bradley (Washington, G. & A. R. Co. v. Washington) 7 Wall. 575, 19 L. ed. 274; Hinckley v. Gilman, C. & S. R. Co. 94 U. S. 467, 24 L. ed. 166; Desvergers v. Parsons, 8 C. C. A. 526, 23 U. S. App. 239, 60 Fed. 143; East Coast Cedar Co. v. People's Bank, 49 C. C. A. 422, 111 Fed. 446; La Bourgogne (Deslions v. La Compagnie Generale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664; Thomson v. Dean (Dean v. Nelson) 7 Wall. 342, 19 L. ed. 94; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Southern P. R. Co. v. United States, 168 U. S. 48, 49, 42 L. ed. 376, 377, 18 Sup. Ct. Rep. 18, 2 Dan. Ch. Pl. & Pr. 997, 1 Foster, Fed. Pr. 323; Moore v. Fields, 42 Pa. 467; Wing v. Warner, 2 Dougl. (Mich.) 288; Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 373, 7 U. S. App. 208, 51 Fed. 560; French v. Shoemaker, 12 Wall. 86–89, 20 L. ed. 270.

Plaintiff could have sued on the decree in Michigan.

2 Black, Judgm. 2d ed. § 962; Storer v. Storer, 6 Mass. 390; Gooding. v. Hingston, 20 Mich. 439.

(3) General jurisdiction of the probate court and presumptions supporting its decree.

People ex rel. Campau v. Circuit Ct. 11 Mich. 393, 83 Am. Dec. 754; Church v. Holcomb, 45 Mich. 29, 7 N. W. 167; Alexander v. Rice, 52 Mich. 451, 18 N. W. 214; Morford v. Dieffenbacker, 54 Mich. 593, 20 N. W. 600; Schlee v. Darrow, 65 Mich. 362, 32 N. W. 717; Fingleton v. Kent Circuit Judge, 116 Mich. 211, 74 N. W. 473; Reason v. Jones, 119 Mich. 672, 78 N. W. 899; Robinson v. Fair, 128 U. S. 53, 32 L. ed. 415, 9 Sup. Ct. Rep. 30; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Galpin v. Page, 18 Wall. 350–365, 21 L. ed. 959–962; Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Nolan v. Garrison, 156 Mich. 399, 120 N. W. 977; Holbrook v. Campau, 22 Mich. 288; Dickinson v. Seaver, 44 Mich. 624, 7 N. W. 182; Re Andrew, 92 Mich. 449, 17 L.R.A. 296, 52 N. W. 743; Nester v. Ross, 98 Mich. 200, 57 N. W. 122; Cole v. Cole, 125 Mich. 655, 85 N. W. 113; Kellogg v. Aldrich, 39 Mich. 576; Winegar v. Newland, 44 Mich. 367, 6 N. W. 841.

There is no fraud in the procurement of the decree and no conflict with the record.

An executor, when called to account by the probate court in Michigan, that being the court of his appointment, must render a true and correct account of all assets

which have come to his hands as executor.

Hall v. Grovier, 25 Mich. 428, 23 Mich. 10; Story, Confl. L. 7th ed. § 514b; Lewis v. Parrish, 53 C. C. A. 77, 115 Fed. 287; Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Yonley v. Lavender, 21 Wall. 276–280, 22 L. ed. 536–538.

Assets which have come into the possession of the executor, and which have been misappropriated by him, are not, under the laws of Michigan, "administered" assets.

Lafferty v. People's Sav. Bank, 76 Mich. 35, 43 N. W. 34; Hall v. Grovier, 25 Mich. 432; Brown v. Forsche, 43 Mich. 492, 5 N. W. 1011; Buss v. Buss, 75 Mich. 163, 42 N. W. 688; Re Sanborn, 109 Mich. 191, 67 N. W. 128; Ward v. Tinkham, 65 Mich. 695, 32 N. W. 901; Campau v. Gillett, 1 Mich. 416, 53 Am. Dec. 73; Hall v. Cushing, 9 Pick, 395; Ipswich Mfg. Co. v. Story, 5 Met. 310; Tarbell v. Jewett, 129 Mass. 461; 1 Woerner, Am. Law of Administration p. 9; Re Choate, 163 Mich. 288, 128 N. W. 240; 165 Mich. 420, 131 N. W. 169.

Due cognizance should be taken of the force and effect of the notice by the probate court, duly served on the executor personally and by publication, fixing date for examination of his alleged final account then before the court, together with the statements filed by the petitioners therein.

Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; MacLean v. Speed, 52 Mich. 257, 18 N. W. 396; Re Axtell, 95 Mich. 244, 54 N. W. 889.

A proceeding for an accounting by the executor is inclusive of the making of an honest statement of the items with which he should be charged and credited, the striking of a balance, and the payment in full of that balance, if against the executor.

Lafferty v. People's Sav. Bank, 76 Mich. 50, 43 N. W. 34; Hall v. Grovier, 25 Mich. 428; Pyatt v. Pyatt, 46 N. J. Eq. 285, 18 Atl. 1048; Cushman v. Richards, 100 Mass. 233; State ex rel. McKown v. Williams, 77 Mo. 463; Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; Tudhope v. Potts, 91 Mich. 490, 51 N. W. 1110; Re Andrews, 92 Mich. 449, 17 L.R.A. 296, 52 N. W. 743; Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505; Mitchell v. Moore, 95 U. S. 587–591, 24 L. ed. 492, 493; Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; Eckfeldt's Appeal, 13 Pa. 171; French v. Winsor, 24 Vt. 402; Wilcox v. Wilcox, 63 Vt. 137, 21 Atl. 423; Palethorp's Appeal, 160 Pa. 316, 28 Atl. 689; Re Callahan, 130 N. Y. 51, 34 N. E. 756; Re Latz, 110 N. Y. 661, 18 N. E. 260; Sequin's Appeal, 103 Pa. 139; Carriere's *Succession*, 34 La. Ann. 1056; State ex rel. *Farmer v. Judge Parish Ct.* 31 La. Ann. *116; May v. May, 167 U. S. 310,* 42 L. ed. 179, 17 Sup. Ct. Rep. 824; Salomon v. People, 89 Ill. App. 374, 191 Ill. 290, 61 N. E. 83; Hanifan v. Needles, 108 Ill. 403; Wilson v. Hartford Fire Ins. Co. 19 L.R.A. (N.S.) 553, 90 C. C. A. 593, 164 Fed. 817.

The loss by reason of waste or maladministration was properly chargeable against the executor in his account; the charge for such loss, made in the statutory accounting proceeding, did not become a challenged cause of action *in personam* at common law, to-wit, for devastavit, of which the probate court was without jurisdiction; and the decree was properly rendered against the executor individually.

Loomis v. Armstrong, 49 Mich. 526, 14 N. W. 505; Campau v. Campau, 19 Mich. 116; Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; Cheever v. Ellis, 134 Mich. 649, 96 N. W. 1067; Hall v. Grovier, 25 Mich. 428; Gott v. Culp, 45 Mich. 275, 7 N. W. 767; MacLean v. Speed, 52 Mich. 259, 18 N. W. 396; Re Axtell, 95 Mich. 244, 54 N. W. 889; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; 18 Cyc. 1187; Basom v. Taylor, 39 Mich. 682; Re Palms' Appeal, 44 Mich. 637, 7 N. W. 200; Clark v. Fredenburg, 43 Mich. 264, 5 N. W. 306; Pierce v. Holzer, 65 Mich. 263, 32 N. W. 431.

The balance, when found against the executor, is properly payable to the administrator *de bonis non* with the will annexed, appointed in his place, and the decree properly directed such payment. Action on the executor's bond is not the only way in which the probate court may ever acquire any jurisdiction whatever over claims against the executor because of his neglect or maladministration. A decree directing payment to the administrator *de bonis non* is proper, especially when all claimants consent thereto.

Campau v. Gillett, 1 Mich. 416, 53 Am. Dec. 73; Storer v. Storer, 6 Mass. 392; Wiggin v. Swett, 6 Met. 194, 39 Am. Dec. 716; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Buttrick v. King, 7 Met. 23; Sewall v. Patch, 132 Mass. 326; Minot v. Norcross, 143 Mass. 326, 9 N. E. 662; Barlow v. Nelson, 157 Mass. 395, 32 N. E. 359; Tallon v. Tallon, 156 Mass. 313, 31 N. E. 287; Browne v. Doolittle, 151 Mass. 595, 25 N. E. 23; Fay v. Muzzey, 13 Gray, 56, 74 Am. Dec. 619; Cranson v. Wilsey, 71 Mich. 356, 39 N. W. 9; Morris v. Morris 4 Gratt. 293; Lafferty v. People's Sav. Bank, 76 Mich. 49, 43 N. W. 34; Hall v. Grovier, 25 Mich. 432; Cole v. Shaw, 134 Mich. 499, 96 N. W. 573; Tyler v. Wheeler, 160 Mass. 206, 35 N. E. 666; Ammidown v. Kinsey, 144 Mass. 587, 12 N. E. 365; Cobb v. Kempton, 154 Mass. 266, 28 N. E. 264; Drew v.

Gordon, 13 Allen, 122; Thorndike v. Hinckley, 155 Mass. 265, 29 N. E. 579; Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Rhines v. Wentworth, 209 Mass. 585, 95 N. E. 951; Slagle v. Entrekin, 44 Ohio St. 637, 10 N. E. 675; American Surety Co. v. Piatt, 67 Kan. 294, 72 Pac. 775; 2 Woerner, Am. Law of Administration, § 536.

The rendition of the decree was not an attempt to deprive respondent of property without due process of law.

Mills v. Duryee, 7 Cranch. 481, 3 L. ed. 411; Moore v. Fields, 42 Pa. 473; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100; 2 Black, Judgm. 2d ed. § 869; Talmage v. Chapel, 16 Mass. 71; Moore v. Petty, 68 C. C. A. 306, 135 Fed. 668; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Vallee v. Dumergue, 4 Exch. 290, 18 L. J. Exch. N. S. 398; Copin v. Adamson, L. R. 1 Exch. Div. 17, 45 L. J. Exch. N. S. 15, 33 L. T. N. S. 560, 24 Week. Rep. 85; Wilson v. Seligman, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; Works, Courts & Their Jurisdiction, p. 212; Cooley, Const. Lim. 6th ed. p. 434; Spencer v. Houghton, 68 Cal. 82, 8 Pac. 679; Trumpler v. Cotton, 109 Cal. 250, 41 Pac. 1033, 1036; Standard Oil Co. v. Missouri, 224 U. S. 270–287, 56 L. ed. 760–769, 32 Sup. Ct. Rep. 406; Twining v. New Jersey, 211 U. S. 78, 111, 112, 53 L. ed. 97, 111, 112, 29 Sup. Ct. Rep. 14.

The probate court not only had jurisdiction of the executor from the time he accepted that office, and exercised it in calling him to account, but he himself invoked that jurisdiction when, by his next friend and attorneys, he filed his cross petition, asking allowance of his accounts and that he be discharged as executor, as also when he offered proof in support of his cross petition, and when he sought to appeal from the decree.

Ingersoll v. Harrison, 48 Mich. 234, 12 N. W. 179; Woerner, Guardianship, §§ 131, 137; Sturgess v. Longworth, 1 Ohio St. 553; Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; Sullivan v. Andoe, 4 Hughes, 290, 6 Fed. 641; Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; Ferguson v. Oliver, 99 Mich. 161, 41 Am. St. Rep. 593, 58 N. W. 43; Freeman, Judgm. § 569; Nations v. Johnson, 24 How. 195, 16 L. ed. 628; Lawrence v. Nelson, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; United States v. St. Louis & M. Valley Transp. Co. 184 U. S. 247, 46 L. ed. 520, 22 Sup. Ct. Rep. 350; Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136; Osborne v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Hill v. Mendenhall, 21 Wall. 453, 22 L. ed. 616; Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236.

The probate court for the county of Ottawa had authority to determine the amount due by Edward P. Ferry as executor of his father's will.

Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; Hall v. Grovier, 25 Mich. 432; Re Saier, 158 Mich. 170, 122 N. W. 563; Davis v. McCamman, 165 Mich. 287, 130 N. W. 691; Murray v. Wood, 144 Mass. 195, 10 N. E. 822; Spencer v. Houghton, 68 Cal. 92, 8 Pac. 679; Probate Ct. v. Chapin, 31 Vt. 373; Trumpler v. Cotton, 109 Cal. 250, 41 Pac. 1033, 1036; Moore v. Fields, 42 Pa. 467.

The accounting suit fixes the liability of Edward P. Ferry, the executor, not the liability of his guardians, and there is no room for the application of the doctrine of privity between guardians.

Ingersoll v. Harrison, 48 Mich. 234, 12 N. W. 179; Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612; Hicks v. Chapman, 10 Allen, 463; Scott v. Winningham, 79 Ga. 492, 4 S. E. 390; Raymond v. Sawyer, 37 Me. 406; Coombs v. Janvier, 31 N. J. L. 240; Van Horn v. Hann, 39 N. J. L. 207.

The remedy is not in equity, but in the probate court.

Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477; Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Lewis v. Parrish, 53 C. C. A. 77, 115 Fed. 285; Norton v. Palmer, 7 Cush. 523; Fay v. Haven, 3 Met. 116; Low v. Bartlett, 8 Allen, 263; Boston v. Boylston, 2 Mass. 393; Cocks v. Varney, 42 N. J. Eq. 514, 8 Atl. 722; Story, Confl. L. 7th ed. § 514b; Lawrence v. Nelson, 143 U. S. 215, 222, 36 L. ed. 130, 133, 12 Sup. Ct. Rep. 440.

There was nothing in the case to indicate that Edward P. Ferry had ceased to be liable as executor and become liable as trustee. But, if it were competent for him to exchange the character of executor for that of trustee, he could not do so until he accounted as executor and credited himself in his accounts with the specific moneys

and properties turned over to himself as trustee.

Buss v. Buss, 75 Mich. 163, 42 N. W. 688; Cranson v. Wilsey, 71 Mich. 356, 39 N. W. 9; Fingleton v. Kent Circuit Judge, 116 Mich. 211, 74 N. W. 473; Re Sanborn, 109 Mich. 191, 67 N. W. 128; Re Sweetser, 109 Mich. 198, 67 N. W. 130; Nowland v. Rice, 138 Mich. 146, 101 N. W. 214.

Messrs. George Sutherland and Franklin S. Richards argued the cause, and, with Mr. Edward Stewart Ferry, filed a brief for respondent:

No court under our system of jurisprudence has power to render a personal judgment against one who resides beyond the territorial limits of the court, upon constructive service of process on him in the place of his residence, and without personal service of process upon him within the jurisdiction of the court, or his voluntary appearance in the proceeding. Such action is beyond the jurisdiction of the court, and any judgment so rendered is absolutely void, and therefore not protected by the full faith and credit clause of the Federal Constitution. The enforcement of such a judgment in another jurisdiction would be a deprivation of property without due process of law.

Pennoyer v. Neff, 95 U. S. 714–720, 24 L. ed. 565–567; New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8. 51 L. ed. 345, 27 Sup. Ct. Rep. 236; D'Arcy v. Ketchum, 11 How. 165, 174–176, 13 L. ed. 648, 652, 653; Galpin v. Page, 18 Wall. 350–368, 21 L. ed. 959–963; Brown v. Fletcher, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702; Haddock v. Haddock, 201 U. S. 562–567, 50 L. ed. 867–869; Raher v. Raher, 150 Iowa, 511, 35 L.R.A.(N.S.) 292, 129 N. W. 494, Ann. Cas. 1912 D, 680; Judy v. Kelley, 11 Ill. 211, 50 Am. Dec. 455; Lawrence v. Nelson, 143 U. S. 222, 36 L. ed. 133, 12 Sup. Ct. Rep. 440; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; Goldey v. Morning News, 156 U. S. 518–521, 39 L. ed. 517, 518, 15 Sup. Ct. Rep. 559; Barrow S. S. Co. v. Kane, 170 U. S. 100–111, 42 L. ed. 964–968, 18 Sup. Ct. Rep. 526; Bigelow v. Old Dominion Copper Min. & S. Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641; Reed v. Hume, 25 Utah, 248, 70 Pac. 998.

No court under our system of jurisprudence has power to render a decree in excess of the claim for relief demanded in the process and pleadings in the particular proceeding before it. The enforcement of such a decree would violate the due process *clause of the* Federal Constitution.

*Re Rosser, 41 C. C. A.* 497, 101 Fed. 562; *Ex parte Lange, 18 Wall.* 163–176, 21 L. ed. 872–878; Fenton v. Garlick, 8 Johns. 196; Munroe v. People, 102 Ill. 406; Hanifan v. Needles, 108 Ill. 403; Williamson v. Berry, 8 How. 495, 540, 12 L. ed. 1170, 1189; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

The probate court of Michigan is a court of limited jurisdiction. In the administration of estates of deceased persons its proceedings are *in rem*, and it had no power to render a personal decree. Its decrees create no liens and cannot be enforced by execution.

Rodgers v. Huntley, 166 Mich. 129, 131 N. W. 524; Holbrook v. Cook, 5 Mich. 225; Detroit, L. & N. R. Co. v. Probate Judge, 63 Mich. 676, 30 N. W. 598; Hilton v. Briggs, 54 Mich. 265, 20 N. W. 47; Durfee v. Abbott, 50 Mich. 285, 15 N. W. 454; Fourniquet v. Perkins, 7 How. 160–171, 12 L. ed. 650–654; Kingsberry v. Hutton, 140 Ill. 603, 30 N. E. 600; Freeman, Executions, 3d ed. § 10, p. 34; Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Schlee v. Darrow, 65 Mich. 362, 32 N. W. 717; Michigan Home Missionary Soc. v. Corning, 164 Mich. 395, 129 N. W. 686; Nolan v. Garrison, 156 Mich. 397, 120 N. W. 977; Wilson v. Hartford F. Ins. Co. 19 L.R.A.(N.S.) 553, 90 C. C. A. 593, 164 Fed. 817; Lyles v. McClure, 1 Bail. L. 7, 19 Am. Dec. 648.

In the absence of express statutory authority an administrator *de bonis non* cannot sue a former executor for damages for conversion. No such authority is given an administrator *de bonis non* by the statutes of Michigan. Therefore, if there was a decree rendered by the Michigan probate court in favor of the Michigan Trust Company, the administrator *de bonis non*, for damages for the former executor's alleged conversion, it is void.

Beall v. New Mexico, 16 Wall. 535, 21 L. ed. 292; Carrick v. Carrick, 23 N. J. Eq. 364; United States use of Wilson v. Walker, 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277; Wilson v. Arrick, 112 U. S. 83, 28 L. ed. 617, 5 Sup. Ct. Rep. 75; Reed v. Hume, 25 Utah, 248, 70 Pac. 998; Nolly v. Wilkins, 11 Ala. 872; Hanifan v. Needles, 108 Ill. 403; Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Rowan v. Kirkpatrick, 14 Ill. 8.

The decree of the probate court was not in favor of the Michigan Trust Company, for it was not a party to the proceeding upon which the decree was based, and therefore it had no right of action upon the decree.

Louisiana Nat. Bank. v. Whitney, 121 U. S. 284, 30 L. ed. 961, 7 Sup. Ct. Rep. 897; Hookpayton v. Bussell, 10 Exch. 27, 2 C. L. R. 1081, 23 L. J. Exch. N. S. 267; Bigelow v. Old Dominion Copper Min. & S. Co. 225

U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641; Reynolds v. Stockton, 140 U. S. 270, 35 L. ed. 469, 11 Sup. Ct. Rep. 773.

The decree of the probate court was rendered in favor of the estate of William M. Ferry, deceased. Therefore it is void, because it was not rendered in favor of a legal entity.

McInerney v. Beck, 10 Wash. 515, 39 Pac. 130; Devlin, Deeds, 2d ed. § 187; Stacy v. Thrasher, 6 How. 60, 12 L. ed. 343.

The decree of the Michigan probate court lacks the first essential element of a final judgment because it neither concludes the right of Edward P. Ferry to participate in the trust fund alleged to be owing by him to the estate of his father, nor determines the extent of his participation.

Martinez v. International Bkg. Corp. 220 U. S. 214, 55 L. ed. 438, 31 Sup. Ct. Rep. 408; Forgay v. Conrad, 6 How. 201-204, 12 L. ed. 404-406; Louisiana Nat. Bank v. Whitney, 121 U. S. 284, 30 L. ed. 961, 7 Sup. Ct. Rep. 897; Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; Holbrook v. Cook, 5 Mich. 229.

There is no privity between a guardian appointed in one state and a guardian appointed in another state to the same mentally incompetent person. Therefore, an action will not lie against the general guardians of Edward P. Ferry, or against Edward P. Ferry personally, in Utah, on an alleged judgment obtained against him personally in a proceeding in Michigan in which a guardian *ad litem* attempted to act for him as executor.

Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; Brown v. Fletcher, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702; Wilson v. Hartford F. Ins. Co. 19 L.R.A.(N.S.) 553, 99 C. C. A. 593, 164 Fed. 817.

Neither the probate court in Michigan nor any other court has power to create a guardian *ad litem* for a nonresident incompetent executor. The appointment of a guardian *ad litem* can be made only where the proceeding is against an infant or incompetent, personally, or against his individual property, and then only after first having obtained proper service of process.

15 Enc. L. & P. 2d ed. 2; Chambers v. Jones, 72 Ill. 275; Good v. Norley, 28 Iowa, 188; Frazier v. Pankey, 1 Swan, 78; Galpin v. Page, 18 Wall. 365, 21 L. ed. 962; New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580.

When the defendant removed from Michigan and judicially was declared mentally incompetent by the Utah court, and his person and property taken into the custody of that court, under general guardianship proceedings there, his office as executor in Michigan became vacant, and the probate court of Michigan lost all jurisdiction whatever over him. It could not proceed to settle his accounts as executor, even for unadministered assets of his father's estate. Such an accounting could be had only in a suit in equity in which the defendant's general guardians in Utah would be given their day in court. Therefore, any action the Michigan probate court attempted to take against Edward P. Ferry as executor or otherwise was absolutely void.

Bush v. Lindsey, 44 Cal. 121; Farnsworth v. Oliphant, 19 Barb. 30; Chaquette v. Ortet, 60 Cal. 594; Re Allgier, 65 Cal. 228, 3 Pac. 849; Reither v. Murdock, 135 Cal. 197, 67 Pac. 784; Prince v. Towns, 33 Fed. 161; Holzer v. Thomas, 69 N. J. Eq. 515, 61 Atl. 154; Perrin v. Circuit Ct. Judge, 49 Mich. 342, 13 N. W. 767.

The conditions in the instant case suggest a remedy which is plain and adequate, and the laws allows it. The residuary distributees of the estate of William M. Ferry never have been prevented from suing Edward P. Ferry in an action for an equitable accounting in Utah, where he easily can be found, and where his representatives stand ready to respond to any just demand against him. The cases are numerous upholding such a proceeding, and it readily will be seen that every worthy consideration makes that course the only proper one to pursue.

Salter v. Williamson, 2 N. J. Eq. 489, 35 Am. Dec. 513; note to Braithwaite v. Harvey, 27 L.R.A. 112; Ritch v. Bellamy, 14 Fla. 543; Stilwell v. Carpenter, 59 N. Y. 425; McNulty v. Hurd, 72 N. Y. 521.

Mr. Justice Holmes delivered the opinion of the court:

These are suits brought in the circuit court for the district of Utah upon decrees of the probate court of Ottawa, Michigan. The defendant demurred to the complaints, the circuit court sustained the demurrers, and *gave judgments for the defend- [352 ant, and these judgments were affirmed by the circuit court of appeals. 99 C. C. A. 221, 235, 175 Fed. 667, 681. A short statement of the facts alleged at great length in the complaints will be enough.

William M. Ferry died in 1867, domiciled in Ottawa county, Michigan. His will was proved, and the defendant, Edward P. Ferry, was appointed executor by the Ottawa probate court, qualified and entered upon his duties. In 1878 he removed to Utah, and becoming incompetent, was put under the guardianship of two sons, W. Mont

Ferry and Edward S. Ferry, in 1892. In 1903 residuary legatees and devisees petitioned the Michigan probate court that the defendant be removed from his office of executor, that he be ordered to account for the unadministered residue of the estate, and that the Michigan Trust Company be appointed administrator *de bonis non* with the will annexed. Notice of the petition and time and place of the hearing was given by publication and also was given to the defendant and his guardians personally in Utah. The guardians, by order of the Utah court, appeared and asked for the appointment of a guardian *ad litem*, which was made, and an answer and cross petition praying for affirmative relief were filed. Lawyers were retained and paid out of the defendant's estate by order of the Utah court. There were various proceedings, the end of which was that the plaintiff was appointed administrator *de bonis non*, the cross petition was denied, and it was decreed that the defendant was indebted to the estate for $1,220,473.41. The defendant being entitled to one fourth of the above sum as residuary legatee, he was declared liable for $915,355.08, and ordered to pay it over within sixty days to the Michigan Trust Company. The defendant also had been appointed by the same court executor under his mother's will, and after proceedings like those that we have described was de-[353 clared *liable for $16,458.81, which, too, he was ordered to pay to the plaintiff within sixty days.

Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. It applies to article 4, § 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause. Nations v. Johnson, 24 How. 195, 203, 204, 16 L. ed. 628, 631, 632. This is true not only of ordinary actions, but of proceedings like the present. It is within the power of a state to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives, by the order of the probate court.

The court below, admitting the power of the Michigan court to adjudge the true state of the account of the assets in the defendant's hands, and to require him to transfer them to his successor, denied its power to adjudge him liable for assets converted to his own use, and to decree that he should pay the amount from his own property. We believe that this is the law in some of the states (United States use of Wilson v. Walker, 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277), but it is no less well established in many that an executor must account for all the property that has come into his hands, and the *pro-[354 ceedings end with a decree that he pay over the sum with which he is chargeable, either to his successor or the ultimate distributees; such a decree indeed being a condition precedent of the cumulative remedy on the bond. Storer v. Storer, 6 Mass. 390, 392, 393; Cobb v. Kempton, 154 Mass. 266, 269, 28 N. E. 264; Murray v. Wood, 144 Mass. 195, 197, 10 N. E. 822; Probate Ct. v. Chapin, 31 Vt. 373, 376. In Beall v. New Mexico, 16 Wall. 535, 540, 21 L. ed. 292, 294, it is recognized that some states have made it the duty of an administrator who has been displaced to account to the administrator *de bonis non*, and very many decisions to that effect are cited correctly in 2 Woerner, Am. Law of Administration, 2d ed. § 352, p. 748. Vide id. § 536, pp. 1181, 1182.

As there can be no doubt of the power of the states to give the larger scope to an account, which indeed is not illogical in view of the fuller modern development of the notion that an executor holds all the assets in a fiduciary capacity, the only question in any case is what the state has seen fit to do. Upon this question courts of other jurisdictions owe great deference to what the court concerned has done. It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the supreme court of the state is produced, the probability is that the local procedure follows the traditions of the place. Therefore we should feel bound to assume that the Michigan decree was not too broad, in the absence of statute or decision showing that it was wrong.

But unless and until the supreme court of Michigan shall decide otherwise, we are of opinion that the probate court was right. The statutes provide for charging an execu-

tor in his account with the whole of the goods of the deceased that come to his possession, and with waste in case of neglect to pay over the money in his hands, or of loss to the persons interested. Liability on the bond is stated as alternative. Comp. 355]Laws 1897, §§ 9428, 9435; *Comp. Laws 1857, §§ 2977, 2984. It is said by the supreme court that money received by an administrator, and unjustifiably paid out, is still in his hands in contemplation of law, and that parties interested may surcharge or falsify his account (Hall v. Grovier, 25 Mich. 428, 432, 436); and again, that the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator; until that time the jurisdiction of the probate court remains (Lafferty v. People's Sav. Bank, 76 Mich. 35, 50, 43 N. W. 34. See farther, Stevens v. Ottawa Probate Judge, 156 Mich. 526, 533, 534, 121 N. W. 477, arising out of this case. Re Saier, 158 Mich. 170, 173, 122 N. W. 563.) In short, Michigan in a general way adopted the Massachusetts probate system (Campau v. Gillett, 1 Mich. 416, 417, 53 Am. Dec. 73), according to which assets are not administered by being converted to the executor's own use, but must be charged to him in his account. If the defendant properly was charged in his account with all that came to his hands and that was not distributed according to law, it was within the power of the probate court to order him to distribute that amount or to pay it to his successor in the trust (Lafferty v. People's Sav. Bank, 76 Mich. 35, 71, 43 N. W. 34).

It follows from what we have said that a petition to the probate court that the defendant be ordered to account covered all his receipts as executor, and that notice of the petition was notice that the accounting would have that scope. The decree upon the account was made with full jurisdiction, and, apart from the insanity of the accountant, could be sued upon (Storer v. Storer, 6 Mass. 390; Cobb v. Kempton, 154 Mass. 266, 269, 28 N. E. 264), and was entitled to full faith and credit elsewhere (Fitzsimmons v. Johnson, 90 Tenn. 416, 428, 429, 433, 17 S. W. 100). It is true that it could not be enforced in Michigan while the defendant remained out of the state. But 356]while the want of power to *enforce a judgment or decree may afford a reason against entertaining jurisdiction (Giles v. Harris, 189 U. S. 475, 488, 47 L. ed. 909, 912, 23 Sup. Ct. Rep. 639), it has nothing to do with the validity of a decree when made. A decree in equity against a defendant who had left the state after service upon him, and had taken all his property with him, would be entitled to full faith and credit where he was found. The judgment of a court "may be complete and perfect, and have full effect, independent of the right to issue execution." Mills v. Duryee, 7 Cranch, 481, 485, 3 L. ed. 411, 413. See Kimball v. St. Louis & S. F. R. Co. 157 Miss. 7, 8, 34 Am. St. Rep. 250, 31 N. E. 697.

Jurisdiction is power, and the power of the Michigan court was not affected by the insanity of Ferry. The authority of the state to remove him and to require his account to be settled at the same time remained, and therefore, subject to any restrictions that might be imposed by the 14th Amendment, it was for the state to determine how he should be represented, and what steps should be taken to protect his rights. As the jurisdiction extended only to the cause, and not to any independent proceeding for guardianship, the orders made necessary were orders in the cause. But we do not perceive what more could have been done to secure Ferry's rights. Still less do we see any ground for declaring the decree invalid because of the 14th Amendment. The steps taken were concurred in by the only courts that had anything to say about it,—the Utah court that controlled his person, and the Michigan court that controlled the cause. On the whole case our opinion is that the judgment should be reversed.

Judgment reversed.

Mr. Justice McKenna and Mr. Justice Lamar dissent. Mr. Justice Van Devanter took no part in the decision.

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*TEXAS & PACIFIC RAILWAY[357
COMPANY, Plff. in Err.,

v.

MRS. MARY E. STEWART, Frederic T. Mayer, Mrs. Christine R. Jepson, Mrs. Kate S. Mason, Miss Julia L. Mayer, and Mrs. Annie I. Woods.

(See S. C. Reporter's ed. 357–363.)

**Carriers — duty to light stations and approaches.**

1. The obligation of a railroad company to use ordinary care to light its stations and approaches for the reasonable accommodation of passengers obtains not only while the passengers are being carried on the train, but while they sustain the rela-

NOTE.—On the measure of care which a carrier must exercise to keep its platforms and aproaches safe—see notes to Johns v. Charlotte, C. & A. R. Co. 20 L.R.A. 520, and Warner v. Baltimore & O. R. Co. 42 L. ed. U. S. 491.

On the degree of care which a carrier

tion of passengers and are performing acts reasonably and fairly attributable to that relation, such as leaving the train for refreshment, for the sending of telegrams, for the taking of exercise, and the like.

[For other cases, see Carriers, II. a, 7, in Digest Sup. Ct. 1908.]

**Carriers — liability to passengers — contributory negligence.**

2. An elderly woman passenger is not guilty, as a matter of law, of such contributory negligence in attempting to alight to ascertain whether or not the train she is on is the right one as will bar a recovery for injuries sustained through the carrier's failure properly to light the station grounds, where no one came into her car for some ten or fifteen minutes after she had boarded it, and it was dimly lighted, and there was no one in charge.

[For other cases, see Carriers, II. a, 4, b, in Digest Sup. Ct. 1908.]

**Proximate cause — injury to passenger — insufficient lighting.**

3. The conduct of an elderly woman passenger once safely on her train, in attempting to alight to ascertain whether or not such train is the right one, where no one had entered the car for some ten or fifteen minutes, and it was dimly lighted, and there was no one in charge, is not the intervention of a new and proximate cause of the injury sustained by her from falling from the car platform which will relieve the carrier from liability to her for its negligent failure to light the station grounds properly.

[For other cases, see Proximate Cause, III., in Digest Sup. Ct. 1908.]

[No. 205.]

Submitted March 20, 1913. Decided April 21, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Texas in favor of plaintiff in a personal-injury action against a carrier. Affirmed.

See same case below, 105 C. C. A. 646, 183 Fed. 575.

The facts are stated in the opinion.

Messrs. W. L. Hall and F. H. Prendergast submitted the cause for plaintiff in error:

By the evidence in the case there is no negligence of the defendant shown that was the proximate cause of the injury.

Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Gulf, C. & S. F. R. Co. v. Hodges, — Tex. Civ. App. —, 24 S. W. 563; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676.

It has been held in a great number of cases that the company doesn't have to furnish assistance to passengers in alighting from the train.

Yarnell v. Kansas City, Ft. S. & M. R. Co. 113 Mo. 570, 18 L.R.A. 599, 21 S. W. 3, 4 Am. Neg. Cas. 714; 2 Shearm. & Redf. Neg. 4th ed. § 510.

If some negligent act or conduct of the defendant had induced Mrs. Mayer to believe that some wrong would come to her if she remained in the car, then she would be in a measure excused for endeavoring to get off; but there is entire absence of any evidence that the defendant did anything or refrained from doing anything which would naturally induce Mrs. Mayer to endeavor to get off of the car when she did.

3 Thomp. Neg. §§ 2937, 2945, 3054.

There was no necessity for Mrs. Mayer to attempt to get off the train when she did in the dark, and she cannot recover damages for injuries received in that attempt.

Houston & T. C. R. Co. v. Leslie, 57 Tex. 85, 6 Am. Neg. Cas. 492; Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874, 3 Am. Neg. Cas. 175; 2 Wood, Railway Law, 1000; Thomp. Carr. Pass. 209, 214; Gwyn v. Cincinnati, N. O. & T. P. R. Co. 83 C. C. A. 648, 155 Fed. 91; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.

Mr. S. P. Jones submitted the cause for defendants in error:

The failure of the railway company to have the station grounds sufficiently lighted to enable passengers leaving the train to see the steps and alight with reasonable safety was the proximate cause of the injury.

Shearm. & Redf. Neg. 5th ed. § 26; Hutchinson, Carr. 2d ed. 809b; Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455, 5 Am. Neg. Rep. 534.

The railway company owes the duty of keeping its station grounds, platforms, approaches, etc., in a safe condition, including sufficient lights to enable persons to get on and off its cars in safety.

(a) As to passengers who had procured tickets and intended boarding its trains.

3 Thomp. Neg. §§ 2638, 2691.

(b) As to passengers who had reached

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must exercise toward passenger at station—see note to St. Louis, I. M. & S. R. Co. v. Woods, 33 L.R.A. (N.S.) 855.

*As to injuries in getting on and off railroad trains—see note to* Carr v. Eel River & E. R. Co. 21 L.R.A. 354.

On negligent condition of place or appliances as the proximate cause of injuries not primarily caused by that condition—see note to Bales v. McConnell, 40 L.R.A. (N.S.) 940.

their journey's end and were leaving its cars.

3 Thomp. Neg. §§ 2638, 2663, 2691.

(c) As to persons going upon station grounds, etc., to transact business with the company.

3 Thomp. Neg. §§ 2653, 2691. To these persons it owed the duty of ordinary care.

(d) As to passengers upon the train at stations who desire to leave the train before reaching end of journey, to transact business connected with the journey.

Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455, 5 Am. Neg. Rep. 534; 3 Thomp. Neg. §§ 2659, 2691.

(e) As to passengers leaving train at stations before end of journey for any purpose not inconsistent with a continuation of the journey.

Ibid.

(f) As to passengers getting off of train before termination of journey for any purpose, but not intending to terminate the journey at that place.

Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 636, 57 L.R.A. 890, 97 Am. St. Rep. 666, 90 N. W. 649; 3 Thomp. Neg. §§ 2659, 2691.

It is a general rule that a carrier's duty to the public includes maintaining of platforms,—approaches over which those having business with it can pass without being injured. No case has upheld the carrier in maintaining approaches or platforms which cannot be used in safety. Most of the courts have been content simply to state that the platforms and approaches must be safe.

Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L.R.A. 687, 18 Am. St. Rep. 330, 23 N. E. 973, 3 Am. Neg. Cas. 261; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178, 5 Am. Neg. Cas. 21; Collins v. Toledo, A. A. & N. M. R. Co. 80 Mich. 390, 45 N. W. 178; Wallace v. Wilmington & N. R. Co. 8 Houst. (Del.) 529, 18 Atl. 818; Green v. Pennsylvania R. Co. 36 Fed. 66, 7 Am. Neg. Cas. 635; Moses v. Louisville, N. O. & T. R. Co. 39 La. Ann. 649, 4 Am. St. Rep. 231, 2 So. 567, 3 Am. Neg. Cas. 536; McDonald v. Chicago & N. W. R. Co. 26 Iowa, 124, 96 Am. Dec. 114, 3 Am. Neg. Cas. 307; St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519, 40 Am. Rep. 105, 2 Am. Neg. Cas. 110; Alexandria & F. R. Co. v. Herndon, 87 Va. 193, 12 S. E. 289, 7 Am. Neg. Cas. 40; Reed v. Axtell, 84 Va. 238, 4 S. E. 587, 10 Am. Neg. Cas. 346; Texas & P. R. Co. v. Brown, 78 Tex. 397, 14 S. W. 1034; Stewart v. International & G. N. R. Co. 53 Tex. 289, 37 Am. Rep. 753, 6 Am. Neg. Cas. 487; Hulbert v. New York C. R. Co. 40 N. Y. 150, 5 Am. Neg. Cas. 135; Dillaye v. New York C. R. Co. 56 Barb. 30, 5 Am. Neg. Cas. 600.

57 L. ed.

Those cases which have varied this simple rule have varied it only in slight degree. Thus it has been required to be reasonably safe.

Watkins v. Great Western R. Co. 46 L. J. C. P. N. S. 817, 37 L. T. N. S. 193, 25 Week. Rep. 905; Moore v. Wabash, St. L. & P. R. Co. 84 Mo. 481; Cross v. Lake Shore & M. S. R. Co. 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361, 9 Am. Neg. Cas. 464.

Safe and convenient.

Hoffman v. New York C. & H. R. R. Co. 75 N. Y. 605.

Safe and reasonable.

Phillips v. Rensselaer & S. R. Co. 57 Barb. 644.

Safe and proper.

Peniston v. Chicago, St. L. & N. O. R. Co. 34 La. Ann. 780, 44 Am. Rep. 444, 3 Am. Neg. Cas. 517.

Safe, convenient, and proper.

Patten v. Chicago & N. W. R. Co. 32 Wis. 524, 7 Am. Neg. Cas. 191.

The access must be such as may safely accommodate the passengers who may reasonably be expected to frequent it.

Murch v. Concord R. Corp. 29 N. H. 9, 61 Am. Dec. 631.

The carriers are bound to see that the platform is a safe one.

Liscomb v. New Jersey R. & Transp. Co. 6 Lans. 75.

This same degree of care with reference to having a safe platform has been practically universally construed to include the duty of having the depot grounds at passenger stations sufficiently lighted to enable persons to get upon and off the trains with safety; to enable them to see how to get on and off cars.

Stewart v. International & G. N. R. Co. 53 Tex. 289, 37 Am. Rep. 753, 6 Am. Neg. Cas. 487; Hutchinson, Carr. 2d ed. 518; 3 Thomp. Neg. § 2691.

It is no longer an open question that it is the duty of the railway company to furnish such lights as the travel and convenience of the public in boarding and leaving its trains demand.

Hutchinson, Carr. 2d ed. § 518; 3 Thomp. Neg. § 2691.

Where the passenger is injured while at the station, and conforming to the reasonable regulations of the carrier, the carrier owes him that high degree of care required to be exercised by the carrier toward and for the benefit of the safety of its passengers.

Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455, 5 Am. Neg. Rep. 534; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 82, 12 Am. St. 8[illegible]

Rep. 541, 19 N. E. 373, 3 Am. Neg. Cas. 843; 3 Thomp. Neg. § 2659.

It was the duty of Mrs. Mayer to exercise only ordinary care for her safety.

3 Thomp. Neg. §§ 2922, 2926.

Mr. Justice Day delivered the opinion of the court:

This case was begun by Mrs. Dora E. Mayer, since deceased, to recover damages for injuries alleged to have been sustained by her because of the negligence of the Texas & Pacific Railway Company in failing to keep its station grounds at Marshall, Texas, properly lighted when Mrs. Mayer was about to take passage upon one of its trains. Judgment upon verdict in the United States circuit court for the eastern district of Texas, to which the case had been removed, was affirmed by the United States circuit court of appeals for the fifth circuit. The case is brought here because of the fact that the railway company was organized as a Federal corporation.

The facts disclosed in the record tend to show that Mrs. Mayer, a woman about fifty-nine years of age, desired to travel from Marshall to New Orleans, Louisiana. For that purpose, accompanied by a young man, a relative, she proceeded to the station in the former city. The train left late at night. The night was dark and rainy. The station at Marshall has three railway tracks adjoining it. The first track, nearest to the depot, was unoccupied. Upon the second a train was standing, bound for the west, 360] *the opposite direction to which Mrs. Mayer expected to travel. The train for New Orleans was standing upon the third track, headed toward the east, consisting of an express car, smoker, chair car, and sleeper. After purchasing her ticket, Mrs. Mayer and her companion proceeded toward the eastbound train on the third track, passing around the train standing nearer the station. On their way they met someone with a lantern, and were told to take the train upon the third track. They entered the smoking car. There was no one in charge of the car, which was dimly lighted. and the testimony tends to show that Mrs. Mayer became apprehensive that she was upon the wrong car, finding after ten or fifteen minutes that no other person entered the coach. Her escort assured her that she was upon the right train and left her in the car, going out of the smoker with a view to ascertaining whether the chair car was open. Mrs. Mayer testified: "I became fearful that I was on the wrong coach, as no one else entered the same, and I left it to find out as to whether it was the right car or not. . . . I went to the door and saw that it was all in darkness, and I wanted to go and I held onto the door frame to try to reach the steps of the car with my feet, and in reaching for them I went on too far and slipped and fell to the ground." She was severely injured.

There was testimony tending to show that the station was improperly lighted, and, as upon writ of error the facts tending to support the judgment must be considered in their most favorable aspect in that regard, we must give due weight to the testimony offered to establish that the illumination was so deficient at this point as to make it very difficult to recognize the countenance of a person more than 10 or 12 feet away, and that, when the train was on the second track, as in this instance, in the vicinity where Mrs. Mayer fell, the door and steps of the car were insufficiently lighted. The court submitted *the[361 question to the jury upon a charge which left to them the issue of negligence in the failure of the railway company to use ordinary care to provide sufficient lights. In this respect the court told the jury:

"Upon that subject you are instructed that after the plaintiff purchased her ticket and went to the car for the purpose of taking passage for New Orleans, the relation of passenger existed between her and the defendant railroad company, and the duty of the defendant to her was that of exercising ordinary care in having proper lights for the guidance of those desiring to take passage on its train, or, if necessary [ity] demanded it, to get off the train. By ordinary care is meant that degree of care and caution that a man of ordinary prudence and ordinary caution would exercise under the same or similar circumstances. Therefore, in this case, determine whether or not the defendant had provided lights such as a man of ordinary prudence and caution under the circumstances would have provided. If you find from the evidence that the railway had provided such lights, you need not pursue your inquiry further, but return a verdict for the defendant. But if you find from the evidence that the lights that the defendant had furnished were not such as a man of ordinary care and ordinary prudence, under the circumstances, would have furnished, then you are instructed to determine the further question in regard to Mrs. Mayer's injuries and how they occurred."

And the court also charged the jury that if it believed that Mrs. Mayer thought that she was on the wrong train, and attempted to get off the train to ascertain that fact definitely before leaving the station, her relation to the railway company continued to be that of a passenger.

The court further instructed the jury

that if it found that the railway company was negligent in the respect mentioned, it should further determine whether Mrs. Mayer was guilty of contributory negli-[362]gence in attempting *to alight from the car under the circumstances shown, and that, to render a verdict for the plaintiff, the jury must find from the evidence that the railway company had not used ordinary care in providing lights, and that the plaintiff, in attempting to descend from the car, had used ordinary care under the circumstances, and that her injury was solely due to the want of ordinary care upon the railway company's part in failing to provide proper lights.

The charge that a railway company is bound to use ordinary care to light its stations and approaches for the reasonable accommodation of passengers, so that they or those intended to become such may enter upon and depart from trains with reasonable safety, was as favorable as the defendant could ask. Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455. The obligation to use due care obtains not only while the passengers are being carried on the train, but while they sustain the relation of passengers and are performing acts reasonably and fairly attributable to that relation, such as leaving the train for refreshment, for the sending of telegrams, for the taking of exercise, and the like. Alabama G. S. R. Co. v. Coggins, supra, and cases therein cited.

We see no reason to disagree with the court below in its charge with reference to contributory negligence. In view of the fact that no one was in charge of the train, and that nobody came into the car after Mrs. Mayer had been there some ten or fifteen minutes, it was not an unusual or improper thing that she, an elderly woman, under such circumstances, should wish to learn for herself whether or not she had taken the right train or car for transportation upon her intended journey.

Nor do we think there is force in the contention that, Mrs. Mayer being once safely on the train, her own conduct in undertaking to leave it was the intervention of a new and proximate cause of the injury, which alone resulted in her misfortune, and of which she cannot complain, [363] *for this argument, like the other, proceeds upon the assumption that, she having once safely become a passenger, the railway company owed her no further duty. As we have said, Mrs. Mayer's conduct, because of her anxiety and desire to be sure that she was upon the right train, did not, in our view, of itself absolve the railway company from its duty to her as a passenger. True it is that a new cause, sufficient to produce the injury, may, after the negligence which is the basis of recovery has occurred, intervene under such circumstances as to relieve from liability the one responsible for the original wrong. In such cases, however, there must be the intervention of a new and independent cause between the wrong and the injury. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 475, 24 L. ed. 256, 259. The doctrine finds apt illustration in the case of Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321, where a child had been safely handed to a person standing on the depot platform at which the passenger with the child wished to alight; the train started, and the third person attempted to place the child back upon the train while in motion. The child was severely injured. It appeared, it will be observed, that the child had been safely deposited at the station, and that the act of the third person in trying to put the child upon the train was the intervening cause which rendered the negligence in failing to stop the train or to assist the child therefrom at the proper station no longer a proper ground of recovery. Assuming, as we think we must, that Mrs. Mayer was acting within her rights as a passenger in undertaking to assure herself that she was upon the right train, we think the mere fact that she proceeded in the manner stated was not of itself the intervention of another and independent cause itself productive of the injury.

Upon the whole record, we find no reason to reverse the judgment, and it is therefore affirmed.

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*LILLIAN F. SLOCUM, Executrix, [364
Petitioner,
v.
NEW YORK LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 364-428.)

**Insurance — premium — partial payment — waiver.**

1. Partial payment of a life insurance premium when not within the contemplation of the policy is not effective to keep

NOTE.—On waiver of forfeiture of insurance policy for nonpayment of premium—see note to Thompson v. Knickerbocker L. Ins. Co. 26 L. ed. U. S. 765.

As to the constitutional power of an appellate court, upon reversing a judgment for plaintiff, entered upon the verdict of a jury, to direct a judgment for defendant without remanding the case for a new trial—see note to Gunn v. Union R. Co. 2 L.R.A. (N.S.) 362.

the policy in force unless the agent, when receiving such partial payment, does something in that connection which operates as a waiver of full and timely payment.

[For other cases, see Insurance, VII. a, in Digest Sup. Ct. 1908.]

**Principal and agent — limitations on authority — knowledge of.**

2. One who deals with an agent, knowing that he is clothed with a circumscribed authority, and that his act transcends his powers, cannot hold his principal; and this is true whether the agent is a general or special one, for a principal may limit the authority of one as well as of the other.

[For other cases, see Principal and Agent, III. a, in Digest Sup. Ct. 1908.]

**Insurance — premium — part payment — waiver — ratification.**

3. Acceptance by the local agent from the wife of the insured of a check for part of the premium then due, accompanied by the delivery to her of a "blue note" for the insured to sign, such note reciting that no part of the premium had been paid, but that the insurance should continue in force until the due date of the note, and that if the note should be paid on or before that date, such payment, together with the cash received, would be accepted as payment of the premium, did not continue the insurance in force where the insured died without signing such note, and where, under the terms of the policy, as qualified by the practice of the insurance company, with which both the insured and his wife were familiar, the agent was without authority to waive full and timely payment of the premium save as he could adjust the matter conformably to the "blue note" plan, and where the insurance company did not itself treat the check as a partial payment, or otherwise ratify the agent's acts.

[For other cases, see Insurance, II. e; VI. c, 2; VII, a, in Digest Sup. Ct. 1908.]

**Trial by jury — infringement of right — directing judgment non obstante veredicto.**

4. A circuit court of appeals, when reversing a judgment of the circuit court, entered on a general verdict in favor of plaintiff, because of error in refusing to instruct the jury that the evidence was insufficient to sustain a verdict for plaintiff, cannot direct, although in accordance with the state practice, as defined in Pa. Laws 1905, chap. 198, that judgment on the evidence be entered contrary to the verdict, but must award a new trial, in order to conform to the provisions of U. S. Const., 7th Amend., that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

[For other cases, see Jury, I. d, 1, in Digest Sup. Ct. 1908.]

[No. 20.]

*Argued April 26,* 1912. Decided April 21, *1913.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which, reversing a judgment of the Circuit Court for the Western District of Pennsylvania in favor of plaintiff in an action on a policy of life insurance, directed that judgment be entered on the evidence in favor of defendant notwithstanding the verdict. Modified by eliminating the direction for the entry of judgment for defendant, and by substituting a direction for a new trial.

See same case below, 101 C. C. A. 56, 177 Fed. 842.

The facts are stated in the opinion.

Mr. George E. Shaw argued the cause, and, with Mr. Daniel B. Henderson, filed a brief for petitioner:

The agreement under which the company obtained the assured's money, testified to by Mrs. Slocum and found by the verdict of the jury, was the agreement recited in the blue note, and was one which the agent was authorized to make. May the company, after receiving the money upon the faith of it, repudiate it as unauthorized merely because it was not put in writing over the signature of the assured?

Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841; Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; Supreme Lodge, K. P. v. Kalinski, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

The Pittsburgh Agency of this company conducted an enormous business. More than twelve thousand premiums were paid or settled annually over its counters. To all these people it was the mouthpiece of the company. From it during a period of seven years the assured in this case had been accustomed to receive all information concerning this policy. The company had, in spite of the express limitations contained in the policy, conferred upon the agency authority to settle premiums in a variety of ways. In the exercise of that authority by this agency the company has obtained the assured's money upon the promise made by its agent, to whom this matter had been committed, that the payment of such money by the assured continued the insurance in force for a period of six months. Truly here is a case where the assured is misled to his hurt, if the company, after reposing such general powers in its agent, may repudiate his act.

Connecticut Mut. L. Ins. Co. v. Spratley,

172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

Good faith requires that the principal should be held by the acts of one whom he has apparently clothed with authority to bind him.

Southern Ins. Co. v. McCain, 96 U. S. 84, 24 L. ed. 653.

Under the act of assembly of Pennsylvania of April 22, 1905, P. L. 286, which authorizes the court to enter judgment *non obstante veredicto*, it is error for the court to enter judgment against the verdict of a jury where there is a conflict of evidence on a material fact.

Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 559.

**Mr. James H. McIntosh** argued the cause, and, with Mr. George B. Gordon, filed a brief for respondent:

A policy of life insurance is but a contract, and, like all other contracts, it must be construed from the language used.

Laventhal v. Fidelity & C. Co. 9 Cal. App. 275, 98 Pac. 1075; Imperial F. Ins. Co. v. Coös County, 151 U. S. 452–463, 38 L. ed. 231–235, 14 Sup. Ct. Rep. 379; Crane v. City Ins. Co. 3 Fed. 558; Wells, F. & Co. v. Pacific Ins. Co. 44 Cal. 397; Goodrich v. Treat, 3 Colo. 408; Foot v. Ætna L. Ins. Co. 61 N. Y. 571; Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; Holly v. Metropolitan L. Ins. Co. 105 N. Y. 437, 11 N. E. 507; Powers v. North Eastern Mut. L. Ins. Asso. 50 Vt. 635.

No contract was consummated between the parties either for an extension of time of payment for the premium, or for a loan with which to pay the premium.

Howell v. Knickerbocker L. Ins. Co. 44 N. Y. 276, 4 Am. Rep. 675; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

No estoppel can be created except by conduct, which the person setting up the estoppel has a right to rely upon, and does in fact rely and act upon.

Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 135, 30 L. ed. 929, 7 Sup. Ct. Rep. 865; Brant v. Virginia Coal & I. Co. 93 U. S. 326–335, 23 L. ed. 927–929; Henshaw v. Bissell, 18 Wall. 255–271, 21 L. ed. 835–840; Linton v. National L. Ins. Co. 44 C. C. A. 54, 104 Fed. 589.

The policy holder is conclusively presumed to know the terms of the contract he holds, and especially of the contract under which he claims.

Upton v. Tribilcock, 91 U. S. 45–50, 23 L. ed. 203–205; New York L. Ins. Co. v. Fletcher, 117 U. S. 519–529, 29 L. ed. 934–937, 6 Sup. Ct. Rep. 837.

If a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound.

Quinlan v. Providence Washington Ins. Co. 133 N. Y. 364, 28 Am. St. Rep. 645, 31 N. E. 31; Galbraith v. Arlington Mut. L. Ins. Co. 12 Bush, 29; Miller v. Northwestern Mut. L. Ins. Co. 49 C. C. A. 330, 111 Fed. 469; New York L. Ins. Co. v. O'Dom, 100 Miss. 210, 56 So. 379.

Even bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them.

Coler v. Cleburne, 131 U. S. 174, 33 L. ed. 150, 9 Sup. Ct. Rep. 720.

Even if this were a forfeiture contract and the case involved a question of forfeiture, there is no evidence here of any waiver of anything.

Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 19; Girard F. & M. Ins. Co. v. Hebard, 95 Pa. 51; Robertson v. Metropolitan L. Ins. Co. 88 N. Y. 545; Hartford F. Ins. Co. v. Small, 14 C. C. A. 33, 66 Fed. 490; Bank of Pennsylvania's Estate, 60 Pa. 471; Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631; United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406; Crook v. New York L. Ins. Co. 112 Md. 282, 75 Atl. 388.

The plaintiff cannot claim there was an intentional relinquishment of a known right because the insurance company held the money, nor would part payment of a premium keep the policy in force.

Willcuts v. Northwestern Mut. L. Ins. Co. 81 Ind. 300; Hudson v. Knickerbocker L. Ins. Co. 28 N. J. Eq. 167; White v. New York L. Ins. Co. 200 Mass. 510, 86 N. E. 928.

**Mr. Justice Van Devanter** delivered the opinion of the court:

This was an action in the circuit court for the western district of Pennsylvania on a policy of insurance on the life of Alexander W. Slocum. The policy was for $20,000, was an ordinary life contract on the twenty-year accumulation plan, was payable to the executors, administrators, or assigns of the insured, became effective November 27, 1899, and called for the payment of a premium of $579.60 on each anniversary of that date. It made provision for interest-bearing loans by the company

to the insured on terms stated, and also contained the following stipulations:

*"This policy is automatically nonforfeitable from date of issue, as follows:*

"First. If any premium is not fully paid, and if there is no indebtedness to the company, this policy will be indorsed for the amount of paid-up insurance specified in the table on the second page hereof, on written request therefor within six months from the date to which premiums were duly paid. If no such request is made, the insurance will automatically continue from said date for $20,000 for the term specified in said table, and no longer.

"Second. If any premium or interest is 367]not duly paid, *and if there is an indebtedness to the company, this policy will be indorsed for such amount of paid-up insurance as any excess of the reserve held by the company over such indebtedness will purchase according to the company's present published table of single premiums, on written request therefor within six months from the date to which premiums were duly paid. If no such request for paid-up insurance is made, the net amount that would have been payable as a death claim on the date to which premiums were duly paid will automatically continue as term insurance from such date, for such time as said excess of the reserve will purchase according to the Company's present published table of single premiums for term insurance, and no longer.

"Grace in payment of premiums.—A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of 5 per cent per annum.

"General provisions.—(1) Only the president, a vice president, the actuary, or the secretary has power in behalf of the company to make or modify this or any contract of insurance, or to extend the time for paying any premium; and the company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above. (2) Premiums are due and payable at the Home Office, unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any premium is not paid on or before the day when due, or within the month of grace, the liability of the company shall be only as hereinbefore provided for such case."

The insured died December 31, 1907, and the action was brought by his executrix. *In the plaintiff's statement* of claim recovery was sought upon two grounds: First, that *all premiums prior to the[368 one of November 27, 1907, had been duly paid; that the premium of that date had been adequately adjusted on December 27, 1907, the last day of grace, by an agreement between the insured's wife, acting in his behalf, and a duly authorized agent of the company, whereby the wife made, and the agent accepted, a payment of $264.20, which was to carry the policy along until May 27, 1908, and whereby the agent was to accept from the insured a "blue note" for $434, payable May 27, 1908, as covering the balance of the premium; and that the company had adopted and confirmed the acts of its agent in that regard; second, that, independently of the adjustment of that premium, the company, on November 27, 1907, held a reserve on the policy sufficiently exceeding any indebtedness of the insured to the company to continue the policy in force, under the latter part of the automatic nonforfeiture provision before quoted, beyond the date of his death, and that in consequence of this the policy was in full force when he died. The company entered a plea of nonassumpsit, and also filed an affidavit of defense, denying the alleged adjustment of the premium of November 27, 1907, as also the existence of any reserve on the policy in excess of the indebtedness of the insured to the company, and otherwise adequately setting up the defenses presently to be noticed. The issues so presented were tried before the court and a jury. At the conclusion of all the evidence, the defendant requested the court to direct a verdict in its favor, which the court declined to do, and the company excepted. A general verdict for the plaintiff was returned, assessing the recovery at $18,224.02, which sum was ascertained by deducting from the amount of the policy a loan of $2,360 from the company to the insured and $434, the amount of the intended blue note, and then allowing interest on the remainder from the date when proofs of death were submitted to the company to the date of the verdict. *The company[369 moved for judgment in its favor on the evidence, notwithstanding the verdict, but the motion was denied, the company excepting, and judgment was entered for the plaintiff. A bill of exceptions, embodying all the evidence with the rulings and exceptions was seasonably presented and allowed, and the case was taken on writ of error to the circuit court of appeals, where error was assigned on the refusal to direct a verdict for the defendant and on the denial of the motion for judgment notwithstanding the verdict. That court reversed the judgment, with a

direction to sustain the latter motion, on the ground that the evidence did not legally admit of the conclusion that the policy was a subsisting contract of insurance at the date of the insured's death. 101 C. C. A. 56, 177 Fed. 842. A writ of certiorari then brought the case here.

The questions now to be considered are, first, whether the circuit court of appeals erred in reversing the judgment, and, second, if it did not err in that regard, whether it should have awarded a new trial instead of directing a judgment for the defendant on the evidence notwithstanding the verdict for the plaintiff.

As a preliminary to the consideration of the first question it may be well to repeat what this court often has said, that when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party. Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; Southern P. Co. v. Pool, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. The recognized mode of invoking the application of this rule is by preferring, at the conclusion of the 370]evidence, a request for *a directed verdict, and the ruling on such a request is subject to re-examination and approval or disapproval on writ of error in like circumstances and in like manner as are other rulings in matter of law during the course of the trial.

The case made by the evidence, in that view of it which is most favorable to the plaintiff, was as follows:

The plaintiff's right to recover if the policy was a subsisting contract of insurance at the date of the insured's death, and the latter's compliance with the terms and conditions of the policy other than the payment of the premium of November 27, 1907, were conceded. The month of grace allowed for the payment of that premium expired four days before the insured died. He had been seasonably and regularly notified of the time when the premium would fall due and of the consequences which would follow a default in its payment. But it had not been paid or adjusted, unless a payment or adjustment was effected by the negotiations and transactions presently to be recited.

When the premium fell due the insured was indebted to the company in the sum of $2,360 for money theretofore borrowed under the policy, and that sum represented the full amount of the reserve on the policy. If there had been no loan, the automatic nonforfeiture provision before quoted and the reserve would have entitled the insured, if he so elected, to a paid-up insurance of $4,000 for the full period of his life, and in the absence of such an election would have operated to continue the policy in force for the full sum of $20,000 for a period of seven years and seven months, without payment of further premiums. But as the insured had borrowed the full amount of the reserve, there was no excess applicable to a continuance of the insurance in either mode. Thus the policy expired according to its own terms before the death of the insured, unless a payment *or adjustment of the premium of[371 November 27, 1907, was affected in the manner already suggested.

While the policy provided that only the president, a vice president, the actuary or the secretary of the company had power in its behalf to modify the terms of that or any other policy, or to extend the time for paying any premium, the company had qualified this provision by adopting a plan of adjusting the payment of premiums, whereby its agents were authorized to accept from an insured less than the full amount in cash if accompanied by a "blue note" for the balance. Notes of this type were distributed by the company, and contained stipulations upon which its consent to the adjustment was conditioned, and to which the insured would necessarily assent by signing the note. The agent at Pittsburgh, to whom the earlier premiums on this policy were paid, was authorized to make adjustments conformably to this plan, but, like other agents, he could not accept a partial payment or grant an extension of time for the balance unless the blue note was given, nor, so far as appeared, had anything been done which was calculated to engender the belief that he could do so. He repeatedly had accepted payment in cash of part of a premium and extended the time for paying the remainder, but this was done only where the policy holder had given a note of the prescribed type, embodying the terms on which the company's assent depended. The practice in this regard was known to the insured and his wife, for they had secured three or four such adjustments in connection with this policy before 1907, the insured being re-

quired in each instance to execute such a note.

On the day before the premium of November 27, 1907, fell due, the wife of the insured, acting in his behalf, called at the agent's office and made inquiry respecting the easiest method of adjusting the premium, explaining at the time that the insured was short of ready money. The 372] *agent suggested two possible methods, and outlined them upon memoranda which she took away to show to the insured. The first method has no bearing here. "By the other method," as is said in the brief for the plaintiff, "it was represented that if she [meaning the insured] paid $264.20 in cash and gave a blue-note contract for $434, payable in six months, the insurance would be continued for a period of six months, and if the note was paid when due, the insurance would be continued for the remainder of the year." The aggregate of these sums represented the premium on the policy and the interest on the loan, settlement of both being essential to a continuance of the policy. On the last day of grace, December 27, 1907, the wife returned to the agent's office with a check for $264.20, payable to her order, and by her indorsed to the company. Of what then occurred she testified: "I gave him [the agent] the check for $264.20, and he handed me the blue note and another paper in an envelop, and he said that the note must be signed, and I must return it. I told him Mr. Slocum was ill, and it might be several days before I could send it back, and he said that would be all right, 'Mail it as soon as you can.'" She took the blue note home with her, intending to get it signed, but found the insured too ill to give it attention. He died four days later without having signed it. The agent did not give a receipt for the $264.20, nor was one requested. In 1905 that year's premium was adjusted by a partial payment in cash and the giving of a blue note for the balance, and when the adjustment was completed the agent gave a single receipt for both the cash and the note, and in the receipt recited the terms upon which the adjustment was made, as was done in the note.

In 1906 the insured had notified the company that his postoffice address was Houston, Texas, and that fact carried matters pertaining to his policy to the company's St. Louis agency. It was from that agency 373]that he *received the notice calling for the payment of the premium of November 27, 1907. On January 6, 1908, the agent at St. Louis, not knowing of the insured's death, wrote to him, acknowledging receipt of the check for $264.20 handed to the

*t at Pittsburgh (the letter inaccurately stated the amount), and saying: "Pending the return by you of the note contract, properly signed, your remittance is held subject to your order." The check was then deposited in a St. Louis bank to the credit of the company, and the latter carried the amount in a suspense account awaiting directions from the insured.

Subsequently the plaintiff tendered to the company the amount for which the blue note was to have been given, and the company tendered to the plaintiff the amount of the check, both tenders being refused.

The material portions of the agreement set forth in the proposed blue note, which was to have been signed by the insured and returned to the company's agent, is as follows:

"This note is accepted by said company at the request of the maker, together with one hundred forty-five and 60-100 dollars† in cash, on the following express agreement: That although no part of the premium due on the 27th day of November, 1907, under policy No. 3,011,158, issued by said company on the life of A. W. Slocum, has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and *said[374 company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made."

The circuit court of appeals was of opinion that the evidence conclusively established that there was no excess of reserve on the policy applicable to a continuance of the insurance after the premium of November 27, 1907, fell due, and we fully concur in that conclusion. Indeed, its correctness is practically conceded by counsel for the plaintiff. That court also was of opinion that the evidence afforded no basis for a finding that that premium was either paid or adjusted. The accuracy of that conclusion is challenged, but we are constrained to give it our approval for the following reasons:

1. The policy plainly provided for the

†The remaining portion of the check represented interest on the loan made under the policy.

payment of the stipulated premium annually within the month of grace following the due day, and as plainly excluded any idea that payment could be made in instalments distributed through the year. Concededly, there was no payment of the whole of the premium in question, and as a partial payment was not within the contemplation of the policy, nothing was gained by handing to the agent the check for $264.20, unless what he did in that connection operated as a waiver of full and timely payment.

2. One who deals with an agent, knowing that he is clothed with a circumscribed authority and that his act transcends his powers, cannot hold his principal; and this is true whether the agent is a general or a special one, for a principal may limit the authority of one as well as of the other.

3. Under the terms of the policy, as qualified by the practice of the company, the agent was without authority to waive full and timely payment of the premium, save as he could adjust the payment conformably to the blue-note plan. His authority turned upon the giving of the note, 375] *which was a matter of real substance, and not of mere form, as is shown by the terms of the note, before quoted. See White v. New York L. Ins. Co. 200 Mass. 510, 86 N. E. 928. Without it he could neither accept a partial payment nor extend the time for paying the balance. No note was given, and so no waiver resulted from his acts. The insured and his wife could not reasonably have understood it otherwise, for they knew the terms of the policy and were familiar with the qualifying practice.

4. There was no evidence that the company itself treated the check as a partial payment or otherwise ratified the agent's acts. Indeed, the only permissible inference from the evidence was to the contrary.

We are accordingly of opinion that the evidence did not admit of a finding that the policy was in force at the time of the insured's death, and therefore that the circuit court should have granted the company's request that a verdict in its favor be directed. As that request was denied, the circuit court of appeals did not err in reversing the judgment.

It becomes necessary, therefore, to consider whether that court should have directed a new trial instead of a judgment on the evidence contrary to the verdict. The latter direction was given conformity to a statute of Pennsylvania, the state in which the circuit court was held, and to the practice thereunder in the courts of the state. The statute reads as follows:

"That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon a trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not *grant a new trial, to so[376 certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the supreme or superior court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court." Pa. Laws 1905, p. 286, chap. 198.

The real question is whether, in the direction given by the circuit court of appeals, there was an infraction of the 7th Amendment to the Constitution of the United States, which declares:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

That what was done may be clearly in mind it is well to repeat that, while on the trial in the circuit court, the jury returned a general verdict for the plaintiff, the circuit court of appeals, on an examination of the evidence, concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the circuit court of appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence. It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly. If this was an infraction of the 7th Amendment, it matters not that it was in conformity with the state statute, or with the *practice thereunder in the[377 courts of the state, for neither the statute nor the practice could be followed in ex-

position to the Amendment, which, although not applicable to proceedings in the courts of the several states, is controlling in the Federal courts.

The Constitution of the United States, as originally adopted, conferred upon this court, by art. 3, § 2, "appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make;" but this and the absence of any provision respecting the mode of trial in civil actions were so generally regarded as endangering the right of trial by jury as existing at common law, and evoked so much criticism on that ground, that the first Congress proposed to the legislatures of the several states the 7th Amendment, which was promptly ratified. 1 Stat. at L. 21, 97; Story, Const. §§ 1763, 1768.

The adjudged cases dealing with the origin, scope, and effect of the Amendment are numerous and so comprehensive that little room for original discussion remains. A reference to some of them will show its true and settled meaning, and point the way to its right application here.

In United States v. Wonson, 1 Gall. 5, 20, Fed. Cas. No. 16,750, a case decided in 1812, and often cited with approval by this court, it was said by Mr. Justice Story, after quoting the words of the Amendment: "Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. . . . Now, according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire 378]facias de novo is awarded. *This is the invariable usage settled by the decisions of ages."

In Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732, decided in 1830, the same learned justice, speaking for this court, said (p. 446): "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the 7th *Amendment of the* Constitution proposed *by Congress; and which received* an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people." And then coming to the clause, and "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," he continued (pp. 447, 448): "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings."

In Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, decided in 1897, where the Amendment was again under consideration, it was said by this court, speaking through Mr. Justice Brewer: "Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. . . . Now *a[379 general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be, and express their conclusions in the verdict. The power of the court to grant a new trial if, in its judgment, the jury have misinterpreted the instructions as to the rules of law, or misapplied them, is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact."

In Capital Traction Co. v. Hof, 174 U. S. 1, 13, 43 L. ed. 873, 877, 19 Sup. Ct. Rep. 580, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: "It must therefore be taken as established, by virtue of the 7th Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds $20, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to

the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."

These decisions make it plain, first, that the action of the circuit court of appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to [380] direct *a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the circuit court, and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the 7th Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the circuit court of appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury.

While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff, and that the circuit court erred in refusing so to instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practised. And this procedure was regarded as of real value, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies *in that of the [381] defendant, which will rightly entitle her to a verdict and judgment in her favor.

We do not overlook the fact that at common law there were two well-recognized instances in which the verdict could be disregarded and the case disposed of without a new trial. One was where the defendant's plea confessed the plaintiff's cause of action and set up matter in avoidance which, even if true, was insufficient in law to constitute a bar or defense; and the other was where the plaintiff's pleading, even if its allegations were true, disclosed no right of recovery. If in either instance a verdict was taken, the court nevertheless could make such disposition of the case as was required by the state of the pleadings, and this because the issues settled by the verdict were wholly immaterial. In the first instance the court's action was invoked by a motion for judgment *non obstante veredicto*, and in the latter by a motion to arrest judgment on the verdict. Thus we find it said in Smith's Action at Law, 12th ed. p. 147, a recognized authority on common-law procedure: "A motion for judgment *non obstante veredicto* is one which is only made by a plaintiff. . . . It is given when, upon an examination of the whole pleadings, it appears to the court that the defendant has admitted himself to be in the wrong, and has taken issue on some point which, though decided in his favor by the jury, still does not at all better his case. A motion in arrest of judgment is the exact reverse of that for judgment *non obstante veredicto*. The applicant in the one case insists that the plaintiff is entitled to the judgment of the court, although a verdict has been found against him; in the other case, that he is not entitled to the judgment of the court, although a verdict has been delivered in his favor. Like the motion for judgment *non obstante veredicto*, that in arrest of judgment must always be grounded upon something apparent on the face of the pleadings." To the same effect are 1 Chitty, Pl. 687; *Stephen, Pl. 96-98; Rand v. [382] Vaughan, 1 Bing. N. C. 767, 1 Scott, 670, 1 Hodges, 173, 4 L. J. C. P. N. S. 239; Pim v. Grazebrook, 2 C. B. 429, 444; Schermerhorn v. Schermerhorn, 5 Wend. 513; Bellows v. Shannon, 2 Hill, 86; McFerran v. McFerran, 69 Ind. 29, 32; Lewis v. Foard, 112 N. C. 402, 17 S. E. 9; Manning v. Orleans, 42 Neb. 712, 60 N. W. 953; McCoy v. Jones, 61 Ohio St. 119, 129, 55 N. E. 219. In Bond v. Dustin, 112 U. S. 604, 608, 28 L. ed. 835, 836, 5 Sup. Ct. Rep. 296, and Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 135, 35 L. ed. 961, 963, 12 Sup. Ct. Rep. 181, this court, recognizing

ing that this was the extent of the common-law practice, held that a motion in arrest of judgment could not be sustained for an insufficiency in the evidence, but only for a defect apparent on the face of the record proper. Thus, it will be perceived that the rules of the common law, permitting a judgment *non obstante veredicto* and the arrest of judgment on a verdict, did not embrace cases like the present, but only those in which the pleadings presented no material issue requiring a trial or verdict.

In the trial by jury, the right to which is secured by the 7th Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right.

This was plainly recognized in Barney v. Schmeider, 9 Wall. 248, 19 L. ed. 648, decided in 1869. That was an action in assumpsit, in which the defendant pleaded the general issue. The trial in the circuit court was before a jury, and the evidence consisted of the testimony taken a few days before on another trial. This testimony was voluminous and was put in with the consent of the parties and the approbation of the court. But it was not read to the jury, because the court regarded it as 383]necessarily *requiring a verdict for the plaintiff. In a charge briefly referring to it and explaining why it was not read, the court instructed the jury that their verdict should be for the plaintiff, and the defendant excepted. Such a verdict was returned and judgment was given on it. This court reversed the judgment, and Mr. Justice Miller, delivering the opinion, referred to the constitutional right to a trial by jury and said, *inter alia:*

"As the defendant in this case did not waive his right to have the facts tried by a jury, it was the duty of the court to submit such facts to the jury that was sworn to try them. It is needless to say that this was not done. The statement is clear that the case was decided upon the testimony taken on a former trial, and not read before this jury, because the court had heard it in the first case, and did not deem it necessary to be heard by the jury in this case.

"It is possible to have a jury trial in which, the plaintiff having failed to offer *any evidence* at all, or any competent evi*dence, the jury finds for the* defendant for that very reason; and in such case it is strictly correct, if the plaintiff does not take a nonsuit, for the court to instruct the jury to find for the defendant.

"But we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court. It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility.

"It is insisted with much ingenuity that in this case there was no disputed fact for the jury to pass upon, and *that the[384 only issue in the case being one of law, it was proper for the court to dispose of it. If this were so, the instruction of the court might be sustained, provided the undisputed facts necessary to sustain the verdict had been submitted to the jury."

A case much in point is Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307, decided in 1882. It was an action in trover, wherein the allegations of the complaint were all put in issue by the answer. On a trial by jury in the circuit court a special verdict was returned consisting of responses to interrogatories specially propounded by the court, but not embracing all the issues presented by the pleadings. Following the reception of the verdict the plaintiffs moved for judgment in their favor, and the defendants for a new trial on the ground that the verdict did not dispose of all the issues. After hearing these motions the court refused to grant a new trial, and gave judgment for the plaintiffs on "the special verdict of the jury, and facts conceded or not disputed upon the trial." When the case came here the defendants complained that their constitutional right to a trial by jury had been violated, and the plaintiffs insisted that the circuit court had but conformed to the local practice sanctioned by numerous decisions of the supreme court of the state where the circuit court was held, and that it therefore should be presumed, nothing appearing to the contrary, that the special verdict and the facts conceded or not disputed upon the trial disposed of all the issues presented by the pleadings and justified the action of the circuit court. Responding to these contentions this court said, speaking through Mr. Justice Harlan:

"It is not necessary, in this opinion, to enter upon an examination of those de-

cisions, or to consider how far the local law controls in determining either the essential requisites of a special verdict in the courts of the United States, or the conditions under which a judgment will be 385] *presumed to have been supported by facts other than those set out in a special verdict. The difficulty we have arises from other considerations. The record discloses that the jury determined a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. . . . We then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. . . . It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons the judgment below must be reversed."

Even more in point is Baylis v. Travellers' Ins. Co. 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494, decided in 1885. It was an action on a policy of accident insurance, and on the trial before a jury in the circuit court the parties differed as to whether the plaintiff's evidence was sufficient to sustain a verdict in her favor, no evidence being presented by the defendant. The court directed a verdict for the plain-386]tiff, subject to *its opinion on the sufficiency of the evidence, and the jury conformed to that direction. On further consideration, and construing the evidence in a manner deemed most favorable to the plaintiff, the court ruled that it was insufficient, because admitting of but one conclusion; namely, that the insured's death resulted from a cause not covered by the policy. Judgment was then given for the defendant notwithstanding the verdict, and the plaintiff brought the case here. The judgment was reversed, with directions to grant a new trial, for reasons stated by Mr. Justice Matthews as follows:

"If, after the plaintiff's case had been closed, the court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this court. Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322, and cases there cited. And, in that event, the plaintiff, having duly excepted to the ruling in a bill of exceptions, setting out all the evidence, upon a writ of error, would have been entitled to the judgment of this court, whether, as a matter of law, the ruling against him was erroneous.

"Or if, in the present case, a verdict having been taken for the plaintiff by direction of the court, subject to its opinion whether the evidence was sufficient to sustain it, the court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict, on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged, or it might, with propriety, have reserved the question, what judgment should be rendered, and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But, without a waiver of *the right of trial by jury,[387 by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.

"This is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn,—a right he demanded and did not waive; and that he has been deprived of it by the act of the court in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned.

"The right of trial by jury in the courts

of the United States is expressly secured by the 7th article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Rev. Stat. §§ 648, 649, U. S. Comp. Stat. 1901, p. 525.

"This constitutional right this court has always guarded with jealousy. Doe ex dem. Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224; D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Castle v. Bullard, 23 How. 172, 16 L. ed. 424; Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307."

In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence; and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insuffi-388]ciency *or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment; and this, we have seen, consists of the court and jury, unless there be a waiver of the latter.

But the suggestion is made that sufficient warrant for setting aside the verdict and rendering judgment on the evidence without a new trial is to be found in the rules of the common law in respect of demurrers to evidence and nonsuits. It therefore will be well to see what those rules were and whether they support the suggestion.

The leading English cases dealing with demurrers to evidence as employed at common law are Middleton v. Baker, Cro. Eliz. pt. 2, p. 752; Wright v. Pindar, Aleyn, 18, Style, 34, and Gibson v. Hunter, 2 H. Bl. 187, 205. The last, which adhered to the principle of the other two, was much considered in the House of Lords, and the opinion delivered by Lord Chief Justice Eyre, who spoke for all the judges, was to the following effect: (a) A demurrer to the evidence is a proceeding whereby the court, whose province it is to answer all *questions of law,* is called upon to declare what the law is "upon the facts shewn in evidence," and, "in the nature of the thing, the question of law to arise out of the fact cannot arise until the fact is ascertained." (b) Such a demurrer is permissible only when proposed by one party, joined in by the other, and allowed by the court. It must contain an express and distinct admission by the demurrant of every fact which the evidence of his adversary conduces to prove, else he cannot insist that the latter join in the demurrer; and the admission, to be effective to that end, must be of the facts, *and not merely the[389 evidence from which their existence is inferable. (c) When the matter of fact is so ascertained and shown in the demurrer, the case is deemed ripe for judgment in matter of law, and the jury properly may be discharged from giving a verdict.

This statement of the true office and use of a demurrer to evidence was both accepted and applied by this court in Fowle v. Alexandria, 11 Wheat. 320, 6 L. ed. 484, decided in 1826. There the court below had sustained such a demurrer, which merely set forth and admitted the evidence as introduced at the trial, as well the testimony of witnesses as written documents. We excerpt the following from the opinion, which was by Mr. Justice Story:

"There is no joinder in demurrer on the record, which is probably a mere defect in the transcript, as the court proceeded to give judgment upon the demurrer in favor of the defendants. Without a joinder in demurrer, no such judgment could be properly entered; and such joinder ought not to have been required or permitted while there was any matter of fact in controversy between the parties. . . . The true and proper object of such a demurrer is to refer to the court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. . . . Indeed, the case made for a demurrer to evidence is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. . . . Upon examination of the case at bar, it will be at once perceived that the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to *positive admissions,[390 but to mere circumstances of presumption introduced on the other side."

And that this was not a new doctrine

in this court is shown in Young v. Black, 7 Cranch, 565, 568, 3 L. ed. 440, 441, decided thirteen years before, where, in declining to disturb the action of the court below in refusing to compel a joinder in a demurrer to the evidence, it was said: "The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it [the demurrer] ought never to be admitted where the party demurring refuses to admit the facts which the other side attempts to prove; and it would be as little justifiable where he offers contradictory evidence, or attempts to establish inconsistent propositions."

True, in Bank of United States v. Smith, 11 Wheat. 171, 6 L. ed. 443, and Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 389, 6 L. ed. 664, 667, the rule that the demurrer should set forth the facts rather than the evidence from which they are inferable was not strictly enforced, but in each of those cases the opposite party voluntarily joined† in the demurrer, thereby consenting that the case be withdrawn from the jury and submitted to the court on the evidence embodied in the demurrer; so, they are without bearing here, save as the opinions contain some observations making strongly for the views expressed in Fowle v. Alexandria. Thus, in Bank of United States v. Smith, the demurrer was criticized as substituting the court in the place of the jury, which, while true of the demurrer there, would not be true of one rightly drafted and allowed; and in Columbian Ins. Co. v. Catlett, it was said: "The plaintiff was not bound to have joined in the demur-391]rer without the defendant's *having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made without insisting on this preliminary, the court is at liberty to draw the same inferences in favor of the plaintiff which the jury might have drawn."

Pawling v. United States, 4 Cranch, 219, 2 L. ed. 601, and Chinoweth v. Haskell, 3 Pet. 92, 7 L. ed. 614, are also cases in which, as shown by the record, there was a voluntary joinder in the demurrer. In the former the record, after setting forth the demurrer, shows this order: "Wherefore let the jury aforesaid be discharged by the court here, by the assent of the parties, from giving any verdict."

†In Bank of United States v. Smith the joinder is shown in the record, although not mentioned in the opinion. It also is shown in the report of the decision of the lower court. 2 Cranch, C. C. 319, Fed. Cas. No. 935.

The doctrine stated in Gibson v. Hunter, and recognized by this court in Young v. Black and Fowle v. Alexandria, has been applied not only in the lower Federal courts, but in several of the state courts. Pickel v. Isgrigg, 10 Biss. 230, 6 Fed. 676; Johnson v. United States, 5 Mason, 425, Fed. Cas. No. 7,419; Miller v. Baltimore & O. R. Co. 1 Ohio L. J. 276, Fed. Cas. No. 9,560; Patty v. Edelin, 1 Cranch, C. C. 60, Fed. Cas. No. 10,840; Copeland v. New England Ins. Co. 22 Pick. 135; Golden v. Knowles, 120 Mass. 336; Dormady v. State Bank, 3 Ill. 236; Ware v. McQuillan, 54 Miss. 703; Ingram v. Jacksonville Street R. Co. 43 Fla. 324, 30 So. 800; Bass v. Rublee, 76 Vt. 395, 401, 57 Atl. 965; Chapize v. Bane, 1 Bibb, 612; Sawyer v. Fitts, 2 Port. (Ala.) 9.

At common law, if, on a demurrer to the evidence, judgment was given for one party when it should have been for the other, the error was corrected in the appellate tribunal by directing the proper judgment, and this because the error was confined to the judgment, and did not reach the facts as ascertained and shown in the demurrer. But when the reversal was for error in allowing the demurrer, the latter necessarily went for naught, and, as there remained no ascertained facts on which to base a judgment, a new trial was deemed essential. Thus, in *Gibson v. Hunter,[392 supra, one of the questions was whether, considering the state of the evidence and the admissions in the demurrer, the plaintiff was obliged to join in it. The question was resolved in the negative; and, as this eliminated the demurrer on which judgment had been given in the court of King's bench, the judgment of reversal was accompanied by a direction for a new trial. And in Fowle v. Alexandria, supra, where this court ruled that the demurrer ought not to have been allowed, the judgment rendered thereon was reversed with a like direction. So, in the present case, when the verdict was set aside, there remained no ascertained facts on which a judgment might be rested, and that made a new trial necessary.

Enough has been said to make it plain, as we think, that there was nothing in the nature or operation of the demurrer to evidence at common law which has any tendency to show that issues of fact tried by a jury could be re-examined otherwise than on a new trial.

We come, then, to the other branch of the suggestion. A nonsuit at common law was a dismissal of the plaintiff's action without an adjudication, other than the imposition of costs, and constituted no bar to another action for the same cause. Originally granted where the plaintiff made

default when his presence was required, or otherwise failed to proceed in due course, it came to be applied on the trial when, although actually present, he chose, in view of the state of his evidence, not to risk an adverse verdict. But unless he assented to being nonsuited on the evidence, it was essential that a verdict be taken, even although it was certain to be against him. In other words, such a nonsuit was always voluntary, and never compulsory. Mr. Starkie says of this proceeding: "The doctrine of nonsuits is founded on the ancient practice, according to which the plaintiff was bound by himself or his attorney to appear at the trial, prosecute his 393]suit, and hear the verdict; *and in case, after being called, he made default, he was decreed to have abandoned his suit; and was nonsuited. This ancient practice has long been used as the medium by which the court intimates an opinion that the plaintiff has not made out a sufficient case for the consideration of the jury. The plaintiff is therefore formally called, although by himself or his counsel he has actually appeared in court. In conformity, however, with the old practice, being called, he may, if he choose, appear, and if he do, the case must go to the jury." Starkie, Ev. 4th London ed. 806. In the course of a similar statement, Mr. Tidd says: "The plaintiff in no case is compellable to be nonsuited; and therefore, if he insist upon the matter being left to the jury, they must give in their verdict, which is general or special." 2 Tidd, Pr. 1807 ed. 796. Mr. Lilly describes the office and nature of the proceeding as follows: "Nonsuit is when a man brings a personal action, and doth not prosecute it with effect, or else upon the trial refuses to stand a verdict; then he becomes nonsuited, which is recorded by the court, and the defendant recovers his costs against him." "The court cannot compel the plaintiff to appear and stand a verdict; but if the plaintiff appears, or his counsel or attorney appears for him, he cannot be afterwards nonsuit, but the jury must deliver in their verdict." 2 Lil. Reg. 1719 ed. 230, 231. And Mr. Chitty says: "A nonsuit must always be *voluntary, i. e.*, by the plaintiff's counsel submitting to the same or not appearing, and in no case can it be adverse or without implied consent." 3 Chitty, Gen. Pr. 910. To the same effect are 3 Bl. Com. 376, 377; Dewar v. Purday, 3 Ad. & El. 166, 170, 4 Nev. & M. 633, 1 Hurlst. & W. 227, 4 L. J. K. B. N. S. 164; Corsar v. Reed, 21 L. J. Q. B. N. S. 18; Stancliffe v. Clarke, 21 L. J. Exch. N. S. 129, 16 Jur. 430; Minchin v. Clement, 1 Barn. & Ald. 252. In the last case the *court, on ruling that a verdict* theretofore given for the plaintiff could not be sustained, was requested to order a nonsuit instead of a new trial; but the request was denied, Lord *Ellenborough, Ch.[394 J., observing: "It is in the plaintiff's option to be nonsuited or not."

The question whether a compulsory nonsuit could be ordered on the evidence was presented to this court in 1828 in Doe ex dem. Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224, a case in which the circuit court, conceiving that the plaintiff's evidence was insufficient to sustain a verdict in his favor, had nonsuited him without his assent. Speaking for all the members of this court but one, Chief Justice Marshall disposed of the question by saying: "The circuit court had no authority to order a peremptory nonsuit, against the will of the plaintiff. He had a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit; but if he did not so choose, the court could not compel him to submit to it." The decision in that case was approved and reaffirmed in D'Wolf v. Rabaud, 1 Pet. 476, 497, 7 L. ed. 227, 236; Crane v. Morris, 6 Pet. 598, 609, 8 L. ed. 514, 518, where Mr. Justice Story said the point was not longer "open for controversy;" Silsby v. Foote, 14 How. 218, 222, 14 L. ed. 394, 396, and Castle v. Bullard, 23 How. 172, 183, 16 L. ed. 424, 427.

It being thus certain that the common-law rules in respect of nonsuits recognized that the plaintiff had a right to have the verdict of the jury taken, which he could waive or assert, at his option, it follows that those rules give no support to the suggestion before mentioned.

In what has been said we would not be understood as implying that a motion for a compulsory nonsuit and a demurrer to the evidence are equivalents of a request for a directed verdict, for while they are sometimes spoken of as analogous to it, this only means that for the purpose of each the evidence must be taken most strongly in favor of the opposite party. In other respects they are essentially unlike. A motion for a compulsory nonsuit looks to an arrest of the trial and a dismissal of the cause, leaving the merits undetermined and the plaintiff free *to[395 sue again, while a request for a directed verdict looks to a completion of the trial and an adjudication of the merits through the accustomed co-operation of the court and jury. Full recognition of this, as also of its bearing here, is found in Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 264, 26 L. ed. 539, 541, where it is said: "The difference in the two modes

is rather a matter of form than of substance, *except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal.*"

Equally pronounced is the difference between a demurrer to the evidence and a request for a directed verdict; for if on such a demurrer, properly joined in and allowed, judgment is not given for the demurrant, it is necessarily given for his opponent, while if a request for a directed verdict is denied, the party making the request may yet receive the jury's verdict and a judgment thereon. And when a judgment on a demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded. This was so at common law, and it has been the uniform course of action in this court from the beginning. These distinctions are so substantial as to show that the suggested analogy is far from complete.

We come now to two decisions in this court which, although not involving the real question here, namely, the power of a Federal court to re-examine, otherwise than according to the rules of the common law, issues of fact which have been determined by the verdict of a jury, yet have such an indirect bearing thereon that they ought not to be passed unnoticed.

In Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 38, 35 L. ed. 55, 60, 11 Sup. Ct. Rep. 478, a case coming 396]here from the eastern *district of Pennsylvania, it appeared that on a trial to the circuit court and a jury the court, following a statute of the state, had entered a compulsory nonsuit which, according to the state law, terminated that suit, but was not an adjudication of the merits, or a bar to another suit on the same cause of action. This court, deeming it important to notice the question of its own jurisdiction, proceeded to inquire whether such a judgment was subject to review on writ of error, and in the course of the inquiry expressed the opinion that the state statute established a practice or mode of procedure which the conformity provisions of the Federal statutes required the circuit court to follow. But it was stated that the question was "not mentioned by counsel in argument," and, as the opinion contains no reference to the right of trial by jury or to the 7th Amendment, it well may be that the bearing of the latter on the applicability of the state statute to the trial in the circuit court was not actually considered.

The other case is Coughran v. Bigelow, 164 U. S. 301, 41 L. ed. 442, 17 Sup. Ct. Rep. 117, which originated in a territorial court, where the 7th Amendment was applicable. On a trial by jury a compulsory nonsuit was entered according to a local statute, for an insufficiency in the plaintiff's evidence, without prejudice to his right to sue again, and when the case came here the judgment was affirmed, it being directly held that granting such a nonsuit does not infringe the constitutional right.

Of these two cases it is to be observed: (1) Although they hold, one by implication and the other expressly, that the constitutional right of trial by jury is not invaded by a statute authorizing the court to enter a compulsory nonsuit against a plaintiff for an insufficiency in his evidence, when he is not thereby prevented from suing again on the same cause of action, they neither hold nor suggest that, consistently with that right, the court can refuse to take the verdict of the jury, or disregard it when taken, *and enter a binding judgment[397 on the evidence. (2) Assuming, without so deciding, that they should be accepted and followed in respect of the particular matter to which they are addressed, that is, the granting of an involuntary nonsuit which leaves the merite unadjudicated, they afford no justification whatever for overruling or departing from the repeated decisions of this court, reaching back to the beginning of the last century, wherein it uniformly has been held (a) that we must look to the common law for a definition of the nature and extent of the right of trial by jury which the Constitution declares "shall be preserved;" (b) that the right so preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court; (c) that the rendition of a verdict is of the substance of the right, because to dispense with a verdict is to eliminate the jury, which is no less a part of the tribunal charged with the trial than is the court; and (d) that when the issues have been so tried and a verdict rendered they cannot be re-examined otherwise than on a new trial granted by the court in which the first trial was had, or ordered by the appellate court for some error of law affecting the verdict.

Coughran v. Bigelow recognizes that this is the true conception of trial by jury, for it is there said, "if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such

instruction, to set aside the verdict." Why instruct the jury in such a case if they have no office to perform? Why contemplate that they may not conform to the instruction if it be immaterial whether they do or not? And why take their verdict or have any concern about it if none is required? The answers are given in prior decisions, which hold, as before shown, that in such a case it is essential "that the jury make its verdict, albeit in conformity 398]with the order of the *court;" and that if there be a verdict, "the action is ended, unless a new trial be granted, either upon motion or upon appeal."

Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings, and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is as true of a second trial as of the first. Whether the evidence is sufficient to sustain a verdict for one party or the other is quite another matter, and does not affect the mode of trial, but only the duty of the court in instructing the jury, and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed, and whether it be ample or meager. To speak, therefore, of the evidence as determinative of the right to a trial by jury, is to confuse the test or that right with a different test, applicable only in determining whether a particular verdict should be directed.

In the present case certain well-defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the Constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the Constitution, to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion, or ordered by the appellate court for error of law. At the trial the defendant requested that a verdict in its favor be directed, and had the court indicated its purpose to do that, it would have been open to the plaintiff, under the then prevailing practice, to take a voluntary nonsuit, which would have enabled her to make a fuller and better presenta- 399]tion of her case, if *the facts permitted, at another trial in a new suit. But the defendant's request being denied and a verdict being returned for the plaintiff, she recovered a judgment. That judgment the circuit court of appeals reversed, and rightly so, because the defendant's request, in the state of the evidence, ought, as matter of law, to have been granted. The reversal operated to set aside the verdict and to put the issues at large, as they were before it was given. But, instead of ordering a new trial, as was required at common law, the circuit court of appeals itself re-examined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done consistently with the 7th Amendment, which not only preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise than "according to the rules of the common law."

To the suggestion that in so holding we are but adhering to a mere rule of procedure at common law there is a twofold answer: First, the terms of the Amendment and the circumstances of its adoption unmistakably show that one of its purposes was to require adherence to that rule, which, in long years of practice, had come to be regarded as essential to the full realization of the right of trial by jury; and, second, the right to a new trial in a case such as this, on the vacation of a favorable verdict secured from a jury, is a matter of substance, and not of mere form, for it gives opportunity, as before indicated, to present evidence which may not have been available or known before, and also to expose any error or untruth in the opposing evidence. As is said in Blackstone's Commentaries, bk. 3, p. 391: "A new trial is a rehearing of the cause before another jury. . . . The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the *subject; and noth- [400 ing is now tried but the real merits of the case."

The judgment of the Circuit Court of Appeals is accordingly modified by eliminating the direction to enter judgment for the defendant notwithstanding the verdict, and by substituting a direction for a new trial.

Mr. Justice Hughes, dissenting:

I concur in the decision of the court so far as it holds that the circuit court of appeals was right in reversing the judgment; but I am unable to agree with the conclusion that the circuit court of appeals was bound to order a new trial, and was without power, under the 7th Amendment, to follow the state practice in directing the entry of the judgment to which, as matter of law, the defendant was entitled.

The serious and far-reaching consequences of this decision are manifest. Not only

does it overturn the established practice of the Federal courts in Pennsylvania in applying, under the conformity act, the provisions of the state law, but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials, and of thus diminishing in a highly important degree the delays and expense of litigation. It cannot be gainsaid that such a conclusion is not to be reached unless the constitutional provision compels it. I cannot see that it does compel it. On the contrary, I submit, with the utmost respect, that the Pennsylvania practice adopted by the circuit court of appeals is entirely in conformity with the 7th Amendment.

What, then, is this case? It was an action upon a policy of insurance. It was tri-[401] able by jury, but the province of *the jury was to decide questions of fact, not questions of law. This court concludes, as did the court of appeals, that "the evidence did not admit of a finding that the policy was in force at the time of the insured's death." In other words, after the plaintiff had had full opportunity to present her case and to show facts for the consideration of the jury, and the case on both sides had been closed, it appeared that there were no facts whatever upon which the jury would be warranted in finding a verdict in her favor. Hence, says this court, the defendant was entitled to a direction of a verdict in its favor, as it requested. Had the trial court rightly applied the law, the case would properly have ended in a final judgment for the defendant. But the trial court erred in the law, and consequently the jury found a verdict for the plaintiff,—not upon facts, but without any facts upon which they could rest it. Now it is said that a statute which permits the trial court or the appellate court, after that wrongful verdict, to correct the error, and in so doing not only to set aside the verdict, but to direct the entry of the judgment to which the defendant in law was entitled, is, as applied to a case in the Federal court, contrary to the Constitution.

The 7th Amendment provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." But wherein has any matter of fact tried by a jury been re-examined? Concededly, there was no fact to be tried by a jury; the case as made was barren of any such fact; and there being none, there has been no re-examination of it. How can it be said that the circuit court of appeals has determined the facts or has passed upon issues of fact? Whether there was any evidence for the jury was a question of law. The trial court, in wrongly deciding it, did not convert it into a question of fact; it was not altered by the verdict, but remained the same in its nature,—a question for the determination of the court. *That, it seems to me, is the substance [402] of the matter, and all else is form and procedure. Whether in such a case, on the error being shown, a new trial should be ordered, or whether the litigation should be ended by a prompt entry of the judgment which should have followed a right decision in the first instance, is a matter to be governed by the applicable rules of practice; but, as I view it, it is not a matter withdrawn from legislative control by the constitutional provision for trial by jury, which is concerned with the settlement of disputes of fact, and not with the determination of legal questions, or with the consequences, which should ensue when that determination is decisive of the right of recovery on the case made.

It is well to note what has been ruled in the third circuit upon this precise question. For the practice was there deliberately adopted after careful consideration. It has commended itself to the bench and bar as a salutary measure, making for the improvement of the administration of justice. And it should be observed that the Constitution of the state of Pennsylvania, where the practice obtains, also provides that the right of trial by jury shall remain inviolate (see Const. [Pa.] 1776; Declaration of Rights, 11; 1790, art. 9, § 6; 1838, art. 9, § 6; 1873, art. 1, § 6.) In Smith v. Jones, 104 C. C. A. 329, 333, 181 Fed. 819, 823, the circuit court of appeals for that circuit thus reviewed the matter:

"The practice of entering judgmente *non obstante veredicto* has long existed in Pennsylvania, and it enables the case to be concluded by a verdict, while the entry of judgment thereon is made dependent on the court's opinion on a reserved question of law. This permits the judge to give to the decisive law question on which a case turns a more careful examination than he can do in the stress of trial. Moreover, if an appellate court, on review of such judgment, finds error, it can reverse and direct entry of judgment for the other party, and avoid a retrial. Long *experience in [403] this practice has convinced the bar and bench of the state of its value in conducing to a more careful and deliberate consideration of the law by the trial judge, and to the avoidance of retrials. The practice in Pennsylvania is of statutory origin, as stated by Judge Acheson in Casey v. Pennsylvania Asphalt Pav. Co. (C. C.) 100 Fed. 748,

adopted in 52 C. C. A. 145, 114 Fed. 189, and the principles involved in its application are set out in Fisher v. Scharadin, 186 Pa. 568, 40 Atl. 1091, and Boyle v. Mahanoy City, 187 Pa. 1, 40 Atl. 1093. Under the conformity act, this practice has long ben followed in the Federal courts in Pennsylvania, and met with the approval of this court in Carstairs v. American Bonding & T. Co. 54 C. C. A. 85, 116 Fed. 449."

In the Carstairs Case to which the court thus refers, decided over ten years ago, the action was brought in the circuit court for the eastern district of Pennsylvania, upon a policy of fidelity insurance. The defendant asked for a binding instruction. The court, reserving that question, submitted the case to the jury, which found a verdict for the plaintiff. After argument, the court concluded that the defendant was right, that there was no case for the jury, and hence set aside the verdict and directed judgment for the defendant upon the point reserved. 112 Fed. 620. The court of appeals sustained this action of the circuit court (116 Fed. 449), Circuit Judge Gray delivering the opinion. There was, however, a dissent by Circuit Judge Acheson, who thought the mode of procedure was an unwarrantable departure from the constitutional provision. Id. p. 455. This called forth a concurring opinion from Circuit Judge Dallas, who said (id. pp. 456, 457):

"The judgment here complained of was entered upon a point which the learned trial judge reserved in these words: 'I reserve the question whether there is any 404]evidence *to go to the jury in support of the plaintiffs' claim.' In our opinion, this was a good reservation. The supreme court of Pennsylvania has, after argument and reargument before a full bench, distinctly so decided (Fisher v. Scharadin, 186 Pa. 565, 40 Atl. 1091; Boyle v. Mahanoy City, supra); and within the knowledge of the writer, the circuit court for the Eastern district of Pennsylvania, from which this case comes, has, in a number of instances, and without protest or disapproval in any, reserved precisely the same point. Indeed, counsel in this cause appear to have regarded the practice as settled, for 'the record shows no objection or any exception to the form of the reservation.' Boyle v. Mahanoy City, supra. . . . But in our opinion there is no substantial difference between a judgment entered upon a directed verdict for defendant and one entered in his favor notwithstanding a verdict rendered for plaintiff, subject to the question whether there was any evidence to warrant it. 'Whether there be any evidence which entitles the plaintiff to recover is necessarily a question of law' (Fisher v. Scharadin, supra); and that question it is which, by either method of procedure, and with like effect in each, the court decides. No encroachment is made upon the domain of the jury where either course is pursued. Its province of finding facts from evidence is not at all invaded. All that is adjudged is that a verdict which is unsupported by any evidence cannot properly be made the basis of a legal judgment; and the soundness of this fundamental proposition is now, we think, too well established to admit of question or to be open to debate."

See also Spencer v. Duplan Silk Co. 112 Fed. 638, 53 C. C. A. 321, 115 Fed. 689, 191 U. S. 526, 527, 532, 48 L. ed. 287, 289, 291, 24 Sup. Ct. Rep. 174.

The practice which had been followed before the Carstairs Case, and was expressly sanctioned in that case, continued to be observed. In 1905, the legislature of *Pennsylvania broadened it by per-[405 mitting a reservation not simply of leave to enter judgment for the defendant, but for either party when there was a request for binding instructions. As the supreme court of Pennsylvania pointed out, in construing the statute, in Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 559, it was not intended in any way to impair and did not impair the function of the jury to deal with disputed questions of fact, but its purpose was to facilitate the disposition of questions of law. It was classed as one of the "practical reforms" instituted by the state "for facilitating business without impairing settled legal principles." It took account of the "growing complexity of issues, the constantly increasing pressure upon the trial lists, the taking of testimony in shorthand, and the consequent hurry of trials;" and it promoted the proper despatch of the work of the courts, while conserving the essential rights of suitors.

Chief Justice Mitchell, in delivering the opinion of the court, said (id. pp. 411–413): "The act being so recent, it is important that it should be examined closely, and its proper construction settled. Its terms are: 'Whenever upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may . . . move the court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court . . . to enter such judgment as should have been entered upon that evidence.'

"This statute makes no radical innovation on the settled line of distinction be-

tween the powers of the court and the jury. It shows no intention to infringe, even if it could constitutionally do so, the province of the jury to pass upon the credibility of witnesses and the weight of oral testimony. The court has long had authority to direct 406] *a verdict for defendant when it was of opinion that the plaintiff, even if all his evidence be believed, has failed to make out his case. . . .

"The act of 1905 is another step in the same direction. It broadens the power of the judge in this respect: that whereas heretofore the verdict was required to be for the plaintiff, and the reservation to be of leave to enter judgment for the defendant *non obstante*, now what is reserved is a request for binding direction to the jury, and may be for either plaintiff or defendant. But though thus enlarged so as to include both parties, the power of the judge is the same as it was before. He is 'to enter such judgment as should have been entered upon that evidence;' or, in other words, to treat the motion for judgment as if it was a motion for binding directions at the trial, and to enter judgment as if such direction had been given and a verdict rendered in accordance. What the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. If, upon such consideration, it shall appear that a binding direction for either party would have been proper at the close of the trial, the court may enter judgment later with the same effect. But, on the other hand, if it should appear that there was conflict of evidence on a material fact, or any reason why there could not have been a binding direction, then there can be no judgment against the verdict now. As already said, there is no intent in the act to disturb the settled line of distinction between the provinces of the court and the jury. The act is capable of usefulness in allowing time for mature consideration, but it should not be carried beyond its legitimate intent."

The provisions of this statute, as thus construed, were applied in the Federal courts in Pennsylvania. The propriety of the practice was challenged in Fries-Breslin 407]Co. v. *Bergen, 168 Fed. 360-364, 99 C. C. A. 384, 176 Fed. 76, 81; and it was sustained by both the circuit court and the circuit court of appeals. Circuit Judge Gray, in delivering the opinion of the latter court, said:

"This Pennsylvania practice act has been referred to, and has not infrequently been brought to the attention of this court in cases where the granting or refusal of judgments *non obstante veredicto* have been the subjects of review. The act enlarges the scope of the common-law motion for judgment for plaintiff, notwithstanding the verdict for the defendant, by permitting it to be made by either plaintiff or defendant, when the verdict is against either. It is in general a more convenient method, so far as a defendant is concerned, of reaching practically the same result as was sought by a motion for a compulsory nonsuit, or for peremptory instructions at the close of the evidence, or by a motion in arrest of judgment, made by the defendant after the verdict, or by the practice prevalent in the Pennsylvania courts, of directing a verdict for the plaintiff, and reserving the question whether there is any evidence in the case entitling the plaintiff to recover. We think, under the conformity provisions of § 914 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 684), the circuit court was required to recognize the practice authorized by the said Pennsylvania act of 1905, there being nothing incongruous therein with the organization of the Federal courts or their settled rules of procedure."

The plaintiff then petitioned this court for a writ of certiorari, and one of the grounds stated was that the circuit court had no power to enter judgment for the defendant notwithstanding the verdict. The petition was denied. Fries-Breslin Co. v. Bergan, 215 U. S. 609, 54 L. ed. 347, 30 Sup. Ct. Rep. 410. And the same practice has been followed since. Smith v. Jones, 104 C. C. A. 329, 181 Fed. 819, 823. See also Pittsburgh Constr. Co. v. West Side Belt R. Co. 151 Fed. 125, 11 L.R.A. (N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929; *West Side[408 Belt R. Co. v. Pittsburgh Constr. Co. 219 U. S. 92, 96, 102, 55 L. ed. 107, 109, 31 Sup. Ct. Rep. 196.

The 7th Amendment, it cannot be doubted, deals with matters of substance, and not with mere matters of form. It guarantees the right of trial by jury, but it does not raise forms of motions or merely modal details to the dignity of constitutional rights. In numerous particulars, common-law practice has been altered by statute in many states, and the new procedure of the so-called code states has been followed, as near as may be, by virtue of the act of Congress, in the courts of the United States. When the question is raised of invasion of the constitutional right, we must always look to the substance of what is done, and not to mere names or formal changes. It is of no consequence that at common law the motion for judgment *non obstante veredicto* was made only by the plaintiff, or was granted on something apparent on the face

of the pleadings. We are not concerned with the mere use of this or any other descriptive term.

The substantial thing is that the common law recognized that the function of the jury was to deal with controversies of fact. If there was a question of law, it was for the court.

The dominating idea, in overturning the practice below, seems to be that at common law, if there was an issue of fact upon the pleadings, the plaintiff was entitled to have a verdict taken in any event; that is, if he did not voluntarily take a nonsuit, it was essential that a verdict be rendered, notwithstanding that upon the evidence there was no question of fact for the jury.

This would seem to be a misconception of the fundamental principles of the common law with respect to jury trials, and to result from unjustified implications from the practice as to nonsuits, as well as from a failure to regard the full scope and import of common-law procedure.

It is not a new thing that a party should be able to challenge the legal sufficiency of [409] the evidence adduced *against him, and call upon the court to answer the question of law whether, upon the facts shown, there should be a recovery, nor is it a new thing that when he does so the court should give judgment without the intervention of the jury, and if the trial court errs in its ruling upon the law, the reviewing court should set the matter right and order the proper judgment to be entered.

This was accomplished by demurring to the evidence. This was a proceeding by which the judges of the court were called upon to declare what the law was upon the facts shown in evidence. It was analogous to the demurrer upon the facts alleged in pleading. The reason, it is said, for demurring to the evidence, was that the jury, if they pleased, might refuse to find a special verdict, and then the facts would not appear upon the record. The party demurring had to admit the truth of all the evidence against him; and if this were circumstantial, he was bound to admit every fact in favor of his adversary which the circumstances might tend to prove. Unless he did so, the other party was not bound to join in the demurrer. If, however, the demurrer was in proper form and embraced all the requisite concessions, the other party was bound to join. The result was that there was nothing left for the consideration of the jury, and the usual practice was to discharge it, although it was recognized as proper for the jury to assess the damages *conditionally*, subject to *the determination of* the demurrer. 2 Tidd, *Pr.* **865-867.

This matter was reviewed by the House of Lords in the leading case of Gibson v. Hunter, 2 H. Bl. 187, decided in the year 1793, where Lord Chief Justice Eyre, in delivering the answer of the judges, said: "All our books agree, that if a matter of *record*, or other matter in *writing*, be offered in evidence in maintenance of an issue joined between the parties, the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence *to join in demur- [410] rer. He cannot refuse to join in demurrer, he must join, or waive the evidence. Our books also agree, that if *parol* evidence be offered, and the adverse party demurs, he who offers the evidence *may* join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to *written* evidence. The language of our books is very indistinct upon the question whether the party offering *parol* evidence should be *obliged* to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he has offered is in writing? The reason is given in Croke's report of Baker's Case,† because, says the book, '*there cannot be any variance of matter in writing.*' Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing, but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing to join in demurrer applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet, if there can be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury, and transferred to the judges. If the party who demurs will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence than *in a matter in [411] writing; and the reasons for compelling the party who offers the evidence to join in demurrer will then apply, and the doctrine of

†Cro. Eliz. pt. 2, p. 753.

demurrers to evidence will be uniform and consistent. That this is the regular course of proceeding, in respect to parol evidence of the nature that I have been describing, I think may be collected from the known case upon this subject, Baker's Case. There is also another case, Wright v. Pindar, as it stands reported in Aleyn's Reports,† which carries the doctrine further, and home to every case of evidence circumstantial in its nature, affording ground for a conclusion of fact from fact; and the two cases taken together, I think, prove satisfactorily that the course is that which I have already supposed, and which would remove all the difficulties that are in the way of obliging the party to join in demurrer upon parol evidence. Baker's Case, after stating that the party must join in demurrer, or waive his evidence, where a matter in writing is shewn in evidence, goes on thus: 'If the plaintiff produces witnesses to prove any matter in fact upon which a question in law arises, if the defendant admits their testimony to be true, there also the defendant may demur in law upon it, but then he ought to admit the evidence given by the plaintiff to be true.' Those cases have very carefully marked the precise ground upon which a party may demur to evidence; and prove that if a party *may* demur, the other party *must* join in demurrer. According to Aleyn's Report of the case of Wright v. Pindar, which case underwent very serious consideration, it was resolved, 'that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court; *and if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved by presumptions or probabilities*, and 412]the *other party demurs thereupon, he that alleges this matter *cannot* join in demurrer with him, but ought to pray the judgment of the court, that he *may not be admitted* to his demurrer, unless he will *confess the matter of fact to be true*.' It seems to follow as a necessary conclusion, that if he will confess the matter of fact to be true, there he is to be admitted to his demurrer; and that if he is admitted, the other party must join in demurrer. My Lords, it is said in some of our books that upon a demurrer entered upon parol evidence, the party offering the evidence may choose whether he will join in demurrer or not. But after having stated the two authorities which I have mentioned, I think those passages in the books must be understood with the qualification mentioned in both those authorities, 'unless the adverse party will confess the evidence to be true.' The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record will remain for the decision of the judges." Id. pp. 206–209.

If, on a demurrer to the evidence, judgment was given for one party when it should have been given for the other, the error was corrected in the appellate tribunal by directing the proper judgment. It is now said, in referring to this practice, that this was because the error was confined to the judgment, and did not reach the facts as ascertained and shown in the demurrer. But what was the error? What was the basis of the judgment, and upon what ground was it reversed and the proper judgment directed? The facts, by the proceeding on the demurrer, were made a part of the record, and the question of the legal sufficiency of the evidence was thus one of law arising upon the record. The court dealt with the question of law, that is, with the legal insufficiency of the evidence, and directed judgment which, as matter of law, followed the case made.

*It is also said that when the rever-[413 sal was for error in allowing the demurrer, the latter necessarily went for naught; and as there remained no ascertained facts on which to base a judgment, a new trial was deemed essential; and Gibson v. Hunter, supra, and Fowle v. Alexandria, 11 Wheat. 320, 6 L. ed. 484, are cited. But in Gibson v. Hunter, supra, the reason for holding that the demurrer could not be allowed and that no judgment could be given, was thus stated: "The examination of the witnesses in this case has been conducted so loosely, or this demurrer has been so negligently framed, that there is no manner of certainty in the state of facts upon which any judgment can be founded." In other words, the case was lacking in the record of facts with the essential admissions of the demurring party which were necessary to support a judgment, and there was no option but to award a new trial because of the way the record had been made up. And in Fowle v. Alexandria, supra, the ruling was that issue could not be joined upon the demurrer so long as any matter of fact remained in controversy between the parties; that no party could insist upon the other party's joining in the demurrer without distinctly admitting upon the record every fact and every conclusion of fact which the evidence given for his adversary conduced to prove. The court said: "Upon examination of the case at bar, it will be at once perceived that the demurrer to evidence, tried by the principles already stated, is totally defective.

†Aleyn, 18, Style, 22.

The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. . . . Even if the demurrer could be considered as being exclusively taken to the plaintiff's evidence, it ought not to have been allowed without a distinct admission of the facts which that evidence conduced to prove. But when the demurrer was so framed as to let in the defendant's evidence, 414]and thus to rebut what the *other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the circuit court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the court was not a question of law, but of fact."

The court, therefore, concluded that in this posture of the case, it was bound to order a new trial, and it was added: "We may say, as was said by the judges in Gibson v. Hunter, that this demurrer has been so incautiously framed that there is no manner of certainty in the state of facts, upon which any judgment can be founded. Under such a predicament, the settled practice is, to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried." (Id. pp. 323, 324.) The necessary implication is that, had the demurrer been properly framed and the record properly made, so that there had been certainty in the facts and the proper basis for the determination of a question of law, no new trial would have been ordered.

How can it be said that these authorities furnish any support for the conclusion which has been reached in this case? For this court has found no uncertainty in the state of facts shown by the record, and it has not been unable to determine the question arising thereon. On the contrary, the record being made up in an appropriate manner and the question being properly raised, this court holds that there was no evidence whatever to sustain a verdict for the plaintiff, and, because there is certainty in the record, adjudges that the trial court erred in refusing a binding instruction.

The practice of demurring to the evidence was recognized in Pawling v. United States, 4 Cranch, 219, 2 L. ed. 601; Young v. Black, 7 Cranch, 565, 3 L. ed. 440; Bank of United States v. Smith, 11 Wheat. 171, 182, 6 L. ed. 443, 447; Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 389, 6 L. ed. 664, 667; Thornton v. Bank of Washington, 3 Pet. 36, 415]7 L. ed. 594; *Chinoweth v. Haskell, 3 Pet. 92, 7 L. ed. 614; Corfield v. Coryell, 4 *Wash. C. C. 371, 386,* Fed. Cas. No. 3,230; *Johnson v. United States, 5 Mason,* 425, 436, Fed. Cas. No. 7,419; Pickel v. Isgrigg, 10 Biss. 230, 6 Fed. 676; and other cases.

After the decision of this court in Fowle v. Alexandria, supra, Mr. Justice Story, who delivered the opinion in that case, thus laid down the rules with regard to demurrers to evidence in Johnson v. United States, 5 Mason, 436, Fed. Cas. No. 7,419:

"The general nature and operation of such a demurrer has been expounded with great force and correctness in the opinion delivered by Lord Chief Justice Eyre, in the case of Gibson v. Hunter, 2 H. Bl. 187. The Supreme Court of the *United States* has also, on various occasions, been called upon to discuss the nature and effect of the proceeding. But I shall do no more at present than to refer to some of the leading cases, not meaning to comment on them. The result of the whole is, that the party demurring is bound to admit not merely all the facts which the evidence directly establishes, but all which it conduces to prove. The demurrer should state the facts, and not merely the evidence of facts; and it is utterly inadmissible to demur to the evidence, when there is contradictory testimony to the same points, or presumptions leading to opposite conclusions, so that what the facts are remains uncertain, and may be urged with more or less effect to a jury. The court, however, will, in favor of the party against whom the demurrer is sought, as it withdraws from the jury the proper consideration of his case, make every inference for him which the facts in proof would warrant a jury to draw. But if the facts are so imperfectly and loosely stated that the court cannot arrive at a satisfactory conclusion that the judgment can be maintained upon the actual presentation of the evidence of these facts, then the course is to reverse the judgment, and to award a venire facias de novo."

In Pawling v. United States, 4 Cranch, 219, 2 L. ed. 601, the United *States[416 sued in debt upon an official bond. The defendants pleaded that the bond had been delivered as an *escrow* upon a condition which had not been performed. The United States demurred to the evidence produced on behalf of the defendants. The court held the evidence insufficient and judgment went in favor of the United States. This court reversed the judgment, and directed that judgment be entered for the defendants in the court below.

That the practice in the present case did not differ in its essential features from that permitted at common law is shown by the decision of this court in Chinoweth v. Haskell, 3 Pet. 92, 7 L. ed. 614. That was an action in ejectment. What took place on the trial is thus stated by Chief Justice

Marshall (p. 94): "At the trial, the defendants demurred to the plaintiffs' testimony, and the jury found a verdict for the plaintiffs, subject to the opinion of the court on the demurrer. The court overruled the demurrer and gave judgment for the plaintiffs." The applicable principles were thus stated (p. 96):

The defendants in the district court having withdrawn their cause from the jury by a demurrer to evidence, or having submitted to a verdict for the plaintiffs subject to that demurrer, cannot hope for a judgment in their favor, if, by any fair construction of the evidence, the verdict can be sustained. If this cannot be done, the judgment rendered for the defendants in error must be reversed." On reviewing the evidence, this court found that the demurrer ought to have been sustained. And this was its judgment:

"The judgment is reversed and the cause remanded with directions to enter judgment in favor of the defendants in the district court."

Here, then, is a case in this court which contradicts the conclusion that there is no permissible practice under the Constitution by which, when a verdict has been taken 417] *for the plaintiff, and it has been found, the point being duly made, that there is no legal basis for it in the evidence, judgment can be directed for the defendant.

It is said that there was a *voluntary* joinder in demurrer. Undoubtedly, the plaintiffs in the district court did join in the demurrer, but in what sense did they join voluntarily? The demurrer to the evidence in the Chinoweth Case was manifestly well taken. And this being so, the other party was bound to join in it. As it was said in Gibson v. Hunter, supra, the cases "prove that if a party *may* demur the other party *must* join in the demurrer." Whether a demurrer should be allowed was the initial question for the trial court; but if the case was one where it was proper to allow the demurrer, and it was duly taken and allowed, the other party was not entitled to stand on his evidence and go to the jury. Let it be assumed that he could take a nonsuit; but this is not to say that by refusing to join in the demurrer he had the right to have his case, although insufficient in law for that purpose, submitted to the decision of the jury. Of course, if there were some defect or variance which he believed he could remedy, it would be natural for him to withdraw his case; but if he had proved all he could possibly prove, there would be no reason for a withdrawal unless he was willing to abandon the litigation. If he did not desire to do this, but wished to proceed, insisting upon the legal sufficiency of the evidence to which the demurrer was taken, he had to join in it. For, unless he did so, he waived his evidence (Bakers' Case, Cro. Eliz. pt. 2, p. 753; Gibson v. Hunter, supra) and was left without any evidence to go upon; while, if he did join in the demurrer, he had to abide the judgment of the court upon the point of law. He had no right to reach the jury, against proper objection, when his evidence raised no question of fact. In the Chinoweth Case, the plaintiffs, confronted with the demurrer, and desiring to stand upon their evidence, and not to waive it, complied with the rules *of law[418 which required them to join in the demurrer. The judgment was determined by the decision of the question of law. This court, finding no basis for the verdict which had been taken for the plaintiffs subject to the opinion of the court on the demurrer, did not order a new trial, but directed judgment for the defendants.

The practice of demurring to the evidence was cumbrous. It fell into disuse, and the practice of moving for a direction of a verdict came to take its place. The fundamental question, however, of the legal insufficiency of the evidence, remained the same. As this court said in Parks v. Ross, 11 How. 362, 373, 13 L. ed. 730, 735: "But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is therefore error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred. Hence, the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many states superseded the ancient practice of a demurrer to evidence. It answers the same purpose, and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

Can it be doubted that it would be competent for Congress, if it saw fit, to reinstate the old practice of demurring to the evidence, and on a proper demurrer to its legal sufficiency, with an admission of all facts that his evidence tended to prove, to compel the other party to join in the demurrer; and to provide that thereupon the court should decide the question of law and enter judgment accordingly? Or that if the trial court decided wrongly, the appellate court should be at liberty to direct the entry of the judgment to which, as matter of law, a party was entitled? And could not Congress, following the analogies

419] *of a still earlier day, before written pleadings were introduced, permit the question to be raised by a motion upon the trial? Could it not now provide, when the testimony is reported stenographically, that the record so made and appropriately approved by the court should constitute the record of the evidence for the purpose of determining the question of law thus raised?

Again, the court having this power to decide the question of law and to enter judgment accordingly, can it not be authorized to take provisionally the verdict of the jury to avoid the delay and expense of a new trial in case it should appear on a careful consideration of the evidence that it involved a dispute of fact which the jury should have resolved?

This is all, as it seems to me, that the Pennsylvania practice comes to. Had the old practice obtained, and had there been a demurrer to the evidence in this case, this court, in view of its holding that the "evidence did not admit of a finding that the policy was in force at the time of the insured's death," must necessarily have concluded that the demurrer was well taken; that the trial court would have been justified in directing judgment for the defendant without submitting the case to the jury; and that if it had not decided the question correctly, the appellate court could so decide it and direct the entry of that judgment. The rest of the matter was simply the exercise of caution to avoid unnecessary litigation by taking the verdict of the jury so that it might be available if it appeared that the case was one for the jury.

The plaintiff did not take a nonsuit, or attempt in any way to dismiss her case. No question is presented with respect to her right to withdraw the suit, or to start again, if it had been withdrawn. It is said that, had the court indicated a purpose to direct a verdict for the defendant, the plaintiff might have taken a nonsuit; but the practice in the state and Federal courts 420]had long been established *and must have been well understood. There is nothing to indicate to the contrary. The situation disclosed is that the plaintiff was standing upon her evidence, contending, as she still contends, that it was sufficient to permit the jury to find in her favor. The defendant insisted that, conceding all that the evidence tended to prove, the plaintiff had no case for the jury. In this, the court now finds that the defendant was right. The defendant having made this point, and the plaintiff, on the other hand, having asserted the sufficiency of the evidence, and stood thereon, I find no ground for saying that the local practice was opposed to the principles of the common law in providing, in effect, that the question of law thus raised should be determined by the court, which should render judgment for the party entitled thereto.

This court has frequently said that it would deal with questions of this sort according to the substance of the matter. Thus, in Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539, it was held that where it was shown by the opening statement of counsel that the contract on which the suit was brought was void as being either in violation of law or against public policy, the trial court might properly direct the jury to find a verdict for the defendant. The court, by Mr. Justice Field, said (id. p. 266):

"Indeed, there can be, at this day, no serious doubt that the court may, at any time, direct a verdict when the facts are undisputed, and that the jury should follow such direction. The maxim that questions of fact are to be submitted to the jury, and not to be determined by the court, is not violated by this proceeding any more than by a nonsuit in a state court where the plaintiff fails to make out his case. The intervention of the jury is required only where some question of fact is controverted." In Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, it was held that a state statute which authorized the judge presiding at the trial to order a judgment *of nonsuit where the evidence intro-[421 duced by the plaintiff was insufficient in law to sustain a verdict might be followed in the Federal court under Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684, and that the judgment so rendered might be reviewed here upon writ of error. The court said: "The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of this court, 'rather a matter of form than of substance, except [that] in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal. Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 264, 26 L. ed. 539, 541.

"Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of 'practice, pleadings, and forms and modes of proceeding,' as to which the courts of the United States are now required by the act of Congress of June 1, 1872, chap. 255, § 5 (17 Stat. at L. 197), re-enacted in

§ 914 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 684), to conform as near as may be to those existing in the courts of the state within which the trial is had. Sawin v. Kenny, 93 U. S. 289, 23 L. ed. 926; Ex parte Boyd, 105 U. S. 647, 26 L. ed. 1200; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; Glenn v. Sumner, 132 U. S. 152, 156, 33 L. ed. 301, 10 Sup. Ct. Rep. 41." Id. pp. 39, 40.

In other words, a practice which would not have been allowed in the absence of statute was permitted under the statute, because in the substance of the thing it was entirely in accord with the principles of the common law. In Coughran v. Bigelow, 164 U. S. 301, 41 L. ed. 442, 17 Sup. Ct. Rep. 117, the constitutional question was directly presented, and after referring to the ruling in Doe ex dem. Elmore v. Grymes, 1 Pet. 469, 7 L. ed. 224, that in a Federal court there was no authority to order a peremptory nonsuit against the will of the plaintiff (Crane v. Morris, 6 Pet. 598, 8 L. ed. 514; Castle v. Bullard, 23 How. 172, 16 L. ed. 424), the court said:

422] *"The foundation for those rulings was not in the constitutional right of a trial by jury, for it has long been the doctrine of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict. Parks v. Ross, 11 How. 362, 13 L. ed. 730; Schuchardt v. Allen, 1 Wall. 359, 17 L. ed. 642; Pleasants v. Fant, 22 Wall. 116, 120, 22 L. ed. 780, 782. And, in the case of Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 264, 26 L. ed. 541, it was said by Mr. Justice Field, in delivering the opinion of the court, that the difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is 'rather a matter of form than of substance.'

"That the cases above cited, which held that the circuit court of the United States had no authority to order peremptory nonsuits, were based not upon a constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this court, is shown by the recent case of Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 38, 35 L. ed. 55, 60, 11 Sup. Ct. Rep. 478, where it was held that, since the act of the Congress of June 1, 1872, chap. 255, § 5, 17 Stat. at L. 197, re-enacted in § 914 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 684), courts of the United States are required to conform, as near as may be, in questions of 'practice, pleadings, and forms and modes of proceeding,' to those existing in the courts of the state within which the trial is had, and a judgment of the circuit court of the United States for the eastern district of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld. It is the clear implication *of this[423 case that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury.

"As there was a statute of the territory of Utah authorizing courts to enter judgments of peremptory nonsuit, there was no error in the trial court in granting the motion for a nonsuit in the present case, nor in the judgment of the supreme court, affirming such ruling; if, indeed, upon the entire evidence adduced by the plaintiffs, enough did not appear to sustain a verdict." Id. pp. 307, 308.

In the present case, the point is not that the ordinary practice on a motion for the direction of a verdict is identical with that on a demurrer to the evidence, but that the latter as well as the former was clearly permitted by the Constitution, and that the modern application of it, in a convenient form, through the local statute in question, was not a substantial departure.

I do not see that the authorities relied upon in the opinion of the court sustain its ruling. They may be briefly reviewed. In United States v. Wonson, 1 Gall. 5, 20, Fed. Cas. No. 16,750, it was held that where a cause had once been tried by a jury in the district court, there could not be a new trial by a jury in the circuit court. The statement of Mr. Justice Story with regard to the constitutional provision and the importance of trial by jury have obvious reference to cases of disputed questions of fact with which it is the province of the jury to deal. Facts once tried by a jury are not re-examined, and the court is not to substitute its judgment of the facts for the judgment of the jury, but, in such case, should order a new trial.

Applying this rule to the present case, if this court found that on the trial there was any question of fact for the jury to decide, it could not sustain, as it does sustain, the circuit court of appeals, in reversing the judgment for the plaintiff.

*In Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 724.

L. ed. 732, it was held that it was not the intention of Congress by the act of May 26, 1824, chap. 181, 4 Stat. at L. 62, to confer upon this court the power, in reviewing a judgment of the district court of Louisiana, to decide questions of fact which had been passed upon by the jury. The court said that no points of law were brought under review, and that the whole object was "to present the evidence here in order to establish the error of the verdict in matters of fact." The remarks of the court in Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, plainly have reference to the same subject. Thus, it is said that the 7th Amendment "does not attempt to regulate matters of pleading or practice," that "its aim is not to preserve mere matters of form and procedure, but substance of right," and that "this requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In Barney v. Schmeider, 9 Wall. 248, 19 L. ed. 648, the court received the testimony taken on a former trial, but did not have it read to the jury. The court informed the jury of its purport, and directed them to find a verdict in favor of the plaintiff. In other words, the court followed the practice of directing a verdict by a jury without the evidence upon which it should rest being properly presented to the jury. The court overruled the contention that there was not a disputed question of fact, saying, after reviewing the case: "Where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weight and balance the testimony, and not the court's. The proposition is not, therefore, sustained, that nothing but a question of law was to be decided." Id. p. 253.

The cases mostly relied upon are those of Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307; and Baylis v. 425]Travellers' Ins. *Co. 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494. But it is submitted that these cases neither control the matter nor are inconsistent with the principles which I have urged as determinative of this question.

In Hodges v. Easton, supra, there was a so-called special verdict, in answer to questions propounded by the court. But the questions and the verdict in response thereto covered only a part of the material issues of fact. The court gave judgment upon the special verdict and upon what is described as "facts conceded or not disputed upon the trial." What these facts were, which lay outside the verdict, did not appear from the record. "No bill of exceptions was taken showing the evidence introduced by either party, nor was there a general verdict." This court said that having regard alone to the questions and answers propounded to the jury, it was clear that the plaintiffs had not proved their case. If it were presumed that there were no material facts beyond those found by the jury, then the judgment was unauthorized; on the other hand, if there were other material facts, they were found by the court, and not by the jury. As the court pointed out, there was no waiver of a jury, by a stipulation in writing, as provided by the statute (Rev. Stat. §§ 648, 649, U. S. Comp. Stat. 1901, p. 525), and there was "nothing in the record from which such stipulation or waiver may be inferred." The case, then, was one in which the record afforded no basis for a judgment, and there was no alternative but to direct that a trial be had "upon all the material issues of fact."

In Baylis v. Travellers' Ins. Co. supra, the action was upon a policy of insurance to be paid to the plaintiff in case his father "should accidentally sustain bodily injury which should produce death within ninety days." After the close of the testimony, the defendant moved to dismiss on the ground that the evidence was insufficient to support a verdict. The motion was denied, the plaintiff insisting that there were questions of fact which should be *submitted to the jury. The court[426 then directed the jury to find a verdict for the plaintiff, subject to its opinion upon the question whether the facts warranted a recovery. Subsequently the court denied a motion for judgment on the verdict in favor of the plaintiff, and directed judgment to be entered for the defendant. This court reversed the judgment and ordered a new trial.

The pith of the decision is that, despite what the trial judge said regarding the matter, there were really questions of fact for the jury, and that the trial judge could not take the place of the jury in deciding them. The appellant challenged the judgment in this court upon that ground, which was found to be well taken. What was actually decided appears from the following statement of the opinion:

"But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.

"This is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are

correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury.

"In this particular, we think error has been well assigned." Id. pp. 320, 321.

This being the point of the case, it would seem to be rather an extreme construction 427] of the rest of the opinion, *in its references to practice, to treat it as an exhaustive statement of all the possibilities of legislative control over procedure within constitutional limits, or as laying down rules which would preclude the court in a case where there was *no* question of fact for the jury, from following the applicable state practice, or an act of Congress, in entering judgment for the party who, upon the record, was, as matter of law, entitled to it. That, as I regard the decision, is very far from its purpose and effect.

It is said, however, that a new trial affords opportunity to a plaintiff to better his case by presenting evidence which may not have been available before. But we are not dealing with an application for a new trial upon the ground of newly discovered evidence, or with the principles controlling an application of that sort. We are concerned with the question whether a party has a constitutional right to another trial, simply because the trial court erred in its determination of a question of law which was decisive of the case made. Had the trial court done what this court says it should have done, it would have directed a verdict for the defendant; and if the jury, simply following the instruction of the trial court, had so found, final judgment would have been entered and no new trial would now be granted. Still the jury would not have passed upon any question of fact, but would simply have obeyed the judge. The opportunity to better the case on a second trial would probably be as welcome, but it would not be accorded. I am unable to see any basis for a constitutional distinction which raises a constitutional right to another trial in the one case and not in the other.

Of course, in any case, where there are questions of fact for the jury, the court cannot undertake to decide them unless a jury trial is waived. But it would seem to be an entire misapprehension to say that trial by jury, in its constitutional aspect, requires the submission to the jury of evidence which presents no question for their *decision; and that, although there be[428 no facts for the jury to pass upon, still the judgment which follows as matter of law can be arrived at only through a verdict. This is to create a constitutional right out of the practice of taking verdicts by direction. The ancient method of challenging the sufficiency of the evidence by demurrer, and thereupon either discharging the jury altogether or assessing the damages conditionally to await the decision of the demurrer (Darrose v. Newbott, Cro. Car. 143), reveals the function of court and jury in a clearer light, and shows that the idea that the jury upon a trial where there is no evidence to sustain a finding by the jury can be reached only through a verdict could not have been entertained at the time the Constitution was adopted.

To repeat and conclude: All that has been done in the present case could, in substance, have been done at common law, albeit by a more cumbrous method. There has been no invasion of the province of the jury. That conclusively appears from the fact that this court holds that there was no basis for a finding by the jury in favor of the plaintiff. We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record. I submit, with deference, that in now condemning this practice, long followed in the courts below, this court is departing from, instead of applying, the principles of the common law, and is extending rather than enforcing the constitutional provision.

I am authorized to say that Mr. Justice Holmes, Mr. Justice Lurton, and Mr Justice Pitney concur in this dissent.

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*EX PARTE: IN THE MATTER OF[429 WILLIAM J. DANTE, Collector of the Estate of Stilson Hutchins, Deceased, Petitioner.

(See S. C. Reporter's ed. 429-432.)

**Appeal — time for taking — extension — death of party.**

The death of a party to a cause does not extend the twenty days' limitation for taking or perfecting an appeal from the supreme court of the District of Columbia to the court of appeals of the District, prescribed by rule 10 of the latter court, promulgated under the authority of § 6 of the

act of February 9, 1893, 27 Stat. at L. 434, chap. 74, creating that court.

[For other cases, see Appeal and Error, IV. d, 4, in Digest Sup. Ct. 1908.]

[No. 15, Original.]

Argued April 14, 1913. Decided April 28, 1913.

PETITION for a Writ of Mandamus requiring the judges of the Court of Appeals of the District of Columbia to show cause why an action should not be reinstated on the docket of the court, and heard and decided upon its merits. Rule discharged.

The facts are stated in the opinion.

Mr. Edwin C. Brandenburg argued the cause, and, with Messrs. Clarence A. Brandenburg and F. Walter Brandenburg, filed a brief for petitioner.

Messrs. Wharton E. Lester and Michael J. Colbert argued the cause and filed a brief for respondents.

Mr. Chief Justice White delivered the opinion of court:

To a rule commanding the judges of the court of appeals of the District of Colum-430]bia to show cause why a *certain action should not be reinstated on the docket of the court, and heard and decided upon its merits, return was filed and hearing had on the issues raised. Before passing upon those issues we set out the facts of the controversy.

On April 16, 1912, in an action pending in the supreme court of the District of Columbia, a verdict was returned in favor of the plaintiff India Bagby against Stilson Hutchins. After the filing of a motion for a new trial, and in arrest of judgment, and on Sunday, April 21, 1912, Hutchins died. On May 3, 1912, the trial court overruled the motions and entered judgment *nunc pro tunc* as of the date of the verdict. The rules required the taking of appeals to the court of appeals of the District within twenty days from a judgment, and, although no representative of the estate had been appointed, the former attorneys of Mr. Hutchins noted an appeal within the time limited, styling themselves "attorneys for the defendant, and on behalf of the executors named in his last will." Owing to a contest over the admission of such will to probate, William J. Dante was appointed collector of the estate on June 14, 1912, and soon afterwards was authorized to enter his appearance in the Bagby *Case, with* authority to "take such steps as *may be necessary to prosecute* an appeal from the judgment entered therein." He then moved in the trial court to vacate and set aside the judgment against Hutchins upon the ground that the court was without power or authority in the premises, "inasmuch as the cause abated upon the death of said Stilson Hutchins; and upon the further ground that no one representing said estate had been appointed at the time of the hearing upon said motion or the entry of said judgment." On June 22, 1912, the trial court ordered the action revived in the name of Dante, as collector, in the place and stead of Hutchins, but denied the motion to vacate the judgment. The order concluded as follows: *"The[431 said William J. Dante, collector of the estate of Stilson Hutchins, by his attorneys, in open court, notes an appeal to the court of appeals of the District of Columbia," followed by a recital as to the penalty of the bond for costs. The citation which issued, dated June 24, 1912, required the appellee "to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf." On June 25, 1912, a bill of exceptions was signed and made a part of the record, containing the substance of the evidence taken at the trial in which judgment was entered against Hutchins. In the court of appeals counsel for Bagby moved to dismiss the appeal taken in the name of Hutchins because "futile;" and to dismiss the appeal taken in the name of collector Dante, on the ground that if it was from the judgment, it was too late, and if from the order refusing to vacate the judgment, that order was not appealable. The hearing of the motion was postponed to the merits. On January 6, 1913, however, after the cause had been argued on the merits, the court below granted the motion to dismiss the appeal of the collector, on the ground that the order allowing the appeal was from the decision on the motion to vacate the judgment, and no appeal lay from such an order. On the state of facts just detailed, and the averment that the dismissal of his appeal without consideration of the merits of the judgment recovered by Bagby deprived the petitioner "of a substantial property right without due process of law," relief by mandamus was prayed, and we allowed a rule to issue.

From the answer to the rule it appears that the death of Hutchins was suggested to the trial court on April 23, 1912, and that on motion of the former attorneys of Hutchins the motions in arrest of judgment and for a new trial were continued to May 3, and on that day were overruled

and the judgment entered *nunc pro tunc.* 432] It is *also shown that from the organization of the court of appeals, pursuant to the powers conferred upon the justices of that court by § 6 of the act of Congress of February 9, 1893 [27 Stat. at L. 434, chap. 74], creating the court, there was promulgated a rule known as rule 10, in the 1st section of which it is provided as follows:

"No order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, shall be reviewed by the court of appeals, unless the appeal shall be taken within twenty days after the order, judgment, or decree complained of shall have been made or pronounced."

This rule is still in force and has been interpreted to include the perfecting of an appeal by filing bond, and is the only rule governing the time within which appeals from the supreme court of the District shall be taken or perfected; and there is no statute or rule which extends the time for taking or perfecting an appeal in the event of the death of a party to the cause. Under these circumstances we are of opinion that whatever may be the scope of the appeal noted by the collector, as the time for appealing from the judgment had expired long prior to the making of the order, the court did not err in dismissing the appeal. The rule, therefore, must be and it is discharged.

Rule discharged.

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433] *SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.
P. R. MOORE.

(See S. C. Reporter's ed. 433-435.)

**Appeal — harmless error.**

Holdings of a circuit court of appeals, when affirming a judgment of a circuit court in an action to recover damages for personal injuries, to the alleged effect that the Federal employers' liability law abolished, as to all cases coming under its provisions, the defense of assumption of risk, and that a railroad employee injured in the course of his employment could avail himself of the benefits of the statute, although at the time of the injury he was not actually engaged in interstate commerce, furnish no ground for reversal, where the benefit of the defense of the assumption of risk was accorded to the railway company at the trial, and the right of the employee to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce.

[For other cases, see Appeal and Error, VIII. m, in Digest Sup. Ct. 1908.]

[No. 609.]

Argued and submitted December 3, 1912. Decided April 28, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Florida in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, 113 C. C. A. 668, 193 Fed. 1022.

Mr. James F. Glen submitted the cause for plaintiff in error. Mr. P. O. Knight was on the brief.

Mr. George C. Bedell argued the cause, and, with Messrs. Horatio Bisbee, Hilton S. Hampton, Roswell King, and A. H. King, filed a brief for defendant in error.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White:

The defendant in error sued to recover damages for injuries sustained on October 6, 1909, while in the employ *of the[434 railway company as a foreman of switch engines, in being thrown from an alleged defective step or footboard of a switch engine. The case was submitted to a jury upon a single count of the declaration. The jury was specially instructed that it was the duty of the plaintiff to prove the existence of the defect complained of, that it was a defect of such a character as to cause its existence to be a negligent failure of the defendant to properly equip its engine, that the defect was the proximate cause of the injury, and that the plaintiff was, at the time he was injured, "engaged in interstate commerce." The jury was also instructed that the burden of proof was upon the railway company to establish the truth of defenses interposed by it of contributory negligence and assumption of risk. A judgment entered for the plaintiff upon a verdict in his favor was affirmed by the circuit court of appeals, in a brief opinion, and this writ of error was then prosecuted.

The matters pressed upon our attention on behalf of the plaintiff in error embrace assertions of the commission of error by the circuit court of appeals in deciding that the trial court rightly refused to give instructions asked on behalf of the railway company, covering the various issues raised by the pleadings. Based upon a statement made in the opinion of the court below to the effect that the case of Second Employers' Liability (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, was decisive of the constitutionality and applicability to the case of the employers' liability

law, and, moreover, disposed of a number of contentions urged in the assignments of error filed below, it is pressed upon our attention that the court decided and erred in deciding that the employers' liability law abolished, as to all cases coming under its provisions, the defense of assumption of risk, and, also, that a railroad employee injured in the course of his employment could avail of the benefits of the statute, although at the time he sustained the in-435]jury he *was not actually engaged in interstate commerce. But we think it is plain that the contentions last stated are without merit, and that the only even pretext afforded for their assertion arises from a misconception of the opinion below, which, we think, despite its meager and maybe inadequate examination of the case, nevertheless on its face rebuts the inferences which the contentions attempt to draw from it. It is unnecessary to recur to the text of the opinion to demonstrate the conclusion just stated, because in any event the contentions must be overruled, since the benefit of the defense of assumption of risk was accorded to the railway company at the trial, and the right of the plaintiff to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce. Indeed, in a bill of exceptions, certified by the trial judge, it was stated that there was evidence tending to show that the freight train in question was engaged in hauling two freight cars which were loaded with lumber "destined to be shipped to the terminal of the Tampa Northern, at Hooker's Point, near Tampa, and there unloaded, and to be afterwards shipped by schooner to a point in the state of New Jersey." Coming to consider the errors alleged to have been committed in sustaining refusals of the trial court to give requested instructions, we content ourselves with saying, after an adequate examination of the record, and in the light of the various bills of exceptions therein set forth, containing the "substance and effect" of the evidence, that we think the charge as given by the trial court fully and correctly stated the applicable law. As "we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the courts below," the judgment of the Circuit Court of Appeals must be affirmed. Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

Affirmed.

*EDWARD B. JORDAN, Collector of [436
Internal Revenue,
v.
JAMES W. ROCHE. (No. 202.)

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EDWARD B. JORDAN, Collector of Internal Revenue,
v.
CHARLES H. ROSS and William P. Ross. (No. 203.)

(See S. C. Reporter's ed. 436-446.)

**Internal revenue — Porto Rican manufactures — duties.**

1. The tax "equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture" which, under the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 3, is collectable on Porto Rican manufactures coming into the United States, in addition to the duty of 15 per cent of the duties levied upon like articles imported from foreign countries, is not a "tariff duty" within the meaning of the provision of that section that whenever the legislature of Porto Rico shall put into operation a system of local taxation, the President shall make proclamation thereof, and thereupon all tariff duties upon imports or exports between the United States and Porto Rico shall cease.

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

**Internal revenue — tax on Porto Rican manufactures — similitude.**

2. Substance, and not name, is the test of the likeness between articles of domestic and Porto Rican manufacture for the purpose of fixing the tax on importations of articles of Porto Rican manufacture which, under the act of April 12, 1900, § 3, is to be "equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture."

[Federal taxation, see Internal Revenue, in Digest Sup. Ct. 1908.]

**Internal revenue — tax on Porto Rican manufactures — bay rum.**

3. Importations of bay rum from Porto Rico were subjected to a tax equal to the internal revenue tax on distilled spirits by the provision of the act of April 12, 1900, § 3, that articles of merchandise of Porto Rican manufacture, coming into the United States, shall pay a tax "equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture."

[For other cases, see Internal Revenue, III. j, 1, in Digest Sup. Ct. 1908.]

**Statutes — legislative construction — internal revenue.**

4. The imposition of a specific tax upon bay rum imported from Porto Rico, which was made by the act of February 4, 1909 (35 Stat. at L. 594, chap. 65, U. S. Comp. Stat. Supp. 1911, p. 962), was not a congressional declaration that bay rum so imported was not subject to a tax under prior statutes.

[For other cases, see Statutes, 249–255, in Digest Sup. Ct. 1908.]

[Nos. 202 and 203.]

Argued April 15, 1913. Decided April 28, 1913.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting the question whether bay rum imported from Porto Rico was subject to a tax equal to the internal revenue tax on distilled spirits. Answered in the affirmative.

The facts are stated in the opinion.

Assistant Attorney General Harr argued the cause and filed a brief for Edward B. Jordan, Collector:

The Foraker act has always been construed by the Treasury Department as subjecting Porto Rican bay rum coming into the United States and withdrawn for consumption or sale to taxation as "distilled spirits" according to its alcoholic contents. This contemporary, uniform, and long-continued construction of the act should be held to remove any possible doubt as to the construction of the statute.

Pennoyer v. McConnaughy, 140 U. S. 1, 23, 35 L. ed. 363, 370, 11 Sup. Ct. Rep. 699; Schell v. Fauché, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376.

The present cases suggest a change of view on the part of those courts which in 1906 and 1908 held that Porto Rican bay rum, imported and withdrawn for consumption or sale, was not taxable as "distilled spirits."

Roche v. Jordan, 175 Fed. 237.

Mr. John David Lannon argued the cause, and, with Messrs. Henry J. Webster and Howard T. Walden, filed a brief for James W. Roche and Ross & Ross:

The act of February 4, 1909, taxing bay rum imported from Porto Rico, was a declaration by Congress that it was not subject to a tax under prior statutes.

United States v. Freeman, 3 How. 556, 564, 11 L. ed. 724, 727; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 309, 55 L. ed. 738, 747, 31 Sup. Ct. Rep. 578; Cope v. Cope, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222; Morris v. Mellin, 57 L. ed.

6 Barn. & C. 454; Alexander v. Alexandria, 5 Cranch, 1, 7, 3 L. ed. 19, 20.

If, however, this court is not satisfied that the proper interpretation of the Foraker act is thus obviously shown by the passage of the act of February 4, 1909, resort may be had to the other rules governing the construction of statutes to ascertain the intent of the Congress in passing it.

Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; United States v. Press Pub. Co. 219 U. S. 1, 13, 55 L. ed. 65, 68, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Ex parte Milligan, 4 Wall. 2, 114, 18 L. ed. 281, 293; Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 624, 28 L. ed. 1109, 1111, 5 Sup. Ct. Rep. 606; Platt v. Union P. R. Co. 99 U. S. 48, 64, 25 L. ed. 424, 429.

Porto Rican bay rum is the article of merchandise "like" to bay rum of domestic manufacture, and not "like" to distilled spirits of domestic manufacture.

Anheuser-Busch Brewing Asso. v. United States, 207 U. S. 556, 562, 52 L. ed. 336, 338, 28 Sup. Ct. Rep. 204; United States v. Semmer, 41 Fed. 326; Newhall v. Jordan, 149 Fed. 586; Anderson v. Newhall, 88 C. C. A. 511, 161 Fed. 906; United States v. Stubblefield, 40 Fed. 454; United States v. Wilson, 69 Fed. 144.

Bay rum manufactured in the United States is not subject to an internal revenue tax.

Newhall v. Anderson, 88 C. C. A. 511, 161 Fed. 908.

In construing taxing statutes, the taxpayer, in this case the importer, is entitled to the most favorable construction, and any doubt is to be resolved in his favor.

Hartranft v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55.

Mr. Justice McKenna delivered the opinion of the court:

Actions were brought in the circuit court, eastern district of New York, to recover money paid upon certain importations of bay rum from Porto Rico. Judgment was entered for defendants in the actions, and error was prosecuted from the circuit court of appeals for the second circuit, and that court certifies the following question to this court:

"Was bay rum imported from Porto Rico subsequent to the passage of the act of April 12, 1900 (31 Stat. at L. 77, chap. 191),

and prior to the passage of the act of February 4, 1909, subject to the payment of a tax equal to the internal revenue tax imposed in the United States, under §§ 3248, and 3254 (U. S. Comp. Stat. 1901, pp. 2107, 2111), on 'distilled spirit, spirits, alcohol, and alcoholic spirit?' "

The facts are these: In the years 1907 440]and 1908 plaintiffs *imported from the island of Porto Rico certain casks of bay rum manufactured in said island. Upon arrival at the port of New York, the collector of internal revenue for the first district collected taxes upon the same under the act of April 12 and §§ 3248 and 3254 of the Revised Statutes of the United States. Plaintiffs duly protested against such exaction and paid the same to obtain delivery of the goods. Bay rum is a fragrant spirit obtained by distilling rum with the leaves of the bay berry, or by mixing various oils with alcohol.

The act of April 12, 1900, referred to in the question certified, is known as the Foraker act. Section 3 provides that after the passage of the act all merchandise coming into the United States from Porto Rico, and reversely, shall be subject to a duty of 15 per cent of the duties which were required to be levied upon like articles imported from foreign countries, and, in addition thereto articles of merchandise of Porto Rican manufacture coming into the United States shall pay "a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." Articles of United States manufacture coming into Porto Rico were required to pay a tax equal to the internal revenue tax imposed on like articles of Porto Rican manufacture. It was provided that whenever the legislature of Porto Rico should put into operation a system of local taxation, the President should make proclamation thereof, and thereupon all *tariff duties* upon goods going from the United States into Porto Rico, or from Porto Rico to the United States, should cease, and all such articles should be free of duty.

Section 4 of the act provided that the duties and taxes imposed under § 3 should not be paid into Treasury of the United States, but should be placed at the disposal of the President, to be used for the government of Porto Rico, and that upon the or-441]ganization of the government *of Porto Rico such moneys should be transferred to the local treasury of Porto Rico, the duties and taxes to be collected at such ports and by such officers as the Secretary of the Treasury should designate. And it was provided that as soon as civil government was established in Porto Rico, the President was to make proclamation thereof, and thereafter all duties and taxes in Porto Rico under the provisions of the act should be paid into the treasury of Porto Rico and expended as required by law.

The proclamation of the President, referred to in § 3, was issued July 25, 1901 (32 Stat. at L. p. 1983), and all *tariff* duties on merchandise coming into the United States from Porto Rico ceased. The internal revenue tax upon articles of Porto Rican manufacture remained as that imposed "upon the like articles of merchandise of domestic manufacture" (§ 3). This, however, plaintiffs dispute, contending that the Foraker act was intended to be, and was declared to be, an act temporarily to provide revenue, and that with the institution of a system of taxation in Porto Rico the act ceased to have operation. The contention is untenable. The act explicitly declares that the *tariff duties* shall cease. The distinction was deliberate and its effect unmistakable. We repeat, therefore, that the internal revenue tax upon Porto Rican articles remains as that imposed "upon the like articles of domestic manufacture." Upon the quoted words the controversy in this case turns. What shall determine the likeness between articles of domestic and Porto Rican manufacture,—their name or their substance? The latter is the government's contention; the former is that of plaintiffs.

The contention of plaintiffs has the support of Newhall v. Jordan in the circuit court of the eastern district of New York (149 Fed. 586); also of the circuit court of appeals of the second circuit in Anderson v. Newhall, 88 C. C. A. 511, 161 Fed. 906, sustaining a judgment of the circuit *court of the southern district of New[442 York. But the circuit court of appeals seems to have come to doubt the correctness of its ruling, for the present certificate is from that court, and bears the signature of Judges Lacombe and Ward, who constituted a majority of the court when Anderson v. Newhall was decided. We realize, therefore, that the contentions of the parties present a close question.

Bay rum is a fragrant spirit obtained by distilling rum with the leaves of the bay berry, or by mixing various oils with alcohol. We must seek its likeness in the revenue laws, and the government contends that it is found in §§ 3248, 3254, 3251, and 3282 (U. S. Comp. Stat. 1901, pp. 2107, 2111, 2108, 2128), as respectively amended by the acts of August 27, 1894 (28 Stat. at L. 509, 563, chap. 349, U. S. Comp. Stat. 1901, 2109), and March 1, 1879 (20 Stat. at L. 327, 335, chap. 125, U. S. Comp. Stat. 1901, pp. 2060, 2128).

Plaintiffs contend that "Porto Rican bay

rum is the article of merchandise 'like' to bay rum of domestic manufacture, and not 'like' to distilled spirits of domestic manufacture." And then insisting, and quoting the Commissioner of Internal Revenue in support of the insistence, that, as there is no internal revenue tax imposed on bay rum, as such, it follows necessarily "that if bay rum of domestic manufacture does not pay a tax, then the article of Porto Rican manufacture is not liable to pay a tax." And stress is put upon "manufacture" as defined in Anheuser-Busch Brewing Asso. v. United States, 207 U. S. 556, 562, 52 L. ed. 336, 338, 28 Sup. Ct. Rep. 204, where it is said: "There must be a transformation; a new and different article must emerge, 'having a distinctive name, character, and use.'" And bay rum, it is asserted, satisfies the distinction and has been regarded as satisfying it in the laws, also commercially and practically. It has never been treated, it is said, as distilled spirits, but has been treated as different "by every person and every court and every department of the government until these Porto Rican imports were made." This is the substance of plaintiffs' argument. We cannot follow it in its details.

443] *The government replies to it that the purpose of the Foraker act was to apply the revenue laws of the United States to Porto Rican articles, and to do this comprehensively; not by special or variable adaptations. No article containing alcoholic spirits, the government says, is taxed in the general statutes of the United States by its commercial name, but that all such articles are provided for and taxed in chapter 4 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2104) under the name of "distilled spirits." It is hence argued that domestic bay rum being "distilled spirits" for the purpose of internal revenue taxation, Porto Rican bay rum must be considered as "distilled spirits" and subject to the same tax. In other words, the likeness is established by the essential nature of the article, not by its name. "If this be not so," it is further argued, "not only will the internal revenue tax on Porto Rican bay rum fail, but the tax on Porto Rican alcohol, whisky, brandy, gin, ordinary rum, and on all wines, liqueurs, and cordials, will also fail, because no tax is laid on any such article *eo nomine* by our internal revenue laws, but all are embraced in one generic article, 'distilled spirits.'" We think the argument is complete and irresistible. The purpose of the Foraker act, the provisions of the internal revenue laws, and the administration of both, by departmental officers, all concur in support of the government's contention. The purpose of the Foraker act was the equal taxation of Porto Rican articles and domestic articles; the provisions of the internal revenue laws do not describe articles by name, but by character; the revenue officers have construed them as applicable to Porto Rico, except for a few months, following the decision in Anderson v. Newhall, collector.

The language of the revenue laws is comprehensive enough to cover all distilled spirits. Section 3248, after specifically defining them to be "that substance known as ethyl alcohol, hydrated oxid of ethyl, or spirit of wine, which is commonly produced by the fermentation of *grain, starch, mo-[444 lasses, or sugar, including all dilutions and mixtures of this substance," provides that "the tax shall attach to this substance as soon as it is in existence as such," no matter in what state it may be subsequently separated, or in what other substance it may be subsequently transferred.

By § 3254 it is provided that "all products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits." In other words, all mixtures or dilutions of the substance so defined, and more specifically in § 3248, are subject to a tax as "distilled spirits." And it is provided in § 3282, as amended, that the use of "spirits or alcohol, in manufacturing vinegar or any other article, or in any process of manufacture whatever," is prohibited, "unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid."

The purpose of the law to impose a tax upon the compounds of alcohol under the single designation of "distilled spirits" receives confirmation from the exemptions from the tax. Six exemptions are pointed out by the government, as follows: (1) alcohol withdrawn for scientific purposes by scientific institutions or colleges of learning; (2) wine spirits used in the fortification of sweet wines under certain restrictions; (3) distilled spirits used in the manufacture of sugar from sorghum, or (4) purchased by the United States for government uses, or (5) exported in bond or with benefit of drawback of taxes paid; and (6) distilled spirits denatured in accordance with the denatured alcohol act.

These considerations demonstrate, we think, that bay rum is subject to a tax as an alcoholic distillate.

We have already stated the chief contention of plaintiffs to be that the test of a tax on Porto Rican articles must be a tax upon domestic articles of like name, and that this is *especially so as to bay rum, it[445 is contended, is established by the fact that

under the tariff act, bay rum, as a commercial article, is taxed at a lower rate than brandy and other spirits not specifically provided for. And, further, that bay rum, under the revenue act of June 13, 1898 [30 Stat. at L. 463, chap. 448], was taxed or held taxable by the Commissioner of Internal Revenue under the head of "perfumery and cosmetics." So also the ruling of the Commissioner, it is urged, refusing to hold that druggists and bay rum dealers were liquor dealers, which, it is contended, he would necessarily have to hold them to be, if bay rum were to be considered an alcoholic distillate. It is not necessary to answer these contentions in detail. They have, when taken by themselves, an appearance of strength. They may, however, be explained by other statutory provisions. A general answer to them is that the purpose of the Foraker act was, as we have said, to subject Porto Rican articles to the internal revenue laws of the United States, and under those laws, articles are taxed not by their commercial names or uses, but according to their alcoholic content, under the generic name of "distilled spirits."

One other contention of plaintiffs we may notice. On February 4, 1909 [35 Stat. at L. 594, chap. 65, U. S. Comp. Stat. Supp. 1911, p. 962], Congress passed the act by which it is provided "that upon bay rum, or any article containing alcohol, hereafter brought from Porto Rico into the United States for consumption or sale, there shall be paid a tax of one dollar and ten cents per proof gallon," and the Commissioner of Internal Revenue is given power to establish rules to make the act effective. It is insisted that this act is a declaration by Congress that bay rum was not subject to a tax under prior statutes. The history of the act rejects the contention and manifests that the act was passed in consequence of the decision in Anderson v. Newhall, and the other 446]decisions to which we have *referred. The law was not the declaration of a new policy, but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law.

The question certified is therefore answered in the affirmative.

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JAMES L. BRADFORD, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 446-454.)

**District attorney — powers — binding government.**

*A pardon granted* by the President to a person *convicted of defrauding* the government of certain public lands, and charged with fraud in regard to others, upon condition that he shall first have made full restitution to the satisfaction of the Federal district attorney in respect to all lands, land titles, or claims to lands, gives the latter no authority to bind the government to reimburse the accused for the value of the improvements made by him and the taxes paid by him on any such lands.

[For other cases, see District Attorneys, III., in Digest Sup. Ct. 1908.]

[No. 571.]

Submitted March 24, 1913. Decided April 28, 1913.

APPEAL from the Court of Claims to review the dismissal upon demurrer of a suit to recover for improvements and taxes upon lands relinquished to the United States in consideration of a pardon. Affirmed.

See same case below, on demurrer, 47 Ct. Cl. 141.

Statement by Mr. Justice McKenna:

Suit in the court of claims under the Tucker act [24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752], so-called, to recover the sum of $15,791.92.

*The petition was dismissed upon[447 demurrer.

The facts, as alleged, are these: Appellant is the owner of tracts of land, each containing 160 acres, in the parish of Ascension, state of Louisiana, which have been in his possession and ownership since, respectively, the 10th of October, 1898, 14th of September, 1901, and the 12th of December, 1902. The lands at certain times prior to those dates were public lands of the United States, and subject to entry under § 2289 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1388). One of the tracts was entered under such section by one Robert H. Cox, whose entry resulted in a final certificate being issued to him on April 4, 1908, by the local land officers at New Orleans. On March 5, 1898, after he had made and submitted his final proof, he conveyed 100.45 acres of the land to one Uhlhorn, and on December 27, 1898, the latter sold and conveyed the same to appellant. On January 2, 1901, Cox conveyed the remaining lands to Leon and Julius Weil, with right of redemption. On certain subse-

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NOTE.—On conditional pardons—see notes to People v. Cummings, 14 L.R.A. 286, and Ex parte Wells, 15 L. ed. U. S. 421.

On the effect of pardon—see note to Armstrong's Foundry v. United States, 18 L. ed. U. S. 882.

quent dates Cox sold and relinquished to appellant his right of redemption.

On April 6, 1900, the Commissioner of the General Land Office suspended the entry of Cox upon the report of two special agents of the Land Office, but neither Cox nor appellant was notified of such suspension, and no proceedings were had thereon until one Elijah Green filed in the local land office at New Orleans an application to contest Cox's entry, charging that it had been made for fraud of law, in that it had not been made for his own use and benefit, but for the benefit of appellant. The contest, under the rules of practice, was referred to the Commissioner of the General Land Office, who decided, on May 26, 1902, that Green's application could not be permitted for the reason that Cox's entry had been confirmed by § 7 of the act of Congress of March 3, 1891 (26 Stat. at L. 1095, chap. 561, U. S. Comp. Stat. 1901, p. 1535), more than two years having elapsed between the date of the issue of the final 448]certificate of the entry, and *the date of Green's application. The Secretary of the Interior affirmed the decision.

On February 16, 1903, Cox filed in the local land office at New Orleans a pretended relinquishment of the entry, accompanied by his affidavit executed January 13, 1903, alleging that he had made the entry in fraud of the law, for the benefit of appellant. The papers were transmitted to the Commissioner of the General Land Office, and that officer on May 3, 1904, held the entry for cancelation, and required appellant to apply for a hearing upon the truth or falsity of Cox's averments on pain of forfeiture of his rights under the entry. Appellant applied for a hearing, denied by affidavit the averments of Cox, and set up as a defense, the order of the Commissioner and the Secretary of the Interior, deciding that the entry had been confirmed by the act of Congress of March 3, 1891. The hearing was never held or granted to appellant, and he has not up to this time been given an opportunity to show, as he could show if he were given opportunity, that Cox's charges were false in every particular, and that he, appellant, was a bona fide purchaser for value of the lands embraced in the entry. On the contrary, on April 26, 1905, an indictment was filed against him in the United States district court for the eastern district of Louisiana, charging him with an attempt to defraud the United States, and alleging as an overt act his application for a hearing of the charges made by Cox. The indictment was quashed October 31, 1907, by the United States district attorney, with leave of the court.

On the 24th day of April, 1909, the Commissioner of the General Land Office, upon the consideration of the pretended relinquishment of Cox, canceled the entry, and held that the lands were open to entry by other persons, and entries of the lands have been made.

The second tract described in the petition was entered under the homestead law, by one T. R. Cox, and *through certain [449 mesne conveyances appellant became its owner.

On April 6, 1900, the Commissioner of the General Land Office, in consequence of the report of the agent of the office, suspended the entry, but no official notice of the suspension was given to appellant, and no further proceedings were ever had on the suspension of the entry.

On February 17, 1902, Cox, by a fictitious act of sale, for a nominal consideration, undertook to convey 140 acres of his entry to one S. B. Moore, for the purpose of defrauding appellant.

On March 19, 1902, one Leslie B. Wright filed a contest against the entry, making Cox, Moore, and appellant parties. The local land office decided the contest in favor of appellant, holding that the conveyance to Moore was fictitious and fraudulent, and was executed to defeat appellant's title. Wright appealed from the ruling to the Commissioner of the General Land Office, who affirmed the decision December 1, 1902.

On December 8, 1903, upon a request of a special agent of his office, the Commissioner recalled his decision, and on January 2, 1904, vacated the same without notice to anyone or giving appellant an opportunity to meet the charges, the Commissioner stating that his action had been taken on facts disclosed by the special agent's reports made after the decision.

On April 26, 1905, an indictment under § 5440 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3676) was filed against appellant, alleging as an overt act appellant's appearances before the local land office in the contest by Wright. No trial or other proceedings were had upon the indictment, and, on October 31, 1907, it was quashed by the district attorney, with leave of the court.

On October 14, 1908, without further notice to appellant, the Commissioner of the General Land Office reversed the decision of the local land officers in the contest by *Wright, and canceled the homestead [450 entry of Cox, thereby undertaking to defeat appellant's right and title to the lands as a bona fide purchaser thereof. The Secretary of the Interior affirmed the decision.

Appellant, through his counsel, filed a motion for review, but was compelled to abandon the same by threats of criminal

proceedings under § 5440 of the Revised Statutes of the United States.

The third tract was entered under the homestead law by one Nancy L. Cotton, and final proof was made by her and a final certificate was issued to her. She sold the lands to one Fluker, and the latter conveyed them to appellant.

On February 24, 1904, an indictment was filed against appellant and one Wright, in the circuit court of the United States for the eastern district of Louisiana, under § 5440 of the Revised Statutes. The indictment was, on motion of the district attorney, quashed.

On May 28, 1903, a contest was instituted against the entry of Nancy L. Cotton, charging fraud in the initiation thereof. Notice of the contest was given to Wright, but not to her. Such proceedings were had thereon that a decision was rendered sustaining the contest and recommending the cancelation of the entry. Appellant appealed from the decision, but was forced to withdraw his appeal by threats of criminal prosecution. The entry was thereupon canceled and the lands subsequently entered by another, whose entry is now intact.

The petition alleges the good faith of appellant's purchase of all of the tracts, that he paid to the state of Louisiana taxes thereon, constructed roads to have access to them, and cleared them of timber and otherwise improved them.

The petition further represents that appellant, being in the parish prison at the parish of New Orleans in the summer and fall of the year 1907, under proceedings in two criminal suits, neither of which had 451]relation to or connection with *the lands covered by the entries described, and being above the age of seventy-six years, in bad health and in danger of his life, he applied for a pardon. The pardon was granted on the 5th of September of the same year, but the condition was imposed by W. W. Howe, the then district attorney of the United States for said eastern district of Louisiana, that appellant should relinquish to the United States the lands described in the entries.

The pardon is attached to the petition and recites appellant's conviction for violation of § 5440, Revised Statutes, in two cases, in each of which he was sentenced to imprisonment for one year, and in one, to pay a fine of $3,000, and in the other a fine of $2,500. The sentences were commuted to the payment of the fines and costs "upon condition that he [appellant] shall have previously made full restitution to the satisfaction of the United States district attorney for the eastern district of Louisiana in respect to all lands, land titles, or claims to lands."

Thereupon appellant executed releases of the three tracts, which were the same, the description of the lands only being different They were as follows:

"I hereby relinquish to the United States all my right, title, and claim in and to the following described lands, to wit: . . . reserving, under the laws of Louisiana, the right to all improvements, or the value thereof, with all taxes heretofore paid, and to proceed against the United States for the same."

Appellant cleared portions of the lands to put them in fit condition for cultivation, and also built two good dwelling houses thereon, all which were in a good state of preservation at the time he signed the relinquishment to the government. Appellant also had made other improvements "usual and necessary for the profitable and successful cultivation and carrying on of a farm or plantation in that part of Louisiana."

*Attached to the petition are exhib-[452 its specially describing the improvements and showing the amount expended on the first tract to have been $8,741.60; on the second tract, $5,765; on the third tract, $798, and $487.32 taxes.

The government accepted the relinquishment and permitted the lands to be entered for homestead purposes by other parties.

It is alleged that the United States, by accepting the relinquishment of the lands, became bound and contracted with appellant to pay to and reimburse him for the price and value of the improvements made by him on the lands and the taxes paid by him. Certain articles of the Code of Louisiana are set out which, it is alleged, existed, and that they were specifically relied on by appellant and adopted and accepted as the measure of appellant's rights in the premises by the United States district attorney and by the Land Department of the United States, in accepting and filing the several relinquishments, whereby, it is further alleged, the United States contracted to pay petitioner the amount and value of his improvements made upon the lands, and the taxes.

Mr. Harvey M. Friend submitted the cause for appellant:

The President, as the supreme executive authority of the country, had the right to attach such a condition to the pardon as he might choose to do, provided such condition was not illegal in and of itself.

Ex parte Wells, 18 How. 307, 315, 15 L. ed. 421, 425; Ex parte Garland, 4 Wall. 333, 380, 18 L. ed. 366, 370.

The government, when contracting with an individual, is bound by the same rules and is entitled to no greater consideration at the hands of a court than is such individual.

Lyons v. United States, 30 Ct. Cl. 352; Southern P. Co. v. United States, 28 Ct. Cl. 77; Smoot's Case, 15 Wall. 36, 21 L. ed. 107.

The United States District Attorney had legal authority to enter into this contract with appellant.

Hodgson v. Dexter, 1 Cranch, 345, 363, 2 L. ed. 130, 136; Sheets v. Selden, 2 Wall. 177, 187, 17 L. ed. 822, 825.

Mr. George M. Anderson submitted the cause for appellee. Assistant Attorney General Thompson was on the brief.

Mr. Justice McKenna delivered the opinion of the court, after stating the facts as above:

It will be observed from the allegations of the petition that appellant not only had been convicted of defrauding the government of certain lands, but that he was charged with fraud in regard to the lands which he relinquished, and on account of which he contends a contract arose between him and the government. This must be re-453 ]garded *as an element in the consideration of the case. Appellant was a convicted wrongdoer in two cases; he was a suspected wrongdoer in the other cases, and from that standpoint the government dealt with him; and he was a petitioner for a pardon. The pardon was granted, but upon terms. He was to make restitution for his wrongdoing. The defrauded government was to be made whole. And not by wresting from him a right, either directly or through the coercion of circumstances, but by his voluntary reparation, securing thereby the government clemency.

Appellant, therefore, was not deprived of his lands in the sense for which he contends, nor evicted from them. He voluntarily relinquished them for a benefit to himself. But he asserts that the relinquishment was upon conditions especially reserving rights which put the United States under indebtedness to him. The contention is anomalous. Convicted of two offenses and under sentence for them, and suspected of others, he asks that not only the punishment may be remitted, but that reimbursement of expenses and outlays be made him. And this he bases on the agency which he contends was given the district attorney and the effects of the laws of Louisiana.

Plainly the power of the district attorney was limited by the subject-matter of his agency. He was to secure restitution, not to engage for payments by the United States, amounting to over $15,000,—payments for something which could be of no benefit to the United States, which would be mere uncompensated outlay; not reparation received from appellant, but indemnity given to him. And it is to be observed that the restitution was to be "in respect to all lands, land titles, or claims to lands." It is true that the restitution was to be made to the "satisfaction" of the district attorney, but this did not enlarge his agency to do more than accept restitution.

As we have seen, appellant had been convicted in certain *cases, he had been [454 accused in others, charged with fraud in the entries here involved, found to have practised it. This being the situation, the agency conferred upon the district attorney comprehended such adjustments as would free the lands from the encumbrances of appellant's acts. The district attorney had not the power, as appellant contends, as an individual in like situation. We are not, therefore, called upon to consider what rights the laws of Louisiana gave to appellant, or whether they could give any, nor whether, if the United States is not bound by the condition in the relinquishments, the latter are void. It is only necessary to decide that appellant has not established a contract against the United States.

Judgment affirmed.

The Chief Justice took no part in the decision.

Rehearing denied June 16, 1913. See post, p. 1630.

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MADERA WATERWORKS, Appt.,
v.
CITY OF MADERA et al.

(See S. C. Reporter's ed. 454-457.)

Constitutional law — impairing contract obligations — exclusive privileges — municipal competition.

1. The privilege of using the city streets for water supply purposes in cities having no municipal plant, which was granted to private enterprises by Cal. Const. art. 11,

Note.—On the privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts—see note to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 145.

On the establishment and regulation of municipal water supply—see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 34.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 913

§ 19, subject to the rights of the municipal government to regulate the charges, coupled with the duties imposed by art. 14, §§ 1, 2, and Cal. act of March 7, 1881, §§ 1, 7, 8, upon the municipality to fix water rates annually, and upon the water company to comply with the regulations, does not import a contract that the private person or corporation constructing a plant as invited shall not be subject to competition from the public source.

[For other cases, see Constitutional Law, 1214-1223, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — equal protection of the laws — municipal competition.**

2. The property of a private waterworks company is not taken contrary to U. S. Const., 14th Amend., by the municipal construction of a competing plant, where there is no contract immunity from such competition, although the waterworks company may be forbidden by the local law to divert its property to other uses, and will be called upon to pay taxes to help its rival to succeed.

[For other cases, see Constitutional Law, IV. b, 4; IV. e, in Digest Sup. Ct. 1908.]

[No. 229.]

Argued April 17 and 18, 1913. Decided April 28, 1913.

APPEAL from the Circuit Court of the United States for the Southern District of California to review a decree sustaining a demurrer to and dismissing the bill in a suit to enjoin the construction of a municipal waterworks plant. Affirmed.

See same case below, 185 Fed. 281.

The facts are stated in the opinion.

Mr. Frank E. Short argued the cause, and, with Messrs. F. E. Cook and Edward J. McCutchen, filed a brief for appellant:

The constitutional provisions under consideration are subject not to a technical or strict construction, but to a fair and broad construction, to the end that the liberal and open policy of the Constitutional Convention with respect to water companies, prohibitive of monopoly, and inviting continued competition, and insuring continued regulation of rates, may be construed, applied, and enforced as was obviously designed by the Constitutional Convention.

Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61; Re Johnston, 137 Cal. 119, 69 Pac. 973; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 327, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511.

The cases which hold to and establish the rule that no denial of the right of municipal operations shall be implied or inferred are not in any legal contemplation similar to, nor do the rules of construction arise out of, anything that exists in connection with the constitutional provisions here under consideration.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Helena Waterworks v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40.

In the exercise of its private powers a city is regarded the same as a private corporation.

Dill. Mun. Corp. § 66; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; People ex rel. Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; South Carolina v. United States, 199 U. S. 461, 50 L. ed. 269, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

A city, in providing its inhabitants with a supply of water, exercises its private powers, sometimes termed its business or proprietary powers.

Little Falls Electric & Water Co. v. Little Falls, 102 Fed. 663; Baily v. Philadelphia, 184 Pa. 594, 39 L.R.A. 837, 63 Am. St. Rep. 812, 39 Atl. 494; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871, 6 Am. Neg. Rep. 573; Pikes Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 1.

The whole investment is the private property of the city; as much so as the lands and houses belonging to it.

Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871, 6 Am. Neg. Rep. 573; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434; White v. Meadville, 177 Pa. 643, 34 L.R.A. 567, 35 Atl. 693.

What we are asking here is a construction

255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. *436; and Wilson* v. North Carolina, 42 L. *ed. U. S. 865.*

*As to what laws* are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

which leads to certainty, security, and substantial justice, in preference to that which involves uncertainty, insecurity, and inevitable injustice.

Marye v. Hart, 76 Cal. 293, 18 Pac. 325; San Gabriel Valley Land & Water Co. v. Witmer Bros. Co. 96 Cal. 632, 18 L.R.A. 465, 470, 29 Pac. 500, 31 Pac. 588; Spier v. Baker, 120 Cal. 376, 41 L.R.A. 196, 52 Pac. 659; French v. Teschemaker, 24 Cal. 539.

The entire scheme and purpose of the Constitution upon the subject under consideration must be taken into consideration, and in the light of what was obviously desired to be done and prevented, the Constitution must be construed in order to give effect to the purpose and intent of its framers and of the people in adopting it, in such a way as to accomplish the end sought to be achieved, and do injustice to no one.

8 Cyc. 730; Cashman v. Root, 89 Cal. 383, 12 L.R.A. 511, 23 Am. St. Rep. 482, 26 Pac. 883.

The effect of the construction contended for by the appellees, namely, that under the Constitution municipally owned plants can be installed in competition with privately owned plants, would be that such installation and competition would practically destroy the value of the rights and privileges conferred by the Constitution.

Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253.

A constitutional provision must be construed more especially with respect to its own language and its own provisions, and in the light of what it evidently proposes and intends to establish in order to give it effect.

Cooley, Const. Lim. 7th ed. p. 94; State ex rel. Keyser v. Hallock, 14 Nev. 202, 33 Am. Rep. 559; Field v. People, 3 Ill. 79; Re Maguire, 57 Cal. 609.

Where, as here, an act is designed solely for the general good of the community, and is not in derogation of the common right, and does not confer privileges to which the community at large are not entitled, it is not subject to the rules of construction against fair and liberal interpretation.

Bradley v. New York & N. H. R. Co. 21 Conn. 306.

The situation attempted to be created under the Constitution and laws of California is inevitably violative of natural right and in conflict with the 14th Amendment of the Constitution of the United States.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 234, 33 L. ed. 894, 10 Sup. Ct. Rep. 533.

The court below erred in holding that the city of Madera, in undertaking the enterprise in question, was within either its legal rights or its constitutional rights.

Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682; Hyatt v. Williams, 148 Cal. 586, 84 Pac. 41; Platt v. San Francisco, 158 Cal. 82, 110 Pac. 304; Re Russell, 163 Cal. 668, 126 Pac. 875.

Mr. Raleigh E. Rhodes argued the cause, and Mr. Marshall B. Woodworth filed a brief for appellees:

Since this appeal was allowed the supreme court of the state of California has ruled upon the general grant from the state, contained in § 19 of art. 11 of the Constitution, of the privilege of using the public streets of a municipality and the thoroughfares thereof for introducing and supplying the municipality and its inhabitants with gaslight and with fresh water.

Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722.

The requirement of the 14th Amendment, that no state shall deprive any person of life, liberty, or property without due process of law, does not take up the special provisions of state Constitutions and laws, and make their observance a requisite of the due process of law guaranteed by that Amendment, so as to require the Federal Supreme Court to revise a decision of the state court, holding that, in a given case, there has been a compliance with the requirements of the local law. The 14th Amendment was not intended to bring within Federal control everything done by the states or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States. The mere fact that the injury complained of was in violation of the state Constitution or laws is not of itself sufficient to raise a Federal question.

Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38, 47, 50 L. ed. 361, 364, 26 Sup. Ct. Rep. 249.

And not only is the decision of the state court conclusive as to whether or not a law of the state is in conflict with the state Constitution, but in a broader and more general sense the decision of the state court of last resort is conclusive as to the scope, meaning, and general operation and effect of a state law; and if such law, as construed by the state court of last resort, is consistent with the due process of the 14th Amendment, the Federal Supreme Court will not rule that the state court of last resort has misconceived its true meaning, and that its proper construction demands that it be given some other and different meaning, bringing it in conflict with the due process clause of the 14th Amendment.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 33 L. ed. 970, 980, 10 Sup. Ct. Rep. 462.

Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 414, 41 L. ed. 489, 494, 17 Sup. Ct. Rep. 130; Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Stevenson Iron Min. Co. v. Kibbe, 205 U. S. 537, 51 L. ed. 920, 27 Sup. Ct. Rep. 790; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 172, 26 Sup. Ct. Rep. 23; Borden v. Trespalacios Rice & Irrig. Co. 204 U. S. 667, 51 L. ed. 671, 27 Sup. Ct. Rep. 785; Stearns v. Minnesota, 179 U. S. 223, 232, 45 L. ed. 162, 169, 21 Sup. Ct. Rep. 73; Wilson v. Standefer, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384.

Section 19 of art. 11 of the Constitution of California is self-executing. By its provision there is offered to every person or corporation accepting the same the franchise of using the public streets of municipalities for the purposes mentioned in the section. The reason for the rule which limits the franchise to the express words of the grant is just as strong in the case of a constitutional provision as in that of a legislative enactment. The rule is applied not because of the vehicle of the grant, but because of the nature of the grant.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Barden v. Northern P. R. Co. 154 U. S. 288, 325, 38 L. ed. 992, 1001, 14 Sup. Ct. Rep. 1030; Winchester v. Mabury, 122 Cal. 527, 55 Pac. 393; Winchester v. Howard, 136 Cal. 438, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

Even in a case where that court may exercise an independent judgment respecting the construction of a state statute claimed to infringe the contract clause, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state.

Board of Liquidation v. Louisiana, 179 U. S. 622, 638, 45 L. ed. 347, 353, 21 Sup. Ct. Rep. 263; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 172, 26 Sup. Ct. Rep. 23; Chicago Theological Seminary v. Illinois, 188 U. S. 662, 675, 47 L. ed. 641, 649, 23 Sup. Ct. Rep. 386.

Section 19 of art. 11 of the Constitution of California does in fact constitute a contract between the state and the appellant. *Whether* or not that contract gives to the *appellant the exclusive right* to own and *operate a waterworks system* within the city of Madera will be decided upon the principles found in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Bienville Water Supply Co. v. Mobile, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43; Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224.

The legislature of the state of California and the people of that state and its court of highest resort repudiate the proposition upon which appellant brings its case to this court.

Re Russell, 163 Cal. 668, 126 Pac. 875.

When private property is affected with a public interest, it ceases to be *juris privati* only.

1 Hargrave's Law Tracts, 78; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity to restrain the city of Madera from proceeding with the construction of a water plant in competition with one that the plaintiff and its predecessors have built under the Constitution of the state. The circuit court sustained a demurrer and dismissed the bill. 185 Fed. 281. The ground of the suit is that the state Constitution provides that in any city where there are no public works owned by the municipality for supplying the same with water, any individual or corporation of the state shall have the privilege of using the public streets and laying down pipes, etc., for the purpose, subject to the right of the municipal government to regulate the charges. Art. 11, § 19. It is argued that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the corresponding duty of the water company to comply with the regulations, both under severe penalties (art. 14, §§ 1, 2, act of March 7, 1881, §§ 1, 7, 8), imports a contract that the private person or corporation constructing works as invited shall not be subject to competition from the public source. Otherwise, it is pointed out, the same body will be called upon to regulate the *plaintiff's [456 charges and to endeavor to make a success of the city works. Furthermore, the plain-

tiff is forbidden by other provisions to divert its property to other uses, and, again, will be called on to pay taxes to help its rival to succeed. Thus, it is said, the city proposes to destroy the plaintiff's property, contrary to the 14th Amendment of the Constitution of the United States.

But if, when the plaintiff built, the Constitution of the state authorized cities to built waterworks as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen. An appeal to the 14th Amendment to protect property from a congenital defect must be vain. Abilene Nat. Bank v. Dolley, 228 U. S. 1, 5, ante, 707, 33 Sup. Ct. Rep. 409. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the Constitution so as to avoid the result, if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.

The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 156, 48 L. ed. 127, 129, 24 Sup. Ct. Rep. 43; Helena Waterworks Co. v. Helena, 195 U. S. 383, 388, 392, 49 L. ed. 245, 248, 250, 25 Sup. Ct. Rep. 40. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 35, 50 L. ed. 353, 359, 26 Sup. Ct. Rep. 224. Compare Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 470, 50 L. ed. 1102, 1111, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253. As there is 457]no contract, *the plaintiff stands legally in the same position as if the Constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show.

Decree affirmed.

HARRY K. JOHNSON, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 457–459.)

**Witnesses — self-crimination — use of bankrupt's books.**

The books of a bankrupt which have been transferred to the trustee in accordance with the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511), § 70, may be produced before the grand jury and before the petit jury at the trial of the bankrupt for concealing money from the trustee without infringing the bankrupt's constitutional privilege against self-crimination.

[For other cases, see Witnesses, V. e, in Digest Sup. Ct. 1908.]

[No. 715.]

Argued April 11, 1913. Decided April 28, 1913.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a conviction of a bankrupt for concealing money from the trustee in bankruptcy. Affirmed.

The facts are stated in the opinion.

Mr. Edward J. Fox argued the cause, and, with Messrs. James W. Fox and Robert A. Stotz, filed a brief for plaintiff in error:

The bankrupt's books may not be used against him in a criminal proceeding.

Re Harris, 221 U. S. 274, 55 L. ed. 732, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Ballmann v. Fagin, 200 U. S. 195, 50 L. ed. 437, 26 Sup. Ct. Rep. 212;

NOTE—On compulsory deposit of bankrupt's books with receiver or trustee as infringing privilege against self-crimination—see note to Re Harris, 55 L. ed. U. S. 732.

Upon the general question of the constitutional privilege against self-crimination—see note to Levy v. Superior Ct. 29 L.R.A. 811.

On incriminating evidence furnished by defendant acting under compulsion—see note to State v. Turner, 32 L.R.A.(N.S.) 772.

by the company to the trustee is an assignable right.

Van Kirk v. Vermont Slate Co. 140 Fed. 38; Re Judson, 192 Fed. 834; Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. W. 83; Re Wolff, 165 Fed. 984.

Mr. Justice Day delivered the opinion of the court:

The action was brought in the United States district court for the southern district of New York by the trustees of the firm of T. A. McIntyre & Company, and of the individual members of that firm, bankrupts, against Charles M. Crouse and the Equitable Life Assurance Society of the United States, to recover the sum of $90,698.32, the net proceeds of certain policies of insurance issued by the Equitable Life Assurance Society upon the life of Thomas A. McIntyre, one of the bankrupts, deceased. The proceeds of the policies were paid into court by the Society. The judgment of the district court in favor of Crouse was affirmed by the circuit court of appeals (104 C. C. A. 227, 181 Fed. 479), and the case has been appealed to this court.

It appears that on the 10th of April, 1902, Thomas A. McIntyre obtained two policies of life insurance in the Equitable Society. They were known as "guaranteed cash-value, limited payment, life policies," each providing that upon the death of the insured the company would pay to his executors, administrators, or assigns the sum of 466]$100,000 *in fifty annual instalments, or the sum of $53,000 in cash, a total of $106,000 for the two policies. On April 14, 1906, the policies were assigned absolutely to the firm of T. A. McIntyre & Company, and on April 24, 1907, they were by that firm assigned to the Equitable Society as collateral security for a loan of $15,370. On February 25, 1908, two months prior to the filing of the petition in bankruptcy, the policies were assigned by McIntyre & Company to the defendant, Charles M. Crouse, subject, however, to the prior assignment to the Equitable Society. A petition in involuntary bankruptcy was filed against McIntyre & Company and its individual members on April 25, 1908, and on May 9, 1908, the defendant Crouse paid the premiums on the policies, in the sum of $6,078.38. McIntyre & Company and the individual members thereof were adjudged involuntary bankrupts on May 21, 1908, and the trustees were elected on the 24th of July, 1908. On the 29th of July, 1908, Thomas A. McIntyre died, and the policies became payable.

It appears that the policies had a cash surrender value, which, at the time when the trustees qualified, was $15,370, or the amount of the loan of the Equitable Society upon the policies. It is therefore apparent that on the day when the petition was filed, as well as the day of the adjudication in bankruptcy, the cash surrender value would not have exceeded the loan and lien of the Society upon the policies. The circuit court of appeals for the second circuit held that, under the circumstances, the policies did not pass to the trustees as assets, and therefore the action which had been begun to set aside the transfer to Crouse, as a preference within the bankruptcy act, could not be maintained.

The correctness of this decision depends primarily upon the construction of § 70a of the bankruptcy act, which reads:

*"The trustee of the estate of a bank-[467 rupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property." [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511.]

The part of the section particularly to be considered is subdiv. 5 and its proviso. Subdivision 5 undertakes to vest in the trustee property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon or sold under judicial

process against him. Then follows the proviso with reference to insurance policies which have a cash surrender value, permit-468]ting a bankrupt, when the cash *surrender value has been ascertained and stated, to pay or secure such sum to the trustee, and to continue to hold, own, and carry the policies free from the claims of creditors; otherwise the policies to pass to the trustee as assets.

Two constructions have been given this section, and the question, as presented in this case, has not been the subject of direct determination in this court. The one favors the view that only policies having a cash surrender value are intended to pass to the trustee for the benefit of creditors† The other, conceding that the proviso deals with this class of policies, maintains that policies of life insurance which have no surrender value pass to the trustee under the language of § 70a immediately preceding the proviso, which reads: "Property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."‡

To determine the congressional intent in this respect requires a brief consideration of the nature of the rights dealt with. Life insurance may be given in a contract providing simply for payment of premiums on a calculated basis which accumulates no surplus for the holder. Such insurance has no surrender value. Policies, whether payable at the end of a term of years or at death, may be issued upon a basis of calculation which accumulates a net reserve in favor of the policy holder, and which forms a consequent basis for the surrender of the policy by the insured, with advantage to the company upon the payment of a part of this accumulated reserve. This feature of surrender value was discussed by Judge 469]Brown of the *southern district of New York, in Re McKinney, 15 Fed. 535, 537:

"The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy,—an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured, deposited with the company in advance, to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured, and paid by him to the company in the shape of greatly-increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force, the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund.

"Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made."

This case has been cited with approval in this court. Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488.

*Under the bankruptcy act of 1867 [470 [14 Stat. at L. 522, chap. 176, § 14] no special provision was made for insurance policies. The section providing for the passing of the assets of the bankrupt to the trustee contained the broad language of "all the estate, real and personal." Under this statute it was held in Re McKinney, supra, that the insurance upon the life of the bankrupt vested in the bankrupt estate only to the extent of its cash surrender value at the time of the filing of the petition.

In Holden v. Stratton, supra, this court held that the law of the state of Washington, exempting the proceeds of life insurance policies, was applicable, and under the bankruptcy act of 1898, § 6, the bankrupt might retain such policies. The circuit court of appeals for the ninth circuit, from which Holden v. Stratton came by certiorari to this court, had held that § 70a was not controlled by the exemptions provided in § 6 of the bankruptcy act, and had adhered to its former decision in Re Scheid, 82

†Re Buelow, 98 Fed. 86; Re Josephson, 121 Fed. 142; Gould v. New York L. Ins. Co. 132 Fed. 927; Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83.

‡Re Becker, 106 Fed. 54; Re Slingluff, 106 Fed. 154; Re Welling, 51 C. C. A. 151, 113 Fed. 189; Re Coleman, 69 C. C. A. 496, 136 Fed. 818; Re Hettling, 99 C. C. A. 87, 175 Fed. 65; Re Orear, 30 L.R.A.(N.S.) 990, 102 C. C. A. 78, 178 Fed. 632.

L.R.A. 188, 44 C. C. A. 233, 104 Fed. 870, in which § 70a had been construed to pass insurance policies having a cash surrender value to the trustee, unless the bankrupt paid or secured the surrender value, as pointed out in the section. While this court held that the exemption under the state law applied under the bankruptcy act to the policy in question, coming to deal with the construction of § 70a, this court said (198 U. S. p. 213):

"As § 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured 471]bankrupt by limiting *the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve."

The section came again before this court in Hiscock v. Mertens, supra, and it was held that the insured was entitled to retain the policies upon the payment to the trustee of a sum equivalent to the amount the company was willing to pay according to its custom, although there was no stipulation in the policies as to a cash surrender value, and upon this subject the court said (p. 212):

"What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies? In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to 'continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.'"

And in that case it appeared that this sum was less than $6,000, whereas in a short time, some six months later, the maturity of one of the policies would give it a value of over $11,000. But this court held that this circumstance made no difference in the right of the insured to pay the surrender value and hold the policy.

True it is that life insurance policies are a species of property and might be held to pass under the general terms of subdiv. 5, § 70a, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. It is also true that a proviso may sometimes mean simply additional legislation, *and not be intended to have the [472 usual and primary office of a proviso, which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms.

This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been much varied in form since, and policies payable in a period of years, so as to become investments and means of money saving, are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay, and which brings the policy within the terms of the proviso (Hiscock v. Mertens, supra), and makes its present value available to the bankrupt estate. While life insurance is property, it is peculiar property. Legislatures of some of the states have provided that policies of insurance shall be exempt from liability for debt, and in many states provision is made for the protection from such liability of policies in favor of those dependent upon the insured. See Holden v. Stratton, supra.

Congress undoubtedly had the nature of insurance contracts in mind in passing § 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment *to the trustee as a condition of keep- [473 ing the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate, the bankrupt should be permitted to retain the insurance which, because of ad-

vancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the bankruptcy act to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance.

It should be observed, in this connection, that in the persent case the company had advanced upon the policies their full surrender value, as stipulated in the policies, and that the only interest that could have passed to the trustees would have been the speculative right to the net proceeds of the policies, contingent upon the death of the bankrupt, and possibly dependent upon the payment of large annual premiums for thirteen years.

It is urged, however, that under § 70a, the cash surrender value was to be paid by the *bankrupt* when ascertained, and the policies kept alive for *his* benefit; and as these policies had been assigned by the beneficiary to McIntyre & Company, not as collateral, but absolutely, they would not come within the terms of the proviso, and therefore the proceeds of the policies vested in the bankrupt estate; but we find nothing in the act by which the right of the assignee of a policy to the benefits which would have accrued to the bankrupt is limited. As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors, and not otherwise to limit the bankrupt in dealing with his policy.

474] *As to the reimbursement of Crouse for the premiums advanced by him, and the application by him of the proceeds of the policies to particular items of indebtedness of the bankrupt estate in his favor,—upon the facts found we have no occasion to disturb the decree of the circuit court of appeals.

It results that the judgment of the Circuit Court of Appeals must be affirmed.

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A. LEO EVERETT, as Trustee in Bankruptcy of Alfred M. Judson, Individually and as a Member of the Firm of Judson & Judson, Petitioner,

v.

WILLIAM D. JUDSON, as Executor of the Last Will and Testament of Alfred M. Judson.

(See S. C. *Reporter's ed.* 474–479.)

**Bankruptcy — assets — life insurance — cash surrender value — death of bankrupt.**

The time when the petition in bankruptcy is filed fixes the cash surrender value of the insurance policies mentioned in the proviso in the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511), § 70a, subd. 5, that a bankrupt, when the cash surrender value of insurance policies having such value has been ascertained, may pay or secure such sum to the trustee and continue to hold and own them free from the claims of creditors, otherwise the policies shall pass to the trustee as assets, and hence the death of the bankrupt between the time of the filing of the petition and the date of the adjudication does not make the proceeds of the policies, over and above the cash surrender value, assets in the hands of the trustee, although that section also provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date of adjudication.

[For other cases, see Bankruptcy, VI. a., in Digest Sup. Ct. 1908.]

[No. 595.]

Argued March 13, 1913. Decided April 28, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed an order of the District Court for the Southern District of New York, directing that the proceeds of policies of insurance upon the life of a bankrupt, less their cash surrender value, be paid to the bankrupt's executor. Affirmed.

See same case below, 113 C. C. A. 158, 192 Fed. 834.

The facts are stated in the opinion.

Mr. Charles K. Beekman argued the cause and filed a brief for petitioner:

Life insurance policies of a bankrupt, payable to himself, his executors, administrators, or assigns, but having no actual surrender value, payable at the time of the filing of an involuntary petition in bankruptcy against him, either by their terms, or the concession of the company issuing the same, are property within the meaning of the bankruptcy act, and pass to a trustee as assets of his estate.

Re Coleman, 69 C. C. A. 496, 136 Fed. 818; Grigsby v. Russell, 222 U. S. 149, 156, 56 L. ed. 133, 137, 36 L.R.A.(N.S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913 B, 863; Sessions v. Romadka, 145 U. S. 29, 30, 36 L. ed. 609, 610, 12 Sup. Ct. Rep. 799; Re

NOTE.—As to life insurance as assets of bankrupt—see note to Burlingham v. Crouse, ante, 920.

Orear, 30 L.R.A.(N.S.) 990, 102 C. C. A. 78, 178 Fed. 632; Re Welling, 51 C. C. A. 151, 113 Fed. 189; Meyers v. Josephson, 10 Am. Bankr. Rep. 687.

They are also property which the bankrupt, prior to the filing of the petition in bankruptcy, could have transferred.

1 Remington, Bankr. p. 556, § 1002; Re Barrow, 98 Fed. 583, 3 Am. Bankr. Rep. 416; Partridge v. Andrews, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed. 329.

If policies of life insurance payable to a bankrupt, his executors, administrators, or assigns, have a surrender value at the time the petition was filed, and the bankrupt dies before adjudication, his legal representatives cannot obtain the proceeds thereof by paying or securing to the trustee this surrender value only.

Partridge v. Andrews, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed. 325, 27 Am. Bankr. Rep. 397.

The trustee takes title to the proceeds of property which was owned by the bankrupt at the time the petition was filed, as well as to the actual property which then belonged to the bankrupt.

Partridge v. Andrews, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed. 331; 1 Remington, Bankr. p. 647, § 1135; Re McDonnell, 101 Fed. 239, 4 Am. Bankr. Rep. 94; Re Ghazal, 98 C. C. A. 517, 174 Fed. 809, 23 Am. Bankr. Rep. 178; Re Laplume Condensed Milk Co. 145 Fed. 1013, 16 Am. Bankr. Rep. 729; Re Pease, 4 Am. Bankr. Rep. 582.

The cash surrender value referred to in the proviso of § 70a, subd. 5, is the surrender value as of the date upon which the same is stated to the trustee by the company issuing the same; to wit, after adjudication upon the date of the trustee's qualification or thereafter, and not the surrender value when the petition was filed.

Re McKinney, 15 Fed. 537; Holden v. Stratton, 198 U. S. 214, 49 L. ed. 1022, 25 Sup. Ct. Rep. 656; Hiscock v. Mertens, 205 U. S. 202, 209, 51 L. ed. 771, 774, 27 Sup. Ct. Rep. 488.

The trustee takes title to rights of action arising upon contracts which existed at the date of adjudication, but which had not matured at petition filed, where the bankrupt has died between those dates, and the contracts were owned by him prior to the filing of the petition.

Matthews v. American Cent. Ins. Co. 154 N. Y. 460, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751; Partridge v. Andrews, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed. 325, 27 Am. Bankr. Rep. 397.

*Mr. George S. Ludlow* argued the cause, *and, with Mr. Wilbur L. Ball*, filed a brief [illegible] policies that could at any time pass to the trustee was their cash surrender value.

Hiscock v. Mertens, 205 U. S. 202, 212, 51 L. ed. 771, 775, 27 Sup. Ct. Rep. 488.

The trustee is entitled only to the property owned by the bankrupt at the date of the filing of the petition, and not to property acquired by him or his estate between that date and the date of adjudication.

Re Harris, 2 Am. Bankr. Rep. 359; Re Pease, 4 Am. Bankr. Rep. 578; Re Elmira Steel Co. 5 Am. Bankr. Rep. 487; State Bank v. Cox, 16 Am. Bankr. Rep. 35; Sibley v. Nason, 22 Am. Bankr. Rep. 712; Smith v. Berman, 24 Am. Bankr. Rep. 855; Re Schermerhorn, 16 Am. Bankr. Rep. 507.

Mr. Justice Day delivered the opinion of the court:

This case involves the title to the proceeds of certain insurance policies upon the life of Alfred M. Judson, bankrupt, deceased, collected by the trustee in bankruptcy. The executor of Judson's estate brought suit against the trustee in the United States district court for the southern district of New York, asserting title to such funds. The district court ordered that the proceeds of the policies, less their cash surrender value, be paid to the executor (188 Fed. 702); the circuit court of appeals for the second circuit, upon petition to revise, affirmed that order (113 C. C. A. 158, 192 Fed. 834), and the case comes here on certiorari.

*A petition in involuntary bankruptcy [477 was filed against the firm of Judson & Judson and its members, Alfred M. Judson being one, on December 17, 1910, and on December 23, 1910, Judson entered a notice of his appearance in the proceedings. On January 9, 1911, the firm and its members were adjudged bankrupts, and on February 9, 1911, Everett qualified as trustee. Judson owned certain life insurance policies at the time of the institution of the bankrupt proceedings, and thereafter and until his death, payable to his executors, administrators, or assigns. So far as this case is concerned, at the time of the filing of the petition in bankruptcy, these policies, with cash surrender values and subject to loans, were as follows: One policy for $5,000, having a cash surrender value of $2,291.49, and subject to a loan of $2,238; another for $1,000, having a cash surrender value of $332.31, and subject to a loan of $322; and another for $10,000, having a cash surrender value of $5,030, and subject to a loan of $5,240. It therefore appears that the cash surrender value of the policies on December 17, 1910, was $63.80.

On January 4, 1911, Judson committed suicide. Notice was served on the trustee that the executor claimed the right, under [illegible]

§ 70a of the bankruptcy act, to pay to the trustee the cash surrender value of the policies when ascertained, but the trustee denied such right and also the right of the executor to the balance of the proceeds of the policies. Under agreement, the insurance companies paid to the trustee $8,675.14 upon the policies. The executor asserted title to the difference between the sum realized on the policies and the cash surrender value; namely, $8,611.34. The district court, upon the authority of Burlingham v. Crouse, 104 C. C. A. 227, 181 Fed. 479, held that the proceeds of the policies, over and above the cash surrender value as of the date of the filing of the petition, passed to the executor. The circuit court of appeals affirmed the order of the district 478]court, holding that the *time when the interest of the bankrupt estate in the policies passed to the trustee was the date of the filing of the petition, and further, also upon the authority of Burlingham v. Crouse, supra, that the interest of the trustee in the policies extended only to their cash surrender value.

The present case was argued at the same time as the case of Burlingham v. Crouse [228 U. S. 459, ante, 920, 33 Sup. Ct. Rep. 564], and in so far as it is like that case the principles therein laid down are controlling. The present case has, however, a feature not directly involved in the case of Burlingham v. Crouse, because Judson, the insured, committed suicide before the adjudication in bankruptcy, although after the filing of the petition, and it is the contention of the petitioner that the bankruptcy act vested the title to the property in the trustee as of the time of the adjudication, and that the death of the bankrupt between the filing of the petition and the date of the adjudication made the proceeds of the policies assets in the hands of the trustee.

While it is true that § 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96, wherein it was held that, pending the bankrupt proceedings, and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The *bankrupt's dis- [479 charge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. Zavelo v. Reeves, 227 U. S. 625, 630, 631, ante, 676, 678, 33 Sup. Ct. Rep. 365. The schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition.

We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. And it is as of that date that the surrender value of the insurance policies mentioned in § 70a should be ascertained. The subsequent suicide of the bankrupt before the adjudication was an unlooked-for circumstance which does not change the result in the light of the construction which we give the statute.

It follows that the judgment should be affirmed.

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HANNAH L. ANDREWS, Executrix of the Estate of Benajah D. Andrews, Deceased, Petitioner,

v.

HARVEY J. PARTRIDGE, Trustee in Bankruptcy of Benajah D. Andrews.

(See S. C. Reporter's ed. 479-481.)

**Bankruptcy — assets — life insurance —cash surrender value — death of bankrupt.**

The right of a bankrupt under the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511), § 70a, subd. 5, to pay the trustee in bankruptcy the cash surrender value of insurance policies on his life, and to continue to hold and own them free from the claims of creditors, is not extinguished by his death after the filing of the petition, but before adjudication, and such right may be exercised by his executors.

[For other cases see Bankruptcy, VI. a, in Digest Sup. Ct. 1908.]

[No. 496.]

Argued March 13, 1913. Decided April 28, 1913.

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NOTE.—As to life insurance assets of bankrupt—see note to Burlingham v. Crouse, ante, 920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which, reversing a decree of the District Court for the District of New Jersey, upheld the right of the trustee in bankruptcy to the proceeds of policies of insurance on the life of the bankrupt. Reversed.

See same case below, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed. 325.

The facts are stated in the opinion.

**Mr. Samuel H. Richards** argued the cause, and, with Mr. Thomas E. French, filed a brief for petitioner:

The filing of the petition in bankruptcy fixes the moment when the affairs of the bankrupt are supposed to be wound up, and there is no reason for allowing the bankrupt estate to profit by delay beyond the day of settlement.

1 Loveland, Bankr. 776; Collier, Bankr. 9th ed. 995; Re Elmira Steel Co. 109 Fed. 472; Re Burka, 104 Fed. 326; Re Harris, 2 Am. Bankr. Rep. 359; Re Hogan, 114 C. C. A. 634, 194 Fed. 846; Sexton v. Dreyfus, 219 U. S. 339, 344, 346, 55 L. ed. 244, 245, 246, 31 Sup. Ct. Rep. 256.

A policy can have no surrender value at a date subsequent to the death of the insured. It cannot then be abandoned and given up for cancelation. It has a matured, face, or payment value, and no longer a surrender value.

Re Welling, 51 C. C. A. 151, 113 Fed. 192; Riegel v. American L. Ins. Co. 153 Pa. 134, 19 L.R.A. 166, 25 Atl. 1070.

The bankrupt does not defeat the title of the trustee, and again acquire title, but continues to hold, own, and carry such policy. The word "continue" does not admit of any intervening substance to break the continuity. It implies uninterrupted connection.

Belknap v. Belknap, 2 Johns. Ch. 466, 7 Am. Dec. 548.

The purpose of the statute was to secure to the trustee the surrender value, and to enable the bankrupt to continue to hold, own, and carry the policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.

Hiscock v. Mertens, 205 U. S. 202–212, 51 L. ed. 771–775, 27 Sup. Ct. Rep. 488.

If the insurance company never makes a statement of the cash surrender value, the policy never passes to the trustee.

Van Kirk v. Vermont Slate Co. 140 Fed. 44.

The right to pay or secure to the trustee the surrender value, and continue to hold, own, and carry the policies free from the *claim of creditors* participating in the dis*tribution of his estate under the* bankruptcy proceedings, passed to the bankrupt's widow as executrix.

18 Cyc. 1380, 1381; Central Nat. Bank v. Hume, 128 U. S. 195–211, 32 L. ed. 370–377, 9 Sup. Ct. Rep. 41; Bonnel v. Dunn, 29 N. J. L. 435; Hiscock v. Mertens, 205 U. S. 202, 213, 51 L. ed. 771, 776, 27 Sup. Ct. Rep. 488; Re Josephson, 121 Fed. 142; Meyers v. Josephson, 59 C. C. A. 650, 124 Fed. 734; Gould v. New York L. Ins. Co. 132 Fed. 927; Re Judson, 188 Fed. 702, affirmed 113 C. C. A. 158, 192 Fed. 834; Re McKinney, 15 Fed. 535; Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83; Re Pease, 4 Am. Bankr. Rep. 582; Re Zotti, 108 C. C. A. 196, 186 Fed. 84; Sexton v. Dreyfus, 219 U. S. 339, 344, 346, 55 L. ed. 244, 245, 246, 31 Sup. Ct. Rep. 256; Van Kirk v. Vermont Slate Co. 140 Fed. 38.

**Mr. John D. McMullin** argued the cause and, with Mr. Henry F. Stockwell, filed a brief for respondent:

If the contracts of insurance are property which could be assigned by the bankrupt prior to the petition, they vest in the trustee, as of adjudication, in the condition in which they are, and with the values which they have at the time of the adjudication, unless excepted by the proviso.

Re Welling, 51 C. C. A. 151, 113 Fed. 193; Re Orear, 30 L.R.A.(N.S.) 990, 102 C. C. A. 78, 178 Fed. 637.

**Mr. Justice Day** delivered the opinion of the court:

Harvey K. Partridge, trustee in bankruptcy of Benajah D. Andrews, by petition filed in the United States district court for the district of New Jersey, sought to acquire the title to the proceeds of certain insurance policies upon the life of Benajah D. Andrews, bankrupt, deceased, a claim to such proceeds having been made by the executrix of Andrews's estate. An order having been entered in the district court in favor of the executrix, except as to the cash surrender value of the policies, the circuit court of appeals for the third circuit, upon a petition to revise, reversed the decree of the district court, and ordered that the proceeds pass entirely to the trustee. 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed 325. To review that decree this writ of certiorari was issued.

It appears from the finding of facts by the circuit court of appeals that a petition in involuntary bankruptcy was filed against Andrews on February 3, 1910; that on April 4, 1910, he was adjudicated a bankrupt, and on April 28th of the same year a trustee was elected and qualified. It further appears that Andrews died on February 15, 1910, *having at that time, and at the time[481

of the filing of the petition in bankruptcy, two policies of insurance upon his life, one for $10,000, payable upon his death to his executors, administrators, or assigns, and the other for $5,000, payable upon his death to his estate. At the date of filing the petition in bankruptcy the $10,000 policy had a cash surrender value of $14.93, and was subject to a loan of $4,481.39; and the $5,000 policy had a cash surrender value of $100. Under a stipulation between the trustee and the executrix the net proceeds of the two policies were paid to the trustee, to be held until the title thereto had been determined.

The district court decreed that the trustee was entitled to the cash surrender value of the policies as of the date of the filing of the petition, and that the bankrupt estate had no interest in the balance of the proceeds of the policies. The circuit court of appeals also held that the cash surrender value of the policies must be ascertained as of the date of the filing of the petition in bankruptcy. Construing § 70a of the bankruptcy act, it decided, however, that the policies passed to the trustee, subject to the right of the bankrupt to pay or secure to the trustee the cash surrender value of the policies, and to continue to hold and own them, but that this right was extinguished by his death before adjudication.

This case was argued and submitted at the same time as the cases of Burlingham v. Crouse, 228 U. S. 459, ante, 920, 33 Sup. Ct. Rep. 564, and Everett v. Judson, 228 U. S. 474, ante, 927, 33 Sup. Ct. Rep. 568. An application of the principles therein laid down requires the reversal of the judgment of the Circuit Court of Appeals, and it is accordingly reversed.

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482] *NORTHERN PACIFIC RAILWAY COMPANY and Northern Pacific Railroad Company, Appts.,

v.

JOSEPH H. BOYD.

(See S. C. Reporter's ed. 482–515.)

**Corporations—following diverted funds — lease of railroad.**

1. An agreement between one railway company and the president of another, by which the latter was to deliver to the former a majority of the capital stock in his company, and was to cause such company to lease its road for 999 years to the other company, for a rental payable only from net profits, and was to have his company issue bonds to be guaranteed by the lessee in an amount which was twice the value of the road, a part of which were to be used in refunding an outstanding issue, and the proceeds of the other and larger part to be used in paying for the stock, constituted, when carried out, a wrongful diversion of such proceeds, which renders the lessee liable in equity to a judgment creditor of the lessor until the funds are restored to the true owner, and such obligation is not lessened or discharged by the subsequent expenditure of a larger sum by the lessee in bettering or extending the leased line.

[For other cases, see Corporations, XI. a; VI. f; Railroads, V.; Trusts, V. b, in Digest Sup. Ct. 1908.]

**Corporations — reorganization — validity as to creditors — participation by stockholders.**

2. The reservation by the old stockholders in an agreement for the reorganization of an insolvent railway company of a stock interest in the new company, which was to and did purchase the railway property at a foreclosure sale made pursuant to the agreement and under a consent decree, although free from fraud, leaves the property still subject to the claims of nonassenting unsecured creditors of the original company, who were not parties to the foreclosure, nor made such by notifying creditors by publication to prove their claims.

[For other cases, see Corporations, III. b, in Digest Sup. Ct. 1908.]

**Judgment — res judicata — parties.**

3. A judgment dismissing the bill by which an unsecured creditor of an insolvent corporation attacks a reorganization plan under which a stock interest in the new corporation was to be reserved for the old stockholders is not binding as *res judicata* upon another unsecured creditor, not a party to the record.

[For other cases, see Judgment, III. k, in Digest Sup. Ct. 1908.]

**Limitation of actions — laches — setting aside judicial sale.**

4. Ten years' delay on the part of a nonassenting unsecured creditor of an insolvent corporation before attacking in equity a reorganization plan effected by judicial sale under which a stock interest in the new corporation was reserved for the old stockholders is not such laches as bars the suit where the corporations and their stockholders were not prejudiced thereby, and the

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NOTE.—As to the right of creditors of a corporation which has transferred all, or substantially all, of its assets to another corporation, to subject the assets so transferred to an equitable lien or preference—see note to Ex parte Savings Bank, 5 L.R.A. (N.S.) 520.

On the effect of consolidation, merger, or absorption of corporation on its unsecured liability, in the absence of applicable statutory or contract provisions—see notes to Atlantic & B. R. Co. v. Johnson, 11 L.R.A. (N.S.) 1119; and Luebecke v. Des Moines Cabinet Co. 32 L.R.A.(N.S.) 616.

As to laches as a defense—see notes to Middletown v. Newport Hospital, 1 L.R.A. 931

delay was not the result of inexcusable neglect, but was in spite of the creditor's diligent effort to reduce his claim to judgment, so that he might proceed in equity, which was accomplished only after protracted litigation.

[For other cases, see Limitation of Actions, I. b, 2, g, in Digest Sup. Ct. 1908.]

[No. 47.]

Argued November 11 and 12, 1912. Decided April 28, 1913.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Washington, subjecting the property of a railway company to the payment of a judgment against another railway company. Affirmed.

See same case below, 101 C. C. A. 18, 177 Fed. 804.

Statement by Mr. Justice Lamar:

The circuit court of appeals for the ninth circuit affirmed a decree subjecting the property of the Northern Pacific Railway Company to the payment of a judgment for $71,278, which Joseph H. Boyd had revived against the Cœur D'Alene Railway & Navigation Company. The record on this appeal is very lengthy and the transactions so overlap that any chronological statement would necessarily be confusing. It will conduce to clearness to refer first to those between the Cœur D'Alene and the Northern Pacific Railroad and then set out as succinctly as possible the facts connected with the foreclosure of the Northern Pacific *Railroad* and its purchase by the Northern Pacific *Railway*.

In 1886 the Cœur D'Alene Railroad & 484]Navigation *Company constructed a narrow gauge railroad from Burke, Idaho, on the Northern Pacific Railroad, to Old Mission. Spaulding, in 1887, brought suit in an Idaho court to recover $23,675 for work done and material furnished in building it. Owing to the inaccessibility of the county seat in which the territorial court was held, and the fact that the terms were generally devoted to criminal business, there was much delay in getting a hearing. At last there was a trial, lasting forty days; but the presiding judge died before making his findings and entering judgment. His successor having been of counsel for one of the parties, was disqualified, so that it was not until 1896 that Spaulding recovered judgment against the Cœur D'Alene. Boyd claimed that this judgment belonged to him; and learning that Spaulding had threatened to transfer the judgment, Boyd, in 1898, instituted a suit to establish his title. It terminated in his favor in May, 1901. When the appeal was dismissed, the judgment against the Cœur D'Alene was about to become dormant. Boyd thereupon (1903) began proceedings in Idaho to have it revived, and on October 23, 1905, obtained a judgment against the Cœur D'Alene Company for $71,278, being the original debt with accumulated interest and costs. An appeal was taken, which was dismissed, and thereupon Boyd, in September, 1906, brought in a state court this suit against the Northern Pacific Railroad and the Northern Pacific Railway Company, claiming that the rail*road* was liable for this debt of the Cœur D'Alene, and that the rail*way* in turn was liable for this debt of the rail*road*. The case was removed to the United States circuit court for the eastern district of Washington.

The Cœur D'Alene Railway & Navigation Company in 1886 built a narrow gauge railroad 33 miles in length. D. C. Corbin was president and controlled 5,100 shares, which constituted a majority of the stock, which had been increased to $1,000,000, and all of which was unpaid.

*In 1888, while the Spaulding suit[485 was pending, Corbin entered into a contract with the Northern Pacific Railroad in which he agreed to sell it his stock, stated to be full paid and nonassessable; to secure for it a lease of the Cœur D'Alene's property for 999 years and authority to issue $825,000 of mortgage bonds. The Northern Pacific was to pay the interest of 6 per cent on those bonds issued at the rate of $25,000 per mile on the 33 miles of road constructed, or to be constructed; and after a certain date to create and maintain a sinking fund for the redemption of the bonds at maturity; to pay for the value of material on hand, and $20,000 to cover amounts expended for surveys.

Corbin secured the adoption of resolutions authorizing the lease and the issuance of the bonds. On September 18, 1888, 5,100 shares of stock were transferred to the railroad, which entered into possession as lessee October 1, 1888, taking charge of all the matters relating to the Cœur D'Alene,

191; Calhoun v. Delhi & M. R. Co. 8 L.R.A. 248; Coffey v. Emigh, 10 L.R.A. 125; Pratt v. Carroll, 3 L. ed. U. S. 627; Hammond v. Hopkins, 36 L. ed. U. S. 135; and Felix v. Patrick, 36 L. ed. U. S. 720.

*On statutes of limitation* and lapse of *time as bar to enforcing trust*—see notes to Prevost v. Gratz, 5 L. ed. U. S. 311; Thomas v. Brockenbrough, 6 L. ed. U. S. 287; Philippi v. Philippe, 29 L. ed. U. S. 336; Ducie v. Ford, 34 L. ed. U. S. 1091; and Gisborn v. Charter Oak L. Ins. Co. 35 L. ed. U. S. 1029.

including its litigation, although Corbin and the other officers did not immediately resign.

The resolution provided for the immediate issuance of $825,000 of bonds, $360,000 of which were to be retained to redeem the outstanding bonds for that amount. The agreement was silent as to what should be done with the remaining $465,000 of bonds, and the parties are at issue as to what use was, in fact, made of them. The railway insists that the records show that they were delivered by the mortgage trustee on October 29 and 30, 1888, upon the order of Corbin, president, part to him and part to another person. Boyd, however, contends that these bonds, $465,000, or their proceeds, were used to pay Corbin for the 5,100 shares of stock sold by him to the Northern Pacific Railroad, while the latter insists that the consideration for the transfer was, as stated in the contract, the railroad's guarantying the principal and inter-486 est of *the bonds, and taking a lease of the property for 999 years, which provided for rental to be paid out of net earnings.

The evidence on this branch of the case is meager. On behalf of the defendant the records showed that on October 29 and 30, 1888, the bonds were turned over on the order of Corbin, president of the Cœur D'Alene Company. Corbin, who was an old man at the time of taking the testimony in 1907, stated that he received none of the bonds, but so much cash; that neither he nor his associates received any benefit from the mortgage, "though I presume it was probably used to pay us. I know we got our money. . . . I do not think we received any bonds, unless possibly we might have received bonds with an agreement with somebody to take them off our hands and pay us the money, because I never had any bonds. . . . If they ever came into my hands at all, they just passed through my hands."

A witness for the Northern Pacific, who had been its auditor in 1888, had no personal knowledge of the transaction, but testified that there was nothing on the books of the Northern Pacific which showed that it had ever received the $465,000 of bonds, or that it had ever paid anything for this stock. He did not think that the 33 miles of railroad cost $825,000, and supposed that the $465,000 of bonds went to Corbin and his associates. "His rights and so on were worth something."

In December, 1889, the railroad obtained, through Corbin, the remaining 4,000 shares of stock in the Cœur D'Alene, paying therefor $250,000. It changed the road from a narrow to a broad gauge at a cost of $150,000, and extended the line 16½ miles at a cost of $750,000, and, as provided in the mortgage, issued $413,000 of additional bonds, being at the rate of $25,000 per mile. The cost of this extension, change in grade, and other betterments amounted to $910,000, or about $500,000 more than the *Northern Pacific Railroad received [487 from the sale of this last issue of $413,000.

The first twenty-one months after the lease the Cœur D'Alene's net earnings amounted to $176,000, and, as the lease provided that net earnings should be paid as rental, a dividend of 6 per cent was declared. Thereafter the earnings rapidly decreased and ultimately the books showed a loss. But the Northern Pacific Railroad, in accordance with the terms of the lease, paid the interest on the bonds until it was itself put in the hands of a receiver in 1893. He failed to pay the interest in 1895, and proceedings were instituted to foreclose the mortgages on the Cœur D'Alene Company. The property was sold under foreclosure in January, 1899, for $220,000, to the newly organized Northern Pacific Railway Company.

This left nothing for payment of Boyd's debt, and he insists that the lease and the diversion of the funds in purchase of Corbin's stock made the railroad responsible for the debts of the Cœur D'Alene, including his judgment. He further claims that the rail*way* became liable for the payment of the same debt by virtue of new and independent proceedings now to be stated, under which the Northern Pacific Rail*way* in 1896 acquired the property of the Northern Pacific Rail*road*.

On August 15, 1893, Winston and others filed in the United States court for the eastern district of Wisconsin a creditors' bill against the Northern Pacific Railroad, alleging that it was insolvent, its mortgage bonds amounting to about $140,000,000 and its floating debts to $11,000,000, and praying for the appointment of a receiver to preserve the property as an entirety, and to prevent it from being dismembered by separate sales under attachments and other liens. The company owned or controlled 54 subsidiary companies, and main and branch lines 4,700 miles in length. It also owned or was entitled to receive about 40,000,000 acres under land grants. There *were[488 six mortgages—some on one part of the property, some on another—and a general mortgage on the entire railroad lines. It also owned a large body of land which was not encumbered by liens. Interest had been paid on some of the bonds, but there had been a default in the interest on those secured by the junior mortgages.

Shortly after the filing of the creditors' bill a suit was brought in the same court by the trustees to foreclose these latter

mortgages. The cases were consolidated and the receivership continued under the consolidated causes. The railroad demurred. As the road ran through several states, there were many questions of conflicting jurisdiction which were not settled until January 31, 1896, so that, except for administrative orders, no steps were taken in the litigation proper.

The representatives of the stockholders intended to resist the foreclosure, and while recognizing the superior claim of the bonds, advised that "if properly protected, stockholders can secure equitable terms in any reorganization." There were also representatives of the bondholders, and ultimately the two interests agreed upon a plan, the terms of which were stated by the reorganization committee which, March 16, 1896, issued a circular to "the holders of bonds and stocks issued or guaranteed by the Northern Pacific Railroad." This circular outlined a plan under which all of the stocks and bonds of the railroad were to be transferred to a new company (the present Northern Pacific Railway Company), which was to purchase the property of the railroad, issue new bonds, part of which were to be sold to raise money with which to discharge receivers' certificates, purchase needed equipment and make necessary betterments. The balance was to be issued in exchange for the bonds of the old company.

The plan also contemplated the issuance of preferred and common stock, part to be used in paying debts of the subsidiary companies, for which the Northern Pacific 489] *Railroad was liable, part for the expenses of the reorganization, and the balance to be issued in exchange for the outstanding stock of the Northern Pacific Railroad. Under the proposed plan the holder of $100 of preferred stock in the old company, upon paying $10 per share, was to receive $50 of preferred and $50 of common stock in the new company. For each $100 of common stock the holder was to receive one share of common in the new corporation upon paying $15 per share. The aggregate of these cash payments on stock was about $11,000,000.

The records showing the cost of the original construction were not accessible, and in some particulars the costs of the main and subsidiary lines appear to have been combined. But there is testimony tending to show that the cost of the railroad property, subject to the mortgage, was about $241,000,000. What was the value of the 40,000,000 acres of land is not stated. For several years prior to the receivership the road's net earnings had varied between $10,000,000 and $4,449,000. Its fixed charges amounted to $11,000,000,—showing an annual deficit of about $5,000,000. The bonds, unpaid interest, and receivers' certificates aggregated at date of sale $157,000,000. The unsecured debts proved before the master amounted to about $15,200,000. The reorganization contemplated an issue of new bonds for $190,000,000 at lower rates of interest, $75,000,000 of preferred stock, $80,000,000 of common stock,—a total in bonds and stock of $345,000,000.

The reorganization agreement contained a statement that the property intended to be purchased was mutually agreed to be of the value of $345,000,000, payable in the stocks and bonds as above described.

The plan of reorganization was accepted, and on April 27, 1896, the decree of foreclosure was entered and the property ordered to be sold, on a date later fixed for July 25, 1896.

*On June 23, 1896, an order was en-[490 tered directing the special master to give notice by publication requiring each and every creditor of the railroad to present their claims against the company or specific property before November 1st, 1896; in default of which they should be excluded from the benefit of the reference. Publication was made as directed.

On July 22, 1896, Paton and others, holding contingent and unsecured claims for $5,500,000 against the Northern Pacific R. R., filed a bill, in the same court that had jurisdiction of the creditors' bill and foreclosure suit, charging that the sale was the result of a conspiracy between bondholders and stockholders to exclude general creditors, and to award to stockholders in the old company rights in the new which were valuable and could not be legally reserved for the stockholders until first offered to and declined by the general creditors. It prayed that the decree of foreclosure should be opened; that the court would formulate a just and fair plan for distribution; and that the sale be enjoined. This was later modified so as to permit the sale to proceed, but asking an injunction to prevent the distribution of the proceeds and securities. The court held that the company was insolvent; that the assets were insufficient to pay the mortgage debts; that practical operation had demonstrated that the net earnings would not pay the fixed charges; that there was no equity in the property out of which unsecured creditors could be paid, and no reason existed why the stockholders could not go into a reorganization plan whereby they would become stockholders in the new company, if it should become the purchaser. The prayer for injunction was denied. No appeal was taken.

On July 25th the railroad property was sold at public outcry to the newly organized railway company at a price representing $61,500,000, or $86,000,000 less than the secured debts. On July 27th the sale was 491]reported to the *court, and, all parties consenting, was three days later confirmed. The railway company entered into possession, and the first year its earnings were $489,000 above fixed charges, which had been lessened under the reorganization. The second year it declared a dividend of $3,000,000 and carried $3,000,000 to surplus. Since that time the earnings have been continually large, the business profitable, and the value of the securities correspondingly great; but for a year after the sale, stock on which $10 and $15 had been paid in cash sold at prices varying from $18 to $51 for preferred and $13 and $18 for common.

In addition to the property covered by the mortgage, the Northern Pacific Railroad owned large quantities of land which was not encumbered, and in May, 1896, the Farmers' Loan & Trust Company filed its supplemental bill describing this unmortgaged property, and alleging that various intervening creditors had obtained judgments against the railroad company, some of which had been assigned to the trust company. It prayed that these lands of the railroad should be sold and the proceeds applied to the satisfaction of the unsecured claims. On the same day that this supplemental bill was filed, the railroad company and other parties to the consolidated causes answered, the court adjudged that the complainant was entitled to the decree asked for, and appointed a receiver of the property.

It was not, however, until April 27, 1899, that the sale was ordered. The property was thereupon sold to the Northern Pacific Railway for $1,623,000. The parties stipulated that the sale should be confirmed, and on the same day in September, 1899, this was done.

Out of the proceeds of this unmortgaged land a dividend of $108,000 was paid on the Cœur D'Alene bonds held by the Northern Pacific Railway. The Northern Pacific Railway had a claim against the old railroad of $86,000,000 for deficiency between 492]the bid at foreclosure sale and *the lien debts held by it. It had also purchased about $14,000,000 of other unsecured claims. On this $100,000,000 it was paid a dividend of $1,200,000, or a little over 1 per cent.

But during these years the litigation between Spaulding and the Cœur D'Alene to recover judgment for work done, between Boyd and Spaulding over the title to the judgment, and between Boyd and the Cœur D'Alene to revive the judgment, had been in progress and did not terminate until 1905, when the judgment was revived. When the appeal was dismissed, Boyd brought this bill in equity against the Northern Pacific Railroad Company and the Northern Pacific Railway Company, insisting that the railroad was liable for this debt of the Cœur D'Alene, and that the railway was in turn liable for this debt of the railroad. There was no demurrer, but both answered and much evidence was taken. A decree in favor of Boyd and against the railway was made a lien on the property purchased, subject, however, to the mortgages placed thereon. The decree was affirmed by the circuit court of appeals (170 Fed. 779, 101 C. C. A. 18, 177 Fed. 804), and both defendants appealed. In this court a brief was filed by an *amicus curiæ*, insisting that the complainants' remedy was against stockholders of the Northern Pacific Railroad, and not against the railway company or its property.

Messrs. **Charles Donnelly** and **Francis Lynde Stetson** argued the cause, and, with Mr. Charles W. Bunn, filed a brief for appellants:

The doctrine of equity that the assets of a corporation constitute a trust fund for the payment of its creditors has no application here, so far as it depends upon the point that the debtor was a corporation. That doctrine applies only to corporations that are either insolvent or contemplating insolvency (McDonald v. Williams, 174 U. S. 397-401, 43 L. ed. 1022, 1023, 19 Sup. Ct. Rep. 743; New Hampshire Sav. Bank v. Richey, 58 C. C. A. 294, 121 Fed. 960), and not until long after the transaction of 1888 did the Cœur d'Alene Company become insolvent. The complainant's claim rests upon a doctrine that applies not peculiarly to corporations, but equally to natural persons.

During a period of more than six months after its receipt of the stock the railroad company sustained to the Cœur d'Alene Company no relation other than that of stockholder and lessee. We submit that for the acts of the executive officers of the Cœur d'Alene Company during that period it cannot be held accountable. Certainly its ownership of the majority of the Cœur d'Alene stock does not make it accountable for them.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 596, 597, 29 L. ed. 499, 501, 502, 6 Sup. Ct. Rep. 194; Stone v. Cleveland, C. C. & St. L. R. Co. 202 N. Y. 352, 35 L.R.A.(N.S.) 770, 95 N. E. 810.

The misappropriation by one man of the

property of another does not, at the time of the misappropriation, entitle the creditor of that other to pursue the misappropriated proceeds, unless at such time such creditor has reduced his claim to judgment, has issued execution against his debtor upon it, and the execution has been returned unsatisfied.

Scott v. Neely, 140 U. S. 106, 113, 35 L. ed. 358, 361, 11 Sup. Ct. Rep. 712; Cates v. Allen, 149 U. S. 457, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977.

The mortgagee in good faith may lawfully agree to sell to the mortgagor.

Wicker v. Hoppock, 6 Wall. 94–98, 18 L. ed. 752, 753; Shoemaker v. Katz, 74 Wis. 374, 43 N. W. 152.

Such a previous arrangement to provide money for the purchase of the property and for its improvements often has received the recognition and the approval of the courts.

1 Bigelow, Fraud, p. 581; Central Trust Co. v. United States Rolling Stock Co. 56 Fed. 7; Paton v. Northern P. R. Co. 85 Fed. 838; Wenger v. Chicago & E. R. Co. 51 C. C. A. 660, 114 Fed. 36; Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co. 103 Fed. 110; Dickerman v. Northern Trust Co. 176 U. S. 181–189, 44 L. ed. 423, 429, 20 Sup. Ct. Rep. 311; Pennsylvania Transp. Co's Appeal, 101 Pa. 576; Kurtz v. Philadelphia & R. R. Co. 187 Pa. 59, 40 Atl. 988; MacArdell v. Olcott, 104 App. Div. 263, 93 N. Y. Supp. 799, 189 N. Y. 381, 82 N. E. 161.

Prior to the decree in the present suit, no court has held to be fraudulent the reorganization of an insolvent corporation under a plan which permitted interests in the new company to be acquired by stockholders of the old company only upon making substantial money payments. In the Howard Case (7 Wall. 392, 19 L. ed. 117), in the Monon Case (174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827), in the Paul Case (35 C. C. A. 639, 93 Fed. 878), in the Des Moines Case (101 Fed. 632, and in the Kansas City Southern Case (76 C. C. A. 615, 146 Fed. 337), the interest of the stockholders in the foreclosed property was preserved at the expense of general creditors, by allotting to such stockholders a stock interest in the new company, without new consideration of any kind.

One who objects seasonably to the validity of a foreclosure sale, upon the ground that the price paid was inadequate, must accompany his objection with an offer of some responsible person to pay more. This principle is elementary, and it applies even when the objections are seasonably made,—for example, before the sale is confirmed.

Jones, Mortg. § 1641; Jones, Corporate Bonds & Mortgages, § 662.

It applies as well in railroad foreclosure sales as in other foreclosure sales.

Turner v. Indianapolis, B. & W. R. Co. 8 Biss. 380, Fed. Cas. No. 14,259.

Even though the court should be of opinion that in this reorganization there was such participation by stockholders as should have invalidated the proceedings in the consolidated suit, still the court having charge of those proceedings adjudged otherwise; and that judgment, sustained after consideration of the specific objections here relied on, and decreeing the railway company to be entitled to the property, is binding on all the world, including the complainant.

Fauntleroy v. Lum, 210 U. S. 230, 237, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641; 2 Freeman, Judgm. § 486.

The filing of a bill relating to real estate, or to enforce a mortgage or other lien thereon, is notice to all of those claiming under the defendants named in the bill after its filing, or who docket judgments against such defendants, or acquire liens pending the suit. Much more is it notice to those possessing mere naked claims not reduced to judgment. Such persons need not be, indeed, cannot properly be, made parties formally, but are bound precisely as if they had been named as parties and process served upon them.

1 Dan. Ch. Pl. & Pr. 5th Am. ed. pp. 280, 281; Story, Eq. Pl. §§ 156, 351; Murray v. Ballou, 1 Johns. Ch. 577; Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Ex parte South & North Ala. R. Co. 95 U. S. 221, 24 L. ed. 355; Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1133, 14 Sup. Ct. Rep. 127; Herring v. New York, L. E. & W. R. Co. 105 N. Y. 340, 12 N. E. 763; Bronson v. La Crosse & M. R. Co. 2 Black, 524, 17 L. ed. 359.

Even if complainant had been an execution creditor of the railroad company instead of the claimant of a mere right in equity, then, knowing of the foreclosure, as he admits he did, and having an opportunity under the express invitation of the creditors' bill to intervene in the consolidated suit (Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 379, 37 L. ed. 1113, 1115, 14 Sup. Ct. Rep. 127), yet refraining from intervening, he was represented by the Northern Pacific Railroad Company when it made this full and frank disclosure of the plan as much as he was in any other part of the foreclosure proceedings, and is bound by the judgment therein. Certainly he was represented by the creditors of the class to which he claims to belong, and who urged unsuccessfully the same objections.

Complainant is precluded by his laches from recovering in this suit.

Hammond v. Hopkins, 143 U. S. 224, 274,

36 L. ed. 134, 153, 12 Sup. Ct. Rep. 418; Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 99, 100, 36 L. ed. 899, 903, 13 Sup. Ct. Rep. 28; Alsop v. Riker, 155 U. S. 448, 39 L. ed. 218, 15 Sup. Ct. Rep. 162; Felix v. Patrick, 145 U. S. 317, 329, 36 L. ed. 719, 725, 12 Sup. Ct. Rep. 862; Starkweather v. Jenner, 216 U. S. 524, 54 L. ed. 602, 30 Sup. Ct. Rep. 382, 17 Ann. Cas. 1167; Rothchild v. Memphis & C. R. Co. 51 C. C. A. 310, 113 Fed. 476; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827; Graham v. Boston, H. & E. R. Co. 118 U. S. 161, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; 5 Pom. Eq. Jur. § 26; Hardt v. Heidweyer, 152 U. S. 547, 560, 38 L. ed. 548, 552, 14 Sup. Ct. Rep. 671; Evers v. Watson, 156 U. S. 527, 535, 39 L. ed. 520, 523, 15 Sup. Ct. Rep. 430; Johnson v. Atlantic, G. & W. I. Transit Co. 156 U. S. 618, 648, 39 L. ed. 556, 566, 15 Sup. Ct. Rep. 520; Halstead v. Grinnan, 152 U. S. 412, 38 L. ed. 495, 14 Sup. Ct. Rep. 641; St. Paul, S. & T. F. R. Co. v. Sage, 1 C. C. A. 256, 4 U. S. App. 160, 49 Fed. 326.

Mr. Samuel W. Moore filed a brief as *amicus curiæ:*

Even though the court should be of the opinion that in this reorganization an interest in the property was preserved to the old stockholders through the issue to them of stock in the new company, still the complainant is not entitled to a decree against the new company or against its property, but must pursue the old stockholders to the extent that they have received an interest in the new company which should have gone to the general creditors.

Wolf v. Stix, 99 U. S. 1, 7, 25 L. ed. 309, 312; Dunphy v. Kleinsmith, 11 Wall. 610, 20 L. ed. 223; Clements v. Moore, 6 Wall. 299, 18 L. ed. 786; Moody v. Burton, 27 Me. 427, 46 Am. Dec. 612; Wenger v. Chicago & E. R. Co. 51 C. C. A. 660, 114 Fed. 34.

Messrs. **George Turner** and **R. L. Edmiston** argued the cause and filed a brief for appellee:

The transaction constituted a diversion and appropriation by the Northern Pacific Railroad Company to its own use of the assets of the Cœur d'Alene R. & Nav. Co., and made the former company liable to the creditors of the latter company to the extent of the assets so diverted and appropriated.

Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; Central R. & Bkg. Co. v. Pettus, 113 U. S. 124, 28 L. ed. 918, 5 Sup. Ct. Rep. 387; Mellon v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 56, 14 Sup. Ct. Rep. 240.

That the Cœur d'Alene Company was insolvent in the sense that the term was used in McDonald v. Williams and kindred cases, from the moment that all its property was leased to the railroad company for 999 years, burdened with a mortgage indebtedness of $825,000,—twice its cost and twice its value,—as the result of the agreement of lease, thus leaving creditors no possibility of securing possession of the property or any part of it by execution sale, and in truth leaving them nothing to sell except an overburdened and worthless equity to accrue at the end of 999 years, seems a proposition too plain to require argument.

Toof v. Martin, 13 Wall. 47, 20 L. ed. 481; 4 Words & Phrases, p. 3647.

The railroad company cannot now, nor can its successor, avoid liability by showing, as it has attempted to do, the expenditure of a large sum for betterments and extensions put on the Cœur d'Alene property after it came into its possession.

Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550.

The Northern Pacific Railroad Company obtained possession and control of all the property of the Cœur d'Alene Company by purchase of all the stock of that company, and the making to it of a 999-year lease. Upon this state of facts the property in the hands of the railroad company remained charged with the debts of the Cœur d'Alene Company.

10 Cyc. p. 1267; 1 Thomp. Corp. §§ 332, et seq. also vol. 5, § 6543; Brum v. Merchants' Ins. Co. 16 Fed. 140; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 3 McCrary, 368, 10 Fed. 596; San Francisco & N. P. R. Co. v. Bee, 48 Cal. 398; Jones v. Arkansas Mechanical & Agri. Co. 38 Ark. 17; Fogg v. St. Louis, H. & K. R. Co. 5 McCrary, 449, 17 Fed. 871; McVicker v. American Opera Co. 40 Fed. 861; Tysen v. Wabash R. Co. 11 Biss. 510, 15 Fed. 765; Montgomery & W. P. R. Co. v. Branch, 59 Ala. 139; Sidell v. Missouri P. R. Co. 24 C. C. A. 216, 51 U. S. App. 1, 78 Fed. 726; Grenell v. Detroit Gas. Co. 112 Mich. 73, 70 N. W. 414; Vance v. McNabb Coal & Coke Co. 92 Tenn. 60, 20 S. W. 424; Central R. & Bkg. Co. v. Pettus, 113 U. S. 124, 28 L. ed. 918, 5 Sup. Ct. Rep. 387; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 287, 35 L. ed. 903, 10 Sup. Ct. Rep. 550; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 15, 38 L. ed. 63, 14 Sup. Ct. Rep. 240; Perry, Tr. §§ 241, 242; Story, Eq. Jur. § 1252.

This was a liability of the railroad com-

pany, not, indeed, unlimited, but a liability to make good the debts of the Cœur d'Alene Company out of the specific property which it had received. It was a contingent, or qualified, liability, but one which made Boyd a creditor within the meaning of the statute against fraudulent conveyances.

20 Cyc. p. 421; McLaughlin v. Bank of Potomac, 7 How. 220, 12 L. ed. 675; Thompson v. Crane, 73 Fed. 327; Yardley v. Torr, 67 Fed. 857.

It cannot be claimed that the liability of a successor company is dependent on the possession of the identical property received by it. The law is that if the property has been transferred or lost, the creditor may pursue the debtor *in personam*.

Wait, Fraud. Conv. §§ 176, 178; Moore, Fraud. Conv. p. 1023; 3 Pom. Eq. Jur. §§ 1057, 1058; 20 Cyc. p. 821.

The railroad company, as the transferee of the stock, on the insolvency of the Cœur d'Alene Company, became liable, to the extent of the unpaid subscriptions, for the debts of the Cœur d'Alene Company.

Cook, Stock & Stockholders, §§ 199, 256; Webster v. Upton, 91 U. S. 64, 23 L. ed. 224.

The railroad company did not buy the stock believing in good faith that it was fully paid up, and if it did not, then the railroad company became responsible as the transferee of the stock.

Cook, Stock & Stockholders, §§ 49, 50.

If it was not in fact paid up, and the original subscriber, or transferee, took it, knowing that fact, his liability to creditors is precisely the same as if there had been an original formal subscription upon which the books of the company show no payments, or only partial payments.

1 Thomp. Corp. § 1142; Kelley v. Clark (Kelley v. Fourth of July Min. Co.) 21 Mont. 291, 42 L.R.A. 621, 69 Am. St. Rep. 668, 53 Pac. 959, 19 Mor. Min. Rep. 431; Camden v. Stuart, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 585.

This liability, it is true, is primarily to the corporation, but it accrues to the creditor on the insolvency of the corporation, and, in the absence of statutes, is worked out in favor of the creditor by a bill in equity, brought by him against the corporation and the stockholders.

Cook, Stock & Stockholders, §§ 200, 204.

Any person having a claim, legal or equitable, direct or contingent, sounding in contract or in tort, and either present or prospective, is a creditor within the meaning of the statute against fraudulent conveyances.

Wait, Fraud. Conv. 2d ed. 1888, § 73.

*Lex non cogit ad impossibilia.*

*Case v. Beauregard*, 101 U. S. 690, 25 L. ed. 1004; Merchants' Nat. Bank v. Paine, 13 R. I. 592; Pendleton v. Perkins, 49 Mo. 565; Turner v. Adams, 46 Mo. 95; Peay v. Morrison, 10 Gratt. 149; Pope v. Solomons, 36 Ga. 541; Kipper v. Glancey, 2 Blackf. 356; Scott v. M'Millen, 1 Litt. (Ky.) 302, 13 Am. Dec. 239.

Mr. Boyd's attorneys thought the allegations of the bill entitled him to the aid of a court of equity, and the attorneys for appellant evidently thought likewise, because no objection to the equitable jurisdiction of the court was interposed by them in either of the courts below, in any shape, manner, or form. If they have now changed their minds, it comes too late to avail them. It is the settled doctrine of this court that such objections must be taken *in limine*, and that if not so taken, they are waived.

Hollins v. Brierfield Coal & I. Co. 150 U. S. 381, 37 L. ed. 1115, 14 Sup. Ct. Rep. 127; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; Reynes v. Dumont, 130 U. S. 394, 32 L. ed. 945, 9 Sup. Ct. Rep. 486.

The foreclosure proceedings, by and through which the railway company holds title and possession of the property of the railroad company, were a fraud on the creditors of the latter company, because prosecuted pursuant to a previous collusive agreement between bondholders and stockholders, whereby the latter were recognized and permitted to retain an interest in the property on a reorganization after foreclosure sale. Louisville Trust Co. v. Louisville N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Central of Georgia R. Co. v. Paul, 35 C. C. A. 639, 93 Fed. 878; St. Louis Trust Co. v. Des Moines, N. & W. R. 101 Fed. 632; Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 52 C. C. A. 149, 114 Fed. 263; Guardian Trust Co. v. Kansas City Southern R. Co. 146 Fed. 337.

If the transaction was such in legal effect as to constitute a fraud on creditors, then the fact that the parties knowingly and intentionally consummated the transaction carries with it conclusively the intent to defraud, even though they may have been innocent of an actual fraudulent purpose. This is elementary.

Thomson v. Crane, 73 Fed. 330; Wait, Fraud. Conv. §§ 196, 197.

The case is to be treated as if the Northern Pacific Railroad Company, in view of its obligations to bondholders under its several mortgages, had conveyed its property to the said bondholders or their trustees in payment of the mortgage debt. The consent decree, and the understanding had

prior to it, reduced the transaction to that complexion.

Gutta Percha Rubber Mfg. Co. v. Kansas City Fire Dept. Supply Co. 149 Mo. 538, 50 S. W. 917; Smith v. Craft, 11 Biss. 340, 12 Fed. 856; Lukins v. Aird, 6 Wall. 79, 18 L. ed. 751; Crawford v. Neal, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Wait, Fraud. Conv. 2d ed. § 197; Briggs v. Mitchell, 60 Barb. 316.

One entitled to share in the distribution, and not a party, is not bound by the decree of distribution.

Williams v. Gibbes, 17 How. 239, 15 L. ed. 135; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117.

We have made proof in this case of "no wilful default" and of "no want of reasonable diligence."

Williams v. Gibbes, 17 How. 239, 15 L. ed. 135; David v. Frowd, 1 Myl. & K. 200, 2 L. J. Ch. N. S. 68, 2 Eng. Rul. Cas. 246.

Any judgment of any court, procured to be rendered by fraud, is *coram non judice*, absolutely void, and subject to be attacked at any time and in any forum, by any person injuriously affected.

Black, Judgm. §§ 293, 605; Bump, Fraud. Conv. p. 521; Moore, Fraud. Conv. § 50; Freeman, Judgm. 3d ed. § 250; Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294; Drury v. Cross, 7 Wall. 299, 19 L. ed. 40; Johnson v. Waters, 111 U. S. 667, 28 L. ed. 556, 4 Sup. Ct. Rep. 619; Michaels v. Post, 21 Wall. 426, 22 L. ed. 525; Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407; Guardian Trust Co. v. Kansas City Southern R. Co. 76 C. C. A. 615, 146 Fed. 337; Kurtz v. Philadelphia & R. R. Co. 187 Pa. 59, 40 Atl. 988; Bandon v. Becher, 3 Clark & F. 479.

There is no room in this case for the application of the doctrine of laches.

Fogg v. St. Louis, H. & K. R. Co. 5 McCrary, 449, 17 Fed. 871; Wilson v. Wilson, 41 Or. 459, 69 Pac. 923; 5 Pom. Eq. Jur. §§ 10–36; O'Brien v. Wheelock, 184 U. S. 480, 46 L. ed. 647, 22 Sup. Ct. Rep. 354; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Townsend v. Vanderwerker, 160 U. S. 186, 40 L. ed. 388, 16 Sup. Ct. Rep. 258.

After the establishment of his rights in the judgment, a few months elapsed during which he might have brought this suit if he had then known the facts on which it is based. The advice of his attorneys, in this conjuncture, to await a revivor of the judgment before attempting further proceedings to enforce it would protect complainant against the charge of laches, even if the advice was bad. Twenty years' delay, on the mistaken advice of an attorney, has been held not to constitute laches.

Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892.

Nor can the time spent by Spaulding and Boyd in ineffectual legal proceedings be counted as unreasonable delay or neglectful repose. The prosecution of an ineffectual appeal, if taken in good faith, prevents the delay thereby occasioned being counted as laches.

Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 520, 28 L. ed. 503, 4 Sup. Ct. Rep. 583.

One pressing for patent in the Land Office is not guilty of laches because, pending his application for patent, he fails to bring suit to quiet title to his land, although he might have brought the suit before patent.

Southern P. R. Co. v. Stanley, 49 Fed. 266.

A delay of eight years was excused by adversary proceedings in the Land Office.

Hodge v. Palms, 54 C. C. A. 570, 117 Fed. 396.

Delay of five years in bringing suit for infringement of a patent was excused by the pendency of suit to establish the validity of the patent.

United States Mitis Co. v. Detroit Steel & Spring Co. 122 Fed. 863; Russell v. Dayton Coal & I. Co. 109 Tenn. 43, 70 S. W. 1.

After complainant brought his suit of revivor he was constantly in court, with the railway company confronting him, litigating his right to a revivor, and the judgment of revivor was pending in the circuit court of appeals on the appeal of the railway company at the moment this suit was brought. While complainant might have brought the suit immediately after the judgment of revivor in the lower court, on the ground that the appeal did not suspend the judgment, it was not laches to await the result of the appeal.

Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Hodge v. Palms, 54 C. C. A. 570, 117 Fed. 396; United States Mitis Co. v. Detroit Steel & Spring Co. 122 Fed. 863; Russell v. Dayton Coal & I. Co. 109 Tenn. 43, 70 S. W. 1; Southern P. R. Co. v. Stanley, 49 Fed. 266.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

Boyd's judgment against the Cœur D'Alene Railway & Navigation Company was rendered in 1896, in an action begun in 1887 in a court of the territory of

Idaho. After he had established his title to the judgment and revived it in 1906 for $71,278, there was nothing on which an execution could be levied, because, in the meantime, all of the property of the Cœur D'Alene had been sold under foreclosure. He thereupon brought this suit, claiming that the Northern Pacific R. R. Co. was liable in equity as for a diversion of $465,000 of bonds belonging to the Cœur D'Alene, but used by the Northern Pacific in payment of 5,100 shares of stock bought from Corbin in 1888.

At that time the Cœur D'Alene was sol-[499] vent, owning *and operating at a profit a narrow guage railroad, 33 miles in length, constructed at a cost of about $12,000 a mile, and paid for mainly out of the proceeds of $360,000 of first-mortgage bonds. The original capital stock of $500,000, increased to $1,000,000, had been issued, but the subscriptions were unpaid. A majority of this stock was controlled by Corbin, the president.

On August 1, 1888, he, in his individual capacity, entered into a written contract with the Northern Pacific, in which he undertook to have the Cœur D'Alene issue $825,000 of bonds, $360,000 of which were to be retained to retire those then outstanding. He also agreed to cause the Cœur D'Alene to lease its property for 999 years to the Northern Pacific, which, in turn, was to guarantee the payment of the principal and interest of the bonds. The contract further recited that, in consideration of the execution of the lease and guaranty, Corbin would transfer to the Northern Pacific 5,100 fully paid and nonassessable shares of the capital stock of the Cœur D'Alene. The agreement was promptly carried into effect. A resolution was passed by the directors of the Cœur D'Alene, authorizing the issue of $825,000 of bonds for properly constructing, completing, and equipping the road; the 999-year lease was made and Corbin transferred his stock. Shortly afterwards the trust company, named in the mortgage, issued to Corbin, president, or order, $465,000 of the new bonds. They were not used for completing or equipping the road, paying the debts, or other corporate purpose, and although the Northern Pacific was the then holder of a majority of the stock and in charge of the business and litigation of the Cœur D'Alene, no steps were taken to trace or recover them. Corbin testified that he was paid for the stock, in cash, about the par value of the bonds; that he had never received them, or if so, that they only passed through his hands "with an agreement that somebody was to *take them off of our hands* and pay us the *money.*"

*1. The buyer would naturally have [500] been the person to make arrangements for the payment. But the railway insists that the payment was not made in cash, but that, as recited in the written contract, the stock was transferred by Corbin in consideration of the Northern Pacific guarantying the bonds and entering into the lease. But even if Corbin sold his 5,100 shares for a consideration nominally moving to the Cœur D'Alene, that would not change the character of the transaction if, in fact, Corbin made the transfer with the further understanding that he was to have the proceeds of the guaranteed bonds. In that event the purchaser would be as much liable for the diversion of the $465,000 as the seller. Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550. The terms of the contract, Corbin's control of the Cœur D'Alene, the failure to produce or account for the absence of the agent who represented the Northern Pacific Railroad in the purchase, together with Corbin's testimony that the stock was paid for out of the cash proceeds of the bonds, support the concurrent findings of the two courts that the Northern Pacific combined with him to divert $465,000 of the assets of the Cœur D'Alene. And even if, as claimed, liability for a diversion of trust funds was dependent upon the insolvency of the Cœur D'Alene, that insolvency was brought about in the very act of carrying the illegal contract into effect; for thereby the Cœur D'Alene was encumbered with a mortgage for twice its value, and the lease for 999 years, with rental payable only from net profits, left nothing out of which debts could be made by levy and sale. 134 U. S. 277.

2. Being liable for this diversion of $465,000, the Northern Pacific Railroad remained so liable until the funds were restored to the true owner. Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 277, 33 L. ed. 900, 10 Sup. Ct. Rep. 550. The obligation was not lessened by set-offs, nor discharged in whole, because the Northern Pacific spent $500,000 of its own *money in broadening the gauge, ex-[501] tending the line, equipping the road, or for other purposes, which may have been thought by it advantageous to the Cœur D'Alene. Such disbursement was not a restoration of what had been taken, but an expenditure by the Northern Pacific, for its own benefit, in improving a road which it practically owned by virtue of the 999-year lease.

3. Although this diversion of $465,000 of bonds in 1888 made the Northern Pacific liable, in equity, for the payment of Boyd's

judgment for $71,278, recovered in 1896 and revived in 1906, yet his right was apparently not enforceable because, in 1896, all of the property of the Northern Pacific Railroad had been sold under foreclosure to the newly created Northern Pacific Railway Company. He thereupon brought this suit against the mortgagor and purchaser, seeking to subject the property bought to the payment of this liability. He claimed that the foreclosure sale was void because made in pursuance of an illegal plan of reorganization, between bondholders and stockholders of the railroad, in which, though no provision was made for the payment of unsecured creditors, the stockholders retained their interest by receiving an equal number of shares in the new railway. There was no question as to parties and no demurrer to the bill. The railway answered, and on the trial of the merits offered evidence, tending to support its contention that the decree was regular in form, free from fraud, and that the property brought a fair price at public outcry. Both courts found against this contention, and entered a decree making Boyd's claim a lien upon the property of the railroad in the hands of the railway, but subject to the mortgages placed thereon at the time of the reorganization.

The appellants attack the ruling from various standpoints based upon many facts in the voluminous record. But, having been summarized in the statement, they will not be discussed in detail, inasmuch 502] as the case, though *presenting various aspects, is controlled by a single proposition. For although Boyd was not a party to the foreclosure, and was not made such by the publication notifying creditors to prove their claims, yet the original and supplemental decrees were free from any moral or actual fraud, and were, in form and nature, sufficient to have passed a title good against him, unless the contract of reorganization, reserving a stock interest in the new company for the old shareholders, left the property still subject to the claims of nonassenting creditors of the Northern Pacific Railroad.

4. Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a nonassenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. Cf. San Francisco & N. P. R. Co. v. Bee, 48 Cal. 398; Grenell v. Detroit Gas Co. 112 Mich. 70, 70 N. W. 413. There is no difference in principle if the contract reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree.

5. It is argued that this is true only when there is fraud in the decree,—the appellants insisting that in all other *cases [503 a judicial sale operates to pass a title which cuts off all claims of unsecured creditors against the property. They rely on Wenger v. Chicago & E. R. Co. 51 C. C. A. 660, 114 Fed. 34; Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co. 103 Fed. 110; Pennsylvania Transp. Co's Appeal, 101 Pa. 576; Kurtz v. Philadelphia & R. R. Co. 187 Pa. 59, 40 Atl. 988; Paton v. Northern P. R. Co. 85 Fed. 838; Shoemaker v. Kats, 74 Wis. 374, 43 N. W. 151; Bame v. Drew, 4 Denio, 287; Ferguson v. Ann Arbor R. Co. 17 App. Div. 336, 45 N. Y. Supp. 172; MacArdell v. Olcott, 104 App. Div. 263, 93 N. Y. Supp. 799, a. c. 189 N. Y. 368, 384, 82 N. E. 161; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294. Some of these cases hold directly, and others inferentially, that, in the absence of fraud, as here, a judicial sale is binding upon nonassenting creditors even though the decree was entered and the sale was made in pursuance of a contract, to which the stockholders were parties, and by which they were to retain a stock interest in the purchasing company. This makes the creditor's legal right against the shareholders' interest depend upon the motive with which they act and the method by which they carry out the scheme. If they do so by means of a private contract, though in ignorance of the existence of the creditor, the property remains liable for his debts. If they do so by means of a judicial sale under a consent decree, and in like ignorance or disregard of his existence, the result is said to be different, although the shareholders should reserve exactly the same interest and deprive the creditor of exactly the same right.

Such and similar possibilities at one time caused doubts to be expressed as to whether a court could permit a foreclosure sale which left any interest to the stock-

holders. But it is now settled that such reorganizations are not necessarily illegal, and, as proceedings to subject the property must usually be in a court where those who ask equity must do equity, such reorganizations may even have an effect more extensive than those made without judicial sale, and bind creditors who do not accept 504]fair *terms offered. The enormous value of corporate property often makes it impossible for one, or a score, or a hundred bondholders to purchase, and equally so for stockholders to protect their interests. A combination is necessary to secure a bidder and to prevent a sacrifice. Co-operation being essential, there is no reason why the stockholders should not unite with the bondholders to buy in the property.

That was done in the present case. And while the agreement contained no provision as to the payment of unsecured creditors, yet the railway company purchased unsecured claims aggregating $14,000,000. Whether they were acquired because of their value, to avoid litigation, or in recognition of the fact that such claims were superior to the rights of stockholders, does not appear, nor is it material. For, if purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid. Being bound for the debts, the purchase of their property, by the debts, the purchase of their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim, they were none the less bound to recognize his superior right in the property, when, years later, his contingent claim was liquidated and established. That such a sale would be void, even in the absence of fraud in decree, appears from the reasoning in Louisville Trust Co. v. 505]Louisville, N. A. & C. R. Co. 174 *U. S. 683, 43 L. ed. 1134, 19 Sup. Ct. Rep. 827, where, "assuming that foreclosure proceedings may be carried on to some extent, at least, in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder)," the court said that "no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. . . . Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

6. The railway seeks to distinguish that case from this, insisting that even if the stockholders' participation in the reorganization would have invalidated the proceeding, such result does not follow here because the court having charge of the foreclosure passed on this very question before the sale in 1896 and dismissed the bill of Paton, an unsecured creditor, when he made exactly the same attack upon the reorganization as that by Boyd in this bill. That court then held that as the property was insufficient to pay the mortgage debts of $157,000,000, there was nothing which could come to the unsecured creditors, and they, therefore, had no ground to complain if the bondholders were willing to give new shares to the old stockholders. No appeal was taken from that decision,—possibly because the Paton claim was purchased by the railway. But inasmuch as Boyd was not a party to the record, that decree was not binding upon him as *res judicata*, and the opinion, not being controlling authority, cannot be followed in view of the principles declared in Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827.

In saying that there was nothing for unsecured creditors, the argument assumes the very fact which the law contemplated *was to be tested by adversary pro-[506 ceeding in which it would have been to the interest of the stockholders to interpose every valid defense. If, after a trial, a sale was ordered, they were still interested in making the property bring its value, so as to leave a surplus for themselves as ultimate owners. Even after sale they could have opposed its confirmation if the bids had been chilled, or other reason existed to prevent its approval. In the present case all these tests and safeguards were withdrawn. The stockholders, who, in lawfully protecting themselves, would necessarily have protected unsecured creditors, abandoned the defense that the foreclosure suit had been prematurely brought. The law, of course, did not require them to make or insist upon that defense if it was not meritorious, nor

does it condemn the decree solely because it was entered by consent. But the shareholders were not merely quiescent. They, though in effect defendants, became parties to a contract with the creditors, who were in effect complainants, by which, in consideration of stock in the new company, they transferred their shares in the railroad to the railway. The latter then owning the bonds of the complainant and controlling the stock in the defendant, became the representative of both parties in interest. In such a situation there was nothing to litigate, and so the demurrer to the bill was withdrawn. An answer was immediately filed, admitting all the allegations of the bill. On the same day, "no one opposing," a decree of foreclosure and sale was entered. Two months later the property was sold to the agreed purchaser at the upset price named in the decree. In a few days and by consent that sale was confirmed. As between the parties and the public generally, the sale was valid. As against creditors, it was a mere form. Though the Northern Pacific Railroad was devested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the 507]same debts. The circumlocution *did not better their title against Boyd as a nonassenting creditor. They had changed the name, but not the relation. The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale.

The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this, the question must be decided according to a fixed principle, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale, the property was insufficient to pay prior encumbrances. The facts in the present case illustrate the necessity of adhering to the rule. The railroad cost $241,000,000. The lien debts were $157,000,000. The road sold for $61,000,000, and the purchaser at once issued $190,000,000 of bonds and $155,000,000 of stock on property which, a month before, had been bought for $61,000,000.

It is insisted, however, that not only the bid at public outcry, but the specific finding in the Paton Case, established that the property was worth less than the encumbrances of $157,000,000, and hence that Boyd is no worse off than if the sale had been made without the reorganization agreement. In the last analysis, this means that he cannot complain if worthless stock in the new company was given for worthless stock in the old. Such contention, if true in fact, would come perilously near proving that the new shares had been issued without the payment of any part of the implied stock subscriptions except the $10 and $15 assessments. But there was an entirely different estimate of the value of the road when the reorganization contract was made. For that agreement contained the distinct recital that the property to be purchased was agreed to be "of the full value of $345,000,000, payable in fully paid nonassessable stock, and the prior *lien and general [508 lien bonds to be executed and delivered as hereinafter provided."

The fact that at the sale, where there was no competition, the property was bid in at $61,000,000, does not disprove the truth of that recital, and the shareholders cannot now be heard to claim that this material statement was untrue, and that as a fact there was no equity out of which unsecured creditors could have been paid, although there was a value which authorized the issuance of $144,000,000 fully paid stock. If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever.

7. This conclusion does not, as claimed, require the impossible, and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock. If he declines a fair offer, he is left to protect himself as any other creditor of a judgment debtor; and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it. If, however, no such tender was made and kept good, he retains the right to subject the interest of the old stockholders in the property to the payment of his debt. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities.

8. Lastly, it is said that Boyd was estopped from attacking, in 1906, a reorganization completed in 1896, and, ordinarily, such a lapse of time would prevent any creditor *from asserting a claim like that here[509 made. For along with the policy to encourage reorganizations goes that of requiring prompt action by those who claim that their rights have been injuriously affected. The

fact that improvements are put upon the property—that the stock and bonds of the new company almost immediately became the subject of transactions with third persons—calls for special application of the rule of diligence. But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the nonaction of the complainant operated to damage the defendant, or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time. Townsend v. Vanderwerker, 160 U. S. 186, 40 L. ed. 388, 16 Sup. Ct. Rep. 258.

In this case the defendants and their stockholders have not been injured by Boyd's failure to sue. His delay was not the result of inexcusable neglect, but in spite of diligent effort to put himself in the position of a judgment creditor of the Cœur D'Alene so as to be able to proceed in equity to collect his debt. He accomplished this result only after protracted litigation, beginning in 1887 and continuing through the present appeal (1913). The more important chapters of the different cases, with lawsuits within lawsuits, are reported in 5 Idaho, 528, 51 Pac. 408; 6 Idaho, 97, 53 Pac. 107; 6 Idaho, 638, 59 Pac. 426; 85 Fed. 838; 35 C. C. A. 295, 93 Fed. 280; 174 U. S. 801, 43 L. ed. 1187, 19 Sup. Ct. Rep. 884; 170 Fed. 779; 101 C. C. A. 18, 177 Fed. 804. They involve a series of independent transactions, in different courts, between Spaulding and the Cœur D'Alene Company; Boyd and Spaulding; Boyd and the Cœur D'Alene Company; the Northern Pacific Railroad and Cœur D'Alene; and finally the foreclosure of the Northern Pacific Railroad and its purchase by the Northern Pacific Railway.

510] *When Spaulding recovered against Cœur D'Alene, it required years for Boyd to establish his title to the judgment. To prevent it from becoming dormant it was necessary promptly to institute proceedings against Cœur D'Alene in the nature of scire facias to revive the judgment. There is no reason suggested by this record why it should have done so, unless it was to avoid the enforcement of this very claim, but the Northern Pacific Railway, by its counsel, defended that revivor suit against the Cœur D'Alene, and when, in 1906, it terminated in favor of Boyd, he at once filed this bill, alleging that the railroad was liable for the debts of the Cœur D'Alene, and the railway liable for the debts of the railroad.

*The delay in* beginning the present suit—*the last of a remarkable series of* legal proceedings—was excusable if not absolutely unavoidable. Boyd claims that he had no notice of the fact that the stockholders were to retain an interest in the new company, and that, in part, the delay to begin proceedings was occasioned by the railway company itself; since it, as the purchaser of the Cœur D'Alene property, resisted his attempt to revive the judgment. Boyd's silence, in 1896, did not mislead the stockholders, nor did his nonaction induce them to become parties to the reorganization plan. They have not in any way changed their position by reason of anything he did or failed to do, and the mere lapse of time under the peculiar and extraordinary circumstances of this case did not estop him, when he revived the judgment, from promptly proceeding to subject the shareholders' interest in property which in equity was liable for the payment of his debt. The decree of the Circuit Court of Appeals is affirmed.

*Dissenting opinion by Mr. Justice [511 Lurton:

I find myself unable to agree with the opinion of the court. The consequences which may result from the decision to the numerous reorganizations of railroad companies which occurred about the time of this reorganization or since are, to my mind, alarming. Arrangements and agreements in advance of judicial sales between creditors interested for the common benefit are the usual incidents of foreclosures, and if fairly and openly entered into and approved by the court are not subject to criticism.

Nor do I agree that every plan of reorganization which in any way includes stockholders of the reorganized company is for that reason alone to be regarded as an illegal withholding from creditors of corporate property which should go to the payment of corporate debts. That corporate property must be applied to corporate debts before shareholders can participate is plain. But I think every case should stand upon its own facts, and the remedy be shaped to do justice and equity in the particular case, and not tried out by any hard and fast rule such as indicated when this court says that the invalidity of a judicial sale must turn upon the character of the reorganization agreement, and is not affected by actual consequences to creditors.

Here is a single creditor who comes forward many years after a judicial sale under a general creditors' bill and a mortgage foreclosure bill which had been pending several years, and asserts the right to ignore the judicial sale and the title resulting, and asks to have the property of the old company subjected to his nonlien claim, not because of any actual fraud in the sale, nor

because he can show that he has in any way suffered a loss by reason of the plan of reorganization under which the sale was con-
512]ducted, but *solely and simply because the shareholders of the debtor company are said to have participated in some way in the benefits of the sale. I think this goes too far, and that there is no just foundation for upsetting a judicial sale upon the complaint of an unsecured creditor of the debtor company, in the absence of proof of fraud in the decree. The cases supporting this view, which I venture to say should control this case, are cited in the opinion of the court. It is not a case of the transfer by stockholders of one company to themselves as stockholders of another. The railroad company was hopelessly insolvent. Its annual deficit was about five million dollars. Its general creditors, represented by the general creditors' bill, and its mortgage creditors, represented in the mortgage foreclosure proceeding, were endeavoring to prevent a disintegration, and to bring the property to sale. The stockholders, represented by the company, were resisting. The receivership had already lasted for several years and the situation was growing steadily worse. The lien creditors, to save themselves, devised a plan for the sale and purchase of the property by a new company which should assume their claims, so far as possible, and put the new company in shape to meet its obligations. A large sum of actual money was necessary, and also the consent of the stockholders, to bring about a speedy sale. This money might be in part procured by the sale of the bonds of the new company; but if fixed charges were to be reduced, and the deficit of the old company turned into a surplus, the bonded debt and interest must be reduced. Therefore it was that most of this necessary money must come from the sale of stock. That was not a hopeful outlook. The value of this new stock was obviously speculative. The very basis of the plan to receive any large sum upon stock sales was believed to depend upon making a market among the stockholders of the old company. This was the motive that led to the proposal that they
513]should exchange their *shares for those in the new company, paying the price stated. This actually produced about eleven of the twenty-five million dollars deemed essential to any arrangement which would save to the bondholders any large part of their debt. The price fixed turned out to be little below what the stock actually sold for on the open market for the year following the operation of the property by the purchasers. The subscription price to the shareholders, as the situation then appeared, was deemed fair, full, and just by the very court which had approved the plan and decreed the sale, as is shown by the opinion of Judge Jenkins in the Paton Case, 85 Fed. 838.

It is true that Boyd was not a party to that suit. But it was a bill filed after the decree and before the sale, attacking the reorganization plan upon the precise grounds here advanced, and is highly persuasive as to the good faith of the plan and the fairness of the subscription price.

The upset price of $61,000,000 was fixed by the court,— probably as large as could be expected at the sale. As observed by this court in Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 683, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827, "railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers." Hence it was that the upset price must be fixed at such a sum as was reasonably within the range of any bidding which the property might be started at by the only probable bidders. The case last cited goes to the very verge of the law; but in that case the denunciation of such a plan of reorganization goes no farther than to condemn any arrangement by which the subordinate rights of stockholders are saved at the expense of creditors. That was not done here. The sale price was about eighty million dollars less than the lien claims entitled to be paid before creditors of the class to which Boyd belongs. Many of his class were actual parties to the consolidated cause in which the reorganization
*plan was approved and the sale de-[514
creed. They might have sought a larger upset price, but did not. They might have objected to the plan upon the grounds now brought forward, but they did not. They consented to the decree. They were doubtless hopeless of any sale price which could by any possibility save them, and therefore they stood aside. Technically Boyd was not a party, though under the order of the court every creditor was by publication, all along the line of the railroad, and in many states, notified to come in or be barred from participation in the proceeds. He had actual knowledge of the pending of the foreclosure proceedings, and yet took no steps to assert his rights. I do not find from the facts of this case any such diligence in his litigation against the real debtor company,—the Cœur D'Alene,—and the determination of his claim to ownership of the judgment against that company in the name of Spaulding, as to excuse the long delay in the assertion of

his rights against the railroad company or its successor; and it is not explained why he did not intervene and set up his contingent claim before the sale, or, at least, after the sale, many years before he did. I think he waited too long, and that no court of equity should upset a judicial sale after such unreasonable delay. What was said by this court in Alsop v. Riker, 155 U. S. 459, 460, 39 L. ed. 222, 223, 15 Sup. Ct. Rep. 162, applies with great force to this case:

"The record discloses no element of fraud or concealment upon the part of the trustees or of any of them. What they did was done openly and was known or might have been known by the exercise of the slightest diligence upon the part of everyone interested in the property of the old corporation. The plaintiff unquestionably knew, or could easily have ascertained, before the trustees bought the property at the foreclosure sale,—at any rate, before they transferred it to the new corporation,—that their purchase would be, and was, exclusively for the benefit of certificate holders interested 515]in the trust. *Although his bonds had not then matured, he could have taken steps to prevent any transfer of the property that would impair his equitable rights in it, or instituted proper judicial proceedings, of which all would be required to take notice, to have his interest in the property adjudicated. He allowed the trust to be wound up, and postponed any appeal to a court of equity based upon an alleged breach of trust by the trustees, until six out of the seven original trustees had died."

In Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 99, 100, 36 L. ed. 899, 903, 13 Sup. Ct. Rep. 28, it was said:

"If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest and knows that proceedings are pending, the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment."

Boyd had actual knowledge. If he had sought to intervene, I have no doubt he would have been permitted to do so. He chose to do nothing, and now asks a court of equity, after the purchaser has been for more than a decade in undisturbed possession and ownership, to declare the judicial sale invalid as against him. The case is without merit, and the bill should have been dismissed.

The Chief Justice, Mr. Justice Holmes, d Mr. Justice Van Devanter concur in *dissent.*

*EX PARTE: IN THE MATTER OF[516 THE FIRST NATIONAL BANK OF DEXTER, NEW YORK, a Corporation, Petitioner. (No. 11, Original.)

EX PARTE: IN THE MATTER OF BENJAMIN F. EDWARDS, Petitioner. [No. 12, Original.]

(See S. C. Reporter's ed. 516-518.)

**Mandamus — to inferior court — revising decision.**

Mandamus will not issue to revise the ruling of the court of appeals of the District of Columbia sustaining, after a hearing on the merits, a motion to strike out the bill of exceptions because not prepared in conformity with the rules of that court, since the case is not one where an inferior court refuses to take jurisdiction when by law it should do so, or where, having obtained jurisdiction, it refuses to proceed, but its action, if erroneous, is at most an error committed in the exercise of a judicial discretion which can only be corrected by a writ of error.

[For other cases, see Mandamus, 39-47, 86-94, in Digest Sup. Ct. 1908.]

[Nos. 11 and 12, Original.]

No. 11, Original, argued March 10 and 11, 1913. Decided May 5, 1913.

No. 12, Original, submitted March 11, 1913. Decided May 5, 1913.

IN MANDAMUS to the judges of the Court of Appeals for the District of Columbia to require the reinstatement of a bill of exceptions which had been struck out because not prepared in conformity with the rules of that court. Rule discharged.

The facts are stated in the opinion.

Messrs. Charles L. Frailey and A. S. Worthington argued the cause and filed a brief for petitioner in No. 11, Original.

Mr. J. J. Darlington argued the cause and filed a brief for respondents.

Mr. William W. Millan submitted the cause for petitioner in No. 12, Original.

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Note.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

On mandamus to control inferior tribunal —see note to Ex parte Morgan, 29 L. ed. U. S. 135.

On superintending control and supervisory jurisdiction of the superior over the inferior tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

Mr. J. J. Darlington submitted the cause for respondents.

Mr. Chief Justice White delivered the opinion of the court:

By § 226 of the Code of Law of the District of Columbia, the right of appeal to the court of appeals of the District is given to "any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any jus-517]tice thereof, 'including any final *order or judgment, in any case heard on appeal from a justice of the peace.'" [31 Stat. at L. 1225, chap. 854.] By an act approved February 9, 1893, creating the court of appeals, the justices of the court were invested with the power to make "such rules and regulations as may be necessary and proper for the transaction of the business" [27 Stat. at L. 435, chap. 74, § 6] and the taking of appeals to said court. In the assumed exercise of such power certain rules were promulgated to govern the practice on appeals, among which is paragraph 4 of rule V., regulating the mode of preparing bills of exceptions, and requiring such exceptions to be so prepared as to present only the rulings of the court below upon matters of law, accompanied by only such statement of fact as may be necessary to explain the bearing of the rulings upon the issues involved, and providing further, that where a defect of proof is the ground of the ruling or exception, only the substance of the evidence connected with and having relation to the proposition or propositions in respect to which the proof is supposed to be defective shall be set out in the bill of exceptions.

The petitioners herein—the First National Bank of Dexter, New York, and Benjamin F. Edwards, respectively—commenced actions in the supreme court of the district, against Edmund K. Fox and others, to recover upon notes given as part of the consideration on the purchase of a yacht. The defense was interposed in each case that the sale was induced by fraudulent representations, and that the plaintiff was not an innocent holder in due course, so as to exclude the assertion of such defense. By order of the trial court, the cases were tried together, before the same jury, the issues and the testimony being identical except as to the circumstances under which each plaintiff acquired the promissory note sued upon in the respective cases. A verdict was returned in each case for the defendants, whereupon the plaintiff prosecuted an appeal to the court of appeals. That court, after a 518]hearing *upon the merits, sustained a motion to strike out the bill of exceptions, because not prepared in conformity to the rule on the subject, and while a motion for judgment because of the want of a bill of exceptions was pending below, we allowed rules to issue upon petitions filed on behalf of the plaintiffs below, directing the court of appeals to show cause why it should not be commanded to reinstate the bill of exceptions in the cause in the record thereof. The respondents answered, and, after detailing the facts, averred that the action of the court below complained of "was simply the rightful and necessary enforcement by the court of one of its rules, established in pursuance of the authority to that end conferred upon it by the act of Congress creating it, and necessary to the due and proper discharge of the business before it."

We deem it unnecessary to detail the contentions as to the compliance or noncompliance by counsel in the bills of exceptions referred to with the rule of court on the subject, nor do we think it necessary to consider whether the rule warranted the particular exertion of power, and if it did authorize such exertion of power, whether it was amenable to condemnation. In view of the fact that the case was heard below on the merits, and it was not until after such hearing that the court sustained the motion to strike out the bill of exceptions, we are of opinion that the case presented is not one "where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise." Re Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708. The court below, in effect, took jurisdiction, and its action in striking out the bill of exceptions was at best but an error committed in the exercise of its judicial discretion, to correct which is the province of a writ of error where the right to such writ obtains. Ex parte Brown, 116 U. S. 401, 29 L. ed. 676, 6 Sup. Ct. Rep. 587; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324.

Rule discharged.

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*UNION TRUST COMPANY OF ST.[519
LOUIS, Executor of the Estate of George A. Madill, Deceased, Plff. in Err.,

v.

BEN WESTHUS and E. B. Allen, Collector of Internal Revenue, First District of Missouri.

(See S. C. Reporter's ed. 519-524.)

**Error to circuit court — Federal question — prior appeal to circuit court of appeals.**

A constitutional question imported into the case by an amendment to the petition, allowed by a Federal circuit court after

the cause which, up to that time, involved only questions of statutory construction, had been taken to the circuit court of appeals, where the judgment of the trial court sustaining a demurrer to the answer had been reversed and the case remanded, with directions to overrule such demurrer, and for further proceedings consistent with its opinion, will not sustain a direct writ of error from the Federal Supreme Court to the circuit court to review the final judgment.

[For other cases, see Appeal and Error, 990-993, in Digest Sup. Ct. 1908.]

[No. 46.]

Argued November 8 and 11, 1912. Decided May 5, 1913.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment entered conformably to the mandate of the Circuit Court of Appeals for the Eighth Circuit, which, reversing the judgment of the Circuit Court, sustaining a demurrer to the answer in an action to recover back a legacy tax, remanded the cause with directions to overrule the demurrer, and for further proceedings consistent with its opinion. Dismissed for want of jurisdiction.

See same case below, in circuit court of appeals, 90 C. C. A. 441, 164 Fed. 795; on rehearing, 94 C. C. A. 95, 168 Fed. 617.

The facts are stated in the opinion.

Mr. H. T. Newcomb argued the cause, and, with Messrs. Montague Lyon and S. L. Swarts, filed a brief for plaintiff in error.

Assistant Attorney General Harr argued the cause and filed a brief for defendants in error.

Mr. Chief Justice White delivered the opinion of the court:

Plaintiff in error was plaintiff below, and brought this action to recover a sum levied as a legacy tax under §§ 29 and 30 of the war revenue act of June 13, 1898, chap. 448, 30 Stat. at L. 464, 465, as amended by the act of March 2, 1901, chap. 806, §§ 10, 11, 31 Stat. at L. 946–948, U. S. Comp. Stat. 1901, pp. 2308, 2310. The grounds for recovery stated in the petition in effect presented only questions of statutory construction. The trial court, being of opinion that a recovery was justified upon one of the stated grounds, sustained a demurrer to the answer, and the defendants not desiring to plead further, judgment was entered for the plaintiff. The case was then taken to the circuit court of appeals. That court, in a full and careful opinion, reviewed the grounds for recovery relied upon in the petition, decided that all the grounds of the claim were without merit, and held there was no right to the relief prayed. In consequence the judgment of the court below was reversed and the case was remanded with directions to overrule the demurrer, and for further proceedings consistent with the views expressed in the opinion of the court. 90 C. C. A. 441, 164 Fed. 795. A petition for rehearing was overruled. 94 C. C. A. 95, 168 Fed. 617.

On the receipt of the mandate the trial court allowed the plaintiff to file an amended petition, wherein, in addition to repeating the contentions urged in the original petition, it was alleged that the "clear value" of the life estate in question had been fixed and determined by a method so arbitrary as to amount to a deprivation of property without due process of law. A demurrer to this amended petition was sustained, and, the plaintiff electing *not to plead [521 further, judgment was entered in favor of the defendants.

The case was then brought directly to this court upon the theory that a constitutional question was involved. The assignments of error invoked a re-examination of all the issues, including those which had been adversely passed on by the circuit court of appeals. On these assignments the case was argued at bar and taken under advisement on a record which contained only the proceedings had in the trial court subsequent to the filing of the mandate of the circuit court of appeals. While in that situation the published report of the opinion of the circuit court of appeals came under our observation. Mindful of the proper consideration due to the circuit court of appeals, and of our duty at all times to be scrupulous to keep within our jurisdiction, for the purpose of enabling us to apply the doctrine announced in the case of Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4, in which case, as in this, the record did not disclose that the cause had been passed upon by the circuit court of appeals, although there were on the files of this court certiorari proceedings so showing, to which resort was had, we directed that the court below supply the deficiency, if any there was, in the record, by certifying all the proceedings had in the case. At once, by stipulation of counsel, an additional transcript was filed, stating the proceedings on the first trial, the taking of the appeal to the cir-

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed. U. S. 894; and *Paducah v. East Tennessee Teleph. Co.* 106 *C. C. A. 333.*

cuit court of appeals, and the action of that court, and in the light thus afforded we come first to consider our jurisdiction over the controversy.

There can be no doubt that on the record upon which the circuit court of appeals acted, the judgment of that court, if it had been final in form, would have been beyond our competency to review. Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376. There can equally be no doubt that if we have power to 522]pass upon the case on this record, *our jurisdiction embraces not only the right to decide the alleged constitutional question raised after the mandate of the circuit court of appeals had been filed in the trial court, but also all other questions arising on the record, including those passed upon by the circuit court of appeals. Indeed, it is unnecessary to cite the many authorities sustaining this view, since the insistence of the plaintiff in error is that every question is open, and in effect the argument seeks a review and reversal of the rulings previously made by the circuit court of appeals. But by the distribution of power made by the act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488] and embodied in the Judicial Code [36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128], no jurisdiction is conferred upon this court to review a judgment or decree of the circuit court of appeals otherwise than by proceedings addressed directly to that court in a cause which is susceptible of being reviewed. Under these conditions the absence of jurisdiction to exercise the authority which we are now asked to exert would seem to be clear unless the principle be recognized that we have a right to do by indirection that which the statute gives us power only to do by direct action. It is, however, said the statute gives the right to come directly to this court where a constitutional question is involved, and as such question was raised below, albeit after the cause was pending in the trial court for the purpose of giving effect to the mandate of the circuit court of appeals, the right to direct review exists and cannot be denied without refusing to accord the relief plainly afforded by the statute. At best this proposition but involves the assertion that by virtue of the power conferred to take a direct appeal from one court, authority is given to indirectly review the decision of another and higher court, although the statute restricts the right to review such decision to a direct proceeding. But resort to original reasoning to establish the unsoundness of the proposition relied on is scarcely necessary, as that result will be made 523]plainly manifest by applying *principles established in the following cases: Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37, 37 L. ed. 986, 988, 14 Sup. Ct. Rep. 4; Brown v. Alton Water Co. 222 U. S. 325, 56 L. ed. 221, 32 Sup. Ct. Rep. 156, and Metropolitan Water Co. v. Kaw Valley Drainage Dist. 223 U. S. 519, 56 L. ed. 533, 32 Sup. Ct. Rep. 246. Nor, as in effect held in the Metropolitan Case, can the case of Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726, be considered as announcing a doctrine in conflict with the rulings in the Aspen and Alton Cases. And aside from a distinction suggested in the Metropolitan Case between the Aspen and Alton Cases and the Globe Case, it must follow that if the ruling in the Globe case was in anywise in conflict with the doctrine announced and approved in the Metropolitan Case, to the extent of such conflict it was necessarily qualified by that decision.

It is insisted, however, that in both the Aspen and the Alton Cases, the questions which it was sought to review by direct appeal after the decision of the circuit court of appeals had been, either expressly or by necessary implication, passed upon by that court and therefore were expressly foreclosed, while here such is not the case, since the constitutional question was not in the case when it went to the circuit court of appeals, but only made its appearance by an amendment to the pleadings after the decision of that court. Granting the premise upon which the argument rests, the deduction is unfounded. The ruling in both the Aspen and Alton Cases rested upon plain ground of the duty of this court not to exert a power not conferred, of the impossibility of proceeding upon the theory that error could be said to have been committed by the trial court because it had applied the decision of the circuit court of appeals, or of maintaining the right to the direct appeal which was relied upon in those cases consistently with the power of the circuit court of appeals not only to decide questions within its jurisdiction, but, moreover, to determine whether, when in a particular case it had decided such questions and remanded the case *in which they had been de-[524 cided to a trial court for further proceedings, that court had in such further proceedings given due effect to its decision. Indeed, these considerations were expounded in the Metropolitan Case, and it was there pointed out that the attempt to make a distinction upon the mere form of the mandate was without merit (p. 523). Looked at *arguendo*, however, as a matter of first impression, the source of the error which the proposition here relied upon involves is not difficult to perceive. It consists in pursuing a min-

taken avenue of approach to this court; that is, of coming directly from a trial court in a case where, by reason of the cause having been previously decided by the circuit court of appeals, the way to that court should have been pursued even if it was proposed to ultimately bring the case here. The error comes from attempting, after the case has been taken to the circuit court of appeals and been there decided, to resort to proceedings for review which, under the statute, are applicable only in case no such action by the circuit court of appeals had been taken. A consideration of the confusion which inevitably would result if the doctrine of the Metropolitan, Alton and Aspen Cases were not applied, of the necessity which would arise for denying powers conferred upon the circuit court of appeals by the statute, and of calling into play a power of review by this court not given, clearly demonstrates the error of the right to direct appeal here insisted upon. And the correctness of the rule announced in the Aspen Case, and which was reiterated in the Alton and Metropolitan Cases, which we again now apply, is shown by the complete accordance between all of the provisions of the statute which will be brought about by its application.

Dismissed for want of jurisdiction.

Mr. Justice Pitney took no part in the decision of this case.

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525] *UNITED STATES, Plff. in Err.,

v.

ARNULFO CHAVEZ, alias Arnuto Chavez.

(See S. C. Reporter's ed. 525–533.)

**Neutrality — exporting or shipping contraband goods.**

1. The act of sending the prohibited merchandise from the United States to the foreign and prohibited country, without reference to the completion of such act by landing or delivery at its destination, must be deemed to be condemned by the joint resolution of March 14, 1912 (37 Stat. at L. 630), § 1, making it unlawful to export any arms or munitions of war from any place in the United States to an American country brought within the terms of the resolution by the proclamation of the President that he finds conditions of domestic violence to exist there which are promoted by the use of arms or munitions of war procured from the United States,—especially since § 2 of the resolution, making the prohibitions of the 1st section operative by punishing violations of its provisions, does not purport to punish the act of exporting, but in express terms makes punishable "any shipment of material hereby declared unlawful."

*[For other cases, see Neutrality, IV. c, in Digest Sup. Ct. 1908.]*

**Neutrality — exporting or shipping contraband goods.**

2. Resort to personal carriage as a means of moving the prohibited articles from the United States to the foreign and prohibited country will not render inapplicable the prohibitions of the joint resolution of March 14, 1912, §§ 1, 2, against the shipment of arms and munitions of war from any point in the United States to an American country brought within the terms of the resolution by the proclamation of the President that he finds conditions of domestic violence to exist there which are promoted by the use of arms or munitions of war procured from the United States.

[For other cases, see Neutrality, IV. c, in Digest Sup Ct. 1908.]

[No. 863.]

Argued April 11, 1913. Decided May 5, 1913.

IN ERROR to the District Court of the United States for the Western District of Texas to review a judgment quashing an indictment charging the shipment of arms and munitions of war from the United States to Mexico. Reversed.

See same case below, 199 Fed. 518.

The facts are stated in the opinion.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchway, filed a brief for plaintiff in error:

Any wilful act of transporting or shipping contraband articles from any point in the United States, with Mexico as the destination of such transportation or shipment, is criminal. Such is the natural meaning of the words used.

Swan & Fr. Co. v. United States, 190 U. S. 143, 47 L. ed. 984, 23 Sup. Ct. Rep. 702; 17 Ops. Atty. Gen. 583; Clarke v. Clarke, 3 Woods, 408, Fed. Cas. No. 2,846; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Almy v. California, 24 How. 169, 16 L. ed. 644; Coe v. Errol, 116 U. S. 517–525, 29 L. ed. 715–718, 6 Sup. Ct. Rep. 475; Turpin v. Burgess, 117 U. S. 504, 506, 507, 29 L. ed. 988, 989, 990, 6 Sup. Ct. Rep. 835; Dooley v. United States, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62; Kidd v. Flagler, 54 Fed. 367; United States v. Forrester, Newberry, Adm. 81, Fed. Cas. No. 15,132; Fisher v. Minot, 10 Gray, 262; Harrison v. Fortlage, 161 U. S. 57–63, 40 L. ed. 616–618, 16 Sup. Ct. Rep. 488; Moray Ledon v. Havemeyer, 121 N. Y. 186, 8 L.R.A. 245, 24 N. E. 297; Century Dict. Ship; Shipment; Standard Dict. Ship; Shipment.

The construction given the resolution by the court below is inconsistent with the purpose of its enactment, and renders enforcement practically impossible.

United States v. Hartwell, 6 Wall. 396, 18 L. ed. 832.

No brief was filed for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

By virtue of the act of March 2, 1907 [34 Stat. at L. 1246, chap. 2564] this direct writ of error is prosecuted for the purpose of reversing the judgment below because of an alleged erroneous construction given by the court to the joint resolution of March 14, 1912 (37 Stat. at L. 630), in consequence of which the indictment in this case was quashed because stating no defense against the provisions of the joint resolution.

528] *The charging part of the indictment is as follows:

"That heretofore, to wit: on the 3d day of May, A. D. 1912, in the city and county of El Paso, in the state of Texas, in the western district of Texas, and within the jurisdiction of this court, one Arnulfo Chavez, alias Arnuto Chavez, late of said district, did unlawfully, knowingly, wilfully, and with intent to export the munitions of war hereinafter described from the said city of El Paso to Ciudad Juarez in Mexico, make a certain shipment of munitions of war, to wit: two thousand (2,000) Winchester cartridges of the caliber 30-30, that is to say, did make a shipment of said munitions of war from said city of El Paso and with said Ciudad Juarez in Mexico as the destination of said shipment, by transporting the same on his person from a point the exact location of which is to your grand jury unknown and hence not here given, near the intersection of North El Paso and San Francisco streets in said city of El Paso to a point, the exact location of which is to your grand jury unknown, and hence not here given, but which is near the intersection of South Stanton and Fifth streets in the said city of El Paso."

The joint resolution is as follows:

"Section 1. That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President shall prescribe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

"Sec. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or by imprisonment not exceeding two years, or both."

*The proclamation of the President[529 applying without exception or limitation the provisions of the resolution to Mexico was issued April 12, 1912. Proclamations 1912, p. 57.

Considering it to be indisputable that two acts are essential to constitute export in the legal sense, a shipment from this country to a foreign country, and the landing of the goods in such foreign country, the court below held that no transgression of the prohibition of the 1st section, making it unlawful to export, could arise from the facts charged, because they alleged—giving them the most favorable view to the government—but a shipment from this country to Mexico, unconsummated by delivery in the foreign country. Coming to consider the 2d section, it was held that the act punished by that section was the exportation prohibited by the 1st section, and hence the charge of shipment without an averment of landing in the foreign country stated no offense punishable by the 2d section. The court said:

"The allegations of the indictment, as understood by the court, charge in effect that the defendant attempted to export munitions of war,—nothing more; and as the joint resolution is directed against actual exportation, and not merely the attempt to export, the acts charged against the defendant are not embraced within the prohibition. The word 'shipment,' employed in connection with the words 'material hereby declared unlawful,' can only refer, in the judgment of the court, to material shipped, exported, to the country where the disturbance exists; since it is only such material that is declared to be unlawful by the 1st section of the resolution, defining the offense." [199 Fed. 521.]

In common speech the shipment of goods from this to a foreign country without regard to their landing in such country is often spoken of as an export. It is true also that, for the purposes of the provisions of § 9, article 1, of the Constitution, prohibiting the laying by Congress of *a[530 tax or duty "on articles exported from any state," and § 10, article 1, forbidding any state, without the consent of Congress, to "lay any imposts or duties on imports or exports," a shipment is considered as the initiation of export so as to bring the goods shipped within the protection of the constitutional safeguards. Almy v. California, 24 How. 169, 16 L. ed. 644; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135. Despite, however, the significance ob-

on to the words "to export" in these cases. It is nevertheless certain, as stated by the court below, that by a practically unanimous concensus of opinion, accurately speaking, exportation in the complete sense consists of two essential ingredients,—the sending of merchandise from this to a foreign country, and its landing in such country. But the question which we are called upon to solve, that is, the meaning of the words "to export," as used in the joint resolution, may not be disposed of by any mere abstract consideration of the meaning of the words, but their signification must be determined with reference to the text of the resolution itself.

Putting out of view the parenthetical clause in the text of the resolution concerning the proclamation of the President, it reads as follows: "It shall be unlawful to export any arms or munitions of war from any place in the United States to such country;" that is, the country brought within the terms of the resolution by a proclamation of the President. Conceding for argument's sake that if the words "to export" stood alone in the text, that is, were not accompanied by explanatory or defining words, they would have to be interpreted with reference to the meaning of export in the complete sense, that is, as including landing in the foreign country, such concession is not here controlling or persuasive. We say this because, as we have seen, the words "to export" are expressly qualified by a clause which serves, in a sense, to define their meaning, and, at all events, to make clear the nature and character 531]*of the acts intended to be embraced by the prohibition against exporting. In other words, the resolution does not say it shall be unlawful to export, but it adds, "any arms or munitions of war from any place in the United States to such foreign country." In view of the accepted significance of the words "to export" when used in their complete sense, and of the fact that in the preceding sentences of the resolution the causes leading to its adoption are expressly stated to be the violence and confusion sometimes promoted in foreign countries "by the use of arms or munitions of war procured from the United States," the insertion of words of definition, and the omission from such words of all reference to landing of the prohibited merchandise, would seem to make it clear that the prohibition of the resolution was directed against the act of sending from this to the foreign and prohibited country, without reference to the completion of such act by the landing or delivery of the prohibited merchandise at its destination; in other words, that the object was to forbid the act of shipment from the United States of the prohibited munitions of war to a foreign country, without reference to the fulfilment of the complete act of export by the landing of the contraband goods. If there be room for hesitancy, that is to say, ambiguity, as to the correctness of this construction of the 1st section, we think there can be no ground for such doubt if the context of the resolution be considered; that is, if the 2d section be taken into view as illustrating and making clear the text of the 1st section. There can be no doubt that the object of the 2d section was to make the prohibition of the 1st section operative by punishing violations of its provisions. Now, the 2d section does not purport to punish the act of exporting, but in express terms it only punishes "any shipment," thus affixing the construction which we have given to the 1st section and causing it in reason to be impossible to say that the 1st *section simply prohibits export in the [532 completed sense. And this construction of the 2d section becomes irresistible when it is observed that for the purpose of preventing misconception the words "any shipment" are explained and their meaning made more emphatic by the declaration that they constitute the act "hereby made unlawful;" thus again in express terms affixing a significance to the 1st section and confirming the meaning which we have given it.

And if the legislative intent manifested on the face of the joint resolution and derived from a consideration of the evil against which it was obviously intended to provide be taken into view, it is not difficult to perceive the reasons which led to the prohibition against and punishment of shipment instead of export in the complete sense. As we have previously observed, the terms of the resolution show that it was the means afforded for the promotion of turmoil and violence in certain foreign countries by the use of arms and munitions of war derived from the United States which gave rise to the passage of the resolution. But to have merely prohibited and punished the export, in the complete sense, of arms and munitions, would not have served to prevent the continued future delivery of such arms, etc., except as the anticipation of punishment might serve as a deterrent. On the other hand, as shipments from the United States were the source of the evil, a prohibition against such shipments and punishments for making them not only exerted all the deterrent influence which could possibly have arisen from punishing export, but besides would reach the acts done in the United States which were the generative source of the trouble, and hence afford the means of putting an effective stop to the evil which it was the purpose to suppress. Although no

question is raised on the subject, as in consequence of the construction we affix to the joint resolution we shall reverse and remand, we deem it well to say that merely 533]because *resort was had to personal carriage as a means of moving the prohibited articles from this to a foreign country would not render inapplicable the prohibition against any shipment.

Judgment reversed.

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UNITED STATES, Plff. in Err.,
v.
JOSE MESA.

(See S. C. Reporter's ed. 533, 534.)

This case is governed by the decision in United States v. Chavez, ante, 595.

[No. 864.]

Argued April 11, 1913. Decided May 5, 1913.

IN ERROR to the District Court of the United States for the Western District of Texas to review a judgment quashing an indictment charging the shipment of arms and munitions of war from the United States to Mexico. Reversed.

See same case below, 199 Fed. 518.

The facts are stated in the opinion.

Assistant Attorney General Adkins argued the cause, and, with Mr. Karl W. Kirchwey, filed a brief for plaintiff in error. For contentions of counsel, see their brief as reported in United States v. Chavez, ante, 950.

No brief was filed for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

The defendant in error was indicted upon the charge that within the jurisdiction of the court he "did unlawfully, knowingly, wilfully, and with intent to export the munitions of war hereinafter described from the said city of El Paso to Ciudad Juarez, in Mexico, make a certain shipment of certain munitions of war, to wit: three thousand (3,000) Winchester rifle cartridges of the caliber 4/; that is to say, did make a shipment of said munitions of war from said city of El Paso, and with said Ciudad Juarez, in Mexico, as the destination of said shipment, by transporting the same in a wagon from a point," etc.

534] *A demurrer to the indictment was heard, along with the demurrer to the indictment in the case against Chavez, which we have just decided. [228 U. S. 525, ante, 950, 33 Sup. Ct. Rep. 595.] The demurrer was sustained and the indictment quashed upon the opinion rendered in the Chavez Case. The ruling which we have just made in that case is therefore applicable to this, and necessitates a reversal.

Judgment reversed.

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GEORGE LEMIST CLARKE, Trustee under the Will of Samuel Parsons, Appt.,
v.
HENRY M. ROGERS, Trustee in Bankruptcy of the Estate of John O. Shaw.

(See S. C. Reporter's ed. 534-549.)

**Bankruptcy — provable debts — obligation of defaulting trustee.**

1. Independently of liability on his bond, there is an obligation of a contractual nature resting upon a defaulting testamentary trustee to restore to the trust estate the value of the assets embezzled, which obligation is provable in bankruptcy under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 63a, subd. 4, as a debt "founded on an open account, or upon a contract, express or implied."

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

**Bankruptcy — preference — restoring trust assets.**

2. A defaulting trustee of several trusts, who, with knowledge of his insolvency, and within four months of the filing of a petition in bankruptcy against him, transferred his individual property from himself individually to one of such trusts, and to himself as trustee thereof, to make good a shortage, the effect being to enable that trust to recover a larger share of its debt than the others, thereby gave a preference within the meaning of the provision of the act of July 1, 1898, § 60a, as amended by the act of February 5, 1903 (32 Stat. at L. 799, chap. 487, U. S. Comp. Stat. Supp. 1911, p. 1506), that a transfer by an insolvent within four months of bankruptcy shall be deemed a preference if any one of his creditors will obtain thereby a greater percentage of his debt than any other creditor of the same class.

[For other cases, see Bankruptcy, VI. b, in Digest Sup. Ct. 1908.]

[No. 221.]

Argued April 16 and 17, 1913. Decided May 5, 1913.

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of Massachusetts in favor of a trustee in bankruptcy in a suit to recover a preference. Affirmed.

See same case below, 106 C. C. A. 64, 183 Fed. 518.

The facts are stated in the opinion.

Mr. Felix Rackemann argued the cause, and, with Mr. Harrison M. Davis, filed a brief for appellant:

It is not enough that the person receiving the transfer, or benefited thereby, be shown to have had some kind of a legal or equitable claim against the bankrupt. Thus, a transfer for the benefit of a customer of a stockbroker was held not a preference because the relation of debtor and creditor did not exist.

Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981.

It has been held, referring to § 63a, clause 4, that the implied contract intended includes the fictitious contract implied in law, —only treated as a contract for the sake of the remedy,—and the true contract implied in fact. Re Hirschman, 104 Fed. 71. We think this court has not yet approved so loose a construction of the words "founded upon a contract, express or implied." It is respectfully submitted that Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, and Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493, have been misunderstood, and that they do not cover cases where the claim does not grow out of any relation of contract; but they apply only to cases like Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332, where there is a claim arising out of contract, but of such a nature that there is at the same time an independent remedy in tort.

It was held in New York that a statute containing the words "contract, express or implied," did not apply to the case of a contract implied by law.

People ex rel. Dusenbury v. Speir, 77 N. Y. 144.

There is no liability apart from the bond.

Brooks v. Brooks, 11 Cush. 21; Conant v. Kendall, 21 Pick. 36; Johnson v. Johnson, 120 Mass. 465; Wheelock v. Freeman, 13 Pick. 167, 23 Am. Dec. 674.

The doctrine of quasi contract has no application to the facts disclosed in the case at bar, and does not enable the court to find here a provable debt.

Jones v. Hoar, 5 Pick. 285; 1 Cooley, Torts, 3d ed. p. 160; Wald's Pollock, Contr. p. 238; Loveland, Bankr. 4th ed. p. 669; Gould v. Emerson, 99 Mass. 157, 96 Am. Dec. 720; Johnson v. Johnson, 120 Mass. 465; Henchey v. Henchey, 167 Mass. 77, 44 N. E. 1075; Minchin v. Minchin, 157 Mass. 265, 32 N. E. 164.

In whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself.

Eastman v. Wright, 6 Pick. 321; Lewin, Tr. 8th Eng. ed. p. 91; 1 Perry, Tr. 5th ed. p. 11; Prentice v. Dehon, 10 Allen, 353; Sigourney v. Wetherell, 6 Met. 557; Benchley v. Chapin, 10 Cush. 173; Choate v. Thorndike, 138 Mass. 371; Bassett v. Fidelity & D. Co. 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205; Ipswich Mfg. Co. v. Story, 5 Met. 313; Leland v. Felton, 1 Allen, 531; Mattoon v. Cowing, 13 Gray, 390; Woerner, Am. Law of Administration, § 311.

To regard the trust estate in the case at bar as the creditor instead of the trustee would be but to introduce another fiction.

Taylor v. Davis (Taylor v. Mayo) 110 U. S. 330, 334, 28 L. ed. 163, 165, 4 Sup. Ct. Rep. 147.

Shaw's guilty knowledge could not be imputed to his innocent principals.

McNaboe v. Columbian Mfg. Co. 83 C. C. A. 81, 153 Fed. 967; Lindsey v. Lambert Bldg. & L. Asso. 4 Fed. 48.

Mr. Melvin M. Johnson argued the cause, and, with Messrs. Henry M. Rogers and A. Farley Brewer, filed a brief for appellee:

The courts of the United States have the right in bankruptcy jurisdiction to resort to the principles of the common law, and therefrom to determine whether or not an obligation of a contractual character arises upon the conversion of goods, and is available to the owner.

Atherton v. Green, 30 L.R.A.(N.S.) 1053, 103 C. C. A. 298, 179 Fed. 806; Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391, 110 C. C. A. 409, 188 Fed. 615; Murray v. Chicago & N. W. R. Co. 62 Fed. 24; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 103, 45 L. ed. 765, 771, 21 Sup. Ct. Rep. 561.

Several courts have held that a claim for the conversion of personal property is not provable, particularly if the plaintiff elected to sue in trover; but it is now settled that such a claim is provable.

Crawford v. Burke, 195 U. S. 176, 194, 49 L. ed. 147, 154, 25 Sup. Ct. Rep. 9.

The doctrine of implied contract, as applied to a tortious conversion, is in some cases a mere fiction of law, but like all fictions it is effectual when it will accomplish the ends of justice. This particular fiction is one of ancient lineage—Lamine v. Dorrell, 2 Ld. Raym. 1216; Johnson v. Spiller, 1 Dougl. K. B. 167—and of recognized standing to-day. Tindle v. Birkett, 205 U. S. 183, 186, 51 L. ed. 762, 764, 27 Sup. Ct. Rep. 493.

Indeed, it has been repeatedly held that

the owner of converted money or property may recover upon an implied contract.

Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 106; Staat v. Evans, 35 Ill. 455; Dashaway Asso. v. Rogers, 79 Cal. 211, 21 Pac. 742; Toledo, W. & W. R. Co. v. Chew, 67 Ill. 383; Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391, 110 C. C. A. 409, 188 Fed. 614.

It is abhorrent to the judicial conscience that one trust shall fare better in the distribution of the bankrupt's assets than the other trusts from which he embezzled. This is a proposition which can be no more sustained in law than in morals. Wherever this situation has been met by chancellors whose opinions command the greatest respect in administering the bankruptcy law, the courts have declared a contractual relation.

Emma Silver Min. Co. v. Grant, L. R. 17 Ch. Div. 122, 50 L. J. Ch. N. S. 440, 29 Week. Rep. 481; Jack v. Kipping, L. R. 9 Q. B. Div. 113, 51 L. J. Q. B. N. S. 463, 46 L. T. N. S. 169, 30 Week. Rep. 441; Sharp v. Jackson [1899] A. C. 419, 68 L. J. Q. B. N. S. 863, 80 L. T. N. S. 841, 15 Times L. R. 418, 6 Manson, 264; Hamilton v. Blackpool Motor Car Co. [1901] 1 Ch. 77, 70 L. J. Ch. N. S. 61, 49 Week. Rep. 124, 8 Manson, 193.

This question has not frequently been met with in this country, but, wherever dealt with, the implied contract has been recognized.

Atherton v. Green, 30 L.R.A.(N.S.) 1053, 103 C. C. A. 298, 179 Fed. 806; Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391, 110 C. C. A. 409, 188 Fed. 611; Block v. Rice, 167 Fed. 693; Bush v. Moore, 133 Mass. 198; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; Bremer v. Williams, 210 Mass. 257, 96 N. E. 687.

This is an active, undetermined, Massachusetts probate trust, and the legal title to such trust property is in the trustee. It follows that Shaw, as trustee, owned the claim.

Bean v. Com. 186 Mass. 348, 71 N. E. 784.

If Shaw, trustee, had a claim against Shaw personally, there is no reason why he could not invoke the aid of the courts to enforce it. The rule that a person may not sue himself is a rule at law, and not in equity. Moreover, the rule is purely technical; it has no foundation in the essential character of judicial proceedings, as is apparent from the fact that such person could always in equity sue a board or partnership of which he might be a member.

Cooper v. Nelson, 38 Iowa, 440; Stone v. Brooks, 6 How. (Miss.) 373; Orrett v. Corser, 21 Beav. 56, 1 Jur. N. S. 882, 3 Week. Rep. 604.

Where a bankrupt, as executor of a creditor of himself, personally proved against his own estate in bankruptcy, Lord Hardwicke said that his rights as executor and as bankrupt must be considered as centering in separate individuals.

Cowper's Case, Green, Bankr. Law, 260; Ex parte Shaw, 1 Glyn & J. 147.

It is theoretically and legally possible for an embezzling trustee to bring proceedings against himself for adjustment of his relations between his various defrauded estates.

Bremer v. Williams, 210 Mass. 258, 96 N. E. 687.

For instances where the same person has been plaintiff and defendant in different capacities, see—

Dana v. Dana, 185 Mass. 156, 70 N. E. 49; Portland Bank v. Hyde, 11 Me. 196; Westcott v. Price, Wright (Ohio), 220; Price v. Spencer, 9 Phila. 281; Livingston v. Livingston, 2 Mill, Const. 428, 12 Am. Dec. 684; Bosanquet v. Wray, 6 Taunt. 597, 2 Marsh. 319, 16 Revised Rep. 677; Grahame v. Harris, 5 Gill & J. 489; Eastman v. Wright, 6 Pick. 316; Chalfont v. Johnston, 3 Yeates, 16; Blaisdell v. Ladd, 14 N. H. 129; Van Ness v. Forrest, 8 Cranch, 30, 3 L. ed. 478.

Proof against a bankrupt trustee, and in favor of his trust, has been variously allowed in England. It was made by a *cestui que trust* in—

Ex parte Beilby, 1 Glyn & J. 167; Ex parte Shakeshaft, 3 Bro. Ch. 197; Ex parte Heaton, Buck, Bankr. 386; Ex parte Forrester, Mont. & C. Bankr. 143; Ex parte Moody, 2 Rose, 413; Ex parte Wells, 2 Mont. D. & DeG. 504; Ex parte Llewellyn, Cooke, Bankr. Law, 137; Ex parte Brooks, Cooke, Bankr. Law, 138.

By a coexecutor in—

Ex parte Shakeshaft, 3 Bro. Ch. 198.

By relators in—

Re Popjay, cited in 1 Glyn & J. 160; Re Merryman, cited in 1 Glyn & J. 160.

By the trustee himself in—

Ex parte King, 2 Mont. & Ayr. Bankr. 410, 1 Deacon, Bankr. 143; Ex parte Ellis, 1 Atk. 101; Ex parte Leeke, 2 Bro. Ch. 596; Cooke, Bankr. Law, 138, 139; Ex parte Brooks, Cooke, Bankr. Law, 138; Ex parte Markland, 2 P. Wms. 546.

Indeed, under the English statute, the word "creditor" has been held to include a surety even before he has been called upon to pay.

Ex parte Read [1897] 1 Q. B. 122, 66 L. J. Q. B. N. S. 71, 75 L. T. N. S. 316, 3 Manson, 309; Hamilton v. Blackpool Motor Car Co. [1901] 1 Ch. 77, 70 L. J. Ch. N. S. 61, 49 Week. Rep. 124, 8 Manson, 193. See also

Emma Silver Min. Co. v. Grant, L. R. 17 Ch. Div. 122, 50 L. J. Ch. N. S. 440, 29 Week. Rep. 481; Jack v. Kipping, L. R. 9 Q. B. Div. 113, 51 L. J. Q. B. N. S. 463, 46 L. T. N. S. 169, 30 Week. Rep. 441.

The payment by an individual within four months prior to his own bankruptcy, and when he was insolvent, to himself, as trustee, of funds to make good trust property which he had previously misappropriated, has been held to be a voidable preference.

Block v. Rice, 167 Fed. 693; Bush v. Moore, 133 Mass. 198.

Whether or not the preference is voidable depends upon the knowledge of the recipient; that is, of Shaw, as trustee.

Ibid.; Taylor v. Davis (Taylor v. Mayo), 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 274, 9 Am. St. Rep. 698, 17 N. E. 496; United States v. State Nat. Bank, 96 U. S. 30, 24 L. ed. 647.

While the court below regarded it as immaterial, yet it has been held that a payment for the benefit of a surety, even before he has been called upon to pay as surety, may be a fraudulent preference.

Ex parte Read [1897] 1 Q. B. 123, 66 L. J. Q. B. N. S. 71, 75 L. T. N. S. 316, 3 Manson, 309; Collier, Bankr. 9th ed. 810 (2).

The effect of this transfer was to benefit not only the Parsons trust, but also the surety, Cobb. And he was in possession of facts sufficient to put an ordinary prudent man upon inquiry.

Sundheim v. Ridge Ave. Bank, 138 Fed. 951.

Notice of facts which would put him on inquiry is notice of whatever such inquiry would disclose.

Coder v. McPherson, 82 C. C. A. 99, 152 Fed. 951.

That which is within the mischief intended to be remedied is considered within the statute, though not within the letter thereof; and that which is not within the mischief is not within the statute, though within the letter.

Eyston v. Studd, 2 Plowd. pp. 464a, 465, note; State v. Canton, 43 Mo. 48; People ex rel. Wood v. Lacombe, 99 N. Y. 49, 1 N. E. 599; United States v. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728; Re Scanlon, 2 N. B. N. Rep. 58; Re Grubbs-Wiley Grocery Co. 96 Fed. 183; Re Carolina Cooperage Co. 2 N. B. N. Rep. 24; Re Richards, 2 N. B. N. Rep. 43; Hawkins v. Gathercole, 1 Jur. N. S. 483, 6 DeG. M. & G. 1, 3 Eq. Rep. 348, 24 L. J. Ch. N. S. 332, 1 Jur. N. S. 481, 3 Week. Rep. 194.

That construction which tends to suppress the mischief or advance the remedy should *be favored.*

*Heydon's Case, 3 Coke, 7a;* Stradling v. Morgan, 1 Plowd. 205; 1 Co. Litt. 11, 42; VanHorn v. Dorrance, 2 Dall. 316, Fed. Cas No. 16,857.

Mr. Justice McKenna delivered the opinion of the court:

Petition by appellee as trustee in bankruptcy of the estate of John O. Shaw to recover a preference.

The facts are these: The bankrupt, John O. Shaw, was, for a long time prior to the adjudication in bankruptcy, trustee under the will of Samuel Parsons, late of Newton, in the county of Middlesex, Massachusetts, of two trusts; one for the benefit of Charles A., James H., and Henry B. Parsons, and the other for the benefit of E. F. and E. A. Parsons.

After the proceedings in bankruptcy had been commenced, Shaw resigned the trusts, and his resignation was accepted by the probate court of Middlesex county on the 25th of March, 1908, and appellant, George Lemist Clarke, was appointed trustee of the trusts and duly qualified.

In the month of January, 1908, and within four months before the filing of the petition in bankruptcy against him, and whilst he was insolvent, Shaw was largely indebted to each of the trusts and to himself as trustee, and transferred from himself individually to the trusts and to himself as trustee thereof as follows: To the trust for C. A. Parsons et al., seven of the $1,000 collateral trust 4 per cent bonds of the American Telephone & Telegraph Company (numbers specified) and two $1,000 Chicago, Burlington, & Quincy Railroad Company 3½ per cent Illinois Division (numbers specified); to the trust of E. F. and E. A. Parsons, twelve $1,000 Northern Pacific-Great Northern 4 per cent joint bonds, Chicago, Burlington, & Quincy collateral.

The transfers were made by Shaw with knowledge of his insolvency, and with intent to prefer the trusts and himself *as trustee, and the effect (it is al-[540 leged) of such preference, if not avoided, will be to enable the trust estates and himself as trustee thereof (being one of his individual creditors) to obtain a greater percentage of his debts than any other of his creditors of the same class.

The petition prayed that the bonds be declared to be the bonds of petitioner, appellee here, and that Clarke, appellant here, be ordered to execute such instruments as might be necessary to transfer the title to and possession of all the bonds to petitioner.

The answer of appellant denied only that the transfers were made within four months of the bankruptcy, that Shaw was, at the time of the transfer, insolvent, that all the trusts were his creditors then or have be-

come so since, within the meaning of the statute, and denies that he intended by the transfers to give a preference, or that they constitute a preference.

The decree of the district judge was that five of the seven Telephone and twelve of the Northern Pacific-Great Northern Railroad Company 4 per cent joint bonds, and all of the coupons thereon payable after January, 1908, were the property of the trustee in bankruptcy, appellee here.

It was further adjudged that the American Telephone & Telegraph Company collateral trust 4 per cent bonds (numbered 20,818 and 20,819) were in part the property of the appellant as trustee and of appellee as trustee. The bonds were directed to be sold. The decree was affirmed by the circuit court of appeals.

The district court found the facts. They are summarized in its opinion as follows:

"The bankrupt, being insolvent, and knowing himself to be insolvent, was discovered by the surety on his bond as trustee under the Parsons will, not to be in the possession of some of the securities which formed a part of the trust estate, and which should 541 ]have been in his possession as *trustee. He was being urged by the surety to make good this shortage. For the purpose of doing so, he placed the bonds in question in a safe-deposit box, taken and agreed on by himself and the surety as a separate place of deposit for the securities belonging to this trust. In the box were placed also those securities belonging to the trust funds which had not gone out of his possession. All the securities thus placed in the box and held as constituting the trust funds have since remained there. The bankrupt has been removed as trustee, and the respondent, his successor in the trust, has at present the possession and control of the contents of the box, including the bonds in question.

"The bankrupt had at the time more than twenty-five other trust estates in his charge as trustee. There was, in the case of each, a shortage for which he was responsible, and he knew the fact to be so. The total amount of those shortages exceeded $350,000.

"It has not been shown that any of the bonds used as above to make good the shortage in the Parsons trust estate, or that any of the money wherewith the bankrupt purchased those bonds, can be identified as belonging to any one of the other trust estates in the bankrupt's charge. He drew out and used to purchase certain of the bonds a savings bank deposit of $1,500 belonging to one of the Parsons trust funds; but with that exception the money wherewith the bonds were bought as well as the bonds themselves must, for the purposes of the questions to be decided, be regarded as the bankrupt's individual property at the time he set them apart in the manner stated, to be thereafter held as trust property."

The question in the case is, Do these facts show a preference within the meaning of the bankruptcy law?

Putting to one side the identity of Shaw as an individual and Shaw as the trustee of the trusts, there are the elements of a preference. In other words, there is indebtedness; Shaw is indebted to all of the estates of which he *was trustee. He[542 used his individual property to pay the indebtedness to the Parsons trust, and he then gave that trust a preference over the others. It was enabled to the extent of the property transferred to obtain a greater percentage of its debts than the other trusts. What, then, stands in the way of setting the transfer aside? The debt was not a provable one in bankruptcy, it is contended, and on that contention the case is rested, and to it we may direct our considerations, and in that the provisions of the statute become necessary elements.

Section 60a, as amended, is as follows:

"A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [32 Stat. at L. 799, chap. 487, § 13, U. S. Comp. Stat. Supp. 1911, p. 1506.]

A creditor is defined to be "anyone who owns a demand or claim provable in bankruptcy may include his duly authorized agent, attorney, or proxy."

Debt includes any debt, demand, or claim provable in bankruptcy. Transfer includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.

Appellant deduces from these definitions that no question of a preference can arise except when the transfer is made to the owner of a provable claim, or to his agent, and that no claim is provable except when enumerated in § 63a, and none other can be liquidated under paragraph b. Of the claims enumerated in § 63a, the fourth is the only one with which we are concerned. It is as follows: "(4) Founded on an open account, or upon a contract, express or implied." The final contention of appellant is that one, to receive a preference, must be a *creditor of the bankrupt upon a[543 ob-

contract, express or implied. It is not enough that there be some kind of legal or equitable claim against the bankrupt. These postulates laid down, he builds upon them an argument of great technicality to show that the trusts of Shaw were not his creditors, and therefore could not receive from him a preference. An obligation to the trusts is not denied, but it is an obligation, it is asserted, which was represented entirely by his bond, and had no remedy but by a suit on the bond. The liability of Shaw, it is further contended, considered independently of the bond, was in the nature of a pure tort liability which could not be waived and the remedies of a contract availed of.

That some torts may be waived and be the basis of provable claims is decided in Crawford v. Burke, 195 U. S. 176, 187, 49 L. ed. 147, 151, 25 Sup. Ct. Rep. 9. Crawford and one Valentine were stockbrokers and dealers in investments. They had in their possession certain shares of stock which they held as a pledge and security for the amount due them by Burke on the stock. They sold Burke's reversionary interest in the stock, whereby it was wholly lost. He sued them in trover. They set up their discharge in bankruptcy. It was held, the court speaking through Mr. Justice Brown, to be clear that the debt of Burke was embraced within the provisions of paragraph a, as one "founded upon an open account, or upon contract, express or implied," and might have been proven had he chosen to waive the tort and take his place with other creditors of the estate. The discharge in bankruptcy was held on other provisions of the act to be a defense. The case was applied and followed in Tindle v. Birkett, 205 U. S. 183, 186, 51 L. ed. 762, 764, 27 Sup. Ct. Rep. 493, in an action to recover damages claimed to have been sustained by false and fraudulent representations. It was decided that the claim was one provable under § 63a as "founded upon an open account or upon a contract, express or implied." It is, however, said that these cases are explained 544]and limited *in Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332, to instances "where there is a claim arising out of a contract, but of such a nature that there is at the same time an independent remedy in tort." To make this distinction available, appellant must establish his contention that there was no contractual relation, either between Shaw and his trusts or the *cestuis que trust* of the trusts; in other words, that the sole liability was upon Shaw's bond. There is no other remedy, is the repeated insistence, and that only after a final accounting has been had in the probate court, showing a liquidated balance due from the accountant. Then, and not until then, as we understand appellant, a creditor emerges with a provable claim. Appellant, however, halts somewhat at the logic of his argument, and ventures to say that a decision in his favor does not necessarily involve a decision that a claim upon the bond of the defaulting trustee could not be proved for a dividend in the name of the probate judge. But is not this concession in opposition to the relation asserted to exist between a provable debt and a transfer of property on account of it being a preference?

We have considered the contentions of appellant somewhat minutely, so as to fully present them. The lower courts, while giving attention to the technical elements of appellant's arguments, cut through them to apply the fundamental purpose of the bankruptcy law; that is, equality between creditors. The district court, following Bush v. Moore, 133 Mass. 198, decided in 1882 under a provision of the Massachusetts insolvency laws which was similar to the provision in the bankruptcy act of the United States, found no difficulty in the same person, considered in different capacities, acting as giver and receiver of a fraudulent preference. The court of appeals met the contention of appellant that there must be a contractual relation, and decided that it existed, both on account of the bond and independently of the bond. *The court[545 said: "It is true that, in the ordinary course, enforcing the bond would be at the end of the proceedings, and not at the beginning. Nevertheless, as the equitable rules which govern in bankruptcy always look to the end, and disregard the intervening details as only steps to reach the end, there was in this case a contract from the beginning,—that is, the bond,—which was capable of liquidation on the rules explained in Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493. . . . Aside from this and independently of the bond, we believe there is an obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled, which is of a contractual character."

But this, appellant contends, is to evolve "two moral persons out of one embezzler." The criticism only can be made by putting out of view what the "one embezzler" represents. He is one being, but acts in more than one capacity, and in all of his capacities he has duties and obligations. The re-

lation of a trustee to the trust property is not the same as his relation to his individual property. He certainly may incur obligations to the trust. He can only satisfy the obligations out of his individual property, and by doing so may deplete it, make it deficient, to satisfy its obligations. These are realities, not fictions. We must overlook essential things to disregard them, and hence the decision in Bush v. Moore, supra. Moore was the guardian of his son, and wrongfully appropriated to his own use the moneys of his ward. Within six months preceding his insolvency, and being insolvent, intending to restore the funds he had appropriated, he deposited in the defendant bank the necessary sum derived from his private property. His assignees in insolvency sued in equity to recover the sum as a preference, alleging that he at the time was insolvent, and acted in contemplation of insolvency. The Massachusetts statute made void any payment or conveyance of property by an insolvent "to any creditor or per-[546]son having a claim against *him" and gave power to the assignee to recover the property.

These contentions were made: (1) The ward was not a creditor of the guardian or a person having a claim against him. (2) The act of the guardian did not constitute a preference which was avoidable by reason of his insolvency. (3) Had the misappropriation continued, there would have been no claim by the ward which could not have been the foundation of a suit. (4) His remedy was to summons the guardian into the probate court, and then, upon adjudication there, or if he failed to account, there would have been only the remedy for failure to account or to comply with the decree of the court.

The contentions, it will be observed, were like those made in the case at bar. They were all rejected. It was held that the title to the property continued in the ward, the guardian having its custody only, and, he having wrongfully used it, there was a just claim on the part of the ward that the integrity of the fund should be restored. The court said: "The title to the property of one under guardianship continues always in the ward; the guardian has its custody merely. If, availing himself of that custody, he wrongfully uses it, there is a just claim on the part of the ward that the integrity of the fund shall be restored. It is not important in what form the ward is compelled to seek his remedy, or that the wrongful act of the guardian will not immediately afford a ground of action against him. Even if, upon a settlement in the probate court, it might have been held that the lawful and proper charges of the guardian would exceed the amount of his spoliations, there was not the less a just claim that the ward's property which had been unlawfully dealt with should be replaced."

To the contention that two persons were necessary to consummate a preference, one to transfer and the other to receive the property, the court answered: "But where *the same person acts as the giver and[547] receiver of the security, the concurrence and participation of two parties to the fraudulent preference exists. . . . One individual acting in two capacities, as debtor and on behalf of the creditor, may constitute the two persons contemplated by the statute." And, supplying the element of knowledge of the insolvency and the preference required by the statute, the court said that the ward was bound by the knowledge of his guardian.

The case is certainly determinative of appellant's contention that accounting in the probate court was necessary as a condition to a provable claim, or that a suit on a bond was the only remedy available for the misappropriation of the funds by a guardian. This applies as well to a trustee; and that there may be a contractual obligation of one trust to another under the laws of Massachusetts is decided in Bremer v. Williams, 210 Mass. 256, 96 N. E. 687. In that case a person who was the sole trustee of two separate estates paid the taxes due from one of them with money embezzled from the other. It was held that the new trustee of the latter could maintain suit in equity to recover from another unjustly enriched by the embezzlement. The liability of the latter to the former, the court said, grew out of an implied or constructive obligation, and did not rest upon an express trust; and, being such, the statute of limitations would be a bar in equity as well as in law. In other words, the court recognized that from the misuse of the funds the law would imply an obligation to repay. This ruling brings the case at bar within Crawford v. Burke and Tindle v. Birkett, even if their application be as limited as appellant contends. It may be questioned if they are so limited. They recognize the relation of § 63a to § 17. Section 17 excludes certain debts from discharge; among others, those created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer in any fiduciary *capacity." It was[548] said in Crawford v. Burke: "If no fraud

could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of the discharge?" The question was pertinent in view of the language of the section. It provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as," etc. The relation of the section was also recognized in Friend v. Talcott, 228 U. S. 27, ante, 718, 33 Sup. Ct. Rep. 505. It is there declared that § 17 enumerates the debts *provable* under § 63a which are not discharged. Among them, we have seen, are those created by fraud, embezzlement, misappropriation, or defalcation in any fiduciary capacity. It would seem, therefore, to follow that the conversion oi trust funds creates a liability provable in bankruptcy.

The court of appeals expressed the hardship of a contrary conclusion. "Moreover," the court said, "it will be a great hardship if the various estates of which Shaw was trustee cannot recover any part of their loss of about $350,000 by sharing in his bankrupt estate. This might, of course, in this instance, be but a very small dividend; but in another instance it might be very near the face of the default. Any construction which would leave such a result as that cannot, of course, be accepted unless fairly forced upon us." [106 C. C. A. 69, 183 Fed. 523.]

In this, we think, the court was right. Equality between creditors is necessarily the ultimate aim of the bankrupt law, and to obtain it we must regard the essential nature of transactions, not their forms or accidents. As we have said, there may be an unity of the person in the individual and the trustee, of the individual and the guardian; we must look beyond it to the difference in his capacities and the duties and obligations resulting from it. These duties and obligations are as distinct and insistent as though exercised by different individuals, and have the same legal consequences. The unity of the person has, of course, an effect. 549]It constitutes such relationship *between the different capacities exercised as to impute knowledge of their exercise and for what purpose exercised. Bush v. Moore, 133 Mass. 198; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 282, 9 Am. St. Rep. 698, 17 N. E. 496; Rogers v. Palmer, 102 U. S. 263, 26 L. ed. 164; Atlantic Bank v. Merchants' Bank, 10 Gray, 532, cited in United States v. State Nat. Bank, 96 U. S. 30, 36, 24 L. ed. 647, 648.

Decree affirmed.

*Mr. Justice Holmes* concurs in the result.

CHUOCO TIACO, Alias Choa Tea, Plff. in Err.,
v.
W. CAMERON FORBES, J. E. Harding, C. R. Trowbridge, and A. S. Crossfield. (No. 254.)

GAN TICO, Plff. in Err.,
v.
W. CAMERON FORBES, J. E. Harding, C. R. Trowbridge, and A. S. Crossfield. (No. 255.)

SY CHANG, Plff. in Err.,
v.
W. CAMERON FORBES, J. E. Harding, C. R. Trowbridge, and A. S. Crossfield. (No. 256.)

(See S. C. Reporter's ed. 549–558.)

**Constitutional law — curative acts — ratifying official action.**

1. Any lack of power in the governor general of the Philippines, acting in his official capacity, to authorize the deportation of an alien, could be cured by the subsequent enactment of Philippine act of April 19, 1910, ratifying his action, even though suits were then pending to make the governor general personally answerable in damages for such action.

[For other cases, see Constitutional Law, 944–946, 1007–1018; Statutes, 538–579, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — liberty — deporting alien.**

2. The government of the Philippine Islands having, under the acts of March 2, 1901 (31 Stat. at L. 895, chap. 803), and July 1, 1902 (32 Stat. at L. 691, chap. 1369), all civil and judicial power necessary to govern the Islands, may authorize the summary executive deportation of aliens without contravening the provision of the Bill of Rights in § 5 of the latter act, forbidding the deprivation of liberty without due process of law.

[For other cases, see Constitutional Law, 420, 436–440, in Digest Sup. Ct. 1908.]

**Aliens — deportation by Philippine government.**

3. The extension of the Chinese exclusion and immigration laws to the Philippine Islands does not deprive the government of the Philippines of power to authorize the summary executive deportation of an alien.

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

[Nos. 254, 255, and 256.]

Argued April 24, 1913. Decided May 5, 1913.

THREE WRITS OF ERROR to the Supreme Court of the Philippine Islands to review judgments granting the relief

NOTE.—As to curative and confirmatory statutes—see note to Barnitz v. Beverly, 41 L. ed. U. S. 94.

sought by certain government officials against the prosecution of suits against them, based upon their action in ordering the deportation of certain aliens. Affirmed.

See same case below, 16 Philippine, 534.

The facts are stated in the opinion.

Messrs. Jackson H. Ralston and Clement L. Bouvé argued the cause, and, with Messrs. W. Morgan Shuster and Frederick L. Siddons, filed a brief for plaintiffs in error:

The contention that the act was an act of the state, or performed by the defendant Forbes in his executive capacity as governor general, did not oust the court of first instance of jurisdiction.

Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; United States v. Peters, 5 Cranch, 115, 139, 3 L. ed. 53, 60; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; Re Tyler, 149 U. S. 164, 190, 37 L. ed. 689, 697, 13 Sup. Ct. Rep. 785; Pennoyer v. McConnaughy, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699; Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

No limitation whatever has been fixed with respect to the right of the parties to appeal against a judgment of a court of first instance.

Eleizegui v. Manila Lawn Tennis Club, 1 Philippine, 303.

Under these circumstances it seems plain that there was no ground for the issuance of the extraordinary writ of prohibition.

High, Extr. Legal Rem. §§ 764a, 767; Re Oklahoma, 220 U. S. 191, 55 L. ed. 431, 31 Sup. Ct. Rep. 426; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324; Re Gruetter, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690; Ex parte Nebraska, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581; Re Pollitz, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; Re Huguley Mfg. Co. 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Re Cooper, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453; Ex parte Gordon, 104 U. S. 515, 26 L. ed. 814; Ex parte Detroit River Ferry Co. 104 U. S. 519, 26 L. ed. 815; Troegel v. Second City Ct. Judge, 35 La. Ann. 1164; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 62 L.R.A. 178, 44 S. E. 300; Ex parte Greene, 29 Ala. 52; Ex parte Peterson, 33 Ala. 74; Ex parte State ex rel. Brooks, 51 Ala. 60; Buskirk v. Circuit Judge, 7 W. Va. 91; Murphy v. Superior Court, 58 Cal. 520; State ex rel. Morse v. Burckhartt, 87 Mo. 533; State ex rel. Johnson v. Withrow, 108 Mo. 1, 18 S. W. 41; State ex rel. Brown v. Klein, 116 Mo. 259, 22 S. W. 693; State ex rel. Gooch v. Robinson, 38 La. Ann. 968; State ex rel. Reid v. Fournet, 45 La. Ann. 943, 13 So. 185; Goldsmith v. Owen, 95 Ky. 420, 26 S. W. 8; State v. Hocker, 33 Fla. 283, 14 So. 586.

The government of the Philippine Islands is not a sovereign political community, at least, in an international sense, but a mere dependency of the United States, limited to the exercise of such powers only as those with which it is vested by its organic act.

Fourteen Diamond Rings v. United States, 183 U. S. 176, 179, 46 L. ed. 138, 141, 22 Sup. Ct. Rep. 59; Snow v. United States, 18 Wall. 317, 21 L. ed. 784; Dorr v. United States, 195 U. S. 138, 148, 49 L. ed. 128, 132, 24 Sup. Ct. Rep. 808, 1 Ann. Cas. 697; Cooley, Const. Law, 164; First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. ed. 1046; Murphy v. Ramsey, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; Downes v. Bidwell, 182 U. S. 244, 283, 45 L. ed. 1088, 1104, 21 Sup. Ct. Rep. 770; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 542, 7 L. ed. 243, 255, Fed. Cas. No. 302a; People v. Daniels, 6 Utah, 288, 5 L.R.A. 444, 22 Pac. 159; United States v. Bull, 15 Philippine, 7; De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743.

While Congress may assign to Federal officers, either in the United States or the Philippine Islands, the power to execute the provisions of such acts as Congress may pass regulating the exclusion or expulsion of foreigners from territory subject to the dominion of the United States, it is as least extremely doubtful whether it could delegate to the Philippine government its sovereign power to exclude aliens. Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256. In any event, this power could only be exercised subject to the limitation of the due-process clause of the Federal Constitution and the Philippine Bill of Rights.

Since, in the enumeration of the powers conferred by the act of July 1, 1902, there is none authorizing, even in the most limited way, the exercise of the general right to exclude or expel foreigners, it is manifestly incorrect to hold that such a power has been delegated to the Philippine government.

First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. ed. 1046.

The fact that the regulation of the admission or exclusion of all aliens into or from

the Philippine Islands was a subject never intrusted to that government or its officers (except to the extent of taking the necessary steps to enforce the immigration and exclusion laws of the United States, made applicable to the Philippines), had never been questioned by the supreme court of the Islands up to the rendition of this case.

Re Allen, 2 Philippine, 630.

The regulation of the conditions under which foreigners may enter into and reside in the territory of the United States is incidental to the general and exclusive power vested in Congress to regulate commerce with foreign nations (Head Money Cases [Edye v. Robertson] 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; and United States ex rel. Turner v. Williams, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719); and it is assuredly not to be presumed that, in the absence of an express delegation by Congress of the power to regulate foreign commerce (conceding this to be possible), a dependent community like the government of the Philippine Islands has that right (25 Ops. Atty. Gen. 563, 566).

As well might it have been contended that, had not Congress legislated for the Philippines regarding the right of foreigners to enter and remain there, the Commission would have had the right to pass laws regulating the matter, in the absence of any delegation of power by Congress to that effect, thereby conceding to a dependent community powers inherent in a member of the family of nations, and powers which the various states of the Union have essayed in vain to exercise.

Passenger Cases, 7 How. 283, 12 L. ed. 702; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; and New York v. Compagnie Generalé Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

Chinese subjects are accorded all the rights, privileges, immunities, and exemptions accorded to subjects of the most favored nation.

Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; Downes v. Bidwell, 182 U. S. 244, 283, 45 L. ed. 1088, 1104, 21 Sup. Ct. Rep. 770.

Certificates of residence, when lawfully issued, as is conceded to be the case here, constitute conclusive evidence of the right to remain.

Lew Quen Wo v. United States, 106 C. C. A. 639, 184 Fed. 685; Re See Ho How, 101 Fed. 115; Re Tom Hon, 149 Fed. 842.

A foreigner cannot be deported without some legal procedure being instituted in order to determine his rights.

Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

The act of deportation was arbitrary *in se*.

Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611.

A public officer purporting to act under color of authority is liable as an individual wrongdoer for wrongs and trespasses committed against individuals if there is no law on which he can rely for his authority, or if the law on which he relies is in conflict with the Federal Constitution.

Poindexter v. Greenhow, 114 U. S. 270, 282, 283, 288, 290, 29 L. ed. 185, 190, 192, 193, 5 Sup. Ct. Rep. 903, 962; Re Ayers, 123 U. S. 443, 501, 502, 31 L. ed. 216, 228, 229, 8 Sup. Ct. Rep. 164; United States v. Lee, 106 U. S. 196, 219, 220, 27 L. ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; Cunningham v. Macon & B. R. Co. 109 U. S. 452, 456, 27 L. ed. 994, 995, 3 Sup. Ct. Rep. 292, 609; Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75; Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; Meigs v. M'Clung, 9 Cranch, 11, 3 L. ed. 639; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Brown v. Huger, 21 How. 305, 16 L. ed. 125; Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; Belknap v. Schild, 161 U. S. 10, 18, 40 L. ed. 599, 601; Kendall v. Stokes, 3 How. 87, 11 L. ed. 506; Little v. Barreme, 2 Cranch, 171, 179, 2 L. ed. 243, 246.

The exalted position of an executive officer, *per se*, constitutes no bar to an action for damages for unlawful acts committed by him.

Marbury v. Madison, 1 Cranch, 152, 2 L. ed. 65; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Poindexter v. Greenhow, 114 U. S. 285–293, 29 L. ed. 191–193, 5 Sup. Ct. Rep. 903, 962; Wilkes v. Dinsman, 7 How. 89, 130, 12 L. ed. 618, 636; Wall v. M'Namara, 2 Car. & P. 158, note; Warden v. Bailey, 4 Taunt. 67; Kendall v. Stokes, 3 How. 92, 11 L. ed. 509; Ferguson v. Kinnoull, 9 Clark & F. 279; Mostyn v. Fabrigas, Cowp. pt. 1, p. 161; Langford v. United States, 101 U. S. 341, 25 L. ed. 1010.

There is a distinction between excess of jurisdiction and absolute want of jurisdiction.

Houlden v. Smith, 14 Q. B. 841, 19 L. J. Q. B. N. S. 170, 14 Jur. 598; Calder v. Hal-

ket, 3 Moore, P. C. C. 28; Taaffe v. Downes, 3 Moore, P. C. C. 36, note; Ferguson v. Kinnoul, 9 Clark & F. 296; Piper v. Pearson, 2 Gray, 120, 61 Am. Dec. 438; Clarke v. May, 2 Gray, 410, 61 Am. Dec. 470; Randall v. Brigham, 7 Wall. 523, 19 L. ed. 285; Ackerley v. Parkinson, 3 Maule & S. 411, 16 Revised Rep. 317; Bradley v. Fisher, 13 Wall. 335, 20 L. ed. 646; Cooley, Torts, 2d ed. p. 486; Mechem, Pub. Off. §§ 623, 629; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80; McCall v. Cohen, 16 S. C. 445, 42 Am. Rep. 641.

Power to exclude aliens being a political power, and one directly delegated to General Weyler by the Crown of Spain, it could not possibly survive the extinction of that sovereignty in the Philippines.

O'Reilly de Camara v. Brooke, 209 U. S. 45, 52 L. ed. 676, 28 Sup. Ct. Rep. 439; Pollard v. Hagen, 3 How. 212, 11 L. ed. 565; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 243, Fed Cas. No. 302a; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067.

Any law, whether existing in the form of a royal decree or purely municipal enactment, conferring the power on any one man arbitrarily to cause the expulsion of resident foreigners from the Philippines would cease to be in force on American occupation, being in absolute conflict with our Constitution and laws, as well as the instructions to the Commission.

Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 542, 7 L. ed. 255, Fed. Cas. No. 302a; Halleck International Law, chap. 34, § 14; Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

Mr. Felix Frankfurter argued the cause, and, with Messrs. Thurlow M. Gordon and George A. Malcolm, filed a brief for defendants in error:

Even where Congress has specifically legislated upon certain subjects, it is not to be regarded as placing a restriction upon the Philippine legislature as to other phases of the same subject-matter, but merely to indicate that, upon that specific subject, Congress was fully informed and ready to act (26 Ops. Atty. Gen. 593, 596; United States v. Bull, 15 Philippine, 27).

This must be so from the underlying theory of our Philippine policy. As has been pointed out by the Philippine supreme court, the conclusion is confirmed by the power of annulment retained by Congress (United States v. Bull, supra). To complement the significance of this reserve power of Congress, it is a sound rule of government that, in the absence of annulment or other action by Congress, an act of the Philippine legislature, affecting its local affairs, after having been duly brought to congressional attention, will be presumed to have met with the approval of Congress (26 Ops. Atty. Gen. 91, 97, approvingly quoted in Gromer v. Standard Dredging Co. 224 U. S. 362, 371, 56 L. ed. 801, 805, 32 Sup. Ct. Rep. 499; United States v. Bull, 15 Philippine, Rep. 31).

The Philippine legislature has the power to pass police measures affecting the peace and security of the Islands. The states possess power to make reasonable police regulations for the public health, order, and security,—*a fortiori* the distant quasi sovereign government of the Philippines. The power is fundamental, and it may be exercised even when the indirect consequences are to obstruct interstate and foreign commerce, or to affect our international relations, provided only that Congress itself has not, by direct legislation covering the same field, assumed exclusive jurisdiction.

New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Compagnie Francaise de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811.

Quite on the other side is an attempt by the state to regulate immigration as such.

Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543.

The expulsion of dangerous persons where the cause of danger arose subsequent to entry into the country has never been a subject of Federal regulation. That power remains where the power over immigration resided before the general immigration laws had been enacted. The respective states are free to exercise it. If, in the silence of Congress, a state could properly exclude dangerous aliens, it follows that it could also expel them after they had entered, if by vicious and disorderly conduct they should become a menace to the state (Freund, Pol. Power § 705).

Since the power exists, to exercise it in a summary way is, in the very nature of things, reasonable in the circumstances of the case, and therefore constitutes due process (Moyer v. Peabody, 212 U. S. 78, 84, 53 L. ed. 410, 416, 29 Sup. Ct. Rep. 235). Public danger warrants the substitution of executive process for judicial process (Fong Yue Ting v. United States, 149 U. S. 698, 707, 714, 37 L. ed. 905, 911, 913, 13 Sup. Ct. Rep. 1016; United States v. Ju Toy, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644).

Of course, the ratification of the act of

the governor general by the Philippine legislature confers as complete authority, so far as immunity from liability for suit is concerned, as original authorization.

The Paquete Habana, 189 U. S. 453, 465, 47 L. ed. 901, 903, 23 Sup. Ct. Rep. 593; O'Reilly de Camara v. Brooke, 209 U. S. 45, 52, 52 L. ed. 676, 678, 28 Sup. Ct. Rep. 439; United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688.

The power of the governor general, prior to the American occupation, to deport aliens found to be a menace to the peace of the Islands, is a local police law which survived the American occupation as reasonable to the conditions of the Islands, and not inconsistent with the spirit of American institutions; and, as such, it has been recognized by the Philippine legislature and the supreme court of the Islands, and tacitly recognized by Congress.

Severino v. Governor General, 16 Philippine, 387; Perez v. Fernandez, 202 U. S. 80, 91, 50 L. ed. 942, 945, 26 Sup. Ct. Rep. 561.

The governor general of the Philippine Islands, acting in good faith, in the discharge of his executive duties, cannot be mulcted in damages for an action where he had reasonable belief that he was exercising lawful authority, where his action was authorized by the insular legislature and sustained by the insular supreme court, and was tacitly approved, or, at least, left undisturbed after full knowledge of the facts by the central government.

Tandy v. Westmoreland, 27 How. St. Tr. 1264; Luby v. Wodehouse, 17 Ir. C. L. Rep. 618, 640; Musgrove v. Chun Teeong Toy [1891] A. C. 272, 60 L. J. P. C. N. S. 28, 64 L. T. N. S. 378; Kendall v. Stokes, 3 How. 87, 11 L. ed. 506; Gould v. Hammond, 1 McAll. 235, Fed. Cas. No. 5,638; Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 Sup. Ct. Rep. 235; Re Fair, 100 Fed. 149; McCall v. McDowell, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673; United States v. Clark, 31 Fed. 710; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Bohri v. Barnett, 75 C. C. A. 327, 144 Fed. 389; Mississippi v. Johnson, 4 Wall. 475, 500, 18 L. ed. 437, 441.

The doctrine of immunity of public officers for acts of state has been repeatedly laid down in England.

Feather v. Reg. 6 Best & S. 257, 296, 35 L. J. Q. B. N. S. 200, 12 L. T. N. S. 114; Burdick, Torts, p. 37; Buron v. Denman, 2 Exch. 167; Tandy v. Westmoreland, 27 How. St. Tr. 1264; Luby v. Wodehouse, 17 Ir. C. L. Rep. 618; Musgrove v. Chun Teeong Toy [1891] A. C. 272, 60 L. J. P. C. N. S. 28, 64 L. T. N. S. 378; Secretary of State v. *Kamachee Boye* Sahaba, 13 Moore, P. C. C. *75, 7 Moore, Ind. App. 476.*

It has also been adopted by this court.

The Paquete Habana, 189 U. S. 453, 465, 47 L. ed. 901, 903, 23 Sup. Ct. Rep. 593; O'Reilly de Camara v. Brooke, 209 U. S. 45, 52, 52 L. ed. 676, 678, 28 Sup. Ct. Rep. 439.

Mr. Justice Holmes delivered the opinion of the court:

The three plaintiffs in error severally sued the defendants in error, alleging that Mr. Forbes was the governor *general of the [555 Philippines, Trowbridge chief of the Secret Service of Manila, and Harding chief of police of the same; that the plaintiff was a Chinese person, lawfully resident in the Philippines, and that the defendants forcibly deported the plaintiff to China, and forcibly prevented his return for some months; that the plaintiff returned on March 29, 1910, and that the defendants threatened and were trying to expel the plaintiff again,—Trowbridge and Harding acting throughout under the order of the defendant Forbes. There was a prayer for an injunction and damages. The defendants demurred, but the demurrer was overruled and a temporary injunction granted. Thereupon Forbes, Harding, and Trowbridge sued for writs of prohibition against the judge and the respective plaintiffs, alleging that the expulsion was carried out in the public interest and at the request of the proper representative of the Chinese government in the Philippines, and was immediately reported to the Secretary of War. The complaints were demurred to, but the supreme court overruled the demurrers, granted the prohibition, and ordered the actions dismissed. The judge, having declined to join in the applications for writs of error, was made a respondent, and the cases are here on the ground that the plaintiffs have been deprived of liberty without due process of law. Act of Congress, July 1, 1902, chap. 1369, § 5, 32 Stat. at L. 691, 692.

The purpose of the first suits, of course, was to make the governor general personally answerable in damages for acts done by him by color of his office and in pursuance of what he deemed to be his duty, as well as to prevent his exercising similar power in the future. This sufficiently appears by the declarations, which suggest and do not exclude official action, and is alleged in the complaints for prohibition. On April 19, 1910, in less than three weeks after the original suits were brought, the Philippine legislature passed an act *which, [556 reciting that the governor general had authorized the deportation "in the exercise of authority vested in him by law," enacted that his action was "approved and ratified and confirmed, and in all respects declared legal, and not subject to question or re-

view." So that, if ratification by that body can dispose of the matter, no court has authority to entertain the suits.

The first doubt that naturally would occur is whether, if a right of action had vested previously, it could be taken away by such a statute. But it generally is recognized that in cases like the present, where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act. The person who has assumed to represent the will and person of the superior power is given the benefit of the representation if it turns out that his assumption was correct. O'Reilly de Camara v. Brooke, 209 U. S. 45, 52, 52 L. ed. 676, 678, 28 Sup. Ct. Rep. 439; United States v. Heinszen, 206 U. S. 370, 382, 51 L. ed. 1098, 1102, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688; The Paquete Habana, 189 U. S. 453, 465, 47 L. ed. 901, 903, 23 Sup. Ct. Rep. 593; Phillips v. Eyre, L. R. 6 Q. B. 1, 23, 10 Best & S. 1004, 40 L. J. Q. B. N. S. 28, 22 L. T. N. S. 869; Secretary of State v. Kamachee Boye Sahaba, 13 Moore, P. C. C. 22, 86, 7 Moore, Ind. App. 476. Compare West Side Belt R. Co. v. Pittsburgh Constr. Co. 219 U. S. 92, 55 L. ed. 107, 31 Sup. Ct. Rep. 196; Dunbar v. Boston & P. R. Corp. 181 Mass. 383, 385, 386, 63 N. E. 916.

Therefore the deportation is to be considered as having been ordered by the governor general in pursuance of a statute of the Philippine legislature directing it, under their combined powers, and it is unnecessary to consider whether he had authority, by virtue of his office alone, as declared by the statute, or whether, if he had not, he had immunity from suit for such an official act done in good faith. The former matter now is regulated by a later statute providing for a hearing, etc. No. 2113. February 1, 1912. On the question thus narrowed the preliminaries are plain. It is admitted that sovereign states have inherent power to deport aliens, and seemingly that 557] *Congress is not deprived of this power by the Constitution of the United States. Fong Yue Ting v. United States, 149 U. S. 698, 707, 728, 37 L. ed. 905, 911, 918, 13 Sup. Ct. Rep. 1016; Wong Wing v. United States, 163 U. S. 228, 231, 41 L. ed. 140, 141, 16 Sup. Ct. Rep. 977; Fok Yung Yo v. United States, 185 U. S. 296. 302, 46 L. ed. 917, 920, 22 Sup. Ct. Rep. 686; United States ex rel. Turner v. Williams, 194 U. S. 279, 289, 290, 48 L. ed. 979, 983, 984, 24 Sup. Ct. Rep. 719. Furthermore, the very ground of the power in the necessities of public welfare shows that it may have to be exercised in a summary way through executive officers. Fong Yue Ting v. United States, supra; United States v. Ju Toy, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644; Moyer v. Peabody, 212 U. S. 78, 84, 85, 53 L. ed. 410, 29 Sup. Ct. Rep. 235. So that the question is narrowed further to the inquiry whether the Philippine government cannot do what unquestionably Congress might.

As Congress is not prevented by the Constitution, the Philippine government cannot be prevented by the Philippine Bill of Rights alone. Act of July 1, 1902, chap. 1369, § 5, 32 Stat. at L. 691, 692. Deporting the plaintiffs was not depriving them of liberty without due process of law, unless on other grounds the local government was acting beyond its powers. But the local government has all civil and judicial power necessary to govern the Islands. Act of March 2, 1901, chap. 803, 31 Stat. at L. 895, 910; act of July 1, 1902, chap. 1369, § 1, 32 Stat. at L. 691. The forms are different, but as in Hawaii, the proximate source of private rights is local, whether they spring by inheritance from Spain or are created by Philippine legislation. See Kawananakoa v. Polyblank, 205 U. S. 349, 354, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526; Perez v. Fernandez, 202 U. S. 80, 91, 92, 50 L. ed. 942, 945, 946, 26 Sup. Ct. Rep. 561. It would be strange if a government so remote should be held bound to wait for the action of Congress in a matter that might touch its life unless dealt with at once and on the spot. On the contrary, we are of opinion that it had the power as an incident of the self-determination, however limited, given to it by the United States.

By § 86 of the act of July 1, 1902, all laws passed by the Philippine government are to be reported to Congress, *which [558 reserves power to annul them. It is worthy of mention that the law under consideration was reported to Congress and has not been annulled. The extension of the Chinese exclusion and immigration laws to the Philippine Islands has no bearing on the matter. The right to remain, for instance, under the act of April 29, 1902, chap. 641, § 4, 32 Stat. at L. 176, U. S. Comp. Stat. Supp. 1911, p. 524, does not prevail over a removal as an act of state.

It is held in England that an act of state is a matter not cognizable in any municipal court. Musgrave v. Pulido, L. R. 5 App. Cas. 103, 108, 49 L. J. P. C. N. S. 20, 41 L. T. N. S. 629, 28 Week. Rep. 373. And that was the purport of the Philippine act declaring the deportation not subject to question or review. As the Bill of Rights did not stand in the way, and the implied powers of the government sanctioned by Congress permitted it, there is no reason why the statute should not have

full effect. It protected the subordinates as well as the governor general, and took jurisdiction from the court that attempted to try the case.

Whether prohibition is technically the proper remedy, historically speaking, we need not inquire. On such a matter we should not interfere with local practice except for good cause shown. In substance the decision of the Supreme Court was right.

Judgment affirmed.

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559] *CHICAGO, INDIANAPOLIS, & LOUISVILLE RAILWAY COMPANY, Plff. in Error,

v.

HAYNES L. HACKETT.

(See S. C. Reporter's ed. 559–567.)

**Constitutional law — equal protection of the laws — modifying fellow-servant rule.**

1. The modification of the fellow-servant rule as to railway employees, made by Ind. Acts 1893, p. 294, cannot be deemed to contravene the equal protection of the laws clause of U. S. Const., 14th Amend., because on its face it applies to any railway employee, where, as construed by the highest court of the state, it cannot be invoked by any class of railway employees not engaged in some branch of service where they are subjected to the hazards incident to the movement of trains or engines.

[For other cases, see Constitutional Law, 286-291, in Digest Sup. Ct. 1908.]

**Master and servant — fellow servants — change of rule by statute.**

2. A yard foreman controlling the movements in the yard of a train and its engine for the purpose of distributing the cars is in charge of the train within the meaning of Ind. Acts 1893, p. 294, abolishing the fellow-servant rule in actions by railway employees when the injury was caused by the negligence of any person in the service of the railway company who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive, engine, or train.

[For other cases, see Master and Servant, II. d, 5, in Digest Sup.. Ct. 1908.]

**Error to state court — scope of review — question not involved in record.**

3. The question whether the Illinois supreme court denied full faith and credit to the judicial construction of an Indiana statute by the Indiana courts is not open for review on writ of error from the Federal Supreme Court to the former court, where no settled construction of the act by the Indiana courts was pleaded or proved, and no right or claim under the full faith and credit clause of the Federal Constitution was specially set up until by the petition for the writ of error.

[For other cases, see Appeal and Error, 2164-2174, in Digest Sup. Ct. 1908.]

**Error to state court — scope of review — question not raised below.**

4. An alleged right under a Federal statute, not specially set up in the state court and there passed upon, cannot be considered by the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2164-2174, in Digest Sup. Ct. 1908.]

**Commerce — state regulation of railway employees — congressional action.**

5. The intention of Congress to take control of the subject so as to invalidate existing state statutory regulations cannot be inferred from the enactment of the employers' liability act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316), since that statute, having been held to be an invalid exercise of the power of Congress, was not a law for any purpose.

[For other cases, see Commerce, I. e; III., in Digest Sup. Ct. 1908.]

[No. 889.]

Submitted February 24, 1913. Decided May 5, 1913.

IN ERROR to the Appellate Court, First District, of the State of Illinois, to review a judgment which affirmed a judgment of the Superior Court of Cook County, in that state, in favor of a railway employee in a personal-injury suit against the railway company. Affirmed.

See same case below, 170 Ill. App. 140.

The facts are stated in the opinion.

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NOTE.—As to validity of statute abrogating fellow-servant rule—see note to Bradford Constr. Co. v. Heflin, 12 L.R.A. (N.S.) 1040.

As to what is a railroad hazard within the statutes abolishing or restricting the fellow-servant rule—see notes to Johnson v. Great Northern R. Co. 18 L.R.A. (N.S.) 477; and Hanson v. Northern P. R. Co. 22 L.R.A. (N.S.) 968.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to state regulation of relations between railroad companies engaged in interstate commerce and their employees—see notes to State v. Northern P. R. Co. 15 L.R.A. (N.S.) 134; and People v. Erie R. Co. 29 L.R.A. (N.S.) 240.

Messrs. E. C. Field, H. R. Kurrie, and John D. Black submitted the cause for plaintiff in error.

Mr. Morse Ives submitted the cause for defendant in error.

Mr. Justice Lurton delivered the opinion of the court:

This is a personal-injury case. The plaintiff, Haynes L. Hackett, was a yard switchman in the employ of the railroad company. While engaged in switching cars in the yard of the company at Monon, Indiana, on February 4, 1907, he was injured through the negligence of another servant of the company who was his immediate superior as yard foreman. He brought this action in the superior court of cook county, Illinois, and recovered a judgment for $30,000, for the loss of both legs. This was affirmed by the appellate court of Illinois, which was the highest court of the state to which the case could be carried.

The plaintiff's declaration contained thirteen counts. A demurrer to the first count [561] was sustained and it was dropped out of the case. The remaining counts were based upon the Indiana act of March 4, 1893 (Acts 1893, p. 294), and particularly the fourth paragraph thereof. The demurrer to these counts was overruled, and the plea of not guilty was entered, upon which issue was joined.

The Indiana statute provides that "every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injuries sustained by any employee while in its service, the employee being in the exercise of due care and diligence, in the following cases." One of the cases described was this: "When such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive, engine, or train upon a railway."

Shortly stated, the case alleged was that the plaintiff, while assisting in the switching of certain cars from one track to another, was, through the negligence of the yard foreman, then in control and directing the operation, thrown violently and negligently from one of the cars and run over. The plaintiff in error claimed in the state court that the Indiana statute upon which the action was brought was invalid as a denial to railroad companies of the equal protection of the law guaranteed by the 14th Amendment. This objection was denied, and the ruling is assigned as error.

The constitutionality of the act has been upheld by this court in Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, and in Louisville & N. R. Co. v. Melton, 218 U. S. 36, — L.R.A.(N.S.) —, 54 L. ed. 921, 30 Sup. Ct. Rep. 676.

It is, however, contended that neither of the cases cited brought before this court the precise question here presented, namely, that the act violates the 14th Amendment, because upon its face it applies to "any employee," thereby embracing in one classification those employees subjected to the hazards incident to the actual operation of [562] railway trains with those in other branches of the service not so subjected, and, therefore, not within the reason for the classification. Upon this assumption it is claimed that the act is one which cannot be upheld as valid as to one class of employees and invalid as to the other, embraced within the single classification, and must therefore be condemned as wholly invalid under the rule applied by this court in Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. But this argument overlooks the fact that the act in question is an act of state legislation, and that its construction is a matter for the state courts of Indiana. If the supreme court of Indiana has construed the act as not extending to any class of railroad employees except those whose occupation connects them in some way with the movement of trains where they are exposed to the hazards incident to the operation and movement of trains and engines, and the act as thus construed and applied is a valid enactment, we must accept that as the proper interpretation of the act. The single duty of this court would then consist in determining whether the act as thus construed violated the equality clause of the 14th Amendment of the Constitution of the United States.

In repeated decisions the Indiana supreme court has construed the act as one which cannot be invoked by any class of railroad employees not engaged in some branch of service where they are subjected to the hazards incident to the movement of trains or engines, and held that, as thus limited, the act is valid; Richey v. Cleveland, C. C. & St. L. R. Co. 176 Ind. 542, — L.R.A.(N.S.) —, 96 N. E. 694; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; Cleveland, C. C. & St. L. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165. Thus the Indiana court, in Pittsburgh, C. C. & St. L. R. Co. v. Rogers, 168 Ind. 483, 81 N. E. 212, said:

"It was held by this court in Pittsburgh, C. C. & St. L. R. Co. v. Montgomery (1906)

152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Indianapolis Union R. Co. v. Houlihan (1901) 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943; Pittsburgh, C. C. 563]& St. L. R. Co. v. *Lightheiser (1907) 168 Ind. 438, 78 N. E. 1033; Pittsburgh, C. C. & St. L. R. Co. v. Collins (1907) 168 Ind. 467, 80 N. E. 415; Pittsburgh, C. C. & St. L. R. Co. v. Ross (1907) 169 Ind. 3, 80 N. E. 845, that, as applied to railroads, said employers' liability act was not in violation of the 14th Amendment of the Constitution of the United States, or of any provision of the Constitution of this state. . . . In Pittsburgh, C. C. & St. L. R. Co. v. Ross, supra, we said: 'The validity of this act, so far as it applies to railroads, was upheld in the case of Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, supra, and that holding has been twice reaffirmed since this appeal was filed, . . . and the constitutionality of the law must be regarded as settled.'

"Following the case of Pittsburgh, C. C. & St. L. R. Co. v. Ross, supra, we hold that the constitutionality of said law must be regarded as settled, and it will not be considered in this case."

In Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954, the court said:

"Notwithstanding the language of the statute is 'that every railroad, or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employee while in its service,' it must not for a moment be understood that the benefits of the statute are extended to all employees of a railroad corporation, or to any other class of employees than those whose duties expose them to the peculiar hazards incident to the use and operation of railroads. There is no reason, in fact or fancy, why the benefits of the statute should be extended to the office and shop employees of railroad corporations, or to others removed from the dangers of train service, and denied to the multitude of other workmen engaged in business of like and equal hazard. . . . By this we do not mean that it is essential to the bringing of an employee within the statute that he should be confected in some way with the movement of trains, but it seems sufficient if the perform-564]ance *of his duties brings him into a situation where he is, without fault, exposed to the dangers and perils flowing from such operation and movement, and is by reason thereof injured by the negligence of a fellow servant described in the act."

That the act, as thus construed and upheld by the highest court or Indiana, does not contravene the equal protection clause of the 14th Amendment, is settled by the two decisions of this court cited above. But we do not intimate that the act, if construed as applicable to all employees of a railroad company, would be in contravention of that clause.

The Illinois court held that upon the facts of this case the yard foreman through whose negligence the plaintiff Hackett was injured was in charge of a train within the meaning of the act. The train was in the yard. Its movements were under the foreman's control. The act for which the company was held liable under the statute was, said the Illinois court, quoting from Chicago, I. & L. R. Co. v. Williams, 168 Ind. 276, 79 N. E. 442, "A negligent act, occurring at a time when the doer of the act is in charge or control of a train." To hold that the operation in the yard of a company, of a train hauled by an engine, for the purpose of distributing its cars, is not an operation of a train or engine within the meaning of the Indiana act, and that the negligence of employees directing and controlling the movements of the train is not the negligence of one in charge of a train within the fair purpose and meaning of the act, would be to make the act meaningless as to the most dangerous class of work which falls to the lot of railroad employees.

We therefore conclude that the contention that the Illinois court erred, either in holding the act valid under the equal protection clause or in its application of the act to the facts of this case, is without merit.

It is then said that the Illinois court denied full faith *and credit to the judi-[565 cial construction of this act by the Indiana court. The first answer to this is that there is no want of harmony between the construction and application of the act by the Illinois court and the interpretation and application of the act by the Indiana court, as indicated by the opinions of that court, cited above. A second and sufficient reason is that the plaintiff in error did not plead and prove any settled construction of the act by the Indiana courts. Many opinions of the Indiana court were put in evidence, though not in support of any formal plea of settled construction. Neither did the plaintiff in error specially set up any right or claim under the full faith and credit clause of the Constitution until it did so under its petition for a writ of error from this court. That was too late. Our right to review the judgment of the Illinois court arises under § 709, Revised Statutes, U. S. Comp. Stat. 1901, p. 575, and is therefore limited to a Federal right specially set up by the party seeking to take advantage of it, and denied by the state court. In Louisville & N. R. Co. v. Melton, 218 U. S. 36, —

L.R.A.(N.S.) —, 54 L. ed. 921, 30 Sup. Ct. Rep. 676, where a similar question arose touching an alleged departure of the Kentucky court from the interpretation placed by the Indiana court upon the statute of Indiana, this court said (p 52):

"Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved, and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal."

We conclude, therefore, that we are not concerned in the interpretation placed upon the Indiana act unless it be that that construction offends against some Federal right properly asserted and open to our consideration.

It is then assigned as error that the court 566]below erred *in not holding that the Indiana statute had been superseded by the Federal employers' liability act of June 11, 1906. [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316.] It does appear in one or more of the counts of the plaintiff's declaration that the railroad company was engaged in operating a railroad extending into two or more states, and such was the evidence. The first count might be said to declare upon the liability of the company under the act of 1906. Upon that ground the case was removed to the circuit court of the United States. But that court remanded it to the state court. Thereupon defendant demurred to the first count and the demurrer was sustained. No exception was saved and no error assigned either in the state court or in this. In no other way was any claim set up or asserted under that Federal act, nor did the state court make any ruling as to the effect of that act upon the Indiana statute, and the judgment of the Illinois court was rested wholly upon the Indiana statute. Not having been specially set up in the state court and there passed upon, it is obvious that the point has not been saved.

But the act of Congress of June 11, 1906, had been held an invalid exercise of the power of Congress, this court saying:

"Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution, and nonenforceable." Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 504, 52 L. ed. 297, 311, 28 Sup. Ct. Rep. 141.

That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law. Norton v. Shelby County, 118 U. S. 425, 442, 30 L. ed. 178, 186, 6 Sup. Ct. Rep. 1121; Ex parte Siebold, 100 U. S. 371, 376, 25 L. ed. 717, 719.

*The second employers' liability act,[567 which avoided the faults of the first, was not passed until after the injury complained of. We pass by as not involved any question as to the extent to which that act operated to supersede the Indiana statute. The situation is not at all like that presented in Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160. There a perfectly valid act concerning the hours of service upon railroads engaged in interstate commerce had been passed. The mere postponement of its operation was held not to lessen its effect as a manifestation of the purpose of Congress to regulate a subject which might be the subject of state legislation only when Congress had been silent. The effect of this purpose to take control of the subject was held to supersede an existing state statute dealing with the same matter from the time of the passage of the act of Congress. No such purpose could be manifested by a void statute, since it was not law for any purpose.

We conclude that the judgment of the court below should be affirmed.

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TITLE GUARANTY & SURETY COMPANY, Plff. in Err.,

v.

UNITED STATES, to the Use of Harlan & HOLLINGSWORTH.

(See S. C. Reporter's ed. 567-572.)

**Federal courts — proper district for suit — action on bond of public contractor.**

The provisions respecting the proper district for an action on the bond of a public contractor, which are made by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1911, p. 1071), amendatory of the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), for the protection of persons furnishing material and labor for the construction of a public work, do not apply where the bond and the various con-

NOTE.—As to jurisdiction of district courts generally—see note to Glass v. The Betsey, 1 L. ed. U. S. 489.

tracts were all executed prior to the passage of the amendatory act, although the work was done and the materials furnished after that date; and such suit is therefore properly brought, under the act of August 13, 1894 (28 Stat. at L. 279, chap. 282, U S. Comp. Stat. 1901, p. 2315), § 5, in the district where the principal office of the surety company executing the bond was situated.

[For other cases, see Courts, V. c, 7; Statutes, II. v, in Digest Sup. Ct. 1908.]

[No. 530.]

Submitted April 28, 1913. Decided May 12, 1913.

IN ERROR to the Circuit Court of the United States for the Middle District of Pennsylvania to review a judgment in favor of plaintiff in an action upon the bond of a public contractor. Affirmed.

See same case below, on demurrer, 191 Fed. 944.

The facts are stated in the opinion.

Mr. Russell H. Robbins submitted the cause for plaintiff in error:

The statute is in effect a pure mechanics' lien statute, and the general rules of construction applicable to mechanics' lien statutes have been held to govern both the earlier and the later statutes.

United States use of Hill v. American Surety Co. 200 U. S. 197, 203, 50 L. ed. 437, 440, 26 Sup. Ct. Rep. 168; United States v. Churchyard, 132 Fed. 82; Jones v. Great Southern Fireproof Hotel Co. 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, affirmed in 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; United States use of Standard Oil Co. v. City Trust, S. D. & Secur. Co. 21 App. D. C. 369; United States use of Vermont Marble Co. v. Burgdorf, 13 App. D. C. 519.

The lien is to be determined by the law in force when the labor and materials are furnished, although a different statute was in effect when the contract was made.

Hauptman v. Catlin, 20 N. Y. 247; Sullivan v. Brewster, 1 E. D. Smith, 681; Summerlin v. Thompson, 31 Fla. 369, 12 So. 667; Weaver v. Sells, 10 Kan. 609; McCrea v. Craig, 23 Cal. 522; Goodbub v. Hornung, 127 Ind. 181, 26 N. E. 770; Nixon v. Cydon Lodge, No. 5, K. P. 56 Kan. 298, 43 Pac. 236; Wheaton v. Berg, 50 Minn. 525, 52 N. W. 926; Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120; Hill v. Lovell, 47 Minn. 293, 50 N. W. 81; Rockel, Mechanics' Liens, 1909, § 7, p. 11.

Whatever rights in the nature of a mechanics' lien Congress may give to a materialman under a public contract must necessarily be measured by the statute in force at the time the materials and labor were furnished; and since the general jurisdiction given by the earlier act had been limited, restricted, and in effect prohibited by the later act before the plaintiff had incorporated its caisson into the dry dock, the provisions of the later act should be held to govern.

Merchants' Ins. Co. v. Ritchie, 5 Wall. 541–544, 18 L. ed. 540–542; National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, ante 221, 33 Sup. Ct. Rep. 17.

The materialman's rights are purely statutory, and not contractual, and it would have been entirely competent for Congress to have abrogated the lien altogether.

People v. Adirondack R. Co. 160 N. Y. 225, 54 N. E. 689, affirmed in 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460.

There were no rights in existence at the time of the amendment, so far as a lien was concerned, which could have been impaired, and a change in the statute before the defendant in error had incorporated its materials into the work could not affect a statutory right which had not yet come into existence.

Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437–447, 47 L. ed. 249–253, 23 Sup. Ct. Rep. 234.

Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left with the remedy given by the statute which created the right.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 490, 56 L. ed. 516, 522, 32 Sup. Ct. Rep. 205.

Messrs. G. W. Pepper and Thomas Stokes submitted the cause for defendant in error:

The act of February 24, 1905, is prospective, and does not control actions based upon the rights of materialmen which accrued prior to its passage.

United States Fidelity & G. Co. v. United States, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537; Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324.

Mr. Chief Justice White delivered the opinion of the court:

This is an action upon a contractor's bond executed on May 24, 1904, under the provisions of the act of Congress of August 13, 1894, chap. 280, 28 Stat. at L. 278, U. S. Comp. Stat. 1901, p. 2523, entitled, "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." The question for

decision is whether the court below had jurisdiction of the cause.

The bond was executed by the surety company in connection with a contract entered into by the Scofield Company with the United States for the erection of a dry dock at the League Island navy yard. The Harlan & Hollingsworth corporation took over a subcontract and constructed a caisson for the dock. To recover a balance owing, the corporation resorted to its remedy on the bond. The bond and various contracts were made prior to 1905.

571] *The above-mentioned act of August 13, 1894, contains no direction respecting where suit upon the bond of a contractor shall be brought by a subcontractor, or what courts shall take jurisdiction of the right of action it creates. As the principal office of the defendant surety company was located within the district, this action was commenced in the court below, as authorized by § 5 of an act of Congress also approved August 13, 1894 (chap. 282, 28 Stat. at L. 279, U. S. Comp. Stat. 1901, p. 2315), regulating surety companies which execute bonds required by the laws of the United States.

The Scofield Company did not defend. The surety company, however, entered a plea to the jurisdiction of the court, contending that as the work done and materials and labor furnished by the Harlan & Hollingsworth corporation were done and furnished after the passage of an act approved February 24, 1905 (chap. 778, 33 Stat. at L. 811, U. S. Comp. Stat. Supp. 1911, p. 1071), amendatory of the first-mentioned act of 1894, and making important changes in the rights of a subcontractor, the provisions of the amendatory act governed, and the action should have been commenced in the district in which the contract was to be performed and executed. A demurrer to the plea was sustained, and for want of an affidavit of defense, judgment was entered in favor of the Harlan & Hollingsworth Company, and the case was brought directly here on the question of jurisdiction.

The circuit court was clearly right in upholding its jurisdiction. As already stated, the contract between the United States and the original contractor, the bond of the surety company, and the contract with the use plaintiff, were all executed prior to the passage of the amendatory act. To hold that the latter act applied, therefore, would be to construe the act as having a retroactive effect. It has, however, been definitely decided, that the act was intended to have merely a prospective operation. United States Fidelity & G. Co. v. Struthers Wells Co. 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537; Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324. The decisions *lend no support to the contention now [572 urged on behalf of the plaintiff in error, that Congress intended the act of 1905 to be retroactive in all cases where the work was done after the passage of the amendment.

Judgment affirmed.

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JOHN QUINCY ADAMS, Plff. in Err.,
v.
CITY OF MILWAUKEE and Gerhard A. Bading.

(See S. C. Reporter's ed. 572-585.)

**Constitutional law — equal protection of the laws — classification — milk ordinance.**

1. Milk drawn from cows outside the city is not unconstitutionally discriminated against by a municipal ordinance prohibiting its shipment into the city unless the cows shall first have been subjected to the tuberculin test and an official certificate of their freedom from tuberculosis or other contagious diseases filed with the health officer, while the regulations relative to cows within the city forbid the sale of milk from sick or diseased cows, and contemplate inspection by the health officer, and the application by him of any known test to determine whether the animal inspected is

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NOTE.—Validity of tuberculin test for dairy cattle.

The state court, in upholding the Milwaukee ordinance, conceded that "considerable difference of opinion appears to exist among those having a reputation for learning, with respect to the efficiency of the tuberculin test for ascertaining the presence of tuberculosis in cattle;" but was of the opinion that such test, while not infallible, is the only reliable and useful means for testing cattle for tuberculosis, basing its conclusion not only upon the evidence and findings, but upon certain state statutes and decisions, hereinafter referred to. "The evidence and findings in the instant case, this legislation and these decisions," said the court, "go to show a widespread recognition of the danger of infection from bovine tuberculosis, and of the efficacy of the tuberculin test. When there are conflicting scientific beliefs or theories in such matters, it is for the city council to determine upon what theory it will base its police regulations; and unless it is clearly and manifestly wrong, it is not for the courts to interfere on the ground that the scientific theory on which the ordinance is based is incorrect or unsound." Adams v. Milwaukee, 144 Wis. 371, 43 L.R.A.(N.S.) 1072, 129 N. W. 618.

Montclair, N. J., has a similar provision

afflicted with tuberculosis, and the removal by him of any diseased animal to a place where it will not spread infection.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — police power — milk ordinance.**

2. The confiscation, forfeiture, and immediate destruction contemplated by a municipal ordinance where milk does not conform to the requirements of such ordinance forbidding the shipment into the city of milk drawn from cows outside, unless the cows shall first have been subjected to the tuberculin test, and an official certificate of their freedom from tuberculosis or other diseases shall have been filed with the health officer, do not take property without due process of law, contrary to U. S. Const., 14th Amend., even though the necessity of the tests be not demonstrated, and the beliefs which induced them may be disputed; but such ordinance must be regarded as a valid exercise of the police power, the destruction of the milk being the only available and sufficient penalty for violations of the ordinance.

[For other cases, see Constitutional Law, 582–590, 895–903, in Digest Sup. Ct. 1908.]

[No. 247.]

Argued April 23, 1913. Decided May 12, 1913.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court for Milwaukee County, in that state, sustaining the validity of a municipal ordinance regulating the sale of milk. Affirmed.

See same case below, 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518.

The facts are stated in the opinion.

Mr. Marcus A. Jacobson argued the cause, and, with Mr. D. S. Tullar, filed a brief for plaintiff in error:

The ordinance in question is class legislation, and is a violation of the 14th Amendment of the Constitution of the United States.

State ex rel. Greenwood v. Nolan, 108 Minn. 170, 122 N. W. 255; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; State v. Whitcom, 122 Wis. 110, 99 N. W. 468; State v. Nelson, 66 Minn. 166, 34 L.R.A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066.

The ordinance in question is unconstitutional and void because § 24 authorizes the taking of private property without due

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in its so-called Sanitary Code, the effect of which is to exclude from sale in the town milk and cream, no matter how good or wholesome it may in fact be, and no matter what may be the condition of the cows, if they cannot pass the tuberculin test,—except where the board of health by special permission allows the milk to be sold after it has been pasteurized. This provision was unsuccessfully attacked in State, Borden's Condensed Milk Co. Prosecutor, v. Board of Health, 81 N. J. L. 218, 80 Atl. 30. The court, answering the objection that such a regulation makes the right to sell milk depend not upon the fact of the existence of disease in the cow, but upon the result of a specific method of diagnosis,—the use of the tuberculin test,—said: "It must be conceded that where, as in this case, the board of health makes the determination of the existence of disease depend upon a special method of diagnosis, the method must be, if not the most reliable, as reliable as any. The existence of disease is necessarily to some extent a matter of opinion or inference from established facts. The most skilful veterinarian may err. The most reliable symptoms may be deceptive, and absolute accuracy in diagnosis cannot be looked for. To demand it is a counsel of perfection not adapted to the exigencies of everyday life. Perfection of that degree is not attained under the diagnosis of human diseases where the physician has the advantage of a patient able to state subjective symptoms and give a history of the complaint. All that can be fairly required in the determination of the fact of disease is that the method of diagnosis should be well recognized, thoroughly approved, and as reliable as any." Continuing, the court said that, considering the testimony in the case and the statutes and judicial decisions of other states, "we find that the tuberculin test is the most reliable method of diagnosis of tuberculosis in cattle now known; that, while it is not perfect, the percentage of error is as small as in any method suggested; and that it is more accurate than the method by physical examination."

The court refused to yield to the argument that the ordinance goes further than is necessary for the protection of the public, and hence further than is warranted by any power that can be given by a statute that by its title relates only to health, and said that they were not impressed with the suggestions that healthy cows may, and diseased cows may not, react to the tuberculin test; that many cows react that have had tuberculosis and recovered; that many that now have tuberculosis are likely to recover; and that it is possible for the producer of milk to destroy the value of the test by trick.

To the same effect is State v. Nelson, 66 Minn. 166, 34 L.R.A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066. Here a city ordinance requiring a license to sell milk in the city, and making an inspection of the dairy herd by the city veterinarian a condition precedent to obtaining a license, and providing that, for the purpose of detecting tuberculosis or other contagious or infectious dis-

process of law, contrary to the 14th Amendment.

Wilcox v. Hemming, 58 Wis. 148, 46 Am. Rep. 625, 15 N. W. 435; Gosselink v. Campbell, 4 Iowa, 296; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341; Bittenhaus v. Johnston, 92 Wis. 588, 32 L.R.A. 380, 66 N. W. 805; Edson v. Crangle, 62 Ohio St. 49, 56 N. E. 647; Daniels v. Homer, 139 N. C. 219, 3 L.R.A.(N.S.) 997, 51 S. E. 992; McConnell v. McKillip, 71 Neb. 712, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 Ann. Cas. 898.

Mr. Daniel W. Hoan argued the cause, and, with Mr. John J. Cook, filed a brief for defendants in error:

The contention that the health officer has no authority to enact rules governing the sale of milk in the city of Milwaukee does not present a Federal question.

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

Questions of administration of ordinances do not go to the constitutionality of the same. The court presumes that ordinances will be administered properly, and that the state will not permit hardships to be imposed, and until it has, no Federal question is involved.

New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Schmidinger v. Chicago, 226 U. S. 578, ante, 364, 33 Sup. Ct. Rep. 182.

The police regulations are not only questions primarily for the states to settle, but the question, for example, whether the manufacture of oleomargarin or imitation butter involves such danger to the public health as to require the entire suppression of the business, is one of fact and of public welfare, which belongs to the legislative department of government to determine. If it does not appear from the face of the statute, or from facts of which this court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of such questions is conclusive upon the courts.

Powell v. Pennsylvania, 127 U. S. 678–681, 32 L. ed. 253–256, 8 Sup. Ct. Rep. 992, 1257; Jacobson v. Massachusetts, 197 U. S. 11–28, 49 L. ed. 643–651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

Under the police power a corporation may be deprived of its right to conduct a far-

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case, the veterinarian is authorized to use the tuberculin test, was upheld over the objection that the ordinance is oppressive and unreasonable, in that it requires every dairy herd whose milk is desired to be sold within the city to be subjected to the tuberculin test,—uncertain in its result and deleterious to the health of the cattle The court said: "At the present stage of scientific research on this subject it may be a debatable question whether this test has been fully proven, or how far it is as yet merely experimental. There is ample evidence in this case that it is now the generally accepted theory that the presence of consumption or tuberculosis in animals can be detected by this test, also that this is what is called a 'germ disease' which may be contracted by eating the flesh or drinking the milk of a tuberculosis animal. Upon the evidence we could not say that this provision of the ordinance is oppressive, or that it has not a reasonable tendency to prevent the sale of unwholesome milk within the city."

This case is followed in Nelson v. Minneapolis, 112 Minn. 16, 29 L.R.A.(N.S.) 260, 127 N. W. 445, which further holds that the city has power to order the seizure and destruction of all milk offered for sale from herds of cattle that have not been inspected and tested under the tuberculin test.

Public authorities have the right to require the destruction of dairy cows shown by a practically infallible (tuberculin) test to have tuberculosis and to be a serious menace to the public health. New Orleans v. Charouleau, 121 La. 890, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann Cas. 46.

The court in State, Borden's Condensed Milk Co., Prosecutor, v. Board of Health, 81 N. J. L. 218, 80 Atl. 30, said that one of the most difficult questions raised in that case was that which related to the validity of the regulations under the Federal Constitution; but held that they are a reasonable exercise of the police power of the state, although they may deprive the milk dealer of his property, and may in a probable case interfere with interstate commerce.

But to justify the application of the tuberculin test to all cattle imported into the state for dairy or breeding purposes, it must appear when neither the legislature nor other official body has seen fit to declare that the tuberculin test is an efficient or certain one, that it will in a reasonable degree or in some manner determine the existence or nonexistence of tuberculosis. Pierce v. Dillingham, 203 Ill. 148, 62 L.R.A. 886, 67 N. E. 846.

On validity and construction of statutory regulations as to infected animals—see note to Grimes v. Eddy, 26 L.R.A. 638; also note to decision of Wisconsin Supreme Court in Adams v. Milwaukee, as reported in 43 L.R.A.(N.S.) 1072.

As to validity of various other police regulations affecting sale of milk—see notes to St. Louis v. Liessing, 1 L.R.A.(N.S.) 918; St. Louis v. Grafeman Dairy Co. 1 L.R.A. (N.S.) 926; St. Louis v. Schuler, 1 L.R.A. (N.S.) 928; Sanders v. Com. 1 L.R.A.(N.S.) 932; and Com v. Drew, 23 L.R.A.(N.S.) 401.

tilizer plant in a city, and therefore be deprived of the use of its buildings and investment for that purpose by the police power.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

Or be deprived of the right to manufacture or sell intoxicating liquors, and thereby lose any investment made therein.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

A railroad may be compelled to abolish dangerous grade crossings, even at the expense of elevating its tracks at its own expense.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

One may be deprived of the right to send cattle or horses into a state unless he has first obtained a certificate or bill of health from the state sanitary board that such cattle or horses are free from all contagious diseases, and have not been exposed for ninety days prior thereto to any such disease, the expense of such inspection to be paid by the owners of such cattle.

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

Even though the ordinance did operate to suppress his business, this court has held in a case sustaining the right of the city to forbid the erection of cow stables and dairies in the city limits, in language applying pertinently to this case, that the authority of a municipality to do certain acts under its charter was settled by the decision of the supreme court of the state, and was not open to attack here.

Fischer v. St. Louis, 194 U. S. 361–370, 48 L. ed. 1018–1023, 24 Sup. Ct. Rep. 673.

An ordinance, to be unreasonable, must have no substantial relation to the public welfare.

Grainger v. Douglas Park Jockey Club, 78 C. C. A. 199, 148 Fed. 522, 8 Ann. Cas. 997.

The findings of fact on the question of the danger to the public health from consuming milk from cows infected with tuberculosis, and the remaining findings upon the reliability and reasonableness of the test in question, establish the relation of the ordinance to the public health, and are conclusive upon the question.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Foster, Fed. Pr. p. 1161; 2 Rose's Code Fed. Proc. p. 2074; Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Miller v. Guasti, 266 U. S. 170, ante, 173, 33 Sup. Ct. Rep. 49; Marshall Dental Mfg. Co. v. Iowa, 226 U. S. 460, ante, 300, 33 Sup. Ct. Rep. 168.

In the following cases it has been held proper for the city to require that no milk be sold unless the cows from which it came were tuberculin tested.

State v. Nelson, 66 Minn. 166, 34 L.R.A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066; Nelson v. Minneapolis, 112 Minn. 16, 29 L.R.A.(N.S.) 260, 127 N. W. 445; New Orleans v. Charouleau, 121 La. 890, 18 L.R.A. (N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46; State, Borden's Condensed Milk Co., Prosecutor v. Board of Health, 81 N. J. L. 218, 80 Atl. 30; Limber v. Meadville, Crawford Common Pleas, Pa.

Before the constitutional objection of denial of equal protection of the law, because of unwarranted classification, can be invoked, it must appear that the classification rests upon no reasonable basis.

Rosenthal v. New York, 226 U. S. 260, ante, 212, 33 Sup. Ct. Rep. 27; Toyota v. Hawaii, 226 U. S. 184, ante, 180, 33 Sup. Ct. Rep. 47.

The following cases afford authority for the classification resorted to:

Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 56 L. ed. 175, 179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913 B, 529.

The ordinance in question does not authorize the taking of property without due process of law.

Jacobson v. Massachusetts, 197 U. S. 11, 35, 49 L. ed. 643, 654, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment of the supreme court of Wisconsin sustaining the validity of an ordinance of the common council of the city of Milwaukee, regulating the sale of milk.†

†No person shall bring into the city of Milwaukee for sale, either by wagon, cart, train, or any other kind of vehicle, or keep, have, or offer for sale or sell in said city, any milk or cream drawn from cows outside of said city, contained in cans, bottles, or packages, unless such cans, bottles, or other packages containing such milk or cream for sale, shall be marked with a legible stamp, tag, or impression, bearing the name of the owner of such cows from which such milk was drawn, giving his place of business, including the name of city, street, and number, or other proper address, and unless the owner or owners of such cows shall, within one year from the passage of this ordinance, file in the office of commis-

577] *The ordinance provides that no milk drawn from cows outside of the city shall be brought into the city, contained in cans, bottles, or packages, unless they be marked with a legible stamp, tag, or impression bearing the name and address of the owner of the cows, and unless such owner shall, within one year from the passage of the ordinance, file in the office of the commissioner of health a certificate of a duly licensed veterinary surgeon or other person given authority by the State Live Stock San-578]itary Board to make *tuberculin tests, stating that such cows have been found free from tuberculosis or other contagious diseases. The certificate is required to give a number which has been permanently attached to each cow and a description sufficient for identification. The certificate must be renewed annually, and must show that the cows are free from tuberculosis or other contagious diseases.

A short time before the ordinance was to go into effect this suit was brought against the city and Dr. Bading, its health commissioner, to restrain the enforcement of the ordinance. After a hearing, judgment was entered, dismissing the complaint, and the judgment was affirmed by the supreme court of the state.

The plaintiff (we shall so call him) alleged that he brought the suit for himself and all other producers of and dealers in pure, wholesome milk, as it involved a question of common interest to many persons. He alleged also the following: He is a farmer, living about 17 miles from Milwaukee, and maintains a large dairy herd of cattle, and is enjoying a profitable dairy business, shipping milk into Milwaukee to certain retail milk dealers in the city. His herd is healthy, so far as he is able to know or judge. He keeps his stables wholesome and clean, and if his cows become sick or affected in any way with any infectious or contagious disease, so far as he is able to learn or discover by giving careful attention to his herd in its feeding and care, he removes such animals immediately. So far as he is able to discover, his herd is absolutely free from disease, and the milk he offers for sale in Milwaukee, or will offer for sale, is and will be, so far as he is able to discover, absolutely pure and wholesome; and all that proves to be impure and unwholesome upon being tested in the usual and customary manner will be withdrawn from sale.

Bading, as commissioner of health of the city of Milwaukee, threatens, on and after April 1, 1909, to execute *the ordinance,[579 and confiscate, forfeit, and destroy all milk shipped by plaintiff and other producers to be sold in Milwaukee contrary to the requirements of the ordinance, unless restrained; and if he does so irreparable injury will be caused plaintiff and such other producers, and make their business of maintaining a dairy absolutely unprofitable as well as impracticable.

The tuberculin test required by the ordinance is, as plaintiff is informed and believes, wholly unreliable, untrustworthy, and entirely worthless so far as being a guide or protection to the public as to whether or not the cows tested by it are free from the germs of tuberculosis or any other infectious disease.

The milk threatened to be confiscated, shipped to Milwaukee for sale by plaintiff and other producers, when pure and wholesome, is not dangerous to public health because, perchance, the owners of the cows producing the milk have not had the cows tested, or have failed to secure the certificate of a veterinary surgeon or other person, as required by the ordinance.

It is alleged that the Constitution of the state and the 14th Amendment of the Constitution of the United States are violated.

A motion to dismiss is made on the ground that the questions in this case, un-

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sioner of health, a certificate of a duly licensed veterinary surgeon, or of any other person given authority by the State Live Stock Sanitary Board to make tuberculin tests, stating that such cows have been tested with tuberculin and found free from tuberculosis or other contagious diseases. Such certificate shall give a number which has been permanently attached to each cow, and a description sufficiently accurate for identification, stating the date and place of such examination, and such certificate shall be good for one year from date of its issuance. Such certificate, however, must be renewed annually and filed in the office of the commissioner of health, and each such certificate shall show in each case that the animals from which such milk was drawn are free from tuberculosis or other contagious diseases. All milk and cream from sick and diseased cows, or cows fed on refuse or slops from distilleries, or vinegar factories, unless such refuse or slops be mixed with other dry sanitary grain or food to a consistency of a thick mush, or other than good wholesome food, or milk that is dangerous, or that may affect or be detrimental to life or health, or that has been adulterated, or is below the standard fixed by § 17 of this chapter, or which does not conform to all other provisions of this chapter, shall, upon discovery thereof, be confiscated, forfeited, and immediately destroyed by or under the direction of the commissioner of health, bacteriologist, or officer detailed, who shall, if done in good faith, be held harmless in damage therefor, in any suit or demand made.

der the decisions of this court, are so far foreclosed as to make their discussion unnecessary. The motion is overruled.

The particular contention of plaintiff is that the ordinance violates the 14th Amendment to the Constitution of the United States because it discriminates between milk drawn from cows outside of Milwaukee and milk drawn from cows within the city. Therefore the charge is that the ordinance does not affect all persons alike. If we regard the territorial distinction merely, that is, milk from cows outside and milk from cows within the city, there is certainly no discrimination. All producers 580] *outside of the city are treated alike. Plaintiff identifies himself in interest with all of them and sues for all of them. He therefore seeks grounds of comparison other than the locality of the dairies, and urges that the discrimination exists in the difference between the tests to which cows kept outside of the city are subject and the test to which cows within the city are subject.

To sustain his contention plaintiff in error cites an ordinance of the city which provides that no cows or cattle shall be kept in the city without permit from the commissioner of health, except at places provided or established for purposes of slaughtering, and that the stables and places where such animals may be shall be kept at all times in a cleanly and wholesome condition and properly ventilated, and that no person shall allow any animal to be therein which is affected with any contagious and pestilential disease.

This ordinance was supplemented by various rules made by the health commissioner in regard to cleanliness of the stabling of the animals, keeping from them persons infected or who have been exposed to disease, requiring applications for permits to be accompanied by the certificate of the veterinary surgeon, showing that the animals have been tested by the tuberculin test, and shown by said test to be free from tuberculosis, and that they are not affected with any infectious or contagious disease. If the animals become subsequently infected, they are to be removed from the city, or disposed of in the manner provided by law.

Three contentions are, notwithstanding, made: (1) The rules were promulgated after this suit was begun. (2) The commissioner had no authority to make the rules. (3) They are radically different rules from the rules as to cows kept outside of the city.

The third contention is the only one that involves a Federal question. The others in-
*581]volve* local questions only, *and the su-
*preme court of the state decided* that the sale

of milk drawn from diseased cows is forbidden within the city; that the health officer may remove a diseased animal to a place where it will not spread infection; and that he may apply any known test to determine whether the animal is afflicted with tuberculosis. Inspection and care, therefore, can be applied to the animals within the city, and it is applied also to the milk drawn from such animals. It cannot be applied to animals kept outside of the city. It can only be applied to the milk drawn from them. The court noticed this difference and the difference in the regulations, made necessary by it. "There are brought into Milwaukee," the court said, "from outside of the city, about 28,000 gallons of milk every day, drawn from more than 10,000 cows. It would be practically impossible to subject this quantity of milk to a microscopic examination, or to subject it to what is called in the evidence the centrifugal test, which would also require the use of a microscope, although not to the same extent. Each animal within the city can be subjected to an individual examination, a microscopic test of samples of its milk, an inspection as to its condition of health, and the tuberculin test applied directly under the orders of the health commissioner. This is a sufficient basis for separate legislation relating to milk shipped into the city. There are other regulations covering the sale of milk drawn from cows kept within the city." [144 Wis. 377, 43 L.R.A. (N.S.) 1066, 129 N. W. 518.]

We concur in the conclusion of the court. The different situations of the animals require different regulations. Cows kept outside of the city cannot be inspected by the health officers; they can be inspected by a licensed veterinary surgeon, and a certificate of the fact and the identity of the cows and the milk authenticated as required by the ordinance. The requirements are not unreasonable; they are properly adaptive to the conditions. They are not discriminatory; they have proper relation to the purpose *to be accomplished. That pur-[582
pose and the necessity for it we cannot question. Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, ante, 184, 33 Sup. Ct. Rep. 44; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471.

In St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909, we said that, in considering the classification of a law, not only its final purpose must be regarded, but the means of its administration. The case is quite in point. There regulations were attacked as discriminating between producing and nonproducing vendors of milk with a view to securing its freedom from adulteration; and adulterated milk was defined by law to be that to which something was added or from which the cream was removed or was naturally deficient, or taken from cows fed on certain things or when in certain conditions. The regulations were directed to the inspection of samples of milk from the entire herd. A producing vendor could exempt himself from the penalties of the law by proving that his milk was in the same condition as when it left the herd. The nonproducer had not that privilege. St. John, who was a nonproducing vendor, offered to prove such fact as to the milk he offered for sale, but the proof was rejected and he was convicted of violating the law. The conviction was sustained against his attack of discrimination in the law. In that case, as in this, a disregard of the regulations was sought to be justified by the assertion of the purity of the milk offered for sale.

Plaintiff also contends that the provision of the ordinance which requires milk that does not conform to its requirements to be confiscated, forfeited, and immediately destroyed, takes his property without due process of law.

To sustain his contention, he assumes the purity of his milk, though it has not been 583] tuberculin tested, and then *asserts that "milk of this kind cannot be confiscated and destroyed simply because it is not accompanied with a certificate of a veterinary surgeon or of some person authorized by the Live Stock Sanitary Board of the state of Wisconsin, as provided by said ordinance, certifying that the tuberculin test has been applied." But plaintiff overlooks the allegation of his complaint. His allegation is not that his cows are free from infectious or contagious disease, but only "so far as he is able to learn or discover." And the allegation of his willingness to withdraw tainted milk from sale depends upon the same contingent knowledge or information. He overlooks also the findings of the courts against the sufficiency of his information, and their demonstration of the necessity of the tests established by the ordinance. But even if the necessity of the tests be not demonstrated and the beliefs which induced them may be disputed, they cannot be pronounced illegal. In Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301, we expressed the deference which must be accorded to local beliefs, saying that we would not overthrow an exercise of police power based on them to protect health merely because of our adherence to a contrary belief. It will be observed, therefore, that the contention of plaintiff is without foundation, and that the ordinance is not an arbitrary and unreasonable deprivation of property in a wholesome food, but a regulation having the purpose of and found to be necessary for the protection of the public health.

The police power of the state must be declared adequate to such a desired purpose. It is a remedy made necessary by plaintiff acting in disregard of the other provisions of the ordinance,—that is, failing to have his cows tested and their milk authenticated, as prescribed. The city was surely not required to let the milk pass into consumption and spread its possible contagion. This seems to be the alternative for which plaintiff contends, and might occur. All milk produced outside of the city had amounted, the *supreme court said, to [584 3,500 eight-gallon cans daily. Criminal pains and penalties would not prevent the milk from going into consumption. To stop it at the boundaries of the city would be its practical destruction. To hold it there to await judicial proceedings against it would be, as the supreme court said, to leave it at the depots, "reeking and rotting, a breeding place for pathogenic bacteria and insects during the period necessary for notice to the owner and resort to judicial proceedings."

We agree with the court that the destruction of the milk was the only available and efficient penalty for the violation of the ordinance. The case, therefore, comes within the principle of the cases we have cited and of New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144. In other words, as the milk might be prohibited from being sold, at the discretion of the board of health, and even prohibited from entering the city (Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506), a violation of the conditions upon which it might be sold involves as a penalty its destruction. Plaintiff sets up his beliefs and judgment against those of government, and attempts to defeat its regulations, and thereby makes himself and his property a violator of the law. In North American Cold Storage Co. v. Chicago, 211 U. S. 306, 315, 53 L. ed. 195, 199, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276, we said, by

Mr. Justice Peckham, that food which is not fit to be eaten, "if kept for sale or in danger of being sold is itself a nuisance, and a nuisance of the most dangerous kind; involving, as it does, the health, if not the lives, of persons who may eat it." And it was decided that in such case the food could be seized and destroyed, and that a provision for a hearing before seizure and condemnation was not necessary. It was also decided that the owner of the food had his remedy against the arbitrary action of the health officers.

It is, however, said that plaintiff is precluded from such remedy because the ordinance expressly provides that the health officers "shall be held harmless in damages" 585]for *their acts "if done in good faith." It may be that that portion of the ordinance is separable if invalid. The supreme court of the state said it was not necessary to pass upon the provision. What view it might entertain it did not clearly express. In determining the validity of the provision the court said that it "must assume that the ordinance is otherwise valid," and that it could not presume that plaintiff would disregard the ordinance held by it "to be valid, or place his property in a condition to invite its destruction." "Self-inflicted damage," the court added, "is not recoverable." The open judicial inquiry is in such case: "Was the damage self-inflicted?" In other words, as we understand the court, a question upon that portion of the ordinance has not yet reached a justiciable stage. There is certainly no destruction of the milk impending. Indeed, according to the allegations of the complaint, there is a threat only, to be executed if plaintiff should take milk into the city, which, though he alleges he is anxious to do, he may not do.

Judgment affirmed.

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HELENA BUGAJEWITZ, Appt.,
v.
LOUIS ADAMS, United States Inspector in Charge of Immigration of Colorado; D. C. Bailey, United States Marshal, etc., et al.

(See S. C. Reporter's ed. 585–591.)

**Aliens — deportation — limitation.**

1. The effect of the act of March 26, 1910 (36 Stat. at L. 265, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 502), § 2, striking out the limitation of three years in the provision of the act of February 20, 1907 (34 Stat. at L. 898, chap. 1134), § 3, for the deportation of any alien woman found practising prostitution after her entry into the United States, is not changed because such amendatory act still refers to §§ 20, 21 of the earlier act, as governing the manner of deportation, although each of those sections begins by providing for the taking into custody of aliens subject to removal within three years from entry.

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

**Aliens — deportation — power of Congress.**

2. Congress could constitutionally provide, as is done by the act of February 20, 1907, § 3, as amended by the act of March 26, 1910, § 2, for the deportation of any alien woman found practising prostitution after her entry into the United States.

[For other cases, see Aliens, VI., in Digest Sup. Ct. 1908.]

**Constitutional law — ex post facto laws — deporting aliens.**

3. The prohibition of U. S. Const. art. 1, § 9, against *ex post facto* laws, has no application to provisions like those of the act of February 20, 1907, § 3, and the amendatory act of March 26, 1910, § 2, for the deportation of alien women found practising prostitution after their entry into the United States.

[For other cases, see Constitutional Law, IV. f, in Digest Sup. Ct. 1908.]

[No. 239.]

Submitted April 21, 1913. Decided May 12, 1913.

APPEAL from the District Court of the United States for the District of Colorado to review an order refusing relief by habeas corpus to an alien sought to be deported. Affirmed.

The facts are stated in the opinion.

Mr. Joshua Freeman Grozier submitted the cause for appellant. Mr. John A. Deweese was on the brief:

"Due process" of law in our judicial system takes the place of the "law of the land" under the Magna Charta.

2 Kent, Com. 5th ed. 13; Story, Const. § 1783; Taylor v. Porter, 4 Hill, 146; Fletcher v. Peck, 6 Cranch, 138, 3 L. ed. 178; Vanzant v. Waddel, 2 Yerg. 260; Bank of Columbia v. Oakely, 4 Wheat. 235, 4 L. ed. 559.

By due process of law is not simply meant an act of Congress, but law in its regular course of administration through the courts of justice.

Greene v. Briggs, 1 Curt. C. C. 325, Fed Cas. No. 5,764; Menges v. Dentler, 33 Pa 495, 75 Am. Dec. 616; Hoke v. Henderson, 15 N. C. (4 Dev. L.) 15, 25 Am. Dec. 677; Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; Brown v. Hummel, 6 Pa. 86, 47 Am. Dec. 431; 1 Kent, Com. § 24.

By "judicial power in the Constitution" is meant that source of power which was

recognized and understood to be such at the time of the adoption of the Constitution.

Federalist, 80; Ex parte Randolph, 2 Brock, 447, Fed. Cas. No. 11,558.

The term "persons" in the Constitution of the United States applies to aliens.

Yick Wo v. Hopkins, 118 U. S. 356, 368, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; Wong Wing v. United States, 163 U. S. 238, 242, 41 L. ed. 143, 145, 16 Sup. Ct. Rep. 977; Re Ah Forg, 3 Sawy. 157, Fed. Cas. No. 102; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426; Re Chow Goo Pooi, 25 Fed. 77; Re Wong Yung Quy, 6 Sawy. 232, 47 Fed. 717; Re Lee Tong, 9 Sawy. 333, 18 Fed. 253; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 511; State v. Montgomery, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426.

Anarchy is a crime under the law; one of the severest crimes known to the law; even worse than that of treason. He who is guilty of treason only repudiates his allegiance to one sovereign, that he may declare his allegiance to another sovereign,—that he may become a force to enable one sovereign to overcome and destroy the other sovereign. An anarchist not only seeks to repudiate his allegiance to his sovereign,—not only attempts to destroy the government of his sovereign,—but he seeks to destroy all governments. Therefore, anarchy is the blackest crime known to the law.

Lewis v. Daily News Co. 81 Md. 466, 29 L.R.A. 59, 32 Atl. 246; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; People v. Most, 36 Misc. 139, 73 N. Y. Supp. 220.

Yet this act in question authorizes the executive branch of the government to try, pass judgment, and convict the most respectable and honorable person within the territory of the United States, who is not a citizen of this government, of the blackest crime as a reason for deporting said person. If the act had provided that any alien within the United States who is found guilty of anarchy or prostitution should be deported, then that would have been another question. The act provides that all prostitutes shall be deported. Prostitution is a crime under the law.

State v. Stoyell, 54 Me. 27, 89 Am. Dec. 716; State v. Rice, 56 Iowa, 431, 9 N. W. 343; Springer v. State, 16 Tex. App. 592; Carpenter v. People, 8 Barb. 610; State v. Gibson, 108 Mo. 575, 18 S. W. 1109; Green v. State, 98 Ala. 16, 13 So. 482; Bouvier, Law Dict; Anderson, Law Dict; Black, Law Dict.

This act seeks to take the powers vested in the judicial branch of the government by the framers of the Constitution, and vest said powers in the executive branch of the government.

Cooley, Const. Lim. 87; Story, Const. 518-585; Federalist, 47; 1 Bl. Com. 146; 8 Am. & Eng. Enc. Law, p. 681.

Assistant Attorney General Harr submitted the cause for appellees:

Congress can delegate to the executive branch of the government the authority to execute the provisions of law with reference to the deportation of aliens.

Fong Yue Ting v. United States, 149 U. S. 698, 707, 713, 37 L. ed. 905, 911, 913, 13 Sup. Ct. Rep. 1016; Wong Wing v. United States, 163 U. S. 228, 237, 41 L. ed. 140, 143, 16 Sup. Ct. Rep. 977; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 100, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 611; United States ex rel. Turner v. Williams, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; United States v. Wong You, 223 U. S. 67, 56 L. ed. 354, 32 Sup. Ct. Rep. 195; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359; Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L. ed. 1165, 1167, 32 Sup. Ct. Rep. 734.

The immigration act, as amended March 26, 1910, is not *ex post facto* legislation as applied to appellant.

Fong Yue Ting v. United States, 149 U. S. 730, 37 L. ed. 919, 13 Sup. Ct. Rep. 1016; Johannessen v. United States, 225 U. S. 227, 242, 56 L. ed. 1066, 1072, 32 Sup. Ct. Rep. 613.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from an order discharging a writ of habeas corpus and remanding the petitioner to custody. The ground of the appeal is that the act of March 26, 1910, chap. 128, § 2, 36 Stat. at L. 263, 265, U. S. Comp. Stat. Supp. 1911, pp. 501, 502, relied on as authority for the arrest, impairs the petitioner's constitutional rights. It appears from the petition and the return to the writ that the petitioner is an alien; that she entered the United States not later than January 4, 1905, and that she was arrested on August 3, 1910, on an order of the Acting Secretary of Commerce and Labor, directing the Immigrant Inspector to take her into custody, and to grant her a hearing to show cause why she should not be deported. The order recited that she was then a prostitute and inmate of a house of prostitution, and that she was a prostitute at the time of entry, and entered the United States for the pur-

pose of prostitution or for an immoral purpose. The answer to the return demurs to its sufficiency, and denies that she was a prostitute at the time of entry, or that she entered the United States for any of the purposes alleged; but we must take it, at least, that she is a prostitute now.

By the act of February 20, 1907, chap. 1134, § 3, 34 Stat. at L. 898, 899, any alien woman found practising prostitution within three years after she should have entered the United States was to be deported "as provided by sections twenty and twenty-one of this act." This section was amended by the act of March 26, 1910, chap. 128, § 2, 36 Stat. at L. 265, U. S. Comp. Stat. Supp. 591]1911, p. 502, *and the limitation of three years was stricken out, but the amendment still refers to §§ 20, 21, and orders deportation "in the manner provided by" §§ 20, 21. The beginning of these two sections provides for the taking into custody of aliens subject to removal, within three years from entry, and so it has been argued in other cases that the three-year limitation still holds good. The construction of the amendment was not relied on here, but before we can deal with the constitutional question it becomes necessary to dispose of that point. We are of opinion that the effect of striking out the three-year clause from § 3 is not changed by the reference to §§ 20 and 21. The change in the phraseology of the reference indicates the narrowed purpose. The prostitute is to be deported, not "as provided" but "in the manner provided" in §§ 20, 21. Those sections provide the means for securing deportation, and it still was proper to point to them for that. United States ex rel. Mango v. Weis, 181 Fed. 860; Chomel v. United States, 112 C. C. A. 461, 192 Fed. 117.

The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident. Fong Yue Ting v. United States, 149 U. S. 698, 707, 728, 730, 37 L. ed. 905, 911, 918, 919, 13 Sup. Ct. Rep. 1016; Wong Wing v. United States, 163 U. S. 228, 231, 41 L. ed. 140, 141, 16 Sup Ct. Rep. 977; Zakonaite v. Wolf, 226 U. S. 272, 275, ante, 218, 220, 33 Sup. Ct. Rep. 31; Tiaco v. Forbes, *May 5, 1913. [228 U. S. 549, ante, 960, 33 Sup. Ct. Rep. 585.]* The prohibition of *ex post facto* laws in article 1, § 9, has no application (Johnannessen v. United States, 225 U. S. 227, 242, 56 L. ed. 1066, 1072, 32 Sup. Ct. Rep. 613), and with regard to the petitioner, it is not necessary to construe the statute as having any retrospective effect.

Judgment affirmed.

*In accordance with a stipulation of [592 counsel, the same judgment will be entered in the cases of Schwartz v. Adams, No. 240, and Weiner v. Adams, No. 241.

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*NORFOLK & WESTERN RAILWAY [593
COMPANY, Plff. in Err.,
v.
DIXIE TOBACCO COMPANY.

(See S. C. Reporter's ed. 593–596.)

**Connecting carriers — liability beyond line — Carmack amendment.**

1. A carrier receives property for transportation from a point in one state to a point in another, within the meaning of the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), § 7, to the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 20, making it liable under such circumstances for a loss anywhere *en route*, notwithstanding any stipulation to the contrary, where it accepts an interstate shipment to be transported over a route selected by the shipper, which was a different one from that which the carrier otherwise would have chosen, and was one respecting which the carrier had no established through route or rate. [For other cases, see Carriers, 180–206 a, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — regulating liability of connecting carriers.**

2. Acceptance by a carrier of an interstate shipment to be transported over a route selected by the shipper, which was a different one from that which the carrier would otherwise have chosen, and was one respecting which the carrier had no established through route or rate, cannot be said to be so far involuntary that to construe the provisions of the Carmack amendment of June 29, 1906, § 7, to the interstate commerce act of February 4, 1887, § 20, as making such carrier answerable for the damages done by connecting carriers, notwithstanding any stipulation to the con-

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NOTE.—On liability of connecting carrier for loss beyond its own line—see notes to Michigan C. R. Co. v. Mineral Springs Mfg. Co. 21 L. ed. U. S. 297; and Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1.

As to validity of statutes regulating liability of connecting carrier for loss beyond its own line—see note to Atlantic Coast Line R. Co. v. Riverside Mills, 55 L. ed. U. S. 168.

trary, will take its property without due process of law.

[For other cases, see Constitutional Law, 441-449, in Digest Sup. Ct. 1908.]

[No. 265.]

Argued April 28, 1913. Decided May 12, 1913.

N ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Circuit Court of Bedford County, in that state, holding the initial carrier in an interstate shipment liable to the shipper for loss on a connecting line. Affirmed.

See same case below, 111 Va. 813, 69 S. E. 1106.

The facts are stated in the opinion.

Mr. Francis Markoe Rivinus, by special leave, argued the cause, and, with Messrs. Thomas Reath, Theodore W. Reath, and Samuel Griffin, filed a brief for plaintiff in error:

Obeying the canon of construction that of two possible constructions, one constitutional and the other unconstitutional, the constitutional construction will be adopted, this court has construed the Carmack amendment to fasten liability on the primary carrier only if that carrier has by some voluntary act accepted liability to destination.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164; Galveston. H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

An initial carrier cannot refuse a shipment designated for a point beyond its own line.

Seasongood, S. K. Co. v. Tennessee & O. River Transp. Co. 21 Ky. L. Rep. 1142, 49 L.R.A. 270, 54 S. W. 193; Inman v. St. Louis Southwestern R. Co. 14 Tex. Civ. App. 39, 37 S. W. 37; Hutchinson, Carr. 3d ed. § 226; Galveston Commercial Asso. v. Atchison, T. & S. F. R. Co. 25 Inters. Com. Rep. 216; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, ante, 442, 33 Sup. Ct. Rep. 229.

At common law a carrier was not obliged to issue a bill of lading, but the Carmack amendment creates a substantive duty to issue a receipt or bill of lading which shall describe the true place of destination for every interstate shipment.

Johnson v. Stoddard, 100 Mass. 306; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; Enterprise Transp. Co. v. Pennsylvania R. Co. 12 Inters. Com. Rep. 327; The Delaware, 14 Wall. 579, 20 L. ed. 779; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998.

No brief was filed for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the defendant in error to recover for damage to tobacco shipped by it on the railroad at Bedford City, Virginia, to Marshall, Texas. The plaintiff got a verdict and judgment, which was affirmed by the supreme court of appeals (111 Va. 813, 69 S. E. 1106), the case having been taken there on the ground that the act of June 29, 1906, chap. 3591, § 7, 34 Stat. at L. 584, 595, U. S. Comp. Stat. Supp. 1911, pp. 1288, 1304, amending § 20 of the act to regulate commerce, of February 4, 1887, chap. 104, 24 Stat. at L. 379, 386, is unconstitutional. This section requires any common carrier receiving property for transportation *from [595 a point in one state to a point in another to issue a receipt or bill of lading for the same; makes the receiving carrier liable for loss caused by any common carrier *in transitu;* and provides that no contract shall exempt it from the liability thus imposed.

The bill of lading stipulated that no carrier should be liable for damages not occurring on its portion of the through route. There was evidence that the tobacco was damaged after it left the railroad company's hands; and the defendant asked an instruction that if the jury believe that it delivered the tobacco in good order to the next carrier the verdict should be in its favor. This instruction was refused and the defendant excepted. There was evidence also that the plaintiff chose the route for the tobacco, being partly by sea, and a different one from that which the railroad would have adopted, which would have been all rail. The railroad had no through route or rate established with the line of steamers by which the tobacco went. Instructions were asked and refused, subject to exception, that the bill of lading controlled, and that the above statute, so far as it attempts to invalidate limitations or liabilities like that quoted above, is void.

The supreme court of appeals followed the ruling in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164 (to which may be added Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205), as conclusive. The plaintiff in error contends that these cases may be distinguished on the ground that in both of them it was to be presumed that the carrier was a voluntary party to a through route and rate, whereas here the stipulation against liability beyond its line, and the fact that it had no through route with the steamship company, exclude that presumption. It

argues that as it was bound to accept goods destined beyond its line for delivery to the next carrier, and was required by the statute to give a through bill of lading, if, on 596]such compulsory acceptance, *it is made answerable for damages done by others, its property is taken without due process of law. But in the former case there was the same stipulation in the bill of lading, and the supposed through routes were only presumed. In the second case the carrier is spoken of as voluntarily accepting goods for a point beyond its line; but there, too, there was the same attempt to limit liability, and in the present case the acceptance was voluntary in the same degree as in that. There is no substantial distinction between the earlier decisions and this.

Judgment affirmed.

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CONSOLIDATED TURNPIKE COMPANY et al., Plffs. in Err.,
v.
NORFOLK & OCEAN VIEW RAILWAY COMPANY.

(See S. C. Reporter's ed. 596–603.)

**Error to state court — Federal question — certificate of presiding judge.**

1. A recital in the certificate of the presiding judge of the highest state court that it was made by the order of the court itself, for the purpose of affording record evidence of the fact that a Federal question raised for the first time by a petition for rehearing was considered and adversely decided, justifies treating such certificate as incorporating into the record the necessary proof of the existence of a Federal question as the basis upon which the authority of the Federal Supreme Court to review the judgment may be exerted.

[For other cases, see Appeal and Error, 2317–2339, in Digest Sup. Ct. 1908.]

**Error to state court — frivolous Federal question.**

2. The bare claim that the judgment of the highest state court operated to take property of the plaintiff in error without compensation is not enough to justify the Federal Supreme Court in taking jurisdiction of a writ of error to the state court unless it also appears from the averments of fact upon which the claim must depend that the question is real and substantial, and not so utterly without merit as to be frivolous, and not concluded by previous decisions.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

**Error to state court — frivolous Federal question.**

3. The contention that the highest court of a state denied the due process of law guaranteed by U. S. Const., 14th Amend., where it rested its decision upon the doctrine that when a corporation possessing the power of eminent domain enters upon lands necessary for its public purposes, under the deed of a mortgagor in possession, and places permanent improvements thereon in good faith, it may later condemn the interest and title of the mortgagee without being required to pay more than the value of the land, without regard to the improvements placed thereon with intent to acquire the entire title, is so unsubstantial and lacking in merit as to justify the Federal Supreme Court in refusing to take jurisdiction of a writ of error to the state court.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

[No. 152.]

Submitted April 28, 1913. Decided May 12, 1913.

PETITION to rehear a cause on a Writ of Error to the Supreme Court of Appeals of the State of Virginia, which the Supreme Court of the United States had dismissed for want of jurisdiction. Denied.

See ante, 857.

The facts are stated in the opinion.

Mr. Charles H. Burr in support of the motion.

Opinion of the court on petition to rehear, by Mr. Justice Lurton:

We gave leave to file the application for rehearing, not because of any doubt as to the correctness of the decree previously announced, but because of our desire to prevent any misconception concerning the reasons by which our previous conclusion to dismiss was sustained. It is insisted that the certificate of the presiding judge of the *court below, reciting that a Federal[598 question was raised and passed upon by the court when it considered and disposed of the petition to rehear, was plainly not the certificate of the judge alone, but that of the court itself, and therefore was sufficient to demonstrate the existence of jurisdiction under the ruling in Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31.

The judgment of the inferior court in Marvin v. Trout had been affirmed without any opinion. Thereafter the Ohio supreme court ordered what is termed "a journal entry" to be made, certifying that the plain-

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NOTE.—On error to state court in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

On certificate of state court as showing *presence* of Federal question—see note to *Cincinnati, P. B. & S. P. Packet Co. v. Bay, 50 L. ed. U. S. 428.*

tiff in error had claimed that the judgment affirmed was founded upon certain sections of the Revised Statutes of Ohio, and that the plaintiff in error had "in his petition asserted that the said sections of the Revised Statutes were in contravention of specified provisions of the Constitution of the United States," and that the judgment of affirmance was in favor of the validity of said statutes. This court said that the certificate was "a certificate from the court, as distinguished from one by an individual judge."

In the present case, while it is true that the certificate of the presiding judge contains a recital to the effect that "the court orders it to be certified and made a part of the record in this case, and the Honorable James Keith, president judge of said supreme court of appeals, does now certify," etc., there is no journal entry as to the matter, and nothing is otherwise contained in the record giving the slightest intimation that a Federal question was raised and decided, or the nature and character of such question, if any.

The distinction between this case and Marvin v. Trout is therefore this: Here there is nothing in the record proper showing that a Federal question was considered and passed upon by the court below, although there is a certificate of the presiding judge to the effect that such was the case, 599] *while in the Marvin case there was a record disclosure of the existence of the Federal question which was in effect also certified to by the presiding judge of the court below. In other words, the distinction between the two cases in no way involved the accuracy of the certificate of the presiding judge, but whether conceding —as of course must be done—its complete accuracy, it was sufficient to show the existence of jurisdiction in the absence otherwise in the record of anything establishing that a Federal question was below considered and decided. Despite this difference, and to prevent any possible inference that there was any intention to doubt in the slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below, we have concluded that, as it is recited in the certificate that it was made by the order of the court itself, for the purpose of affording record evidence of the fact that a Federal question was considered and disposed of, that we may treat the certificate to that effect as incorporating into the record the necessary proof of the existence of some Federal question as the basis upon which our authority to review may be exerted.

Assuming, therefore, that this certificate operates to show that some Federal question was decided when the petition to rehear was refused, yet, if it also appears that the judgment of the state court against the plaintiff in error was based upon a question of general law broad enough to support the decision, this court will not consider the Federal question, though it was considered and determined by the court below adversely to the plaintiff in error. Murdock v. Memphis, 20 Wall. 590, 636, 22 L. ed. 429, 444; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236.

The bare claim that the judgment operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon *which the claim must depend [600 that the question is one real and substantial, and not so utterly without merit as to be frivolous, or a question concluded by previous decisions of this court. New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Deming v. Carlisle Packing Co. 226 U. S. 102, ante, 140, 33 Sup. Ct. Rep. 80. In Equitable Life Assur. Soc. v. Brown, supra, it was said: "'There must be a real, substantive question on which the case may be made to turn;' that is, 'a real, and not a merely formal, Federal question, is essential to the jurisdiction of this court.'" The writ in that case was dismissed, the court saying: "That although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit."

The unsubstantial character of the Federal question in the present case will appear when we come to examine the facts upon which it depends.

The condemnation proceeding was in the right of the Bay Shore Company, a public-service corporation of the state of Virginia, possessed of the right of eminent domain. That company was in possession of the land sought to be condemned, it being a long, narrow strip acquired for the purpose of constructing thereon a line of electric rail-

way. It had entered under a warranty deed from the Consolidated Turnpike Company, another public-service corporation of Virginia. The whole of the property of the latter corporation was under two mortgages made by it to secure issues of negotiable bonds, the land acquired under the deed of the Turnpike Company being but a part of the property subject to the aforesaid mortgages. The principal defendant below 601] was, and the real plaintiff in *error here is, Walter H. Taylor, as trustee under both mortgages. The purpose of the condemnation proceeding was to condemn the interest of the mortgagees and any other adverse interest affecting the title of the Bay Shore Company. Though the entry was under the deed of the Turnpike Company, and therefore subject to the pre-existing liens of Taylor, trustee, the possession was taken for the purpose of placing thereon the railway tracks, and of later extinguishing the interest of the mortgagees by condemnation or otherwise. The claim of the condemning plaintiffs was that the Bay Shore Company, as a corporation, having the right of eminent domain, might thus enter by permission of the mortgagor company, and later condemn the mortgagees' interest by paying the actual value of the land, without considering the improvements which it had placed thereon after entry and before the institution of the proceeding. The judgment of the court below was that the only compensation which might be demanded by the mortgagees was the actual value of the land, and that they had in such a proceeding no right to require the improvements placed thereon by the condemning railway company to be considered in awarding damages.

The contention of the plaintiffs in error is that the permanent fixtures annexed to the mortgaged land passed by virtue of the mortgages to the trustee therein, and that there cannot be any condemnation which does not value such fixtures in assessing the value of the land taken. This was the claim which the Virginia court denied, holding that such a public-service corporation had the right to enter under the deed of the mortgagor company and later condemn, compensating the mortgagees for the land only.

The contention here made is that, under the Virginia eminent domain statute, the Bay Shore Company, as a public-service corporation, had no power to condemn the property of the Consolidated Turnpike Com-
602] pany, another *public-service corporation, and that therefore the basis for the right of condemnation exercised in the state court did not exist.

It was not necessary to acquire any right, title, or interest which belonged to the Turnpike Company. Its title and right had been theretofore acquired through its deed, and all that was sought to be condemned was such right, title, and interest as was in Taylor, trustee. That was subject to condemnation, and the single question which was or is debatable is whether the Bay Shore Company, which had entered under that deed, might condemn the mortgagee interest without paying for its own improvements.

The rule of the common law, to which the plaintiffs in error refer, that fixtures annexed to realty become a part thereof and subject to existing liens thereon, is one subject to many exceptions. One of these is that applied by the Virginia court; namely, that when a corporation possessing the right of eminent domain enters upon lands necessary for its public purposes, under the deed of a mortgagor in possession, and places permanent improvements thereon in good faith, it may later condemn the interest and title of the mortgagee without being required to pay more than the value of the land without the improvements placed thereon with intent to acquire the entire title. Searl v. School Dist. 133 U. S. 561, 33 L. ed. 745, 10 Sup. Ct. Rep. 374; St. Johnsbury & L. C. R. Co. v. Willard, 61 Vt. 134, 2 L.R.A. 528, 15 Am. St. Rep. 886, 17 Atl. 38; Jones v. New Orleans & S. R. Co. & Immigration Asso. 70 Ala. 232; Justice v. Nesequehoning Valley R. Co. 87 Pa. 28; 2 Lewis, Em. Dom. 3d ed. § 759.

From this it abundantly appears that the decision of the Virginia court was placed upon the general law of the state, and that when the Bay Shore Company entered upon the strip of land desired for a right of way under the deed of the Turnpike Company, it might place thereon its tracks and appurtenances, with the right to condemn the interest of pre-existing mortgagees upon paying the *actual [603 value of the land without the improvement placed thereon by it.

The claim that in thus holding and deciding the court below denied to the plaintiffs in error due process of law under the 14th Amendment is neither real nor substantial, but so entirely without merit as to justify this court in refusing to take jurisdiction.

The petition to rehear is accordingly denied.

Mr. Justice Pitney concurs in the result.

DOUGLAS W. BAILEY, Appt.,
v.
ARTHUR SANDERS.

(See S. C. Reporter's ed. 603–609.)

**Evidence — sufficiency — prohibited sale of homestead entry.**

1. The homestead entryman's testimony in a contest before the Land Department, disclosing another person's interest in seeing that commutation proof be made and a deed executed to a third person named by him, and admitting that some kind of an agreement existed between them, together with evidence that the grantee, shortly before the hearing, disclaimed any personal interest in the land,—all uncontradicted by such person, who was present at the hearing,—is sufficient to support the finding of the Land Department that the homestead entryman, before perfecting his entry, had entered into a prohibited agreement to convey the land to another.

[For other cases, see Evidence, XI., in Digest Sup. Ct. 1908.]

**Public lands — homestead entry — contest and cancelation.**

2. The introduction on the hearing of a contest before the Land Department of evidence that a homestead entryman, before perfecting his entry, had entered into a prohibited agreement to convey the land to another, without objection, and with no attempt to refute it, although the circumstances were such that it could have been controverted if untrue, justifies the cancelation of the entry, although the charge on which the hearing was ordered may not clearly or certainly have assailed the entry on that ground.

[For other cases, see Public Lands, 727–736, in Digest Sup. Ct. 1908.]

**Public lands — homestead — agreement to sell before patent.**

3. An agreement to sell the land, made by a homestead entryman in advance of commuting his entry, is forbidden by U. S. Rev. Stat. §§ 2289–2291, as amended by the act of March 3, 1891 (26 Stat. at L. 1095, chap. 561, U. S. Comp. Stat. 1901, p. 1535), which not only proceed upon the theory that the land is to be acquired for the exclusive benefit of the entryman, but contain provisions which make it impossible for him to perfect his claim after alienation or contract therefor without committing perjury, although § 2301, under which the entry was commuted, says nothing about alienation, its only purpose being to give the entryman an option to substitute the minimum price of the land for a part of the five years of residence and cultivation otherwise required.

[For other cases, see Public Lands, 855–861, in Digest Sup. Ct. 1908.]

[No. 271.]

Submitted April 30, 1913. Decided May 12, 1913.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Idaho, sustaining a demurrer to and dismissing the bill in a suit to quiet title to public land. Affirmed.

See same case below, 101 C. C. A. 293, 177 Fed. 667.

The facts are stated in the opinion.

Mr. Douglas W. Bailey, *in propria persona*, and Mr. Henry H. Gilfrey, submitted the cause for appellant:

The action of the Land Department was arbitrary and without authority of law; no notice and no opportunity to be heard was given the parties in interest.

Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Orchard v. Alexander, 157 U. S. 383, 39 L. ed. 741, 15 Sup. Ct. Rep. 635; Stimson Land Co. v. Rawson, 62 Fed. 426.

It was the duty of the Secretary of the Interior, if he found fraud or evidence of fraud in the record, to order a hearing, and give notice and an opportunity to the parties in interest to be heard upon the question.

Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Orchard v. Alexander, 157 U. S. 383, 39 L. ed. 741, 15 Sup. Ct. Rep. 635; Michigan Land & Lumber Co. v. Rust, 168 U. S. 593, 42 L. ed. 592, 18 Sup. Ct. Rep. 208.

After final proof the entry then takes on the character of a contract between the entryman and the government, which cannot be avoided without process of law.

Parsons v. Venzke, 164 U. S. 90, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; Michigan Land & Lumber Co. v. Rust, 168 U. S. 593, 42 L. ed. 592, 18 Sup. Ct. Rep. 208.

In all the cases decided by the Supreme Court of the United States since the case of Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249, upon the question of the power, after final proof, of the Secretary to cancel an entry, that case is not referred to, showing conclusively that the court does not consider that case as having any application.

Orchard v. Alexander, 157 U. S. 383, 39 L. ed. 741, 15 Sup. Ct. Rep. 635; Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Parsons v. Venzke, 164 U. S. 91, 41 L. ed. 362, 17 Sup. Ct. Rep. 27; Michigan Land & Lumber Co. v. Rust, 168 U. S. 593, 42 L. ed. 592, 18 Sup. Ct. Rep. 208; Guaranty Sav. Bank v. Bladow, 176 U. S. 449, 44 L. ed. 540, 20 Sup. Ct. Rep. 425.

Before final proof we concede the right exists in the Secretary to cancel an entry;

but after the entryman has made proof and paid his money for the land, he has a vested right, and it can only be devested according to law; and this process implies notice and an opportunity to be heard.

Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Orchard v. Alexander, 157 U. S. 383, 39 L. ed. 741, 15 Sup. Ct. Rep. 635.

The amendment of U. S. Rev. Stat. § 2301, U. S. Comp. Stat. 1901, p. 1406, eliminated the reference to the pre-emption law, and instead of requiring proof of settlement and cultivation only, it added the additional requirement of residence,—so there can be no doubt but that the legislative mind intended to exclude all other conditions than the payment of $1.25 per acre and proof of settlement and of cultivation and residence for fourteen months.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Re Bunnell, 7 Land Dec. 233.

Prior to notice of final proof Hately had never seen or heard of Bailey, the person with whom it is claimed he entered into the forbidden contract, and as at that time the entryman had done everything the law required he should do to acquire title, it only remained for him to make proof of the fact, and pay the money for the land at the rate of $1.25 per acre; and he could then enter into an agreement to sell after he had acquired his title.

United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; Olson v. United States, 67 C. C. A. 21, 133 Fed. 851; United States v. Richards, 149 Fed. 443.

For a great many years it was the contention of the Land Department that one making a timber and stone entry could not contract to sell until after final proof. This court, however, decided that after the entry was allowed, the law required no further proof of nonalienation, and thereafter the entryman might make a contract to convey even before final proof.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

It was likewise contended that alienation before final proof was prohibited under the timber culture act. This court, also, in that class of cases held the law to be otherwise, and that the entryman could convey or contract to convey before the final proof.

Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512.

And it was for a long time claimed and contended by the Land Department that the *right* of assignment of the entry of a *soldier's additional homestead* before final *proof did not exist;* yet this court held that the right of assignment before final proof did exist, and that the right of alienation was not abridged without a positive statute to that effect.

Webster v. Luther, 163 U. S. 336, 41 L. ed. 180, 16 Sup. Ct. Rep. 963.

Restraint of alienation is not favored by law,—one may do what he pleases, unless prohibited by positive statute, or manifest public policy.

Knight v. Leary, 54 Wis. 469, 11 N. W. 600; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575; Lamb v. Davenport, 18 Wall. 317, 21 L. ed. 762; Barnes v. Poirier, 12 C. C. A. 9, 27 U. S. App. 500, 64 Fed. 15; Webster v. Luther, 163 U. S. 336, 41 L. ed. 180, 16 Sup. Ct. Rep. 963; Pereles v. Weil, 157 Fed. 424; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512.

To contract before final proof, to convey after title acquired, is not a violation of the Federal statute.

Snow v. Flannery, 10 Iowa, 318, 77 Am. Dec. 120; United States v. Biggs, 157 Fed. 264; McKennon v. Winn, 1 Okla. 327, 22 L.R.A. 501, 33 Pac. 582; Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759; Hussey v. Smith, 99 U. S. 20, 25 L. ed. 314; Lipscomb v. Nichols, 6 Colo. 290; Gaines v. Molen, 30 Fed. 27.

The entryman had a right to prove up with intention of selling after he acquired the title.

United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; Olson v. United States, 67 C. C. A. 21, 133 Fed. 851; United States v. Richards, 149 Fed. 443; Pereles v. Weil, 157 Fed. 424.

The court may review the action of the Land Department for error of law or clear mistakes of facts.

Hoyt v. Weyerhaeuser, 88 C. C. A. 404, 161 Fed. 330; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 600; United States v. Northern P. R. Co. 37 C. C. A. 290, 95 Fed. 870; United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948; Bogan v. Edinburgh American Land Mortg. Co. 11 C. C. A. 128, 27 U. S. App. 346, 63 Fed. 192; Lindsey v. Hawes, 2 Black, 554, 17 L. ed. 265.

The conclusions of the Land Department are only conclusive upon the courts when made in a proper proceeding, and after notice and an opportunity to be heard by parties in interest.

Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Orchard v. Alexander, 157 U. S. 373, 39 L. ed. 738, 15 Sup. Ct. Rep. 635; Michigan Land & Lumber Co. v. Rust, 168 U. S. 593, 42 L. ed. 592, 18 Sup. Ct. Rep. 208; Guaranty Sav. Bank v.

Bladow, 176 U. S. 449, 44 L. ed. 540, 20 Sup. Ct. Rep. 425.

Whenever the local office approves the evidence of settlement, etc., and receives the price and issues a receipt, it amounts to a contract known as an entry. It may, like other contracts, be voidable. When by due proceedings the entry is set aside, the contract is terminated.

Parsons v. Venzke, 164 U. S. 91, 41 L. ed. 362, 17 Sup. Ct. Rep. 27.

To set aside a contract for fraud, proof must be clear and convincing.

United States v. Mills, 169 Fed. 686; Walker v. Collins, 8 C. C. A. 1, 19 U. S. App. 307, 59 Fed. 70; Pereles v. Weil, 157 Fed. 424.

After Congress, by act of May 17, 1900, conferred on the entryman, Hately, the right to commute at the rate of $1.25 per acre, and he had announced to the land office and filed notice of his intention to make final proof under the provisions of that act, Congress could not abridge the right by subsequent legislation; the entryman then had a vested right, and had acquired the right to commute at the rate of $1.25 per acre under the act of May 17, 1900, and the subsequent act of January 26, 1901, could not affect that right.

Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; 1 Copp, Public Land Laws, 1882, p. 388; Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 131; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 231; Re Bilbie, 26 Land Dec. 335; Witherspoon v. Duncan, 4 Wall. 218, 18 L. ed. 342; 2 Copp, Public Land Laws, 1198.

No brief was filed for appellee.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to determine which of two claims to a tract of land in the state of Idaho is the better one. The tract is within the ceded portion of the Nez Percé Indian Reservation, which was brought within the operation of the homestead law by the act of August 15, 1894 (28 Stat. at L. 286, 332, chap. 290). Bailey, the plaintiff, claims as the grantee once removed of William W. Hately, who made a preliminary entry of the tract in 1899, commuted the entry in 1901, and received the usual receipt and certificate. Sanders, the defendant, claims under an entry subsequently made and upon which he has obtained a patent. The real controversy is over the effect to be given to certain contest proceedings in the Land Department which resulted in the cancelation of Hately's entry and in the allowance of that of the defendant. In his bill of complaint the plaintiff sets forth all or the major part of the proceedings and evidence in the contest and calls in question the cancelation of Hately's entry. A demurrer to the bill was sustained by the circuit court and the bill was dismissed. The decree was affirmed by the circuit court of appeals (101 C. C. A. 293, 177 Fed. 667), and the plaintiff brings the case here.

We shall refer briefly to such parts only of the case made by the bill and the exhibits as have a direct bearing on the questions requiring decision by us.

As soon as Hately's entry was commuted, he conveyed the land to one Beach, as the result of negotiations with Bailey, the plaintiff, who claimed to be acting for Beach. *The contest against the entry [605 originated in a charge preferred by Sanders to the effect that a fraud had been perpetrated in obtaining the conveyance to Beach, and that Bailey had for a long time been resorting to irregular methods to secure the land. The charge was somewhat vaguely stated, and pointed more to a fraud on Hately than to one on the United States, but the Commissioner of the General Land Office regarded it as requiring investigation, and ordered a hearing in the local office, of which Hately, Beach, and Sanders were to be notified, and in which each was to be heard, "in order that all the facts in the case might be brought out." The hearing was had, Hately and Sanders appearing in person and Beach being represented by Bailey. Upon the evidence adduced the local officers found, among other things, that two or three months before Hately made his commutation proof, an agreement was made between him and Bailey, whereby the latter was to pay the expense of the commutation and Hately was to convey the land to Bailey for an additional consideration of $600 when the commutation was effected, and that the conveyance to Beach was made at Bailey's instance, in pursuance of the agreement. By successive appeals the contest was carried before the Commissioner of the General Land Office and the Secretary of the Interior, with the result that the finding of the local officers was sustained and the entry canceled because of the agreement to convey. The conveyance from Beach to Bailey was made after the contest was heard by the local officers, and while it was pending on appeal before the General Land Office.

1. It is insisted that no evidence was adduced in the contest tending to show the making of such an agreement as was described in the finding of the Land Department, and therefore that the cancelation

of the entry was wholly arbitrary and unauthorized. The evidence is set forth in one of the exhibits to the bill, and it there 606]appears that *Hately gave the following testimony:

Q. When did you first come to know Mr. Bailey, or where did you first meet him?

A. Some time in January, 1901, Woodland, Idaho [the entry was commuted in March following].

Q. What, if any, conversation did he have with you on that occasion concerning the land in controversy?

A. He didn't say much about it. . . .

Q. What did Mr. Bailey say to you about proving up on your land, assisting you to prove up, if anything, at that time?

A. He said he had some folks that wanted a piece of land in the timber. Well, he wanted a deed to the place, and I told him if I had to make the deed what it would take to get the land.

Q How much did you tell him you would take?

A. I told him it would take $600 besides the expense.

Q. Were you living upon your land at that time?

A. Yes.

Q. Was there any special agreement made by you and Mr. Bailey at your house or place?

A. He drawed up some kind of an agreement, but I don't know what it was.

Q. Did he read it to you and inform you of the purport of the paper?

A. Yes.

Q. Did Mr. Bailey subsequently have you appear before some officer in order to consummate your final proof of the land in question?

A. He did.

Q. When did Mr. Bailey have you execute this deed which has been offered in this case, marked Exhibit 'A' [deed to Beach], alleged to have been signed by yourself and wife?

A. Some time in March, 1901.

There was also testimony to the effect that shortly before the hearing, Beach disclaimed any personal interest in the land; and in the decision of the local officers, which is an exhibit to the bill, it is stated that the commutation price was paid by Bailey, and that, although present at the hearing, he refused to be sworn. In these circumstances we think it cannot be said that the finding of the Land Department respecting the agreement to convey was arbitrary or without evidence to support it.

2. Another objection urged against the *action of the Land Department* is that the charge upon which the hearing *was[607 ordered did not clearly or certainly assail Hately's entry on the ground that before perfecting it, he had entered into a prohibited agreement to convey the land to another. It is true that the charge was vaguely stated, but it does not appear that any prejudice resulted from this. The principal testimony relating to the agreement was given by Hately, and no objection was made to his being interrogated on that subject. Nor was any effort made to weaken that part of his testimony by cross-examination. Bailey, with whom Hately said the agreement was made, represented Beach at the hearing and could have contradicted Hately's testimony, if it was not true, but he did not attempt to do so. True, there is in the bill an allegation that the local officers refused to permit Beach to adduce evidence in rebuttal, the nature of which is not stated in that connection, but it appears from the exhibits to the bill that this evidence related to a matter which is of no moment here, namely, the reason why Beach had not paid a draft given by Bailey to Hately for the deed from the latter. The real situation, then, in respect of the proof of the prohibited agreement, is that it was introduced without objection, in circumstances where it could have been controverted if untrue, and that no attempt was made to dispute it. This being so, the present objection must fail as did a similar one in Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249. There an unsuccessful homestead claimant, whose entry had been canceled as the result of a contest before the Land Department, sought to charge the successful claimant, whose entry had been passed to patent, as a trustee of the title. The contest before the Land Department had been initiated by a charge that the first entryman had abandoned the land for more than six months, and the ultimate decision of the Secretary of the Interior directing the cancelation of the entry was based upon a finding, not that the entryman had abandoned the land, but that he was seeking, by a seeming compliance *with the forms of law, to obtain[608 the land for another. The suit proceeded on the theory that the Secretary's decision was inconclusive, because resting upon a point not in issue between the contestants, and the supreme court of Michigan sustained that theory. But when the case came here it was held that, as it appeared from the evidence presented in the contest, and particularly from the testimony of the entryman, that he was not acting in good faith for himself, but with the purpose of acquiring the title for another, the Secretary had not exceeded his authority, but

had only exercised "that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands." Doubtless it is true, as a general rule, that in a contest before the Land Department the decision should be confined to the questions put in issue by the parties; but we think it is also true that when, with their acquiescence, the hearing is extended to other questions, there can be no objection to the decision of the latter.

3. It is further contended that the homestead law does not prohibit, but impliedly permits, an entryman to agree, in advance of commuting his entry, to sell the land, and therefore that the Land Department made a mistake of law in canceling Hately's entry because of his agreement with Bailey. The contention is not sound. Section 2289 of the Revised Statutes, as amended by the act of March 3, 1891, 26 Stat. at L. 1095, 1098, chap. 561, U. S. Comp. Stat. 1901, pp. 1388, 1535, creates the homestead right and names the beneficiaries. Section 2290, as amended by the same act, requires any person applying to enter land under the preceding section to make affidavit that, among other things, "he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatso-609]ever, *by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except himself or herself." It was under these sections that Hately's preliminary entry was made. Section 2291, in prescribing the time and manner of making final proof, requires the applicant to make "affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred eighty-eight," which permits alienation for church, cemetery, school, and other enumerated purposes, none of which is present here. Thus, the homestead law not only proceeds upon the theory that the land is to be acquired for the exclusive benefit of the entryman, but contains provisions which make it impossible for him to perfect his claim, after alienation or contract therefor, without committing perjury. True, § 2301, as amended by the act of March 3, 1891, supra, under which Hately's entry was commuted, says nothing about alienation, but its only purpose is to give the entryman an option to substitute the minimum price of the land for a part of the five years of residence and cultivation otherwise required. In other respects the operation and application of §§ 2290 and 2291 are not affected by it. We are therefore of opinion that the Secretary of the Interior did not err in ruling, as he did, that "entering into such forbidden agreement ended the right of the entryman to make proof and payment, and rendered him incompetent to further proceed with his entry." See Anderson v. Carkins, 135 U. S. 483, 487, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905; Hafemann v. Gross, 199 U. S. 342, 345, 50 L. ed. 220, 223, 26 Sup. Ct. Rep. 80.

Other contentions are advanced in the brief for the appellant, but of them it suffices to say that, in our opinion, they have less merit than those before mentioned.

Decree affirmed.

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*LEWIS PUBLISHING COMPANY,[610
Appt.,
v.
FRANK WYMAN and James L. Stice.

(See S. C. Reporter's ed. 610–618.)

**Appeal — scope of review — moot question.**

1. The contention that an official order in the form of the denial of an application for admission to second-class mail privileges was in effect the suspension or annulment of an existing privilege, which could not be done without a hearing, became a moot question in a suit instituted primarily to enjoin local postoffice officials from interfering with complainant's full use and enjoyment of such privilege, as did also the dispute over the actual extent of the bona fide circulation of complainant's publication, where, pending suit, a new application for entry as second-class matter was made and granted, and the complainant ever since has enjoyed the privilege.

[For other cases, see Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

**Equity — jurisdiction — doing complete justice.**

2. Jurisdiction of a suit instituted primarily to enjoin official interference with an alleged existing second-class mail privilege will not be retained after a new application for second-class rates has been made and granted *pendente lite*, leaving the complainant in no position to ask for an injunction, in order to determine what, if any, relief should be accorded respecting the injunction bond, where there is nothing to show that complainant is in any danger from an action to enforce the bond, nor in order to secure an accounting respecting payments of alleged excess postage for the most part made prior to suit, the prayer for relief in this respect being manifestly incidental to the main prayer for an injunction, nor in order to revise departmental

rulings, when granting the new application, as to the number of legitimate subscribers, and the right to send copies to those whose subscriptions had expired.

[For other cases, see Equity, 13-29, in Digest Sup. Ct. 1908.]

[No. 179.]

Argued March 11, 1913. Decided May 12, 1913.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, dismissing the bill in a suit to enjoin official interference with an alleged existing second-class mail privilege. Affirmed.

See same case below, 104 C. C. A. 453, 182 Fed. 13.

The facts are stated in the opinion.

Mr. **Shepard Barclay** argued the cause, and, with Messrs. P. H. Cullen and Thomas T. Fauntleroy, filed a brief for appellant:

A prayer for general relief (as in this bill) will authorize any relief consistent with the facts alleged.

Pomeroy v. Benton, 57 Mo. 550; Story, Eq. Pl. 10th ed. § 40.

The most material and substantial facts of the bill are not denied at all by the answer, and must be taken as confessed.

Sanborn v. Adair, 29 N. J. Eq. 338; Lee v. Stiger, 30 N. J. Eq. 611; Jones v. Knauss, 31 N. J. Eq. 618.

In such circumstances, the court should grant such relief as may show that equity is not a mere breath, an idle word, but is a living and vital power and force to do justice without any injury to the heavenly structure, whose solidity will rather be enhanced and strengthened thereby.

Patterson v. Barber Asphalt Pav. Co. 94 Minn. 39, 101 N. W. 1064, 102 N. W. 176; Dulaney v. Scudder, 36 C. C. A. 52, 94 Fed. 6; Spears v. New York, 87 N. Y. 359; Peoria v. Johnston, 56 Ill. 45; People ex rel. Staats-Zeitung Co. v. Chicago, 53 Ill. 424; Davenport v. Rylands, L. R. 1 Eq. 302, 35 L. J. Ch. N. S. 204, 12 Jur. N. S. 71, 14 L. T. N. S. 53, 14 Week. Rep. 243; Langmaid v. Reed, 159 Mass. 409, 34 N. E. 593.

Where equity has jurisdiction, as here, it should not turn the complainant back to another court for relief which it may properly give.

Southern P. R. Co. v. United States, 66 C. C. A. 581, 133 Fed. 657; May v. LeClaire, 11 Wall. 217-236, 20 L. ed. 50-54; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Ward v. Todd, 103 U. S. 327, 329, 26 L. ed. 339, 340; Hopkins v. Grimshaw, 165 U. S. 342-358, 41 L. ed. 739-744, 17 Sup. Ct. Rep. 401; Smyth v. Ames, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; Peck v. Ayers & L. Tie Co. 53 C. C. A. 551, 116 Fed. 275; Douglas Co. v. Tennessee Lumber Mfg. Co. 55 C. C. A. 254, 118 Fed. 438; 1 Pom. Eq. Jur. § 181; Lynch v. Metropolitan Elev. R. Co. 129 N. Y. 280, 15 L.R.A. 287, 26 Am. St. Rep. 523, 29 N. E. 315; Whitehead v. Sweet, 126 Cal. 75, 58 Pac. 376; Busch v. Jones, 184 U. S. 598, 46 L. ed. 707, 22 Sup. Ct. Rep. 511; Tayloe v. Merchants' F. Ins. Co. 9 How. 390-405, 13 L. ed. 187-193; New York Grape Sugar Co. v. Peoria Grape Sugar Co. 21 Fed. 878; Sugar Mfg. Co. v. Wilson Sewing-Mach. Co. 38 Fed. 586; Chinnock v. Paterson, P. & S. Tel. Co. 110 Fed. 199; Brooks v. Miller, 28 Fed. 618; United States Mitis Co. v. Detroit Steel & Spring Co. 122 Fed. 866; Kennedy v. Creswell, 101 U. S. 645, 646, 25 L. ed. 1076.

Solicitor General **Bullitt** argued the cause and filed a brief for appellees.

*Mr. Justice **Pitney** delivered the [611 opinion of the court:

This action was commenced by the appellant in the month of March, 1907, in a state court in Missouri, and was removed, on the application of the defendants, now respondents, into the circuit court of the United States. The plaintiff's petition averred that it was and for more than three years last past had been a corporation organized under the laws of South Dakota, and doing business in the state of Missouri, operating a publishing plant at Winner Station, a substation of the St. Louis postoffice; that the defendants were respectively postmaster and assistant postmaster of St. Louis; that one of the publications issued, printed, and circulated by the plaintiff was called the "Woman's Magazine," a monthly publication issued periodically to hundreds of thousands of subscribers, and admitted many years before by the Postoffice Department as second-class mail matter at the St. Louis postoffice; that differences had arisen between the plaintiff and the defendants and the Postoffice Department respecting the right of the plaintiff to transmit the Woman's Magazine through the mails at the pound rate; that defendants were threatening to deprive the plaintiff of its right to use and enjoy the second-class mail privilege without a hearing upon the question whether it should be annulled or suspended; that its legitimate list of subscribers exceeded in number 840,000, and plaintiff was entitled to mail under the second-class privilege approximately twice

that number; and that such threatened suspension would work irreparable damage and loss to the plaintiff; wherefore plaintiff prayed for an injunction to restrain the defendants from detaining any copies of the magazine in transmission through the mail (within the number of 1,600,000 copies), that the court would ascertain and adjudge by its decree the amount of the legitimate subscription list of the magazine as of 612]March 1, 1907, and *for prior months since September, 1905, to the end that the controversy raised by the defendants might be terminated, "and that said defendants, as postmaster and assistant, be perpetually enjoined from interfering with the full use and enjoyment of said second-class privilege by plaintiff according to the finding and decree of this court, ascertaining the proper and just extent and limits thereof, as herein prayed." There was also a prayer for a temporary injunction, and for other and further relief. Upon submission of the bill of complaint and verifying affidavit the circuit court granted a temporary restraining order, and an order to show cause why an injunction *pendente lite* should not be allowed. Upon the hearing of this order an injunction was refused, on the ground that no permit had ever been granted allowing the Woman's Magazine the second-class privilege, except a temporary permit issued August 21, 1902, which by its terms was to continue "until the Postoffice Department shall determine whether it is admissible as second-class matter;" that the only determination of the application was that made by the Postoffice Department in March, 1907, refusing the privilege; that the law did not require the Department to grant a hearing upon the question of admitting the magazine to the second-class privilege, and that there was no provision of law for reviewing the action of the Postmaster General in the matter.

The action proceeded, and while it was pending, and on September 24, 1907, a new application was made by the appellant to the Postoffice Department for the entry of the Woman's Magazine as second-class matter, and this application was granted in December, to take effect as of September 24th. Defendants filed a supplemental plea setting up this order, and that by virtue of it the publication in question was being received and carried by the Postoffice Department at the second-class rate. The appellant replied, and the action proceeded to 613]final hearing, *resulting in the dismissal of the bill. The complainant appealed to the circuit court of appeals, where the decree was affirmed, a majority of the court holding that the questions upon which the appellant's right to equitable relief depended had become moot questions, and that its claim for reimbursement for certain payments made *pendente lite* for postage in excess of the amount calculated at the second-class pound rate was the proper subject-matter of a suit at law, leave to bring which was reserved in the decree. 104 C. C. A. 453, 182 Fed. 13.

It appears that the "Woman's Magazine" was, except for a change of name, identical with a previous publication called the "Winner Magazine," to which the privilege of the second-class rate was accorded by the Postoffice Department in the year 1899. The application for change of name was made in the year 1902. By Postal Laws and Regulations (1902), § 443, in case of a change of name of a publication already entered as second-class matter, publishers are required to apply for re-entry the same as if the publication were a new one. Such an application was made in the present case, and a temporary permit was issued by the defendant postmaster at St. Louis, and confirmed by the Postoffice Department, to continue "pending consideration of the application for its re-entry as second-class matter upon change of name from 'The Winner.'" This was in accordance with Postal Laws and Regulations, § 441. Little or nothing seems to have been done respecting this application until March, 1905, when an investigation was commenced, as the result of which, on June 5th, the publishers were required to show cause why the authorization for the admission of the Woman's Magazine to the second class of mail matter should not be revoked, upon the grounds, "first, it is primarily designed for advertising purposes; second, it is primarily designed to advertise the other businesses in which the stockholders and officers of the publishing company, and *espec-[614 ially E. G. Lewis, are interested; third, it is primarily designed for free circulation, or for circulation at nominal rates." Under date of April 12, 1906, defendant Wyman notified the appellant that "from facts obtained, which in my judgment justify me in the conclusion that the legitimate subscriptions to the Woman's Magazine are not to exceed 539,901, and that you are entitled to transmit through the mails at the pound rate not to exceed 1,079,802 copies of that publication, including sample copies, you are hereby notified that the transient second-class postage at the rate of 1 cent for each four ounces or fraction thereof must be prepaid by stamps affixed on all copies of said publication in excess of your legitimate mailings, as above indicated, hereafter presented by your company." The restriction of the second-class privilege to a number of copies not more than double the

legitimate list of subscribers was based upon §§ 436 and 456 of the Postal Laws and Regulations. This notice served to renew the controversy between the appellant and the Postoffice Department,—a controversy that continued until March 4, 1907, when the Postmaster General made an order that in effect limited the second-class privilege of the Woman's Magazine to 539,901 copies for legitimate subscribers, and a like number in addition for sample copies, sustained the action of the postmaster at St. Louis, based upon that finding, and required the postmaster to remit to the Department the excess postage that had been collected by him, and to demand from the publisher the balance due the government at the transient second-class rate upon all excess copies of the publication mailed on and after October 1, 1905. At the same time the Postmaster General denied "the pending application submitted August 22, 1902, for entry of this publication as second-class matter," upon the following ground: "Upon a hearing granted the publisher April 30th and May 1st, 1906, and upon a careful and thorough investigation 615]of *all of the evidence by the Department, I find that the publication does not have a legitimate list of subscribers; that it is designed and published primarily for advertising purposes; and that it is being circulated at a nominal rate, contrary to the law and the regulations of the Department."

It was and is contended by the appellant that this order, instead of being the denial of an application for admission to the second-class privilege, was in effect the suspension or annulment of an existing privilege; that this could not be done without a hearing because of the provisions of the act of March 3, 1901 (31 Stat. at L. 1107, chap. 851, U. S. Comp. Stat. 1901, p. 2655); and that there had not been any proper hearing.

One of the matters in contention between the parties at the time of the inception of the action was the actual extent of the bona fide circulation of the magazine; the appellant averring that it had a "legitimate list of subscribers" exceeding in number 840,000, and that under the established practice, allowing as many sample copies in addition, it was entitled to the pound rate upon at least 1,600,000 copies of each issue. It was this that gave rise to the prayer of the original petition for an ascertainment of the amount of the legitimate subscription list, and for an injunction to restrain the defendants from detaining any copies within the number of 1,600,000.

*We agree,* however, with the court of appeals, *that the new* application made pending the suit, and the order of the Postoffice Department thereon, admitting the magazine to the second-class privilege as of September 24, 1907, which privilege the appellant has ever since enjoyed, render the above contentions moot questions, inasmuch as the appellant is no longer in a position to ask for an injunction.

It is contended that the bill ought to have been retained, and other equitable relief accorded to the appellant thereunder, principally for three reasons:

*First, that upon the granting of the[616 temporary restraining order in March, 1907, the appellant, pursuant to the order of the court, gave a bond to defendants in the penal sum of $10,000, conditioned that if, upon a later hearing or final hearing, it should be determined that this restraining order was improperly issued, the appellant would pay to the postmaster or to the government all sums of money lost by the Postoffice Department by reason of the granting of the restraining order. But so far as appears no action has been taken or threatened looking to the enforcement of this bond, and so it would be improper to retain the main cause, after the primary object to be accomplished by it has been accomplished by voluntary action of the parties *pendente lite,* in order to determine whether any and what relief should be accorded respecting the bond. Besides, it was not determined at any hearing in the suit that the restraining order was improperly issued. On the contrary, the bill was dismissed because of a subsequent change in the situation. There is nothing to show that appellant is in any danger from an action to enforce this bond.

Some mention is made of indemnity bonds demanded of appellant by the defendant postmaster and given by the appellant and sureties, as security for excess postage. There is nothing before us, however, to show the facts respecting these bonds, or any reason for retaining the suit in order that the rights of the parties under them may be adjudicated.

Secondly, it is said that because the defendant postmaster insisted that the Woman's Magazine did not have the number of subscribers claimed by the appellant, he demanded during the period from April, 1906, to May, 1907, payments of alleged excess postage as a condition to mailing the copies that were being sent out monthly, and that because of that demand appellant made monthly payments under protest, aggregating $20,650. Reference *is made[617 to the prayer of the bill,—"that this court may ascertain and adjudge by its decree herein the amount of the legitimate subscription list of said Woman's Magazine,

as of March 1, 1907, and for prior months since September, 1905, to the end that there may be a close of the unseemly controversy raised by said defendants," etc. But this prayer was manifestly incidental to the main prayer for an injunction. There is nothing in the facts that would justify the retention of the bill in order to secure an accounting respecting the transactions that antedated the commencement of the action. Of the $20,650 in question, all but $3,500 appear to have been paid prior to the inception of the suit. This smaller amount only would, in any view, be within the fair scope of inquiry under the bill, and it would still be necessary for appellant to resort to an action at law for the previous payments. No sufficient reason is shown for retaining the bill in order to determine this controversy in the court of equity.

Thirdly, the order made *pendente lite* by the Postmaster General, admitting the magazine to the second-class privilege as of September 24, 1907, was accompanied with an order that ascertained the legitimate list of subscribers, for the purpose of adjusting the postage that had been paid at the full rate for the October issue, at the number of 343,341, and authorized the postmaster to accept pound-rate postage on mailings as to subscribers of that number of copies, and an equal number of sample copies, and required him to charge postage at the transient second-class rate—1 cent for each four ounces or fraction thereof—upon the mailings in excess of the number mentioned. Also, it is contended that the Department refused to allow the appellant to send copies to those whose subscriptions expired during a considerable part of the interval of suspension. But these are matters of administration, for the orders in question appear to have been made by the Postmaster General with respect to the new 618]application *for admission to the second-class privilege that was made pending the suit, and granted, as already mentioned. They afford no proper ground for any kind of relief in the present action.

Decree affirmed.

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## SOUTHERN PACIFIC RAILROAD COMPANY, Appt.,
## v.
## UNITED STATES.

(See S. C. Reporter's ed. 618–633.)

**Interest — on claim by government — when begins to run.**

The liability of the Southern Pacific Railroad Company for interest upon the statutory minimum price which the United States is seeking to recover under the adjustment acts of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), and March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), where lands located within the overlap of a conflicting railroad land grant had been erroneously patented to the Southern Pacific Railroad Company prior to the date of the first adjustment act, and had been sold by that company to purchasers whose titles had been confirmed, arose when, and only when, suit was begun, since interest was not provided for in the adjustment acts, and was not prayed for in the bill, and the legal proceedings theretofore taken by the United States to enforce liability under those acts, and the course of judicial decision thereon, while finally determining who were bona fide purchasers, contrary to the government's contention, did not fix the resulting pecuniary liability, or conclusively protect against the government's previously asserted right to greater compensation than the minimum statutory price.

[For other cases, see Interest, I. b, 3; I. f, in Digest Sup. Ct. 1908.]

[No. 269.]

Argued April 30, 1913. Decided May 26, 1913.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California, awarding the government the minimum statutory price, with interest, where land had been erroneously patented to a railway company, and sold to purchasers whose titles had been confirmed. Modified by allowing interest only from date of suit, and as modified, affirmed.

See same case below, 108 C. C. A. 607, 186 Fed. 737.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause and filed a brief for appellant.

Assistant Attorney General Knaebel argued the cause, and, with Mr. W. W. Dyar, filed a brief for appellee.

Mr. Chief Justice White delivered the opinion of the court:

The grant made to the Southern Pacific Railroad Company by § 23 of the act of Congress approved March 3, 1871 (16 Stat. at L. 573, chap. 122), overlapped a prior grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866 (14 Stat. at L. 292, chap. 278). A forfeiture of the latter grant by the act of July 6, 1886 (24 Stat. at L. 123, chap. 637), was construed by the Land Department as causing

the lands within the overlap to inure to the benefit of the Southern Pacific Company under its grant of 1871. In consequence, patents for a large quantity of land in California within the overlap were issued to the Southern Pacific Company.

The act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), entitled, "An Act to Provide for the Adjustment of Land Grants Made by Congress to Aid in the Construction of Railroads, and for the Forfeiture of Unearned Lands, and for Other Purposes," among other things provided for the immediate adjustment of all railroad land grants made by Congress; and upon the completion of such adjustment, if it should appear that lands had been, from any cause, erroneously 623] *certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States to aid in the construction of a railroad, it was made the duty of the Secretary of the Interior to demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and, if such company should neglect or fail to so reconvey such lands to the United States within ninety days after such demand, it should thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certificates, or other evidences of title theretofore issued for such lands, and to restore the title thereof to the United States. By § 4, citizens, or persons who had declared their intention to become citizens, and who had purchased lands from the railroad company in good faith, were authorized, on proof of the fact after the adjustment of the grant, to acquire patents from the United States. And it was among other things further provided that after the issue of patent, demand should be made for payment by the company, which had disposed of such lands, of an amount equal to the government price of similar lands; and in case of neglect or refusal to make payment within ninety days thereafter, the Attorney General was directed to cause a suit or suits to be brought therefor.

Referring to suits brought under this act of 1887, in an opinion delivered in United States v. Southern P. R. Co. 39 Fed. 132, the district court said (p. 137):

"While in these cases but a comparatively small amount of land is involved, the suits, it seems from a decision of the Secretary of the Interior, rendered June 23, 1888, *and reported* in volume 6 of the decisions *of the Department of the* Interior, page 816, were instituted by the government to test its right to a large amount of land similarly situated. That decision was made upon an application *on the part of the[624 Southern Pacific Railroad Company that it be called on, under the act of Congress of March 3, 1887, for a reconveyance of the lands which were held by the Land Department to have been improperly patented to said company, so that upon a refusal to reconvey, suits might be brought by the government to set aside such patents, and that no further patents should be issued to said company for lands in the limits of the forfeited grant to the Atlantic & Pacific Railroad Company; and also that the then-subsisting withdrawal of lands within the primary grant limit of the Southern Pacific Railroad (branch line), which are also within the granted and indemnity limits of the Atlantic & Pacific Railroad, should remain undisturbed until the rights of the Southern Pacific Company could be determined by suits before the courts."

The court then observed, in substance, that the Secretary of the Interior acted favorably upon the application so far as related to the bringing of the test suits, and for that purpose had divided "the lands covered by the grants into three classes, to wit: (1) Lands within the common primary limits of the grant to the Atlantic & Pacific Railroad Company and of the grant to the Southern Pacific Railroad Company (branch line); (2) lands within the primary limits of the grant to the Southern Pacific Railroad Company (branch line), and within the indemnity limits of the grant to the Atlantic & Pacific Railroad Company; (3) lands within the indemnity limits of the grant to the Southern Pacific Railroad Company (branch line), and within the primary limits of the grant to the Atlantic & Pacific Railroad Company."

The suits just referred to would seem to have been the first of the test suits. They were brought in 1889 by the United States in the circuit court of the United States for the southern district of California, for the purpose of quieting the title of the United States to various tracts of land situate within the overlapping limits, *aggre-[625 gating about 5,342 acres, and claimed by the defendants, *viz.*: the Southern Pacific Company and other corporations and individuals asserting title under that company. The first of the cases involved lands within the grant or place limits, and the second, lands within the indemnity limits. No money recovery was prayed, other than costs of suit. The cases were ultimately decided in this court on December 12, 1892. United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152;

United States v. Colton Marble & Lime Co. 146 U. S. 617, 36 L. ed. 1105, 13 Sup. Ct. Rep. 163. A third suit was begun by the United States in 1891, also to quiet title, cancel patents, etc., in respect to lands within the overlap. The railroad company, and the trustees under a mortgage, and also certain individuals and corporations, were made defendants. The land affected by the suit aggregated about 700,000 acres—61,939 acres of which had theretofore been patented to the railroad company, and applications were pending for patents as to 72,000 acres. Although this suit sought to quiet the title of the government to lands claimed by numerous individual defendants by purchase from or contract with the railroad company, the decree entered in the circuit court provided that it should not "affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled, 'An Act to Provide for the Adjustment of Land Grants Made by Congress to Aid in the Construction of Railroads, and for the Forfeiture of Unearned Lands, and for Other Purposes,' approved March 3, 1887."

Despite the contention of the railroad company that the decisions in the former cases, reported in 146 U. S., settled merely the status of the particular lands involved in that suit, it was held that those decisions were conclusive as to all the lands within the overlap. 168 U. S. 1, 42 L. ed. 626]355, 18 Sup. Ct. Rep. 18. *Therein also, in an opinion delivered on October 18, 1897, after stating that the circuit court should have determined the rights of the defendants, other than the railroad company, in the lands in dispute, by virtue of the act of 1887, it was said: "The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that act or any other act of Congress." And the decree of affirmance rendered by this court was made subject "to the right of the government to proceed in the circuit court to a final decree as to those defendants."

While the last-mentioned suit was pending in this court, Congress passed an act, approved February 12, 1896 (29 Stat. at L. 6, chap. 18, U. S. Comp. Stat. 1901, p. 1596), amendatory of the act of 1887, wherein it was further provided:

"That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the government a sum equal to the difference between the portion of the purchase price so paid and the government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

Congress also, on March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp Stat. 1901, p. 1603), passed another act relating to the same general subject as the act of March 3, 1887. The act of 1896, among other things, provided for the extension of time within which suits might be brought to vacate and annul land patents, and provided that no patent to any lands held by the bona fide purchaser should be vacated or annulled, but the right and title of such purchaser was by the act confirmed. In this connection it is to be borne in mind that the act of 1887 contemplated that the original erroneous patents or certifications should be annulled, and that new patents *should issue to bona fide purchasers [627 from the railroad company, which should relate back to the date of the original certification of patent.

On the filing in the circuit court of the mandate of this court in the cause last referred to, the United States dismissed further proceedings as to certain defendants other than the Southern Pacific Railroad Company, and the trustees in the mortgage executed by that company, respecting certain tracts of land, and at the same time moved for a further decree against certain other defendants respecting particular tracts of land claimed by them. The decree of the circuit court (38 C. C. A. 637, 98 Fed. 46) determined as to various defendants claiming lands aggregating 43,315.67 acres, for which no patents had been issued by the United States, that they were citizens of the United States, and bona fide purchasers of the lands claimed by them, "and entitled to make payments to the United States, and secure patents from the United States therefor, upon complying with the provisions of the act of March 3, 1887, in that behalf." As to other defendants claiming lands aggregating 9,284.39 acres, for which patents had been issued to the railroad company, it was adjudged that they were bona fide purchasers from and under the railroad, within the meaning of § 4 of the act of 1887, and within the meaning of the act of March 2, 1896. The title of these latter defendants and of their heirs, grantees, and assigns to the lands claimed, was by the decree confirmed. The government appealed the case to the circuit court of appeals upon the contention that the court erred in adjudging that the defendants were bona fide purchasers within the

meaning of the acts of Congress of 1887 and 1896, and, on the affirmance by a decree of the circuit court of appeals, brought the case to this court, where it was determined on January 27, 1902, by the opinion reported in 184 U. S. 49, 46 L. ed. 425, 22 Sup. Ct. Rep. 285. And the record of the case so decided, introduced into the record 628] before us by stipulation, *shows that in that case the government not only prayed confirmation of the titles of the defendants found to be bona fide purchasers within the meaning of the act of March 3, 1887, but also that the United States "may have judgment against the defendant railroad company for the sum of $2.50 per acre for all such lands, if any, which this honorable court may find to be held by the defendants here as such bona fide purchasers for value." The decree did not, however, provide for a pecuniary recovery, and it does not appear why the government failed to seek a decree in that respect.

On April 13, 1899, soon after the decision reported in 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, an additional suit was commenced by the United States against the Southern Pacific Company, in regard to lands within the overlap, which was ultimately decided by this court on February 19, 1906, in an opinion reported in 200 U. S. 341, 50 L. ed. 507, 26 Sup. Ct. Rep. 296. The defendants, in addition to the railroad company and the trustees under certain mortgages, were a number of individuals sued as representatives of a class. The relief sought was the confirmation of the titles of bona fide purchasers, the cancelation of the patents for other lands, and the recovery of the value of the lands conveyed by the railroad company to bona fide purchasers, in accordance with the adjustment acts of 1887 and 1896. A money recovery was had at the rate of $1.25 per acre, where the railroad company realized that amount on the sale by it, and interest was allowed at the rate of 6 per cent per annum, from the date of the decree. 66 C. C. A. 587, 133 Fed. 653, 654.

The United States filed its bill in this case on January 28, 1903,—about one year after the decision of this court in the case reported in 184 U. S. 49,—invoking the aid of equity, as stated in the opinion below, "on the grounds of discovery, accounting, the establishment of a trust, and the enforcement of a lien." The ultimate relief 629] *sought, however, was a decree against the railroad company, under the acts of March 3, 1887, and March 2, 1896, for the statutory price of lands located within the overlap and described in two exhibits, A and B, which had been erroneously patented to the railroad company prior to the passage of the adjustment act of March 3, 1887, and which had been sold by the company to purchasers whose titles had been confirmed. Recovery of interest was not prayed. Exhibit A embraced lands sold by the railroad company to bona fide purchasers who had applied to the Secretary of the Interior, under the provisions of the adjustment acts, for and had received confirmation of their titles to the respective lands purchased by them. The lands embraced in exhibit B were all confirmed by the decree of the case reported in 184 U. S. 49, the purchasers being parties defendants in that suit. Some 1900 acres of the lands set out in exhibit A were the subject of the suit reported in 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152, although the purchasers were not joined, and the remaining lands in that exhibit formed part of the lands which were the subject of the suit reported in 184 U. S. 49, the purchasers being parties defendants in that suit. A final decree was entered against the company (157 Fed. 96), for the principal sum of $40,124.30, together with interest thereon at the rate of 7 per cent per annum from March 2, 1896. This decree was affirmed by the circuit court of appeals (108 C. C. A. 607, 186 Fed. 737), whereupon the railroad company took this appeal.

Presumably in view of the decision of this court in the case reported in 200 U. S. 341, the only assignment of error urged at bar concerns the award of interest, the main contention on behalf of the railroad company being that the statutes of 1887 and 1896, correctly construed, negative any right to interest, and, in any event, the date fixed by the court below from which interest was to run was erroneous.

*It may not be doubted that, testing 630] the right to recover interest exclusively by the face of the adjustment acts, such right would not obtain, since those acts expressly provide for the payment of a specified amount, the minimum statutory price of the land, without any expressions tending to support the conclusion that liability for interest was contemplated. On this subject, it was said in 200 U. S. at page 353:

"The acts of Congress really inure to the benefit of the railroad company, and restrict the right of the government, for they provide that the recovery shall in no case be more than the minimum government price. In other words, the government asks only its minimum price for public land, no matter what the value of the tracts or the amounts received by the company may be."

But it is unnecessary to further pursue this matter, since it is conceded by the government that the right to recover interest here asserted depends not upon an express

liability imposed by the adjustment acts, but upon general principles of law as applied to the facts of the case. Primarily the argument causes the liability for interest to depend upon the fact that the railroad company received from those to whom it had sold the lands, the price thereof, of which moneys it has since had the possession, and therefore it should be condemned to pay interest from the time the money was received. As already pointed out, however, this theory conflicts with the plain purpose of the adjustment acts, which was simply to provide for the settlement of a situation which had arisen by a common mistake, the government taking back the land which had been patented and which the railroad company had not conveyed, and confirming to bona fide purchasers the titles to lands which had been conveyed to them by purchase from the railroad, the government to receive for such lands merely the minimum statutory price,—a provision which excludes the conception that it was con-[631] ceived that *a liability was created, based upon an accounting between the government and the railroads of benefits and profits. It is, however, insisted that, upon principles of equity, interest should be allowed for the following reasons: (a) In view of the definite nature and liquidated character of the obligation of the railroad company to pay, as manifested by the terms of the acts of 1887 and 1896; and (b) as the result of the legal proceedings taken by the United States to enforce liability under the adjustment acts and the course of judicial decision thereon, all of which we have previously stated. The subjects are so interblended that we consider them together.

The interest, as we have already stated, was allowed below, from March 2, 1896, the date of the last adjustment act, as to which it is insisted in argument as follows:

"Then, certainly, if not before, the United States became the equitable assignee *pro tanto* of the purchasers' rights to recover what they had paid to the company through an innocent mistake; and then, certainly, if not before, the company came under an equitable obligation to account to the United States. If it continued to hold the moneys beyond that time, it would be only reasonable and equitable to require it to pay the legal rate of interest."

But, as we have pointed out, both the adjustment acts of 1887 and 1896 provided for no recovery of interest, and in the bill in the case before us, which is expressly based upon those acts, there is no prayer for interest. It certainly cannot be admitted on the one hand, as has been done, that the act did not provide for interest, and yet it be, on the other hand, asserted that the act, intrinsically considered, imposed the liability for interest from the date of its passage. Indeed, both the adjustment acts, as we have already pointed out, were long since treated by this court as contemplating action by the government to ascertain and fix the liability which arose from their enactment.

*Now the history we have given of the [632] various suits concerning the lands within the overlap shows that the case reported in 168 U. S. 1 and 184 U. S. 49, involved the question of who were bona fide purchasers of the larger part of the lands the statutory price of which is sought to be recovered in this suit, and that the United States appealed the case to this court, contesting the correctness of the holding of the courts below, as to defendants being bona fide purchasers,—a question whose decision was essential to fix a pecuniary liability upon the company,—which question was not and could not have been determined until the decision of this court on January 27, 1902.

The very foundation of the liability having thus been in litigation by the action of the government, there is no reason for holding that, until that controversy was determined, the pecuniary liability of the railroad company was so liquidated as to justify the awarding of interest. The question, therefore, is limited to determining whether the effect of the decree in the case decided in 1902 was to so fix the liability as to justify the awarding of interest from that date. We think not, for the following reason: In the suit which was terminated by the decree entered in 1902, the government asked that in cases where the purchasers from the railroad company were found to have acted in good faith, within the meaning of the adjustment acts, it be decreed entitled to recover $2,50 per acre, instead of $1.25 allowed by the adjustment acts. While the decree of 1902 determined who were bona fide purchasers, contrary to the contention of the government, it did not pretend to fix the resulting pecuniary liability, or embrace affirmative language conclusively protecting against the enlarged claim which the government made in the suit. Under these circumstances, we think it cannot be said that such a conclusive liquidation arose or was deemed by the government to have arisen as to justify an award of interest. This conclusion is also fortified by the fact that *when, subse-[633] quently, in 200 U. S., the government obtained a decree for the price of similar land sold to bona fide purchasers, interest was awarded to it only from the date of the decree, without, apparently, objection being made on the part of the United States. This

is further fortified by the fact that in the bill in this suit, filed after the decision in 1902, no demand was made for interest.

Looking comprehensively at the whole situation, especially the decision rendered in 1902, considering the withdrawal by the United States of the previously asserted right to greater compensation than the minimum statutory price, which was a necessary consequence of the filing of its bill in this case, of the averment of demand which the bill contained, and the absence of any objection on the part of the defendant company because of prematurity, we think it is just to say that the liability for interest upon the statutory price arose at the date of the commencement of the suit, and no sooner; and, therefore, that error was committed both in the trial court and in the circuit court of appeals in not confining the commencement of the running of interest to that date.

It follows that the decree of the Circuit Court of Appeals to the extent that it affirmed the judgment allowing interest prior to January 28, 1903, be and the same is modified, and as so modified is affirmed, and the cause is remanded to the District Court, with instructions to enter a decree conformably to this opinion.

Modified and affirmed.

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634] *MERCHANTS NATIONAL BANK OF THE CITY OF NEW YORK and the Banque Commerciale de Bale, Appts.,

v.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Kessler & Company, Appellee.

(See S. C. Reporter's ed. 634–645.)

**Bankruptcy — validity of prior lien — when objection too late.**

1. After the trustee in bankruptcy has virtually asserted, under the sanction of the court with the assent of a debtor to the bankrupt estate, the power to take legal possession of the debtor's stock in trade which the latter had agreed to hold as security for the debt, it is too late for creditors of the bankrupt, as the result of an agreement with such debtor, thereafter made, to raise the question whether the original agreement as to the stock between the debtor and the bankrupt was ineffective to operate as a lien as to creditors because of the want of delivery.

[For other cases, see Bankruptcy, VI. b, in Digest Sup. Ct. 1908.]

**Estoppel — by seeking to enforce contract.**

2. Creditors of a bankrupt seeking to enforce a contract between the bankrupt and its debtor, and the lien arising therefrom, so far as the avails of certain collateral are concerned, may not enforce rights given under one provision of such contract and repudiate another provision, where the two are, under the contract, indissolubly associated, the one being the complement of the other.

[For other cases, see Estoppel, III. b, 7, in Digest Sup. Ct. 1908.]

**Bankruptcy — right of trustee — subrogation.**

3. The trustee in bankruptcy, whose bankrupts had assigned to their various creditors to secure loans certain notes held by such bankrupts which were secured by the stock in trade and accounts of the makers, is entitled, both under general principles of subrogation and under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 67, subds. *c*, *f*, to participate in the proceeds of such collateral to the extent that the general funds of the bankrupt estate have been used to discharge one of the secured debts and acquire the collateral notes, this amount including a deposit to the bankrupt's credit which the secured creditor set off against the debt.

[For other cases, see Bankruptcy, VII., in Digest Sup. Ct. 1908.]

[No. 287.]

Argued and submitted May 2, 1913. Decided May 26, 1913.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, subrogating the trustee in bankruptcy to the right of a secured creditor of the bankrupt. Affirmed.

See same case below, 108 C. C. A. 239, 186 Fed. 127.

The facts are stated in the opinion.

Messrs. George Zabriskie and Henry G. Gray submitted the cause for appellants:

Subrogation is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, ought to pay it.

Arnold v. Green, 116 N. Y. 571, 23 N. E. 1.

It does not apply in favor of one whose duty is to pay the debt.

3 Pom. Eq. Jur. § 1213; People ex rel. McMillan v. Cayuga County, 136 N. Y. 281, 32 N. E. 854.

It is defined to be the substitution of one person in place of another, whether as creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights remedies, and securities.

Leavitt v. Canadian P. R. Co. 90 Me.

153, 38 L.R.A. 152, 37 Atl. 886; Jackson Co. v. Boylston Mut. Ins. Co. 139 Mass. 508, 52 Am. Rep. 728, 2 N. E. 103.

One who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. He must have paid upon request, or as surety, or under some compulsion made necessary by the adequate protection of his own rights.

Acer v. Hotchkiss, 97 N. Y. 403; Cole v. Malcolm, 66 N. Y. 363; Twombly v. Cassidy, 82 N. Y. 155.

He who pays the debt under such circumstances is entitled to an assignment of the debt and of the evidence of it, and also of the collateral security.

Ellsworth v. Lockwood, 42 N. Y. 98.

Such being the nature of subrogation, its operation is limited to reimbursement of so much as the person entitled to it had paid to save the property.

Sheldon, Subrogation, 2d ed. § 202; 27 Am. & Eng. Enc. Law, 2d ed. § 207; Pease v. Egan, 131 N. Y. 271, 30 N. E. 102; First. Nat. Bank v. City Trust, S. D. & Surety Co. 52 C. C. A. 313, 114 Fed. 529; Kilpatrick v. Dean, 15 Daly, 182, 4 N. Y. Supp. 708; Snelling v. McIntyre, 6 Abb. N. C. 469; Bonney v. Seely, 2 Wend. 481; Livingston v. Newkirk, 3 Johns. Ch. 312.

While the case last cited is strictly a case of marshaling assets, it proceeds upon what has been termed "the familiar principle of marshaling assets by means of subrogation."

Hawkins v. Blake, 108 U. S. 422, 435, 27 L. ed. 775, 780, 2 Sup. Ct. Rep. 804.

As the object of subrogation is to indemnify the person who has paid the debt of another, in order to obtain indemnification he must establish a definite sum which he has paid upon the primary liability of the principal debtor.

Sheldon, Subrogation, 2d ed. § 11; Binford v. Adams, 104 Ind. 41, 3 N. E. 753; Hunnicutt v. Summey, 63 Ga. 586; Jenkins v. Continental Ins. Co. 12 How. Pr. 66; Koehler v. Hughes, 148 N. Y. 512, 42 N. E. 1051.

In the absence of evidence, which it was in the power of the trustee to produce, but which he withheld, these appellants are entitled to the most favorable intendments that can properly be drawn with regard to any facts which might have been established by the evidence.

Livingston v. Newkirk, 3 Johns. Ch. 316.

The object of subrogation is to shift the debt upon the person or the fund that ought to bear it. When that object is accomplished and the debt is paid, the equitable principle has exhausted its power, and it can restrain no further the operation of the ordinary principle of merger upon the legal title.

First Nat. Bank v. City Trust, S. D. & Surety Co. 52 C. C. A. 313, 114 Fed. 529; Kilpatrick v. Dean, 15 Daly, 182, 4 N. Y. Supp. 708; Faires v. Cockerell, 88 Tex. 428, 28 L.R.A. 528, 31 S. W. 190, 639.

Mr. **Wallace Macfarlane** argued the cause, and, with Mr. Samuel J. Rosensohn, filed a brief for appellee:

When the general funds of a bankrupt estate have been applied to the redemption of collaterals pledged by the bankrupts, the estate is entitled to be reimbursed before any other claims to the pledged property are satisfied.

Sheldon, Subrogation, 2d ed. p. 39, § 23; McLean v. Cadwalader, 15 Nat. Bankr. Reg. 383; Hiscock v. Jaycox, 12 Nat. Bankr. Reg. 507, Fed. Cas. No. 6,531; Re Klancke, 4 Ben. 326, Fed. Cas. No. 7,864; Reed v. McIntyre, 98 U. S. 513, 25 L. ed. 173; Johnson v. Rogers, 15 Nat. Bankr. Reg. 1, Fed. Cas. No. 7,408; Re Nelson, 9 Ben. 238, Fed. Cas. No. 10,100; Re Steele, 7 Biss. 504, Fed. Cas. No. 13,345; Re Beisenthal, 14 Blatchf. 146, Fed. Cas. No. 1,236; Everett v. Stone, 3 Story, 446, Fed. Cas. No. 4,577.

The trustee, in acquiring the City Bank's collateral, did not stand in the shoes of the bankrupts, but acted in his own right, and is entitled to be subrogated as a purchaser to all the rights of the City Bank.

First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580.

Mr. Chief Justice **White** delivered the opinion of the court:

In July, 1904, Kessler & Company, bankers, contracted to give the R. B. McLea Company, engaged in business as importers and jobbers of dry goods, a line of credit up to $50,000, and in addition to advance money on the invoice price of goods imported, and for the purpose of paying the duties thereon. The advances, it was agreed, should be evidenced by negotiable notes of the company in such amounts and to be furnished at such times as desired by Kessler & Company. It was also agreed that the company would hold its stock in trade as a security for all the advances to be made, with interest charges and commissions, and that the company, when required to do so, would execute any assignments or deeds reasonably necessary to the accomplishment of the purpose in view. It was moreover agreed that all sales of merchandise made by the company should be subject to approval by Kessler & Company, and when approved, Kessler & Company would guarantee the amount, and that the account sales should be transferred to them as security, the accounts,

when collected, to be applied to the extinction of the debt. On October 30, 1907, Kessler & Company made a general assignment, and were adjudicated bankrupts on November 6 following, when Lawrence E. Sexton was designated as receiver, and was appointed trustee on December 30. In the nearly three and one half years which elapsed between the agreement of July, 1904, and the adjudication in bankruptcy, in 1907, Kessler & Company advanced a 636] *large amount of money to the company, and at the date of the bankruptcy there were outstanding notes to the amount of $96,000, given by the company under the agreement. Only one note for $7,000 was then held by Kessler & Company, the other notes having been used by the firm in the course of its business as collateral security for money by it borrowed, as follows: With the Merchants Bank of New York City, notes for $30,000; with the Bank Commerciale de Bale, notes for $15,000; with the National City Bank of New York City, notes for $39,000, and a note for $5,000 with Kessler & Company, Limited, Manchester, England.

It is not disputed that at the time Kessler & Company delivered the notes as collateral, or when the arrangements were made for obtaining the credit to secure which the collaterals were given, the nature and character of the contract with the company was as stated, and it is not controverted that as the result of these statements and the delivery of the collateral notes, holders of the notes became entitled to participate in the security. After the appointment of the receiver, pending a rule taken by him against the company for the purpose of asserting his rights to the accounts and stock of merchandise securing the notes, an agreement was made between the receiver and the company which was sanctioned by the court and put in the form of an order in substance providing as follows: First, directing the receiver to collect any unpaid account sales of the company assigned under the contract of 1904 to Kessler & Company, and forbidding the company from interfering with the discharge by the receiver of this duty; second, directing the company to pay over to the receiver the proceeds of any assigned account sale which had been collected by the company after the service upon them of the rule to show cause on November 16, 1907; and third, providing that an inventory be taken by the receiver and the company, of 637]all merchandise *purchased "during the life of the contract" between the company and Kessler & Company, the possession of which was in controversy between the parties, without prejudice to the right of the trustee, when appointed, to enforce any claims as such trustee, arising from sales or deliveries of merchandise by the McLea Company prior to November 16, 1907. The McLea Company was authorized to deliver any of the inventoried merchandise in fulfilment of orders theretofore received, and to make further sales and deliver goods so sold, all, however, with the approval of the receiver. Provision was made for the deposit by the receiver of the proceeds of the accounts, and by the McLea Company of the proceeds of the merchandise, to await further action, it being specially declared that the making of the order was without prejudice to any of the rights of the McLea Company as against Kessler & Company, the receiver or trustee in bankruptcy when appointed, and that the consent of the McLea Company to the order should not be construed as an admission against its interests or waiver of its rights. The trustee realized from the accounts a sum slightly in excess of $32,000, and the McLea Company, acting under the agreement approved by the court, realized from the stock of goods a sum slightly in excess of $12,000, making about $44,000 held as security under the contract of 1904 for the payment of the McLea notes. The Merchants Bank and the Commercial Bank of Bale, by proceedings not necessary to state, acquired for a small price, which was credited on the debt due them by Kessler & Company, the collateral notes of the McLea Company. On some or all of these notes, judgments were obtained and execution issued or threatened to be issued against the stock of the McLea Company. That company and the two banks thereupon entered into an agreement by which the stock of merchandise was assigned to a named trustee with the duty, as the stock was realized on, to turn over the *pro-[638 ceeds for the purpose of paying the two banks. As this agreement was made after the rule to show cause, issued on behalf of the receiver, and the order of the court consequent thereon, it was expressly provided in the agreement that it was not intended to violate the order of the court, but that it was subject to the approval of the court.

At the time of the adjudication in bankruptcy, Kessler & Company had a deposit account in the National City Bank to which there was a credit balance of $27,000. Although it is not controverted that the bank held as collateral the McLea notes to the amount of $39,000, there is a contention as to the adequacy of the proof, showing the amounts due that bank, back of which the notes were held as collateral. We content ourselves, however, on this subject with

saying that we think it is not subject to be controverted on the record that the National City Bank had a claim for $39,000 and that it set off the deposit of $27,000 against this claim of $39,000, and that the trustee, in order to protect the bankrupt estate, paid the additional $12,000, and received from the National City Bank the $39,000, of McLea collateral notes, along with some other collaterals, the nature and amount of which is not disclosed.

The Merchants Bank and the Commercial Bank of Bale, having made a claim to a special right to the proceeds of the stock of merchandise, concerning which they had made the agreement above stated with the McLea Company, their claim was referred for consideration to a special master. The receiver, the two banks, and Kessler & Company, Limited, of Manchester, being before the master, an agreement was entered into by which it came to pass that the master was called upon to consider and determine upon the facts, as we have stated them, the special rights of the parties in and to the fund derived from the stock of mer-[639]chandise of the McLea Company, *and the amount which had been collected from the account sales of merchandise.

Prior to the arising of the controversy now before us, it seems that a somewhat similar contest had arisen in the Kessler & Company bankruptcy, and had been decided by the district court. The facts in such prior case were these: Kessler & Company had made an agreement with the firm of Milne, Turnbull, & Company, to give financial assistance and take charge of the collection of account sales, etc., upon terms and conditions substantially like those embraced in the contract with the McLea Company which is now under consideration. Under that contract, Kessler & Company had received notes, had transferred some of the notes as collateral to the Merchants National Bank and to Kessler & Company, Limited, of Manchester, and had retained the remainder. Under these circumstances the question which arose was, how should a sum of money derived from the account sales or stock of Milne, Turnbull, & Company, which was a security for the outstanding notes, be distributed among the holders of the notes? That is, it being insufficient to pay all the notes, should it be ratably applied, or was Kessler & Company, as assignor, to be excluded from the distribution until the assignees had been paid? Considering that the question was open and not settled, under the local law of New York, the court came to determine it by its appreciation of principles of general law, and held that as Kessler & Company, as transferrer, occupied a trust relation, that firm could not be allowed to violate its trust by diminishing the security which otherwise would be attributable to the transferred notes. Considering the relation of the transferees between themselves, it was decided that although the act of Kessler & Company, after having transferred some of the notes, in transferring others, was a breach of trust, the second transferee was unaffected thereby, and therefore the fund was subject to be distributed between *the two trans-[640 ferees *pro rata*, to the exclusion of Kessler & Company, or its trustee. The court said:

"It seems to me that that is exactly the situation here: Kessler was solely entitled to receive the proceeds of the accounts payable pledged by Milne, and he so remained down to the time of these bankruptcies. These accounts were, to be sure, security for all the notes that Kessler had; but when he assigned some of the notes, he became a trustee for his assignee to the extent of the face value of the notes in question.

"It can hardly need authority to show that in a court of equity the *cestui que trust* is actually seised of the trust property; he may alien it, and any legal conveyance by him will have the same operation in equity upon the trust as it would have had at law upon a legal estate. Croxall v. Shererd, 5 Wall. 281, 18 L. ed. 577.

"It can make no difference that a holder of collateral securing several notes assigns them successively, and thereby diminishes the value of each note in the event of deficiency. Each *cestui que trust* takes his chances of that; but if (in this case) Kessler became a trustee for the bank by the act of assignment, no act of his, nor any change in his circumstances, can change his relation to the *cestui que trust* he himself created. To the extent of his ability he is at all times bound to account for the trust he had himself created, and that duty has, by operation of law, descended to his trustee in bankruptcy."

In the light of this ruling in the previous case, the special master, in deciding this controversy, concluded that the receiver of Kessler & Company, as assignor, was not entitled, as to the $7,000 or the $39,000 of McLea notes which he held, to participate in the distribution, therefore the fund should be ratably distributed between the Merchants Bank, the Bank of Bale, and Kessler & Company of Manchester. Under this view the master concluded that it was unnecessary to consider the claim made *by[641 the two banks, that because of the agreement with the McLea Company subsequent to the bankruptcy, they were exclusively

entitled to the proceeds of the stock of merchandise.

When the district court came to consider a motion to confirm the report, its previous decision in the Milne, Turnbull, & Company case was pending undetermined on appeal in the circuit court of appeals. While adhering to the ruling made in that case, it was nevertheless decided that the master had erred in considering that case as decisive of the right of the trustee as the holder of the $39,000 of collateral notes, to participate in the security to the extent that the general funds of the bankrupt estate had discharged the principal debt of the National City Bank, on the ground that, to the extent of such payment, the trustee, as the representative of the general creditors, was by operation of law, subrogated to the rights of the bank. In addition to this general right of subrogation, it was held that the right of the trustee to participate to the extent stated was secured by the provisions of subdivisions *c* and *f* of § 67 of the bankruptcy act. Disposing of the right asserted against the proceeds of the stock of merchandise, it was decided that whatever might have been the infirmity, for want of delivery, if any, of the agreement constituting the stock as a security, it was two late to raise such question on behalf of the Merchants Bank and the Bank of Bale, after the trustee had virtually, as a result of the agreement, sanctioned by an order of the court, taken possession of the stock for the purpose of carrying out the agreement. Thereafter, the ruling made in the Milne, Turnbull, & Company case was affirmed by the circuit court of appeals upon substantially the reasoning which controlled the court below (Re Milne, 107 C. C. A. 350, 185 Fed. 244), and that court, in affirming the action of the trial court, taken in this case, also approved and adopted the 642] *reasoning which caused the trial court to permit the trustee to participate, to the extent stated, in the fund held by him as security for the payment of the collateral notes. The court, however, while referring to the right asserted by the Merchants Bank and the Bank of Bale, to exclusively participate on special grounds in the proceeds of the stock, made no ruling on the subject; and error with reference to that matter, as well as with regard to the ruling permitting the trustee to participate to the extent allowed in the funds securing the collateral notes, are the subjects which we are called upon to consider on this appeal taken by the Merchants Bank and the Bank of Bale.

Although it be conceded, for the sake of *argument*, that the power conferred upon *Kessler & Company* to control the sales of merchandise, did not operate to take this case out of the rule as to delivery, which was upheld in the case relied upon, we nevertheless put out of view the contention of the two banks, concerning their particular right to the merchandise fund, for the following reasons: (a) because we think the trial court was clearly right in holding that after the trustee had virtually exerted, under the sanction of the court, with the assent of the McLea Company, the power to take legal possession of the stock, it was too late for the two banks, as a result of an agreement with the McLea Company, thereafter made, to raise the question of whether the original agreement as to the stock between Kessler and the McLea Company was ineffective to operate a lien as to creditors because of the want of delivery; (b) as the two banks were seeking to enforce the contract and the lien arising therefrom, so far as the avails of the account sales were concerned, we do not think they could be heard to disintegrate the contract by enforcing rights given under one provision, and repudiating another provision, the two being, under the contract, indissolubly associated, the one being the complement of the other.

*Underlying the question of the right [643 of the trustee to participate to the extent of the general estate absorbed in acquiring the $39,000 of collateral notes in the fund securing all such notes is the ruling made by the court below in Re Milne, supra. As, however, no appeal was taken in the Milne Case, and the trustee has not here appealed, and it is possible to dispose of the case upon the grounds upon which it was rested below, without re-examining the broader and fundamental ruling involved in Re Milne, we shall confine our attention to the narrower question here arising. In doing so, however, in view of the importance of the subject and of its far-reaching effect, we do not desire, even by implication, to be understood as giving our assent to the principle that one who takes an assignment of part of a claim secured by a mortgage or other lien upon a common fund, thereby, in the absence of special agreement or necessary implication arising from particular circumstances, acquires anything more than a proportional right to the common security, or the power to exclude his assignor, in the event of a deficiency, from participating in such fund to the extent of the portions of the claim held by him. Moreover, for the same reason which causes us to make the reservation just stated, we also desire to expressly exclude any inference that our opinion is that, under the contract here involved, and the facts here disclosed, there

was either an express agreement or anything justifying an implication which would take the case out of the rule of proportional distribution, if that rule were otherwise applicable.

By the effect of the bankruptcy, the rights of the parties became fixed. The collateral note holders had a fund specially applicable to the payment of their debt, and the general creditors had the general fund, to which alone they could look for the discharge of what was due them. It was in the power of neither class to set aside or frustrate, as against the other, the rights fixed by the [644]adjudication, *and which it was the duty of the trustee to conserve and administer. The fund on deposit to the credit of the general estate was an asset of that estate. True, it was subject to be set of, that is, compensated, by the debt due to the National City Bank. But the exercise by that bank of the right of set-off did not change the character of the two funds, and could not confer upon the National City Bank the power to pay its debt out of the general fund, and thereby diminish the general estate, and increase the share of the security fund distributable among those entitled to participate in that fund. The impossibility, legally, of bringing this result about, at once demonstrates the application to the situation of the elementary principle of legal subrogation which, for the protection of the general fund, gives to that fund and to its representative, the trustee, the right to exercise against the special fund, recourse to the extent necessary to prevent the inequality and destruction of right which otherwise would result. To suppose that that principle here finds no application, because Kessler & Company itself, the bankrupt, if it had held the collateral notes, could not enforce them under the principle decided in Re Milne, ubi supra, as lucidly pointed out by the court below, is but to disregard the situation resulting from the adjudication in bankruptcy, and to destroy the equality of distribution which it was the purpose of that act to secure. Nothing could more clearly demonstrate this conclusion than a consideration of the result to be brought about by taking the opposite view; since if that is done, the situation existing at the time of the adjudication would be seriously changed, the rights of the general creditors would be lost, and those of the secured creditors would be greatly enlarged. But resort to the principle of legal subrogation is not here necessary, as the subject is fully covered by subdivisions *c* and *f* of § 67 of the bankruptcy act, especially as elucidated by First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580. Moreover, *even though it be admitted that[645 there would be a possibility, if the text were narrowly considered, to take this case out of the operation of the section, its obvious spirit and intent, as illustrated and make cogent by the entire text of the act, by the purpose which it was intended to subserve, the distinction between secured and unsecured creditors which it draws, all conclusively demonstrate the correctness of the principle which the court below applied, and by which it held this case was not controlled by the doctrine by it announced in Re Milne.

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WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, Petitioner,

v.

INTERNATIONAL CURTIS MARINE TURBINE COMPANY and Curtis Marine Turbine Company of the United States.

(See S. C. Reporter's ed. 645-652.)

**Certiorari — to circuit court of appeals — allowance — question not raised below.**

1. The action of the trial court in failing to examine and pass upon the case, and

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NOTE.—On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

**Right of judge to retry case or review his own decision.**

Apart from statute, there can be no valid objection to the retrial of a case, where a new trial has been granted, before the same judge who presided at the first trial. Fry v. Bennett, 28 N. Y. 324.

"Should a new trial be ordered, it would be absurd," said the court in Atlantic & B. R. Co. v. Cordele, 128 Ga. 293, 57 S. E. 493, "to say that the judge could not preside in the second trial. No such cause of disqualification is recognized by the law."

The same judge who originally tried the case may retry the same upon a reversal of his judgment by a higher court. May v. May, 150 Ky. 522, 150 S. W. 685.

A judge whose order refusing an injunction was reversed by a higher court is not disqualified to preside on the second interlocutory hearing. Atlantic & B. R. Co. v. Cordele, supra.

A mayor and city council having convicted a person of unlawfully keeping intoxicating liquors for sale are not disqualified to try the case again after it has been returned upon a writ of certiorari for a second trial. Sutton v. Washington, 4 Ga. App. 30, 60 1907

in entering a merely *pro forma* decree as a means of expediting the ultimate and final decision of the cause in the circuit court of appeals, does not require the allowance of a writ of certiorari from the Federal Supreme Court, where no objection concerning the matter was made either in the trial court or on the hearing in the circuit court of appeals.

[For other cases, see Certiorari, II. a, in Digest Sup. Ct. 1908.]

**Judges — disqualification — previous connection with case.**

2. The requirement that "no judge before whom a cause or question may have been tried or heard in a district court, as an existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals," made by the proviso to the Judicial Code (act March 3, 1911, chap. 231, 36 Stat. at L. 1132, U. S. Comp. Stat. Supp. 1911, p. 191), § 120, applies to a trial judge who did not, in substance, form or express an opinion on the case in the first instance, but merely entered a *pro forma* decree for the purpose of enabling the case to be heard for the first time by the reviewing court, acting *pro hac vice* as a court of first instance.

[For other cases, see Judges, III., in Digest Sup. Ct. 1908.]

**Judges — disqualification — previous connection with case — consent.**

3. Consent of the parties cannot qualify a judge who heard and disposed of the case in the first instance to sit in the circuit court of appeals, contrary to the proviso to the Judicial Code, § 120, for the purpose of reviewing his own action.

[For other cases, see Judges, III., in Digest Sup. Ct. 1908.]

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S. E. 811. No matter what may have been the prior decision of the lower court, a new trial which has been ordered in the judgment on certiorari is not to be considered as a review of the former trial.

Justices of the peace in trying slaves did not act as jurors only, but as judges, and under the Louisiana statute they were competent, after a mistrial, to sit again in the case until the prosecution was at an end. State v. Peter, 14 La. Ann. 527; State v. Slave Bill, 15 La. Ann. 114.

A Connecticut statute, however (Conn. Pub. Acts 1899, chap. 500), provides that "no judge of any court who shall have presided over any jury trial, either in a civil or criminal case in which a new trial shall be granted, shall again preside at the trial of such cause." State v. Hartley, 75 Conn. 104, 52 Atl. 615.

This statute applies, although the offense described in the count of the information upon which the accused was convicted is not charged in the information upon which the accused was first tried, where the two offenses charged, which in most of their features were identical, were joined in one information and tried together, and practically constituted the same case in which the new trial was granted. Ibid.

Objections to the review by a judge of his own previous decision arise in various forms, and in general do not prevail, in the absence of statutory prohibition.

There is nothing objectionable in a review by the vice chancellor of his own decision, made while acting as master. Wetmore v. Winans, 8 Paige, 370.

A district judge is not disqualified to pass upon a motion to quash the panel of jurors because it was his own act in selecting the jury which was attacked. Freeman v. McElroy, — Tex. Civ. App. —, 149 S. W. 428.

A judge is not disqualified to try an action brought to vacate a judgment by reason of the fact that he presided over the proceeding which resulted in such judgment. Missouri P. R. Co. v. Lasca, 79 Kan. 311, 99 Pac. 616, 17 Ann. Cas. 605.

There is no merit in the contention that conducting the preliminary committal disqualifies, or ought to disqualify, the judge from presiding at the regular trial of the accused under the indictment. Cochran v. State, 113 Ga. 736, 39 S. E. 337. The court was not impressed by the argument that the news that the judge had presided at the preliminary trial and bound the accused over might lead the public, including prospective jurors, to the conclusion that the judge had made up his mind that the accused was guilty.

And under a statute disqualifying a committing magistrate from sitting as a member of the examining court, a justice acting as a coroner is not disqualified from acting as member of the examining court. Forde v. Com. 16 Gratt. 547.

A justice of the peace is not legally disqualified to take jurisdiction of and try a case because he has previously, as one of a board of arbitrators between the same parties and in reference to the subject-matter of the suit, upon a hearing of such matter as such arbitrator, formed an opinion and expressed the same to his associate arbitrator. Batchelder v. Norse, 35 Vt. 642.

In a suit to enjoin the storage of inflammable oils, the fact that the judge had been a member of the city council which had also passed on that question does not disqualify him. Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573, 26 S. W. 96.

In a habeas corpus proceeding by a grandparent to recover possession of the child alleged to have been given to him by its father, and to have been abducted from him by the latter, the awarding of the temporary custody of the child to such grandparent, upon his giving bond for its production in court, does not constitute a pre-judgment of the case, disqualifying the trial court from passing a final judgment awarding the child, and such action does not constitute reversible error where it appears that the final judgment was right. Wilkinson v. Lee, 138 Ga. 360, 42 L.R.A.(N.S.) 1013, 75 S. E. 477.

The dismissal by the county judge of the

**Certiorari — to circuit court of appeals — allowance.**

4. Certiorari will issue from the Federal Supreme Court to a circuit court of appeals where the judge who heard and disposed of the case in the first instance also sat in the circuit court of appeals, contrary to the Judicial Code, § 120, for the purpose of reviewing his own action, although no objection was made to his participation in the hearing and decision of the case in the appellate court.

[For other cases, see Certiorari, II. a, in Digest Sup. Ct. 1908.]

**Certiorari — to circuit court of appeals — disposition of cause.**

5. The Federal Supreme Court, upon allowing certiorari to a circuit court of appeals because the judge who heard and disposed of the case in the first instance also sat in the circuit court of appeals, contrary to the proviso to the Judicial Code, § 120, for the purpose of reviewing his own action, will not retain the cause for a hearing on the merits, but will at once reverse and remand the case to the court below, so that it may be heard by a competent court.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

[No. 1032.]

Submitted April 14, 1913. Decided May 26, 1913.

PETITION for Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed a decree of the District Court for the Eastern District of Pennsylvania, dismissing the bill in a suit for the infringe-

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petition for an order directing the personal representatives of a decedent to convey certain lands to the petitioner, upon the ground that his right to a deed was doubtful, does not disqualify that judge, who afterwards became judge of the circuit court, from hearing and determining an action brought by such petitioner in that court, to establish a resulting trust in the land. Graham v. Selbie, 8 S. D. 604, 67 N. W. 831.

There is no law which renders it a disqualification *per se* to try an indictment for perjury that the judge is the same one who presided at the trial in which the alleged perjury was committed, and also at the trial of a case in which one of the witnesses who testified in the first case was convicted of perjury. Heflin v. State, 88 Ga. 151, 30 Am. St. Rep. 147, 14 S. E. 112.

And that a judge belonging to a vigilance organization whose committee exiled the defendant on grounds unconnected with the present charge does not disqualify him from sitting in the cause. People v. Mahoney, 18 Cal. 185.

A judge having once tried a cause is not thereby disqualified from being a member of the court reviewing the former judgment, in the absence of statutory prohibition. Turnbull v. O'Hara, 4 Yeates, 446; Den ex dem. Pearson v. Hopkins, 2 N. J. L. 195; Peck v. Essex County, 20 N. J. L. 457, reversed on other grounds in 21 N. J. L. 656; Beckham v. Rice, 1 Tex. Civ. App. 281, 21 S. W. 389; Edwards v. Wife, 9 La. Ann. 321; Young v. Adams, 6 Mass. 182; Pierce v. Delamater, 1 N. Y. 17.

Parish judges are competent to pass upon questions arising in partitions made before them as notaries. Babin v. Nolan, 2 La. Ann. 346.

The circuit judge before whom proceedings to dissolve an attachment were had is not disqualified to pass upon a motion to dismiss an appeal to the circuit court from his order. Harvey v. Pealer, 63 Mich. 572, 30 N. W. 188.

A Texas supreme court judge is not disqualified to participate in a decision of a case because he took part in the decision of the case in the court of civil appeals while a member of that court. The grounds of disqualification are specified in the Constitution, and they are exclusive of all others, and the fact that a judge may have tried the case in the lower court, or may have participated in the decision in such court, is not made one of them. Galveston & H. Invest. Co. v. Grymes, 94 Tex. 609, 63 S. W. 860, 64 S. W. 778.

In Reg. v. Justices of London, 18 Q. B. 421, note, it was held that the presence of the magistrate at the hearing of an appeal from his court would not be sufficient to set aside the order made at such hearing, if he did not take part, and did not influence the court, but that it was indiscretion on his part. The question was as to the seating capacity of an omnibus which was exhibited at the hearing, and the alderman who tried the case went in the omnibus and seated himself while it was being exhibited.

The judge who rendered the decision below may not, however, sit in the cause as a member of the Indiana appellate court. Hudson v. Wood, — Ind. App. —, 52 N. E. 612.

Under the New York Constitution of 1821 the chancellor and justices of the supreme court, though members of the court for the correction of errors, were forbidden to join in the affirmance or reversal of their own decrees and judgments, and this lead was followed by the enactment by the legislature of the provisions of 2 N. Y. Rev. Stat. pt. 3, title 1, chap. 3, § 3, that no judge of any appellate court, or of any court to which a writ of certiorari or error shall be returnable, shall decide or take part in the decision of any cause or matter which shall have been determined by him when sitting as a judge of any other court. Pierce v. Delamater, 1 N. Y. 17.

This statute could not, however, exclude a member of the court for the correction of errors from deciding or taking part in the decision of a cause determined by him when acting as a circuit judge, in view of the fact that the only constitutional restrictions

ment of a patent, and remanded the case with directions to enter a decree for damages without an injunction. Certiorari granted, and decree of Circuit Court of Appeals reversed, and cause remanded for further proceedings.

See same case below, 202 Fed. 932.

The facts are stated in the opinion.

Messrs. James R. Sheffield, Clifton V. Edwards, and Samuel Dickson submitted the cause for petitioner.

Messrs. Frederick P. Fish and Richard N. Dyer submitted the cause for respondents.

Mr. Chief Justice White delivered the opinion of the court:

The Curtis Marine Turbine Companies, the respondents, as the owners of several United States letters patent, sued the Cramp & Sons Ship & Engine Building Company, the petitioner, for infringement, because that company had contracted with the Navy Department to build certain torpedo boat destroyers, to be propelled by turbine engines, which were to be constructed by the Cramp Company in accordance with specifications which, it was alleged, would cause the engines, when built in accordance with the contract, to infringe the patents sued upon.

The Cramp Company questioned the jurisdiction of the court on the ground that, as it had made or proposed to make no engines which could, under any possible view, be *an infringement[647] of the patents sued on, except the

upon the appellate powers of the members of that court are that on appeals the chancellor shall have no voice in the final sentences, and on writs of error the justices of the supreme court shall not have a voice for the affirmance or reversal of the judgment. Re Members of Court of Errors, 6 Wend. 158.

The adoption of the Constitution of 1846, which, omitting this clause, confers the same powers on all the judges of the court of appeals, and on all the justices of the supreme court, with the single exception that no judicial officer can exercise his office while under impeachment, virtually repealed the statute. Pierce v. Delamater, supra.

The disqualification provision was restored, however, by an amendment adopted in 1869, which provides that "no judge or justice shall sit at a general term of any court, or in the court of appeals, in review of a decision made by him, or by any court of which he was at the time a sitting member." Pistor v. Hatfield, 46 N. Y. 249.

And this in substance was embodied in the New York Constitution of 1894, with the necessary substitution of "appellate division" for "general term."

Where a case was heard at general term before the election of 1869, but the decision was not made until after the result of the election, showing the adoption of the amendment, the amendment did not apply to such decision. Real v. People, 42 N. Y. 270.

A commissioner of appeals was not a judge of the court of appeals within the meaning of this constitutional provision. Settle v. Van Evrea, 49 N. Y. 283.

An order of a supreme court justice granting leave to sue on a judgment is comprehended by the provisions of the New York Constitution that no judge or justice shall sit at a general term of any court, or in the court of appeals, in review of a decision made by him, or of any court of which he was at the time a sitting member. Van Arsdale v. King, 152 N. Y. 69, 46 N. E. 179.

A judge of the city court of Brooklyn, who settles the form of the judgment to be entered on a referee's report, and grants an allowance, may not take any part in the appeal to the general term of that court from such judgment. Murdock v. International Tile & T. Co. 14 Misc. 225, 35 N. Y Supp. 668.

An *ex parte* order for examination before trial of one of the corporate defendant's officers was not under review on an appeal to the general term of the supreme court from an order of another justice, creating such *ex parte* order upon other affidavits and papers in addition to those on which the original order was granted, and therefore the justice who made the original order was not incompetent to sit in the general term because of the constitutional provision that no judge or justice shall sit at a general term of any court, or in the court of appeals, in review of a decision made by him, or of any court of which he was at the time a sitting member. Philips v. Germania Bank, 107 N. Y. 630, 13 N. E. 923.

A judge of the city court of New York is not disqualified from hearing and determining an appeal to the general term of that court because the order appealed from was signed by him, if the decision was in fact rendered by another judge. Mori v. Pearsall, 14 Misc. 251, 35 N. Y. Supp. 829.

The justice who heard and decided the case at special term does not sit in review of his own decision, contrary to the New York Constitution, where, as presiding justice of the general term of the supreme court, he calls the case and makes some inquiry of counsel respecting the papers, but does not participate in the hearing or in deciding the case. Graham v. Linden, 50 N. Y. 547.

Those judges who sat upon the bench and concurred in a judgment of the New Jersey supreme court were excluded, under the New Jersey Constitution, from sitting upon a review of the case in the court of errors and appeals, although no formal opinion had been given below. Gardner v. State, 21 N. J. L. 557.

The exclusion from the New Jersey court of errors and appeals of justices of the supreme court who sat on the hearing

engines which it was engaged in making for the United States, for use in its war vessels, there was no right to an injunction, and therefore no jurisdiction in equity. Defenses as to the merits of the cause were also set up, challenging the novelty of the matters covered by the patents sued upon, and denying in any event that the engines to be built under the contracts would infringe the patents relied upon. When the case was ripe for hearing, on February 1, 1911, it was argued and taken under advisement by the court. On April 10th, the court announced the following memorandum opinion:

"Since the argument of this case, the current business of the court has engaged my time so fully that I have not been able to consider it. If it is to receive the study it requires, at least two or three weeks' continuous attention would be necessary. Other matters also, to which I need not refer more particularly, have concurred to prevent me from taking it up, and I have therefore decided to enter a *pro forma* decree, in order to send the controversy to the court of appeals as speedily as possible. I wish to add with emphasis that the decree now to be entered in favor of the defendants is not to be construed as affording the slightest intimation of my opinion concerning the merits. I have formed no opinion whatever on that subject; but, as the unusual importance of the suit will certainly carry it to the appellate courts, I feel justified under the circumstances in making a purely formal disposition of the matter in its present stage.

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of the cause, which is made by the New Jersey Constitution, applies only to the hearing of the cause for reversal or affirmance, and does not prevent them from voting and expressing opinions on preliminary and collateral motions. Engle v. Cromlin, 21 N. J. L. 561; Gardner v. State, supra.

A judge sitting and acting for the New Jersey supreme court in making a consolidation order and allowing a bill of exceptions to his ruling consolidating the actions, the effect of which is to change the venue, has, within the meaning of the constitutional provision, given a judicial opinion in the cause in favor of the alleged error complained of, so as to be disqualified from sitting in the New Jersey court of errors and appeals, where error is assigned upon the consolidation order. Defiance Fruit Co. v. Fox, 76 N. J. L. 482, 70 Atl. 460.

By the provisions of the judiciary acts of September 27, 1789, § 4, and April 29, 1802, § 5, re-enacted in the Revised Statutes as § 614, upon the hearing in the circuit court of an appeal from the judgment of the district court, the district court judge who rendered the decision appealed from, although he may, for the information of the circuit court, assign his reasons for that decision, is prohibited from voting or taking part in the judgment of the circuit court, and that judgment is to be entered according to the opinion of the judge who is not so disqualified. An exception is recognized by the act of March 2, 1867, § 2, where the district judge is holding the circuit court alone, which, in order to prevent failure or delay of justice, permits such a case to be heard and disposed of by such judge. United States v. Emholt, 105 U. S. 414, 26 L. ed. 1077.

A Federal district judge cannot sit in the circuit court on a writ of error from his own decision. United States v. Lancaster, 5 Wheat. 434, 5 L. ed. 127.

A Federal district court judge cannot sit as a member of the circuit court upon questions adjourned to that court, under the bankrupt act of August 19, 1841. Nelson v. Carland, 1 How. 265, 11 L. ed. 126.

The Federal district judge who heard and denied a motion to remand the cause to the state court whence it had been removed is disqualified to sit in the circuit court of appeals upon the hearing of an appeal from the final decree of the circuit court in such case, by the provision of the act of March 3, 1891, § 3, that "no justice or judge before whom a cause or question may have been tried or heard in a district court or existing circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals." Rexford v. Brunswick-Balke-Collender Co. 228 U. S. 339, ante, 864, 33 Sup. Ct. Rep. 515.

A judge who appointed a receiver in a foreclosure suit, and made an order allowing him a monthly sum for services, and also rendered the final decree of foreclosure, and decrees for delivery of possession, is disqualified, by this provision, to sit in the circuit court of appeals on an appeal from the decree of another judge concerning the monthly compensation of the receiver after a compromise between him and the purchasers on the foreclosure. Moran v. Dillingham, 174 U. S. 153, 43 L. ed. 930, 19 Sup. Ct. Rep. 620. "The enactment," said Mr. Justice Gray, "alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a whole cause, or upon a single question. A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the circuit court of appeals at the hearing of the whole cause at the same or at any later stage. And, as 'a cause' in its usual and natural meaning, includes all questions that have arisen or that may arise in it, there is strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, in the court of first instance, is thenceforth disqualified to take part in the circuit court of appeals, at the hearing and decision of the cause or of any question arising therein. But, how-

"The clerk is directed to enter a decree dismissing the bill. For the present, no order concerning costs will be made in this court."

A *pro forma* decree was entered against the complainants, dismissing the bill. The case having been taken to the circuit court of appeals, that court found that one of the patents sued upon was valid and had been 648] infringed. The *decree of the district court was therefore reversed, and the case was remanded, with directions to enter a decree for damages, but without allowing an injunction. For the purpose of hearing and disposing of the case, the court of appeals was composed of two circuit judges and of the district judge who had heard the case below, had announced the memorandum opinion, and had entered the *pro forma* decree of dismissal. In disposing of the case the court, referring to the action of the trial court in entering the *pro forma* decree, said:

"In order to secure an early hearing by a full bench of this court, and with its consent, a formal decree was entered by stipu-

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ever, that may be, a judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting in the circuit court of appeals on the hearing and decision of any question in the same cause, which involves in any degree matter upon which he had occasion to pass in the lower court."

A justice of the supreme court of the District of Columbia who had no previous connection with the case except to grant at special term a preliminary injunction upon *ex parte* affidavits is not thereby disqualified to sit upon the final hearing of the case in the general term to which such case was certified in the first instance, since this was not an appeal from any order or decree rendered by him. Walter v. Ward, 3 Mackey, 65.

By the act of Congress of July 4, 1884, it was provided that no justice should act as a member of the Washington territorial supreme court in any action or proceeding brought to such court by writ of error, bill of exceptions, or appeal from any decision, judgment, or decree rendered by him as judge of the district court. This provision excludes only the judge who made the judgment from which the appeal or writ of error was prosecuted, and does not disqualify a judge who made an interlocutory order which is complained of as error on the appeal from the final judgment. Smith v. Wingard, 3 Wash. Terr. 260, 14 Pac. 596.

The Wisconsin statute provides that no judge of any appellate court shall decide or take part in the decision of any cause or matter which shall have been determined by him while sitting as a judge of any other court unless there shall not be a quorum without him. This statute excluded a judge who sustained a general demurrer to the complaint from participating in the hearing and decision of an appeal taken from the judgment rendered after a trial on the merits before another judge, where the decision on the demurrer involved a determination of a question arising on the appeal which must be disposed of before judgment can be rendered. Case v. Hoffman, 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.

An Ohio statute (55 Ohio Laws, p. 82, § 7) provided that a judge of the court of common pleas who had decided the cause in the common pleas should not sit on a review of his own decision in the district court on error or otherwise when there was a quorum in the district court without him. This statute was held in Burns v. State, 2 Ohio Dec. Reprint, 97, to apply to a criminal as well as civil proceeding.

But in Powers v. Seaton, 2 Ohio Dec. Reprint, 365, the statute was held unconstitutional on the ground that the Constitution made it the duty of each member of the court to act.

The mayor of a municipality is disqualified by Ga. Civ. Code, § 4045, from acting as a member of the court on an appeal to the city council from a conviction before him in the police court. Holliman v. Hawkinsville, 109 Ga. 107, 34 S. E. 214.

The New Hampshire statute providing that no justice shall sit in any case in which he has acted as judge in the court below applies only to the supreme court. Stearns v. Wright, 51 N. H. 600.

The voluntary declaration of counsel for the appellant before the hearing is begun, that he will not insist upon the objection to the removal of the cause from a state court, founded upon the time when the removal petition was filed, as he now believes the case was properly removed, so far eliminates that question from the case as to remove the disqualifications of the Federal district judge, who had heard and denied the motion to remand, to sit in the circuit court of appeals on appeal from the final decree of the circuit court, which would otherwise result from the provision of the act of March 3, 1891, § 3, that "no justice or judge before whom a cause or question may have been tried or heard in a district court or existng circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals." Rexford v. Brunswick-Balke-Collender Co. 228 U. S. 339, ante, 864, 33 Sup. Ct. Rep. 515.

The disqualification of the trial judge under Conn. Pub. Acts, 1899, chap. 128, to retry a case in which a new trial was granted, was not waived by merely proceeding to trial, where it was not found that the parties knew of the disqualification of the judge. State v. Hartley, 75 Conn. 104, 52 Atl. 615.

See also note to State ex. rel. Ambler v. Hocker, 25 L.R.A. 114, on disqualification of judge by prior connection with the case.

lation. On appeal the cause is now really heard at first instance, and finally by this court." [202 Fed. 933.]

On the refusal by the court below, of an application to rehear, the application for certiorari, which we are now considering, was made. It is based upon the following grounds, which it is insisted involved considerations apart from questions of mere error, of so grave a character and of such general importance as to justify the allowance of the writ of certiorari for their correction. First, the action of the trial court in failing to examine and pass upon the case, and in entering a merely *pro forma* decree as a means of expediting the ultimate and final decision of the cause in the circuit court of appeals. Second, the participation by the district judge, who had heard the case below, and had entered the decree which was under review in the hearing and decision of the case in the circuit court of appeals. Third, the public consideration which the decision of the cause involves, as demonstrated by the fact that the only act of infringement relied upon consisted in the execution by the defendants of a contract with the government for the construction of vessels of war.

As to the first ground, however much we may appreciate the sense of public duty which led the trial court virtually to decline to examine the merits of the case, and enter 649]the *pro forma* decree so that no time might be lost in taking the case to the circuit court of appeals, we do not wish to be understood as giving our sanction to such procedure. Although we say this, we nevertheless think the contention which is based upon the action of the court in this respect is without merit, first, because no objection seems to have been made concerning the matter in the trial court, and none, it also seems, was raised on the hearing in the circuit court of appeals. Indeed, that court, as we have pointed out, considered that the action of the trial court was the result of a stipulation between the parties. While it is true the accuracy of this conception of the situation is questioned in the brief filed on this hearing, by the petitioners, it is not suggested that any objection was made in the trial court to the entry of a merely *pro forma* decree, or that any error was predicated upon such action when the case was heard in the circuit court of appeals.

The second proposition is of graver moment because of the priviso to § 120, of the Judicial Code, saying "that no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit, shall sit on the trial or hearing of such cause or question in the circuit court of appeals." [36 Stat. at L. 1132, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 191.] This provision is but a reenactment of a prohibition found in the judiciary act of 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 548), and its controlling application to this case is not open to controversy. Rexford v. Brunswick-Balke-Collender Co. 228 U. S. 339, 344, ante, 864, 867, 33 Sup. Ct. Rep. 515, and cases cited.

But it is said, although the strict letter of the prohibition may be here applicable, its spirit and purpose is not here controlling because the judge who heard and disposed of the case in the first instance, and who sat in the circuit court of appeals for the purpose of reviewing his own action, did not in substance form or express an opinion on the case in the first instance, but merely entered a *pro forma* decree for[650 the purpose of enabling the case to be heard for the first time by the reviewing court, acting *pro hac vice* as a court of first instance. This contention is devoid of merit, since it must rest upon the conception that a trial judge, despite the express prohibition of the statute, may endow himself with power to sit in the court of appeals, and review a decree by him rendered if only from a mistaken sense of duty he has adjudicated the merits of a case without considering them. It is urged, however, that as no objection was made to the participation of the trial judge in the hearing and decision of the case in the circuit court of appeals, and indeed, that consent was given to his doing so, the objection is not now open, and the statute therefore should not be applied. Conceding, however, that the asserted consent was given, the error of the conclusion based upon it is conclusively demonstrated by the construction long since affixed to the statute, and quite recently reiterated and enforced in Rexford v. Brunswick-Balke-Collender Co. supra. Indeed, as pointed out in the Rexford Case, the comprehensive and inflexible character of the prohibition was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision of a case in the circuit court of appeals, when, without such consent, because of the prohibition of the statute, he would be disqualified from so doing,—a purpose whose public policy is not difficult to understand.

As the considerations just stated demonstrate that the case was tried and disposed of below, by a court organized, not in conformity to law, but in violation of the express prohibitions of the statute, we think it plainly results that an error of so grave a character, and involving considerations of public importance, was committed, as to

cause it to be our duty to allow the writ of certiorari, without at all considering, for the purpose of such allowance, the questions urged concerning the merits of the 651]cause. *In view, however, of the character of the error which causes us to allow the writ, that is, the mistaken organization of the court below, the question naturally arises, what is our immediate and further duty? That is, must we, after granting the writ, permit the case to remain on the docket until in turn it is reached for hearing, or should we at once, on the allowance of the writ, remand the case so that it may be heard and disposed of in the court below, conformably to the statute? If the first course be pursued, it is obvious not only that delay must follow, but that when the merits are heard we will be virtually exerting the powers of a court of first instance, since we will be called upon, not to review the action of a court below, organized conformably to law, but to decide, virtually in the exercise of original jurisdiction, questions which the law contemplated should be previously passed upon by an inferior court lawfully constituted. Under such circumstances we think, as pointed out in Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 267, 268, 54 L. ed. 757, 761, 762, 30 Sup. Ct. Rep. 505, our duty is not to hold the case upon the docket, for ultimate decision upon the merits, but to at once reverse and remand to the court below, so that the case may be heard by a competent court. conformably to the requirements of the statute. When, on approaching in the Lutcher & Moore Case the consideration of the merits of the case, pending because of a previous allowance of a writ of certiorari, it developed that the court of appeals had virtually failed to decide the case, and therefore that a review of the merits here would be in substance but the exercise of original jurisdiction, it was held that the duty was not to do so, but to remand the cause to the circuit court of appeals, so that that court might properly discharge the duty cast upon it by law. Such conclusion is, of course. cogently applicable here, where the question is not merely an error committed by the circuit court of appeals in failing to decide the merits, but an error 652]resulting from the fact *that the circuit court of appeals which passed upon the case was virtually no court at all, because not organized in conformity to law.

Our orders will therefore be: Writ of certiorari granted; the record of such writ to stand as a return. And, The decree of the Circuit Court of Appeals will be reversed *and* the cause remanded, with directions for *further proceedings* in conformity to this *opinion.*

IN THE MATTER OF THE APPLICATION OF J. HARRY SPENCER EX PARTE. (No. 16, Original.)

IN THE MATTER OF THE APPLICATION OF ALBERT L. SCHOLL, EX PARTE. (No. 17, Original.)

IN THE MATTER OF THE APPLICATION OF FRANK L. MOYER, EX PARTE. (No. 18, Original.)

(See S. C. Reporter's ed. 652–664.)

**Habeas corpus — as substitute for writ of error.**

1. Federal courts will not grant relief by habeas corpus on constitutional grounds to persons imprisoned under a conviction in a state court, where the petitioners failed to raise such questions either when they were brought up for sentence or on appeal to an intermediate appellate court, or by their unsuccessful petition to the highest tribunal of the state to allow an appeal to that court.

[For other cases, see Habeas Corpus, I. b, 3; II. a, in Digest Sup. Ct. 1908.]

**Habeas corpus — to review excessive sentence.**

2. A sentence imposed in excess of what was authorized by statute is not void as to the excess, so as to justify relief by habeas corpus after the legal part of the sentence has been satisfied, where, under the local practice, the sentence was subject to change, modification, or reversal in a higher court, and the accused subject to resentence.

[For other cases, see Habeas Corpus, 88–90, 177–179d, in Digest Sup. Ct. 1908.]

[Nos. 16, 17, and 18, Original.]

Argued April 28, 1913. Decided May 26, 1913.

MOTIONS for leave to file applications for writs of habeas corpus to inquire into a detention under a conviction and sentence in a state court. Rules discharged and petitions dismissed.

The facts are stated in the opinion.

Messrs. M. C. Rhone and W. H. Spencer argued the cause, and, with Mr. F. P. Cummings, filed a brief for petitioners:

Where the court imposes a sentence which is part valid and part invalid, such a sentence is valid to the extent that the court had power to impose it, although it is void as to the excess.

12 Cyc. 782; Re Johnson, 46 Fed. 477; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872.

Note.—On habeas corpus to review excessive sentence—see note to Re Taylor, 45 L.R.A. 136.

On habeas corpus in Federal courts, generally—see note to Tinsley v. Anderson, 43 L. ed. U. S. 92.

If the judgment is void, or is simply in excess of that which the law authorizes, and the same, in so far as it is authorized by law, has been performed, it may be assailed collaterally, and a habeas corpus is a proper remedy.

Ex parte Bowen, 25 Fla. 214, 6 So. 65; Crandell's Petition, 34 Wis. 177; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Feeley's Case, 12 Cush. 598; Hurd, Habeas Corpus, chap. 6, § 2.

Where a sentence has been imposed which is part legal and part illegal, and the legal part of the sentence has been performed, the power of the court is exhausted, and no second or further sentence can be imposed.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872.

Messrs. N. M. Edwards and Max L. Mitchell argued the cause, and, with Mr. A. M. Hoagland and Mr. John C. Bell, Attorney General of Pennsylvania, filed a brief for respondent:

The question of the constitutionality of the act of 1911 not having been raised by the petitioners in either the trial or appellate courts of the state of Pennsylvania, their effort to test this question in the Federal courts by habeas corpus is premature, and is an attempt to substitute writs of habeas corpus for writs of error.

Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; United States v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917, 24 Sup. Ct. Rep. 621; Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 121, 22 Sup. Ct. Rep. 72; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 377; Re Wood, 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; Ex parte Blodgett, 192 Fed. 77; Re Pikulik, 81 Wis. 158, 51 N. W. 261; Re Schuster, 82 Wis. 610, 52 N. W. 757.

Even though the Supreme Court of the United States had decided the very question under consideration, to wit, the constitutionality of the state act, and in favor of the contention of the defendant, that would not be an excuse for the defendant to ignore the state appellate court and apply to the Federal courts for a writ of habeas corpus to test the constitutionality of the state act, under which he was then convicted and sentenced.

Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455.

The minimum sentence imposed upon each of the petitioners is not void, but merely excessive; and until the legal portion of the minimum sentence has been served, applications for writs of habeas corpus are premature.

Daniels v. Com. 7 Pa. 371; Torrence v. Com. 9 Pa. 184; Mills v. Com. 13 Pa. 630; Beale v. Com. 25 Pa. 11; White v. Com. 3 Brewst. (Pa.) 30; Com. v. Barge, 11 Pa. Super. Ct. 164; Re Graham, 138 U. S. 461, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363; Re Bonner, 151 U. S. 242, 258, 38 L. ed. 149, 152, 14 Sup. Ct. Rep. 323; United States v. Pridgeon, 153 U. S. 48, 62, 38 L. ed. 631, 636, 14 Sup. Ct. Rep. 746; Harlan v. McGourin, 218 U. S. 443, 54 L. ed. 1103, 31 Sup. Ct. Rep. 44, 2 Ann. Cas. 849; DeBara v. United States, 40 C. C. A. 194, 99 Fed. 942; Ex parte Davis, 112 Fed. 139; Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; Ex parte Peeke, 144 Fed. 1016; United States v. Peeke, 12 L.R.A. (N.S.) 314, 82 C. C. A. 340, 153 Fed. 166; Connella v. Haskell, 158 Fed. 285.

Mr. Justice McKenna delivered the opinion of the court:

These applications were filed and rules to show cause were issued. They were argued together and may be disposed of in one opinion.

The petitions alleged the following:

Petitioners were indicted in the court of quarter sessions of the peace, in the county of Lycoming, state of Pennsylvania, upon a charge of conspiracy to cheat and defraud, which the indictment charged was executed on the 10th day of September, 1910.

The trial took place in June, 1912, and petitioners were each sentenced to "pay a fine of $500, costs of prosecution, and undergo an imprisonment in the Eastern Penitentiary at Philadelphia, for an indeterminate period, at separate and solitary confinement, at labor, the minimum of which should be eighteen months and the maximum two years."

The costs and fines have been paid. In execution of the sentences of imprisonment, Robert J. McKenty, warden of the penitentiary, holds petitioners in custody in violation of § 10 of article I, of the Constitution of the United States, which forbids any state to pass an *ex post facto* law, and in violation of the 14th Amendment to the Constitution of the United States, in that petitioners are deprived of their liberty without due process of law.

At the time the offense was committed (September 10, 1910), the laws of Pennsylvania provided, in § 128 of the crimes act of March 31, 1860, P. L. 382, that one convicted of the crime of conspiracy to cheat and defraud should be, on conviction, "sen-

tenced to pay a fine not exceeding $500, and [657] undergo an imprisonment at *separate and solitary confinement, at labor, or by simple imprisonment not exceeding two years." This act was amended and modified by the act of May 10, 1909, P. L. 495, known as the first indeterminate sentence act, which provided, *inter alia*, as follows:

"Whenever any person convicted in any court of this commonwealth of any crime shall be sentenced to imprisonment in either the Eastern or Western Penitentiary, the court, instead of pronouncing upon such convict a definite or fixed term of imprisonment, shall pronounce upon such convict a sentence of imprisonment for an indefinite term, stating in such sentence the minimum and maximum limits thereof, fixing as the minimum time of such imprisonment the term now or hereafter prescribed as the minimum imprisonment for punishment of such offense; but if there be no minimum time so prescribed, the court shall determine the same, but it shall not exceed one-fourth of the maximum time, and the maximum limit shall be the maximum time now or hereafter prescribed as a penalty for such offense."

By the terms of these two acts, which were the law for petitioners' punishment at the time their crime was committed, the most severe punishment which could be inflicted upon each of them was a fine of $500, and imprisonment in the penitentiary for the minimum term of six months, and a maximum term of two years.

Nearly a year after the crime was committed, the legislature of Pennsylvania repealed the act of May 10, 1909, without any saving clause, and enacted the act of June 19, 1911, under which petitioners were sentenced. By the terms of the latter act the length of the minimum term of imprisonment is wholly within the discretion of the court, provided it does not exceed the maximum term.

Petitioners will contend that the maximum sentence which could have been inflicted upon them, if the court selected the alternative imprisonment rather than the [658] *simple imprisonment, as provided in the act of 1860, would have been "not less than six months nor more than two years at separate and solitary confinement, at labor."

Petitioners, however, were sentenced each to pay a fine of $500 and costs, and to be imprisoned for an indeterminate period, the minimum of which should be eighteen months and the maximum two years.

To the rules to show cause, the answer of the warden has been filed. It asserts the legality of the sentences and the following reasons why the writs should not issue: Petitioners, after sentence, took an appeal to the superior court of Pennsylvania, where the sentences were affirmed. Subsequently they presented a petition to the supreme court of the state, praying for a special allocatur to allow an appeal from the judgment of the superior court, which petition was refused. In neither court did they raise the question of the constitutionality of the statute of June 19, 1911, or complain that the sentences were imposed under an *ex post facto* law, excessive or in other respects unconstitutional.

Afterwards, petitioners petitioned the supreme court of the state for a writ of habeas corpus to the sheriff of Lycoming county, in whose custody they then were for delivery to the warden, and in their petition raised the same questions which they now raise in their petitions here. The court refused the petition. The petitioners then applied to the judge of the district court of the United States for the middle district of Pennsylvania for habeas corpus, raising the same questions as here. The petition was refused. This action of the courts is averred to be an adjudication of the questions involved. And it is averred that the view most favorable to petitioners is that the sentences imposed upon them are legal and valid sentences for a term of at least six months, and they have not yet served so much of the term.

*The petitions and answer to them [659] indicate the contentions of the parties. The petitioners contend that their sentences are illegal, in that they were imposed under a law which is *ex post facto* and violates article I. of the Constitution of the United States, and that they are deprived of their liberty in violation of the 14th Amendment. Respondent opposes the contentions and urges besides that they have been adjudicated against petitioners, and that they are seeking to use habeas corpus as a writ of error to review and reverse the judgment of the courts of Pennsylvania. One of the contentions of respondent is that it is too late for petitioners to avail themselves of the objections they urge to their sentences; another contention is that their applications are premature, the sentences being at least valid for six months, which had not expired when the petitions were filed.

Petitioners certainly had ample opportunity to avail themselves of the objections they make to the validity of the sentences. They had it when they were brought up for sentence. They had it when they appealed to the superior court. They had it when they applied to the supreme court to allow an appeal from the judgment of the superior court. And this would have been the orderly course, and efficient as orderly. It would have been orderly because their ob-

jections would then have been made in the courts ordained to administer the law applicable to the crime; efficient, because if error was committed against constitutional rights, it could have been reviewed and corrected by this court. And surely even a defendant in a criminal case cannot complain if, in the tribunals in which he is arraigned for crime, he has opportunity to deny the crime, require its proof, resist unjust or excessive punishment, and have a review of all rulings through successive state tribunals, and finally in the ultimate court of review upon questions under the Constitution of the United States. This being 660] a defendant's opportunity, we *have declared many times that it would only be an exceptional case when we should interfere by habeas corpus with the course or final administration by the state courts of the criminal justice of a state. The cases are very numerous. They are cited in Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459, and Re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602. In those cases following other cases, the rule is laid down and some of the exceptional circumstances which might justify its departure are indicated, and the discretion which this court may exercise. In Bailey v. Alabama, 211 U S. 452, 53 L. ed. 278, 29 Sup. Ct. Rep. 141, reviewing a judgment of the supreme court of Alabama, which affirmed a judgment of a lower court, denying a discharge on habeas corpus to the plaintiff in error, we said: "If the supreme court had affirmed the denial of the discharge on the ground that the proper course was to raise the objections relied upon at the trial of the principal case on the merits, and to take the question up by writ of error, it would have adopted the rule that prevails in this court, and there would be nothing to be said."

It is true the rule has been announced in cases where habeas corpus was applied for in advance of final decision in the state courts; but the principle of the rule applies as well after decision. The rule would be useless except to enforce a temporary delay, if it did not compel a review of the question in the state court, and, in the event of an adverse decision, the prosecution of error from this court. In other words, if it gave freedom to omit such defenses in the state court and subsequent review by this court, and yet the accused have an absolute right to habeas corpus. And this case shows the necessity of the application of the rule. We have pointed out the opportunity petitioners had to object to their sentences when they were imposed, and successively to attack their validity in the appellate tribunals of the state and in this court. And this satisfies justice. More than this, that for which petitioners content, *will make unstable[661 and uncertain the administration of the criminal laws of the states. If defenses may be omitted at trials, rights of review omitted, and yet availed of through habeas corpus, the whole course of criminal justice will be deranged, and, it may be, defeated. This is the practical result in the case at bar. Petitioners contend for a discharge, having fulfilled what they consider the legal part of their sentences, but which is manifestly below what, in the law of the state, is fixed for their crime. And, illustrating their arguments, petitioners told us of other cases which are waiting to come forward with an appeal for like remedy and jail delivery.

These views dispose of the petitions, and we are not called upon to express opinion as to whether the act of 1911 is *ex post facto* because increasing the punishment of petitioners' crime after it was committed, or whether, as decided by the Supreme court of the state in Com. v. Kalck, neither that act nor the act of 1909 was intended to fix the punishment for any crime, nor to repeal the laws then in existence, prescribing penalties and punishments for different crimes. We may observe that the court, further characterizing the acts, said "they undertook to regulate, not the law which fixed the punishments, but the sentencing of convicts, and the method of releasing them on parol." And, further, that the purpose of the acts "was to regulate the control and discipline of persons convicted of crimes, with a view to their reformation." The final conclusion of the court was that the statutory punishment was neither changed nor increased by the act of 1911. " 'The maximum sentence,' " the court said, " 'is the only portion of the sentence which has legal validity, and the minimum sentence is merely an administrative notice by the court to the executive department, calling attention to the legislative policy that when a man's so-called minimum sentence is about to expire, the question of grace and mercy ought to be considered, and the *propriety of granting a qualified par-[662 don be determined.' " See Com. v. Brown, 167 Mass. 144, 45 N. E. 1.

The court decided, therefore, that both the acts of 1909 and 1911 prescribed a maximum sentence for crime, and that the provisions for indeterminate sentence, with provision for clemency, were matters of grace, and could be varied by the legislature, and

could not be condemned as *ex post facto* laws.

The remarks of the court are pertinent to the next contention of the petitioners, which is that the sentences have a legal part, to wit, the fine of $500 and costs, and an illegal part, to wit, the imprisonment, and that having fulfilled the legal part, they are entitled to be discharged from the illegal part. In support of the contention they invoke Ex parte Lange, 18 Wall. 163, 21 L. ed. 872. In that case a circuit court of the United States imposed a sentence of a fine of $200 *and* one year's imprisonment, the statute authorizing only a fine *or* imprisonment. The fine was paid, and on the next day the prisoner was brought before the court by habeas corpus, and an order was entered vacating the former judgment, and the prisoner again sentenced to one year's imprisonment. It was held that the court had not power to vacate the judgment and resentence the prisoner, that such action was double punishment for his offense, the legal part of the former sentence having been satisfied. It was further held that the judgment was void, not merely erroneous, and the prisoner was entitled to be discharged upon petition in habeas corpus. Two answers are opposed to the contention that the case is controlling of the case at bar. The case was put upon the ground that the circuit court had exhausted its power. In the case at bar the judgment of the court of quarter sessions was subject to review and modification by the supreme court. Section 1, P. L. 785, 4 Stewart's Purdon's Dig. 4514, § 30; Daniels v. Com. 7 Pa. 741; 663]Torrence v. Com. 9 Pa. 184; *Beale v. Com. 25 Pa. 11; White v. Com. 3 Brewst. (Pa.) 30.

In Daniels v. Com. the court said that under the power given by the statute cited above, it was authorized not only to reverse or affirm, but to modify a judgment; "that is, to change its form, vary, or qualify it, and this as well in criminal as in civil cases." Exercising this power, the court struck from a sentence an illegal part, and affirmed it in all other respects. The same power was exercised in Beale v. Com. In White v. Com. a judgment in excess of what was authorized by the statute was reversed and the prisoner resentenced.

The sentences imposed on petitioners were therefore not void, but erroneous only, and subject to change or modification by the supreme court, or reversal, and petitioners subject to resentence, and Ex parte Lange *does not apply.* In Re Lincoln, 202 U. S. *178, 50 L. ed. 984, 26* Sup. Ct. Rep. 602, habeas corpus was denied because there was an appeal from the judgment attacked which could have been taken to the circuit court of appeals, applying the rule which we have so often expressed, that the writ of habeas corpus is not to be used as a writ of error. And the reason is manifest. When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts; and if the judgment be excessive or illegal it may be modified or changed and complete justice done, as we have said, to the prisoner, and the penalties of the law satisfied as well. This comment is applicable to the case at bar. The supreme court of the state has decided, as we have seen, that neither the act of 1909 nor that of 1911 repealed the act of 1860, supra, which defined the statutory crime of conspiracy, and imposed upon those guilty of it a punishment by fine not exceeding $500 and imprisonment not exceeding two years.

The question then occurs, What is the effect of the act *of 1911 upon the act[664 of 1909, assuming the former to be unconstitutional? The supreme court of the state, as we have seen, has declared it constitutional, but the question has not been presented to the court as to what would be the effect of the act of 1911 if declared by this court to be unconstitutional. Necessarily this court would leave to the supreme court of the state the decision of that question, it being a state question. It would not be our duty to decide it or to anticipate the decision of that court, which might indeed reconcile the acts with the constitutional rights of petitioners. The repealing clause of the act of 1911 is not in absolute form. It repeals only acts which are inconsistent with the act of 1911. It may be declared that a void act cannot be legally inconsistent with a valid one. Shepardson v. Milwaukee & B. R. Co. 6 Wis. 605; State ex rel. Rogers v. Burton, 11 Wis. 51; Campau v. Detroit, 14 Mich. 276; Childs v. Shower, 18 Iowa, 261; Pitkin County v. First Nat. Bank, 6 Colo. App. 423, 40 Pac. 894; Birkenhead Docks v. Laird, 4 DeG. M. & G. 732, 23 L. J. Ch. N. S. 457, 18 Jur. 883, 2 Week. Rep. 7. See Schneider v. Staples, 66 Wis. 167, 28 N. W. 145. There may be cases the other way, as, it may be said, Re Medley is. 134 U. S. 160, 174, 33 L. ed. 835, 841, 10 Sup. Ct. Rep. 384. Which is the more logical rule we are not called upon to pronounce, nor to say which, under the circumstances, the supreme court of Pennsylvania might apply.

Rules discharged; petitions dismissed.

665]*SUSQUEHANNA COAL COMPANY, Appt.,
v.
MAYOR AND COUNCIL OF THE CITY OF SOUTH AMBOY et al.

(See S. C. Reporter's ed. 665–671.)

**Commerce — state taxation — property in transit.**

Pennsylvania coal shipped by its Pennsylvania owner to its own order at a New Jersey tide water port where, if no bottoms were available for its continued transportation, it was dumped into a coal depot or storage yard, to be later transferred to bottoms, as occasion required, it being the intention to keep a certain supply of coal on hand to fill anticipated orders, is subject to local taxation while in such depot or storage yard, although it is destined ultimately for ports in other states, since, under such circumstances, there was something more than an incidental interruption of the continuity of the transportation through the state.

[For other cases, see Commerce, V., in Digest Sup. Ct. 1908.]

[No. 301.]

Argued May 6 and 7, 1913. Decided May 26, 1913.

APPEAL from the Circuit Court of the United States for the District of New Jersey to review a decree which dismissed the bill in a suit to restrain local taxation of coal alleged to be in transit through the state. Affirmed.

See same case below, 184 Fed. 941.

The facts are stated in the opinion.

Mr. Alan H. Strong argued the cause, and, with Mr. James B. Vredenburgh, filed a brief for appellant:

When this coal was delivered to the railroad company as a common carrier in the state of Pennsylvania, to be delivered on board "vessels" in New York harbor, it became interstate commerce and remained so until delivered to "vessels" there, notwithstanding the delay at the railroad station because of the accidental failure of the vessels to reach South Amboy. This coal so delayed was not at rest, for an indefinite time, awaiting transportation, but was in the hands of the carrier, awaiting the delayed vessels to enable the carrier to complete its contract of carriage, and deliver the coal at its agreed destination, as in Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; State, Detmold, Prosecutor, v. Engle, 34 N. J. L. 425; State, Lehigh & W. B. Coal Co. Prosecutor, v. Carrigan, 39 N. J. L. 36.

Mr. Frederick M. P. Pearse argued the cause and filed a brief for appellees:

The property assessed was property subject to taxation in the state of New Jersey.

Lehigh & W. B. Coal Co. v. Junction, 75 N. J. L. 68, 66 Atl. 923; Lehigh & W. B. Coal Co. v. Junction, 75 N. J. L. 922, 15 L.R.A.(N.S.) 514, 68 Atl. 806; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; General Oil Co. v. Crain, 209 U. S. 211, 52 L ed. 754, 28 Sup. Ct. Rep. 475; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 56 L. ed. 168, 32 Sup. Ct. Rep. 38; I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403.

Mr. Justice McKenna delivered the opinion of the court:

Bill in equity to restrain the collection of taxes levied by the city of South Amboy upon coal belonging to appellant, *on[666 the ground that the coal was in transit from points in the state of Pennsylvania, through the state of New Jersey, to destinations outside of the latter state; and being, as it is alleged, in interstate commerce, the taxes on it were illegally levied because in contravention of the commerce clause of the Constitution of the United States.

Appellant is a Pennsylvania corporation and a dealer in coal, buying three fifths of what is sold in the years 1906, 1907, and 1908, and producing two fifths itself. Appellant shipped its coal from its mines in Pennsylvania to New York and the states east thereof by the Pennsylvania Railroad, across New Jersey, to leave the latter state at Harsimus Cove, Greenville, or South Amboy piers, the termini of the road on New York harbor. In the year 1906 it shipped 1,582,000 tons of coal; in 1907 it shipped 2,010,200 tons, and in 1908 it shipped 2,050,500. Of these amounts, 3½ per cent, 4½ per cent, and 6 per cent, respectively, were unloaded at South Amboy. The balance of

NOTE.—As to when transit of goods commenced in other state may be deemed to have been definitely interrupted, or to have terminated so as to subject the goods to local taxation—see notes to General Oil Co. v. Crain, 52 L. ed. U. S. 755, and Merchants' Transfer Co. v. Board of Review, 2 L.R.A. (N.S.) 662.

the amounts shipped passed through Harsimus Cove and Greenville piers. The cars, on arrival at the latter points, were floated across the harbor and transferred to railroads on the opposite side. The bills of lading for the coal thus shipped were made out to designated purchasers as consignees; the coal which arrived at South Amboy was consigned to appellant at such place, and was intended to be transferred to bottoms at tidewater, and shipped to states east of New Jersey. "This coal," we quote from the opinion of the district court, "was forwarded from the mines on orders from the complainant's Philadelphia agents, who issued such orders upon requisitions made upon them from complainant's New York agents. Neither the agents at the mines nor at Philadelphia knew for which particular customers the coal thus forwarded to South Amboy was intended. Complainant had a number of regular customers east of New Jersey, to whom it promised to make deliv-[667]eries on monthly contracts; the *exact requirements of such customers, in tonnage and kind of coal, were known only to the New York agents. These agents from time to time totaled such requirements, plus other orders for coal, and issued their requisition based upon such totals, to the Philadelphia agents. Such requirements and the shipments made thereunder varied in tonnage and kind of coal. At South Amboy complainant had an agent who, upon the orders of the New York agents, superintended the loading upon such bottoms of the kind and amount of coal required for designated customers. When so loaded, the master of the bottoms issued bills of lading in the name of the complainant as shipper, and particular persons as consignees. These bills of lading were sent to complainant's New York agents, whereupon the latter made out invoices to the consignees. Up to the time of loading the bottoms, the title of the coal was in complainant.

"If, upon arrival of the coal at South Amboy, bottoms were on hand to take the kind of coal arriving, such coal was transferred from the cars to the bottoms. If not, such coal was dumped into a coal depot or storage yard of the railroad company, located about 2,000 feet from the piers, equipped with derricks for the loading and unloading of coal, and where the different kinds of coal of the complainant were put into piles, which would be subsequently transferred into bottoms; not necessarily the first bottoms arriving, as the preference was given to coal subsequently arriving and still in cars. In the year 1906 the expense of dumping the coal from the cars, and its subsequent transfer into bottoms, was borne by the railroad company. Subsequently, such expense was borne by complainant." [184 Fed. 943.]

It appears from the testimony that the amount of coal in the depot or storage yard at South Amboy varied. "It went," it was testified, "to 10,000 tons, but it ranges from 20,000 up to 150,000 tons."

*The conclusion of the district court [668 was that, by the storage of coal, appellant "obtained two beneficial results: First, cars arriving when no bottoms were on hand could be released and demurrage charges saved; second, when bottoms arrived and no cars were on hand containing the kinds of coal desired, such vessels could be loaded from the piles, resulting in a saving of time in the departure of such bottoms." In other words, there was something more than the submission to delay in transportation and the acceptance of its consequences. The situation was made a facility of business, —a business conducted through agents and employees. And, it will be observed, there was valuable property kept in the state, represented by the coal, varying in quantity from 10,000 tons to 150,000 tons. There was something more, therefore, than an incidental interruption of the continuity of its journey through the state.

The principal witness in the case for appellant, assenting to the testimony of its vice president, given before the State Board of Equalization, testified that, without regard to any orders, even anticipating the market, the attempt was to keep a certain amount of coal on hand at South Amboy. This anticipation, the witnesses explained, was an anticipation of orders from regular customers in the near future, the witness saying that while there was no order for it, still there was an implied order; "that is, an implied order and a regular condition of trade, and to supply that trade we keep that coal there. . . . The condition was, to take care of the trade that was regular; and this coal was not kept there for that purpose: it was there from an overplus, or inability to load it in boats, and therefore was to fill these implied contracts and orders,—they weren't orders, but were implied contracts." This is confusing, but it is manifest that the coal was used to fill anticipated orders,—orders not immediately made, but, it may be, certain to be made. It *does not appear how they could[669 be filled, uncertain in time as they were, except from the accumulations at South Amboy. Indeed, it is in the testimony that without such accumulations the orders might strike a period when there were no cars and no coal, and then customers would suffer.

It is clear, we repeat, that such trade

could only be accommodated through the storage of coal somewhere, and appellant availed itself of the conditions to put the storage in New Jersey.

The coal, therefore, was not in actual movement through the state; it was at rest in the state, and was to be handled and distributed from there. Therefore, the principles expressed in General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475, and Bacon v. Illinois, 227 U. S. 504, ante, 615, 33 Sup. Ct. Rep. 299, are applicable to it. The products in neither of those cases were destined for sale in the states where stored; the delay there was to be temporary,—a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the state. In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the state.

In Bacon v. Illinois, the grain which was taxed had been shipped by the original owners, who were residents of southern and western states, under contracts for its transportation to New York and Philadelphia and other eastern cities, with a reservation to the owners to remove it from the cars at Chicago for certain temporary purposes," or change the ownership, consignee, or destination thereof." The grain, while in transit, was purchased by Bacon, he succeeding to the rights of the vendors. Upon arrival of the grain at Chicago, he exercised the right to remove it from the cars to his private elevator, to avail himself of the privilege reserved. The privilege being exercised, he turned the grain over to the 670]railroad companies *for transportation in accordance with original contracts. After commenting upon the power he had over the grain while in Chicago, we said: "He had established a local facility in Chicago for his own benefit; and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination." For this conclusion cases were cited. It was further said: "The property was held within the state for purposes deemed by the owner to be beneficial."

In General Oil Co v. Crain, oil contained in tanks at Memphis, Tennessee, was subject to an inspection tax. The oil was shipped to Memphis from producing and refining points in Ohio and Pennsylvania, and handled in tank cars and other receptacles, to be forwarded to customers in Arkansas, Louisiana, and Mississippi, in which states the oil company had many regular customers from whom it always had on hand many unfilled orders for oil to be delivered as soon as possible or convenient. At Memphis the oil company maintained two tanks, one of which was plainly marked: "Oil already sold in Arkansas, Louisiana, and Mississippi," and which remained in Memphis only long enough (a few days) to be properly distributed according to the orders therefor. The other tank or vessel was for oil sold in those states, and kept separate and apart until orders should be received from customers in those states. The oil was never sold otherwise than upon such orders. We said of this situation that the company was doing business in the state, and that its property was receiving the protection of the state. Its oil was not in movement through the state. To the contention that the oil was only there for distribution and to fulfil orders already received, we said: "It required storage there,—the maintenance of the means of *storage, of putting it in[671 and taking it from storage." In that case and in Bacon v. Illinois we considered the cases relied on here by appellant, in which particular exercises of the state power were decided to be in conflict with the paramount authority of Congress over interstate commerce. We need not again review the cases. We are not unmindful of their principle and reasoning, and the difficulty presented in them and presented here of marking the line of dominion between the national and state jurisdiction. The one is as necessary as the other to be preserved.

It is contended by appellees that the basis of the taxes of all three years is the same, and that the taxes of 1906 were attacked by proceedings in the New Jersey state courts, the same grounds of legality being asserted there as here (Susquehanna Coal Co. v. South Amboy, 76 N. J. L. 412, 69 Atl. 454, 77 N. J. L. 796, 72 Atl. 361), and that therefore the decision of the state court is *res judicata*. The views we have expressed make it unnecessary to pass upon the contention or to consider—the question not being raised—whether the decision as to the taxes in 1906 is an adjudication also under the laws of the state of the taxes of 1907 and 1908. See New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Deposit Bank v. Frankfort, 191 U. S. 513, 48 L. ed. 281, 24 Sup. Ct. Rep. 154; Citizens' Bank v. Parker, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181.

Judgment affirmed.

672]*WILLIAM SCOTT WOOD, Miriam Berry Wood, Cornelia Wood Hume, and Mary Scott Wood, Plffs. in Err.,
v.
ABRAM M. CHESBOROUGH, Fremont B. Chesborough, et al.

(See S. C. Reporter's ed. 672–680.)

**Error to state court — Federal question — decision on non-Federal ground.**

A decision of the state court adverse to the parties asserting a title to lands under state grants, which they claim cannot be defeated without a denial of Federal constitutional immunities, is not reviewable by writ of error from the Federal Supreme Court, where the state court rested its decision upon the effect of a decree in another suit as *res judicata*, and on the statute of limitations and laches as barring an attempt to vacate such decree.

[For other cases, see Appeal and Error, 1465–1528. in Digest Sup. Ct. 1908.]

[No. 257.]

Argued April 24 and 25, 1913. Decided May 26, 1913.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancery court of Marion County, in that state, dismissing a suit to quiet title. Dismissed for want of jurisdiction.

See same case below, 95 Miss. 63, 48 So. 613.

The facts are stated in the opinion.

Messrs. **Frank Boughton Fox** and **Duane E. Fox** argued the cause, and, with Mr. Robert E. Bunker, filed a brief for plaintiffs in error:

While it is not unusual to state broadly that this court will not review questions of general or local law decided by a state supreme court, nevertheless, if the pleadings or proceedings in the state court present or disclose the assertion of a Federal right or constitutional immunity, this court has jurisdiction to review the decision of the state court, even though that decision is based entirely upon questions of general or local law, and the decision of this court may decide those questions only. This court will review the decision of the state court and determine whether it has properly or correctly decided the questions of general or local law.

Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Given v. Wright, 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Southern P. Co. v. Schuyler, 227 U. S. 601, ante, 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

State courts have, at times, shaped their decisions with a view to prevent review by this court. But a state court may and does deny a constitutional right or immunity by evading, through local law or practice, a direct decision thereon as well as by expressly denying it.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 668, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540-549, 31 L. ed. 235–238, 8 Sup. Ct. Rep. 211; Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257.

In so far as the question of local law upon which a state court purports to base its decision is dependent upon facts, this court can inquire into the record.

Southern P. Co. v. Schuyler, 227 U. S. 601, ante, 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389.

Mr. **T. M. Miller** argued the cause and filed a brief for defendants in error:

In the instant case, it cannot be affirmed that the supreme court of the state has held against a right claimed under the Federal Constitution, or that the judgment involved a decision of such a question. In such circumstances, there would seem to be nothing for this honorable court to consider.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 38, 31 L. ed. 614, 8 Sup. Ct. Rep. 741; Erwin v. Lowry,

NOTE.—On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—*see note* to Mutual L. Ins. Co. v. *McGrew, 63 L.R.A. 33.*

7 How. 172, 12 L. ed. 655; Murdock v. Memphis, 20 Wall. 591, 22 L. ed. 429; Pierce v. Somerset R. Co. 171 U. S. 648, 43 L. ed. 319, 19 Sup. Ct. Rep. 64; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 350, 46 L. ed. 943, 22 Sup. Ct. Rep. 691.

The question respecting laches is whether it is so intermingled with that of Federal right that the former cannot be considered an independent matter. If it is not so intermingled, then it is beyond the purview of the judiciary act authorizing writs of error from the state courts to the Supreme Court. That is to say, where the decision of the state court is based upon laches, as in the case at bar. And the same is true of limitations, the decision here resting upon both limitations and laches.

Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

672] *Mr. Justice McKenna delivered the opinion of the court:

This suit concerns the title to certain lands in the state of Mississippi. There was an original and an amended bill. The original bill was one to quiet title simply. An answer was filed to it which, among other defenses, set up the decree, hereafter referred to, and adverse possession under the decree. Other defendants were brought in and an amended bill filed. The bills allege the following: Plaintiffs derive title through a patent to the state under the swamp act of 1850 [9 Stat. at L. 519, chap. 83], and patent from the state to the Pearl River Improvement & Navigation Company in 1871, certain conveyances on account of a sale for taxes, and an act of the legislature of the state, approved April 19, 1873, by which, it is alleged, all the acts, deeds, and proceedings of the Pearl River Improvement & Navigation Company were ratified, approved, and confirmed.

On the 14th of October, 1891, the defendant the Southern Pine Company brought a suit making three of the plaintiffs in this suit defendants, in which it was alleged, among other things, that the company was the owner of the lands described, and that the plaintiffs herein asserted title thereto, and prayed that it be canceled, as it cast a cloud upon the title of the company. The plaintiffs (defendants in that suit) made their answer a cross bill and prayed that the title of the Southern Pine Company be canceled as a cloud on their title.

Plaintiffs employed one E. E. Baldwin, who was then and for many years thereafter engaged in the practice of the law at Jackson, Mississippi, to conduct the suit for them. By virtue of his employment he appeared at the November term of court in 1891 and at each subsequent *term[674 until the July term, 1895. During that time nothing was done in the case. Baldwin was paid to conduct the suit from its inception to its termination, but, unknown to plaintiffs, early in October, 1895, he was afflicted with a severe stroke of paralysis, and another in May, 1896, and from that time plaintiffs were informed and believed that he became mentally and physically incapacitated from looking after his engagements.

At the July term, 1896, while plaintiffs were absent from the state, they being nonresidents, and while Baldwin, their counsel, was incapacitated and not cognizant of what was going on, the Southern Pine Company set down the case for final hearing, and at its request a decree was rendered, canceling plaintiffs' title to the lands as a cloud upon that of the Southern Pine Company. The record was made part of the bill. Neither of the plaintiffs had any knowledge or information of the rendition of the decree nor of the incapacity of their counsel until the latter part of the year 1900 or the first of the year 1901, when they began to take steps to assert their rights in the premises.

Plaintiffs allege that under the circumstances the decree should be set aside and held to be absolutely void. And it is alleged that while the suit was pending, the Southern Pine Company conveyed the lands to the defendant, A. M. Chesborough, who conveyed undivided interests therein to other defendants, and that they claim title to the lands by virtue of the conveyances and the decree in favor of the Southern Pine Company.

There were demurrers to the bills, which were overruled, and defendants answered. The answer denied the validity of the acts of 1871 and 1873, under which plaintiffs claimed, and the validity of the title asserted through them; admitted that the Southern Pine Company brought suit as alleged by plaintiffs, and that a decree was rendered therein, and averred that the latter was *res judicata;* *alleged the[675 belief that Baldwin, plaintiff's counsel, abandoned the defense of that suit for the reason that the supreme court of Mississippi had decided in the case of Hardy v. Hartman, 65 Miss. 504, 4 So. 545, and the United States circuit court for the eastern district of Mississippi, in Bradford v. Hall, 36 Fed. 801, that the patents issued to the Pearl River Improvement & Navigation Company were null and void, and no defense could have been interposed to the suit. To the amended bill as a bill of re-

view defendants pleaded the statute of limitations of two years and laches.

Testimony was submitted and there was an agreed statement of facts. A decree was entered dismissing the original and amended bills. It was affirmed by the supreme court of the state. 95 Miss. 63, 48 So. 613.

The supreme court rested its decision entirely upon the decree rendered in the suit of the Southern Pine company, and, stating the facts, said that the Southern Pine Company claimed by virtue of patents issued by the state subsequent to 1871, and plaintiffs (defendants in that suit) claimed under the Pearl River Improvement & Navigation Company act of 1871, dealt with in the case of Hardy v. Hartman, supra. The case, the court further said, was continued from term to term, and was finally submitted upon the pleadings, certain exhibits and documentary evidence, and a decree rendered for the company, confirming its title and canceling that of the defendants. The decree was not appealed from within the two years allowed by law for taking appeals. In 1902, six years after the rendition of the decree, plaintiffs filed their original bill. Upon hearing, and being met by a plea of *res judicata*, they filed an amended bill, seeking to have the decree set aside because their attorney was too ill to give the case proper attention. This illness, the court, however, said, came to the knowledge of plaintiffs three and one-half years before it was sought to set aside the decree. "In this state of facts," the 676]court continued, *"there is no escape from the authority of Brooks v. Spann, 63 Miss. 198, and an attentive examination of that case will show that it can make no difference whether the amended bill is or is not technically a bill of review. Furthermore, we do not think there is such diligence shown by appellants [plaintiffs in error] in this case, as would entitle them to vacate the former decree, even though no statute of limitations barred the way. We cannot see our way clear to go further than this and decide the other important and interesting questions presented, since the action of the court in upholding the plea of *res adjudicata* disposes of the case."

It will be observed that the trial court based its decision upon the effect of the decree in favor of the Southern Pine Company as an adjudication of the issues, and that the supreme court rested its decision mainly upon the statute of limitations and laches.

A motion is made to dismiss on the ground that the case was decided upon non-federal questions sufficient to sustain the *judgment. The* motion is resisted by plaintiffs. *They contend* that the ground urged for its support does not apply because they "consistently pleaded and continually urged constitutional immunities," and that the jurisdiction of this court "cannot be ousted by mere action of the state court in ignoring and refusing to consider such constitutional questions," by assuming that its decision on a point of local law is decisive of constitutional questions; "particularly when the decision of the points of general and local law necessarily include a consideration of the constitutional immunities." An elaborate argument is submitted to establish these contentions. The foundation of it is that Federal questions were essentially involved and their decision was evaded by the supreme court. These questions arose, it is contended, by the impairment of the contract constituted by the acts of 1871 and 1873, under which plaintiffs claim title, by the repeal of those acts by the legislature of the state, and the *cancela-[677 tion of the titles founded upon them in the hands of bona fide transferees, and by executive action pursuant to the repealing acts, granting the lands to others. Such action, it is contended, "impaired the obligation of contracts by legislative enactment, and deprived the plaintiffs of property without due process of law."

The contention undoubtedly presents a Federal question, and, on account of it, it is said that we may review the local questions on which, we have seen, the supreme court of the state based its decision. It is, however, argued that "if the pleadings or proceedings in the state court present or disclose the assertion of a Federal right or constitutional immunity,, this court has jurisdiction to review the decision of the state court, even though that decision is based entirely upon the questions of local law, and the decision of this court may decide those questions only." This is, in effect, saying that in all cases if there be local and Federal questions, we may pass upon both and reverse the state court upon both. And yet it is well established that if there be Federal and non-Federal grounds and the latter be sufficient to support the judgment of the state court, there can be no review by this court. And certainly the application of laches and the statute of limitations does not present a Federal question. Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Preston v. Chicago, 226 U. S. 447, 450, ante, 293, 33 Sup. Ct. Rep. 177.

Plaintiffs, however, advance their contention with confidence and attempt to support it by a citation of cases. We need not review them all. They do not impugn the doctrine that there may be a non-Federal question decided broad enough to support

the state court's decision which we are without power to review, though there may also be Federal questions in the case. They only hold that the sufficiency of the Federal right set up cannot be evaded if necessary to the determination, of the case, and, it may be admitted, that of such 678]necessity this court must in *each instance decide. Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, is an example, and also Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822, and Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316. Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211, is an illustration of the doctrine and its explanation. In Creswill v. Grand Lodge, K. P. it is decided that this court will review the findings of fact by a state court (a) where the Federal right was denied as a result of them and there is no evidence to support them, a question of law hence resulting for decision; and (b) where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be necessary, for the purpose of passing on the Federal question, to analyze and dissect the facts. To the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right.

Neither condition exists in the case at bar. It comes, instead, under the principle of Chapman v. Goodnow. There the Federal question alleged to have been involved in a former decree, and to which due faith and credit under the Constitution of the United States, it was insisted, should have been accorded, was held to be superseded by a new promise. So in the case at bar. The rights of plaintiffs based on the act of 1871, under which the patent to the Pearl River Improvement & Navigation Company was issued, and the confirmatory act of 1873, were determined in the suit of the Southern Pine Company against certain of the plaintiffs, and through whom title is deraigned. That decree stood as an obstruction to the assertion of plaintiffs' title. They attacked it in their amended bill and sought to have it reviewed and set aside. The trial court denied the prayer of the bill and held the decree *res judicata*. The supreme court decided that the statute of limitations of the state precluded the relief sought, and for the decision cited Brooks v. Spann, 63 Miss. 198. The court further decided that "even though no stat-679]ute *of limitations barred the way," there was no "such diligence shown by plaintiffs to entitle them to vacate the former decree."

In Brooks v. Spann, to avert the effects of a plea of *res judicata* against the cause of action set up, an amendment was made which asserted not only the original grounds of recovery, but also averred that the suit, the decree of which was so pleaded, was instituted and prosecuted without the consent, knowledge, or procurement of the party against whom it was rendered. A demurrer to the bill set up, among other grounds, the statute of limitations of the state. Commenting on the decree, the court said that it presented, if valid, an insurmountable obstacle to the suit; it had to be attacked and nullified, or all controversy over its subject-matter was by it forever foreclosed. Holding that the suit was barred by the statute of limitations, the court said: "There is no statute of limitations applicable by its terms to the right to annul the decree, but in the absence of such statute the court will adopt that one which is applicable to analogous rights. By §§ 2680 and 2681 of the Code of 1880 the time in which bills of review and appeals may be prosecuted is limited to two years, and by § 2075 a like limitation is imposed upon the right to surcharge and falsify the accounts of executors, administrators, and guardians. It thus appears that for errors of law or fact, in the classes of cases named in these statutes, a uniform limitation of two years has been declared and within such time, we think, persons having notice of decrees affecting their rights, which for fraud or other sufficient reasons should be vacated by the courts, ought to take action; failing in which, relief should be denied. Plymouth v. Russell Mills, 7 Allen, 433; Evans v. Bacon, 99 Mass. 213; Gordon v. Ross, 63 Ala. 363."

The supreme court, in the case at bar, accepted this decision as determining the law of the state, and we cannot *re-[680 view its judgment and give a different interpretation of that law. That case and this have many features of resemblance. The suit and decree pleaded in that case was a suit and decree in the state court. The suit at bar was commenced in the state court, and the decree pleaded and which is sought to be set aside was rendered in the same court. It was subject, therefore, to the local procedure and local laws. If we should assert a power of review in such case, we could exercise like power in all cases where Federal questions are set up, and substitute our judgment for the judgment of the state courts as to the state laws.

We may say, in conclusion, that there are many cases illustrating the power of the states over the pleadings and practice in their courts, and the right to prescribe within what time and upon what conditions

suits can be commenced and maintained. Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412.

The motion to dismiss must be, and it is, granted.

Dismissed.

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CHICAGO DOCK & CANAL COMPANY, Plff. in Err.,

v.

KATHERINE A. FRALEY, as Administratrix of the Estate of Gertrude V. Claffy, Deceased, Def. in Err.

(See S. C. Reporter's ed. 680–688.)

**Constitutional law — equal protection of the laws — classification — guarding open shafts.**

Requiring the inclosure by a substantial barrier of shafts or openings in the floors of a building in the course of construction through which is operated an elevator or hoist for the purpose of lifting materials to be used in such construction, as is done by Ill. Laws 1907, p. 312, § 7, does not deny the equal protection of the laws because the act does not require other unenclosed openings in the buildings or outside hoists to be guarded, nor because it distinguishes in § 6 between buildings in cities and buildings in villages, and makes a distinction in §§ 2 and 3 between houses used exclusively for private residences and other structures as to the strength of the supports for joists.

[For other cases, see Constitutional Law, IV. a, 1, in Digest Sup. Ct. 1908.]

[No. 286.]

Argued and submitted May 2, 1913. Decided May 26, 1913.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Superior Court of Cook County, in that state, in favor of plaintiff in an action for death. Affirmed.

See same case below, 249 Ill. 210, 94 N. E. 551.

The facts are stated in the opinion.

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NOTE.—As to liability of master for injury to employee, caused by elevator not inclosed, as required by statute or ordinance —see note to Fowler Packing Co. v. Enzenperger, 15 L.R.A.(N.S.) 784.

On equal privileges and immunities, *generally*—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Mr. Morse Ives argued the cause and filed a brief for plaintiff in error:

Section 7 of the act under consideration violates the "equal protection of the laws" clause of the 14th Amendment because the classification it seeks to make is according to minute rather than general distinctions.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 176, 1 N. C. C. A. 875.

It does not bring within its purview all those who are in substantially the same situation or circumstances.

Chicago, M. & St. P. R. Co v. Westby, 102 C. C. A. 65, 178 Fed. 624; Lippman v. People, 175 Ill. 107, 51 N. E. 872, 11 Am. Crim. Rep. 356.

The test is the use of a particular hoistway in a particular manner, for elevated materials to be used for a particular purpose. The lifting of the same materials, elevated in the same quantities in another hoistway, either in a different manner and for the same purpose, or in the same manner, but for a different purpose, is not condemned. This classification is entirely unnatural and wholly arbitrary, and therefore invalid.

Nicol v. Ames, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255; State ex rel. Rolston v. Chicago, B. & Q. R. Co. 246 Mo. 512, 152 S. W. 28; Connolly v. Union Sewer Pipe Co. 184 U. S. 541, 564, 46 L. ed. 682, 691, 22 Sup. Ct. Rep. 431.

But even if § 7 be held to be constitutional, yet so many other sections of the act are unconstitutional that the whole legislative scheme must fall, and therefore the section cannot stand by itself.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 692, 22 Sup. Ct. Rep. 431; Mathews v. People, 202 Ill. 406, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; Chicago v. Burke, 226 Ill. 203, 80 N. E. 720.

Mr. James C. McShane submitted the cause for defendant in error:

The statute in question is remedial in its nature, and should not be strictly construed.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

While the act is designed for the protection and safety of persons in and about the construction, repairing, alteration, or removal of buildings, bridges, viaducts, and other structures, still it is not necessary that the act should cover the entire field of dangers to which such persons are ex-

posed. The question here is one of power of the legislature to enact legislation of this class, and this court should not be concerned with mere matters of policy or wisdom of such legislation.

Rosenthal v. New York, 226 U. S. 260, ante, 212, 33 Sup. Ct. Rep. 27; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.

Employers' liability laws, relating to railroads, and even as covering all employees of railroads, whether engaged in hazardous occupations or not, have been held constitutional by this court, and the classifications therein made, proper.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, 37, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35–44, 55 L. ed. 78–81, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243; Aluminum Co. v. Ramsey, 222 U. S. 251–256, 56 L. ed. 185–189, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 251; Missouri P. R. Co. v. Castle, 224 U. S. 541–546, 56 L. ed. 875–879, 32 Sup. Ct. Rep. 606; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Even if § 7 be held to apply only to hoists and elevators within a building, or even if subject to other criticisms made by counsel for plaintiff in error, such discriminations have a reasonable basis, and are therefore not contrary to the 14th Amendment to the Constitution of the United States.

Quong Wing v. Kirkendall, 223 U. S. 59–65, 56 L. ed. 350–352, 32 Sup. Ct. Rep. 192; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Central Lumber Co. v. South Dakota, 226 U. S. 157, ante, 164, 33 Sup. Ct. Rep. 66.

The provisions of § 6, even if held to be limited to such buildings within cities as are mentioned in this section, are not, on that account, unreasonable.

Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92.

But if this section of the act should be held unconstitutional, if so limited to buildings in cities, then, in order to save the constitutionality of the section, it would be proper to construe the section as not so limited.

Sections 2 and 3 of the act are not unconstitutional because they except from its provisions a private house used exclusively as a private residence.

Arms v. Ayer, 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851.

Even if some of the sections of the act, other than § 7, should be held unconstitutional, yet if § 7 is constitutional, it is separable from the others, and the others are so separated from the act as a whole, that § 7, and the act, as a whole, are valid.

Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 387, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247.

The statute is, in the main, an adoption of a New York statute upon the same subject, and the portion of § 7 in question is a verbatim copy of a portion of a corresponding section of the New York act (§ 20, chap. 192, Sess. Laws [N. Y.] 1899, vol. 1), and that section has been repeatedly enforced by the New York courts (Conroy v. Acken, 110 App. Div. 50, 96 N. Y. Supp. 530; Rooney v. Brogan Constr. Co. 107 App. Div. 258, 95 N. Y. Supp. 1, 121 App. Div. 919, 106 N. Y. Supp. 1143, 194 N. Y. 33, 86 N. E. 814; McNeill v. Bottsford-Dickinson Co. 128 App. Div. 544, 112 N. Y. Supp. 867; McHugh v. Grand Cent. Bldg. Constr. Co. 133 App. Div. 100, 117 N. Y. Supp. 714); and, so far as we have been able to find, its constitutionality has never been questioned.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error is directed to review a judgment of the supreme court of the state of Illinois, affirming a judgment in an action brought by Gertrude V. Claffy, against plaintiff in error, for the violation of § 7 of a statute of the state, entitled, "An Act Providing for the Protection and Safety of Persons in and about the Construction, Repairing, Alteration, or Removal of Buildings, Bridges, Viaducts, and Other Structures, and to Provide for the Enforcement Thereof." Laws of 1907, p. 312.

Section 7 reads as follows:

"If elevating machines or hoisting apparatus are used within a building in the course of construction, for the purpose of lifting materials to be used in such construction, the contractors or owners shall cause the shafts or openings in each floor to be inclosed or fenced in on all sides by a substantial barrier or railing at least 8 feet in height. . . ."

Section 9 gives a right of action for a wilful violation of or failure to comply with any provisions of the act to the person injured, or, in case of loss of life, to his widow, lineal heirs, adopted children, or persons dependent upon him, for damages so sustained.

Gertrude V. Claffy, widow of Charles E. Claffy, brought suit against plaintiff in

error and one Henry Erickson for causing the death of her husband through violation of the act. The defendants filed separate 685]demurrers to the *declaration, which were overruled. An additional count was filed by the plaintiff in the action which set out with detail the cause of action. The defendants answered, and, upon a trial to a jury, a verdict of $10,000 was returned against defendants. A new trial was granted as to Erickson, and $2,500 of the amount found remitted, and a judgment entered against plaintiff in error here for the sum of $7,500. It was sustained by the supreme court of the state. Subsequently, Gertrude V. Claffy having died, her administratrix, defendant in error here, was substituted as appellee in the supreme court.

The facts are these: Plaintiff in error was the owner of a large building in the course of construction in Chicago, and Erickson was the contractor for its erection. The deceased was employed by the plumbing contractor, and, in the course of his employment, was working in the building.

In the building there was an elevator or hoist, operated through a shaft or opening, for the purpose of lifting materials to be used in the construction of the building. It was not inclosed or fenced in as required by § 7 of the act. Deceased was at work upon a pipe immediately alongside of the shaft, and accidentally fell into and down through it a distance of six stories.

The contention of plaintiff in error is here, as it was in the state courts, that §§ 7 and 9 of the act violate the 14th Amendment to the Constitution of the United States in that they deny to him the equal protection of the laws. He specifies as grounds of his contention that the classification of the statute is based upon minute rather than general distinctions, that it does not bring within its purview all of those who are in substantially the same situation and circumstances, in that it distinguishes between openings required for hoisting or lowering materials to be used in construction and stairways and elevator shafts. Section 7, counsel says, "requires that but one of these classes be barricaded; 686]namely, those openings used *for hoisting materials to be used in construction." And, asserting the purpose of the act to be to protect those lawfully on the premises against danger from falling materials, he adds, "that in a case like this, use cannot be made the test. Danger is the thing;" and hence concludes that the classification of the statute, not having relation to its purpose, is arbitrary.

*That danger is the test* may be conceded, *but there may be degrees* of it, and a difference in degree may justify classification. Mutual Loan Co. v. Martell, 222 U. S. 225, 236, 56 L. ed. 175, 180, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913 B, 529. Who is to judge of the danger, whether absolutely considered or comparatively considered? Is it a matter of belief or proof? If of belief, we should be very reluctant to oppose ours to that of the legislature of the state, informed, no doubt, by experience, of conditions, and fortified by presumptions of legality, and confirmed, besides, by the opinion of the supreme court of the state. Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301; Adams v. Milwaukee, 228 U. S. 572, ante, 971, 33 Sup. Ct. Rep. 610. If of proof, there is none in the record. There are assertions by counsel, and considering alone the openings necessary for hoisting machinery and the openings for stairs and other openings, an employee or materials can be imagined as falling through one of them with the same ease as he or the materials can through the others. But other things must be taken into account. The setting of the openings must be considered, the varying relations of the employees to them, and other circumstances. The legislation cannot be judged by abstract or theoretical comparisons. It must be presumed that it was induced by actual experience, and New York, it is said, has been induced by a like experience to enact like legislation. If it be granted that the legislative judgment be disputable or crude, it is, notwithstanding, not subject to judicial review. We have said many times that the crudities or even the injustice of state laws are not redressed by the 14th Amendment.

*The law may not be the best that[687 can be drawn, nor accurately adapted to all of the conditions to which it was addressed. It may be that it would have been more complete if it had gone farther and recognized and provided against the danger that all uninclosed openings in a building might cause, and should not have distinguished between hoists inside of a building and those outside; but we do not see how plaintiff in error is concerned with the omissions. It is not discriminated against. All in its situation are treated alike. What the statute enjoins, it enjoins not only of plaintiff in error, but of all similarly situated. What it does not enjoin, plaintiff in error cannot complain of. "The Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment." Rosenthal v. New York, 226 U. S. 260, 271, ante, 212, 217, 33 Sup. Ct. Rep. 27.

Counsel attacks other sections of the

statute "to show," as he says, that "the whole scheme of the statute is based upon those 'minute distinctions' condemned in the Mondou and Ellis Cases (223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255), and, secondly, to demonstrate, if we can, that, as we urged in the state court, so much of the act is unconstitutional that all must fall." The state court did not yield to the contention nor its asserted consequences. Nor can we yield to it. Its foundation is based on the distinction made between buildings in cities and buildings in villages (§ 6); the distinction between houses exclusively for private residences and other constructions as to the strength of the supports for joists (§§ 2 and 3); the distinction between the protection required for men working upon swinging and stationary scaffolds used in the construction, alteration, repairing, removing, cleaning, or painting of buildings, and that given to advertising agents. (Sections 1 and 5.) Sections 2 and 3 must fall, it is contended, because of the exception of private residences; section 6, because of its limitations to cities; sections 1 and 5, be-688]cause they discriminate between "the indicated classes. It is enough to say of these contentions—(1) of the asserted discrimination in §§ 1 and 5, plaintiff in error cannot complain, and, so far as it is made a criticism of the statute, we are not concerned with it; (2) of the distinction made by the other sections, they are within the power of classification which the legislature possesses.

Judgment affirmed.

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ROY BROOKS, Plff. in Err.,
v.
CENTRAL SAINTE JEANNE.

(See S. C. Reporter's ed. 688–695.)

**Master and servant — fellow servants — volunteer.**

1. A person consenting to aid in hauling a boiler to a sugar mill, whether a volunteer or not, must be regarded as a fellow servant with the driver of the mill owner's automobile during a trip taken for the purpose of doing the work, so as to preclude any recovery against such owner for injuries received by the former through the driver's negligence.

[For other cases, see Master and Servant, II. d, 5, in Digest Sup. Ct. 1908.]

**Evidence — presumption — foreign law.**

2. The common-law fellow-servant rule must be assumed to have existed in Porto Rico, in view of the provisions of Porto Rico Rev. Stats. & Codes 1902, p. 150, adopting the English employers' liability act, that the master shall be liable in certain specific cases for injuries caused by the negligence of a fellow servant, and that the act shall not apply to injuries caused to domestic servants or farm laborers by fellow employees.

[For other cases, see Evidence, II. b, in Digest Sup. Ct. 1908.]

**Trial — question for jury — negligence.**

3. Evidence that it was the custom of an employee to drink while driving his employer's automobile, and that he was "not in the mood or attitude which he usually had when we worked together in the shops," does not require the submission to the jury of the question whether the employer might be liable for injuries to a fellow servant caused by the driver's negligence, on the ground that the master employed an incompetent servant.

[For other cases, see Trial, VI. c, 21, in Digest Sup. Ct. 1908.]

[No. 283.]

Submitted May 2, 1913. Decided May 26, 1913.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment entered on a verdict directed in favor of the defendant in an action for personal injuries. Affirmed.

The facts are stated in the opinion.

Messrs. N. B. K. Pettingill and George H. Lamar submitted the cause for plaintiff in error:

Plaintiff's rights were the same as if he had had no business connection of any kind with defendant company, but had been a stranger, riding as a passenger by invitation issued under due authority.

Union P. R. Co. v. Fort, 17 Wall. 553, 21 L. ed. 739; Northern P. R. Co. v. Hambly, 154 U. S. 349, 357, 38 L. ed. 1009, 1012, 14 Sup. Ct. Rep. 983; Fletcher v. Baltimore & P. R. Co. 168 U. S. 135, 138, 42 L. ed. 411, 412, 18 Sup. Ct. Rep. 35.

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NOTE.—As to fellow servants and their negligence, generally—see notes to Hough v. Texas & P. R. Co. 25 L. ed. U. S. 612; Coyne v. Union P. R. Co. 33 L. ed. U. S. 651; Quebec S. S. Co. v. Merchant, 33 L. ed. U. S. 656; Baltimore & O. R. Co. v. Baugh, 37 L. ed. U. S. 773; and Central R. Co. v. Keegan, 40 L. ed. U. S. 418.

On presumption as to law of other state or country—see notes to Brown v. Wright, 21 L.R.A. 471; and Cherry v. Sprague, 67 L.R.A. 40.

On liability of master for injury to volunteer—see notes to Evarts v. St. Paul M. & M. R. Co. 22 L.R.A. 663; Grissom v. Atlanta & B. Air Line R. Co. 13 L.R.A.(N.S.) 561; and Hunter v. Corrigan, 43 L.R.A.(N.S.) 187.

A gratuitous passenger may recover from the owner for negligence of driver.

Little v. Hackett, 116 U. S. 366, 371, 29 L. ed. 652, 654, 6 Sup. Ct. Rep. 391; New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. L. 171, 54 Am. Rep. 126, 12 Am. Neg. Cas. 258; Crampton v. Ivie Bros. 126 N. C. 894, 36 S. E. 351; Frerker v. Nicholson, 41 Colo. 12, 13 L.R.A.(N.S.) 1122, 92 Pac. 224, 14 Ann. Cas. 730; Clark v. Wright, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 747, 2 Am. Neg. Rep. 100; Wilson v. Puget Sound Electric R. Co. 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50; Chadbourne v. Springfield Street R. Co. 199 Mass. 576, 85 N. E. 737; Johnson v. Coey, 237 Ill. 88, 21 L.R.A.(N.S.) 81, 86 N. E. 678; Gresh v. Wanamaker, 221 Pa. 28, 69 Atl. 1123; Routledge v. Rambler Automobile Co. — Tex. Civ. App. —, 95 S. W. 749.

The ordinary rule for negligence cases is applicable.

Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

The principles of the American law are applicable unless such principles are varied by local statutes.

Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261.

Porto Rico statutes announce principles in substantial harmony with the American law.

Redinger v. Crespo, 18 P. R. R. 106; 12 Manresa's Com. 608–609, 611–612; October 21, 1882; Juris. Civ. vol. 50, p. 207; June 27, 1894; Juris. Civ. vol. 75, p. 848; December 12, 1894; Juris. Civ. vol. 76, p. 483; October 12, 1897; Juris. Civ. vol. 82, p. 417; Rodríguez v. Fernández Hermanos, 13 P. R. R. 349; Vargas v. Monroigé Hijos, 15 P. R. R. 27.

Contributory negligence is an affirmative defense, of which the burden of proof is on the defendant.

Looney v. Metropolitan R. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627.

A passenger invited to ride in a vehicle has a right to presume that the driver furnished is competent and of sufficient experience.

Carr v. Easton, 142 Pa. 139, 21 Atl. 822; State v. Boston & M. R. Co. 80 Me. 445, 15 Atl. 36, 11 Am. Neg. Cas. 642.

At any rate, there was no such evident lack of due care as authorized the taking of the case from the jury.

Chadbourne v. Springfield Street R. Co. 199 Mass. 574, 85 N. E. 737; Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 523.

*The defendant corporation*, as such, was *guilty of negligence in the employment or* retention of Monsieur Lewis as a driver of the steam-driven truck, in the light of the dangers of such employment as revealed by the record in this case.

Northern P. R. Co. v. Herbert, 116 U. S. 647, 648, 29 L. ed. 758, 759, 6 Sup. Ct. Rep. 590; Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; Northern P. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; Baltimore & O. R. Co. v. Henthorne, 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 638; Fletcher v. Baltimore & P. R. Co. 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35.

Even the fellow-servant doctrine would not relieve against such negligence as we have in this case.

Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 702, 27 L. ed. 266, 267, 1 Sup. Ct. Rep. 493; Deserant v. Cerillos Coal R. Co. 178 U. S. 420, 421, 44 L. ed. 1133, 1134, 20 Sup. Ct. Rep. 967, 20 Mor. Min. Rep. 573; Hayes v. Frederick Stearns & Co. 130 Mich. 293, 89 N. W. 947; Norfolk & W. R. Co. v. Thomas, 90 Va. 205, 44 Am. St. Rep. 906, 17 S. E. 884.

The relation of fellow servant was not established.

Thomp. Neg. § 7721; Patterson v. Houston & T. C. R. Co. — Tex. Civ. App. —, 40 S. W. 442; Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252.

As an employee of the Murphy Company, the facts in respect to his aiding in the towing of the boiler are entirely consistent (1) with the principles applicable to service in cases of emergency, and (2) to services rendered by persons assisting servants of another for the purpose of expediting their business, or both. In either instance the defendant would be liable for the negligence of its agents.

Thomp. Neg. §§ 4984, 4986; McKinney, Fellow Servants, § 19, p. 49.

Although the plaintiff might have avoided the accident by the exercise of ordinary care, he may, nevertheless, recover if it be shown that the defendant might have avoided the accident by the exercise of proper care.

Vargas v. A. Monroig é Hijos, 15 P. R. R. 26.

The plaintiff filed his complaint, charging negligence against the defendant, established his grounds of liability, and, having done this, he need not go further in those jurisdictions where the burden of proof is on the defendant to show contributory negligence.

Thomp. Neg. § 401; Baltimore & P. R. Co. v. Landrigan, 191 U. S 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137; Texas & P.

R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104.

At best, the evidence bearing upon the subject of contributory negligence cannot be taken from the jury unless the proof supplied thereby is clear and conclusive.

Thomp. Neg. §§ 369, 401.

**Messrs. Benjamin S. Minor, Hugh B. Rowland, and Colley W. Bell** submitted the cause for defendant in error:

The evidence presented at the trial was insufficient to place any liability upon the defendant for the injuries sustained by Brooks.

Merrick v. Giddings (Morris v. Giddings) 115 U. S. 300, 305, 29 L. ed. 403, 405, 6 Sup. Ct. Rep. 65; Patton v. Texas & P. R. Co. 179 U. S. 658, 660, 45 L. ed. 361, 363, 21 Sup. Ct. Rep. 275; Supreme Lodge K. P. v. Beck, 181 U. S. 49, 52, 45 L. ed. 741, 745, 21 Sup. Ct. Rep. 532.

The fellow-servant rule, as known to the common law of England and the United States, is and apparently always has been in force in Porto Rico, as will be seen from the statute law hercinabove set forth, and from a reading of the decisions of the Porto Rico courts.

Diaz v. Fajardo Development Co. 2 Porto Rico Fed. Rep. 152; Colon v. Ponce & G. R. Co. 3 Porto Rico Fed. Rep. 367; Natal v. Bartolomey, 14 P. R. R. 474.

The plaintiff was a fellow servant of the driver.

Northern P. R. Co. v. Charless, 162 U. S. 359, 363, 364, 40 L. ed. 999, 1001, 1002, 16 Sup. Ct. Rep. 848; Northern P. R. Co. v. Peterson, 162 U. S. 346, 357, 40 L. ed. 994, 998, 16 Sup. Ct. Rep. 843; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 403, 41 L. ed. 1051, 1052, 17 Sup. Ct. Rep. 603, 1 Am. Neg. Rep. 747; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Oakes v. Mase, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345, 1 Am. Neg. Rep. 544; Northern P. R. Co. v. Poirier, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, 1 Am. Neg. Rep. 751; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, 7 Am. Neg. Rep. 182; Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683, 16 Am. Neg. Rep. 645; Texas & P. R. Co. v. Bourman, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319; Bautler v. Grand Trunk Junction R. Co. 57 L. ed. 224 U. S. 85, 56 L. ed. 679, 32 Sup. Ct. Rep. 402.

The plaintiff had ample time and opportunity to observe, had he chosen to do so, the driver of the truck, and to judge for himself as to his competency, carefulness, and capability.

Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561.

A servant who is transferred from one part of the work to another assumes the risks incident to the new employment.

Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 190; O'Connor v. Atchison, T. & S. F. R. Co. 70 C. C. A. 87, 137 Fed. 504.

Assuming that the plaintiff was a fellow servant of the driver of the truck, the defendant cannot be held responsible for the accident in question unless plaintiff shows that the defendant was negligent in some particular. The burden of proof is on the plaintiff, and there is nothing in the record which even intimates that the defendant was in any way negligent, either in the hiring of the driver or in retaining him in its employ.

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 619, 41 L. ed. 1136, 1139, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Patton v. Texas & P. R. Co. 179 U. S. 658, 663, 664, 45 L. ed. 361, 364, 365, 21 Sup. Ct. Rep. 275; Claudio v. Cortinez, 9 P. R. R. 97.

The test whether a person is guilty of contributory negligence is not whether he exposed himself to danger after actually seeing that danger, but whether he had an opportunity of observation from which a reasonable man could judge whether or not danger existed.

Reed v. Stockmeyer, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 189; Northern P. R. Co. v. Freeman, 174 U. S. 379, 383, 43 L. ed. 1014, 1016, 19 Sup. Ct. Rep. 763; Claudio v. Cortinez, 9 P. R. R. 97; Patton v. Texas & P. R. Co. 179 U. S. 658, 659, 660, 45 L. ed. 361, 362, 363, 21 Sup. Ct. Rep. 275.

Mr Justice Holmes delivered the opinion of the court:

This is an action for personal injuries suffered in Porto Rico. The declaration alleges that the plaintiff, at the defendant's request, made a trip on an automobile of the latter "for the purpose of aiding other employees of the defendant in moving a certain boiler which was the property of the defendant," and that, in returning from the trip, the automobile was so negligently operated by the defendant, its agents and employees, that it was driven into a ditch and the plaintiff was badly hurt. There was a trial by jury, in which, at the end

of the plaintiff's evidence, the judge directed a verdict for the defendant and the plaintiff excepted. The evidence showed that the machine was driven by a servant of the defendant, so that it appeared in proof that the plaintiff was suing for an injury caused by a fellow servant, as is to be inferred from the face of the declaration itself.

Notwithstanding the admission that the plaintiff was an employee of the defendant, imported by the words "for the purpose of aiding other employees," it is argued that 693] *the plaintiff was not a fellow servant, and therefore, although the contention hardly is open, the substance of the testimony may be stated. The plaintiff's general employers had sold a sugar mill to the Central, delivered in New Orleans. At the request of the Central they had sent over the plaintiff to put up a chimney, a battery of six boilers, and a bagasse track. While at the work he seems to have been paid by the defendant and was under the direction of its chief engineer. The chimney had been nearly finished and the next work was to set up the boilers, but they had not arrived. The man in charge of the transportation directed the plaintiff to go and help to get a boiler, which, after asking the chief engineer for leave, he did. When they got to the boiler there were not enough machines to haul it, so that they had to return to the Central. On the way the driver seems to have been more or less drunk, and negligently, it must be assumed, upset the machine.

Whether the plaintiff was in the general employ of the defendant, as he seems to have been, or not, the service that he consented to render was the defendant's work. In rendering that, at least, he came under its orders and became its servant. Assuming in his favor that he was a volunteer, that fact did not enlarge his rights. Degg v. Midland R. Co. 1 Hurlst. & N. 773, 26 L. J. Exch. N. S. 171, 3 Jur. N. S. 395, 5 Week. Rep. 364; Potter v. Faulkner, 1 Best & S. 800, 31 L. J. Q. B. N. S. 30, 8 Jur. N. S. 259, 5 L. T. N. S. 455, 10 Week. Rep. 93; Barstow v. Old Colony R. Co. 143 Mass. 535, 536, 10 N. E. 255; Wischam v. Rickards, 136 Pa. 109, 10 L.R.A. 97, 20 Atl. 532. Other cases will be found in 2 Labatt, Mast. & S. § 631. He was the defendant's servant not only while actually at work on the boiler, but during the trip taken for the purpose of doing the work. Northern P. R. Co. v. Peterson, 162 U. S. 346, 358, 40 L. ed. 994, 998, 16 Sup. Ct. Rep. 843; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 403, 41 L. ed. 1051, 1052, 17 Sup. Ct. Rep. 603; Texas & P. R. Co. v. Bourman, 212 U. S. 536, 538, 539, 53 L. ed. 641, 643, 29 Sup. Ct. Rep. 319. And he was fellow servant with the driver of the machine. Martin v. Atchison, T. & S. F. R. Co. supra; *Northern P. R. Co. v.[694 Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683; Texas & P. R. Co. v. Bourman, 212 U. S. 536, 541, 53 L. ed. 641, 644, 29 Sup. Ct. Rep. 319; Beutler v. Grand Trunk Junction R. Co. 224 U. S. 85, 56 L. ed. 679, 32 Sup. Ct. Rep. 402. If the law of Porto Rico does not differ in this respect from the common law, the direction to the jury was right.

Whether the common-law rule prevails is not made clear by any authority cited. But by the act of March 1, 1902 (Rev. Stat. & Codes, 1902, p. 150), the English employers' liability act was copied more or less exactly, as it has been in some of the states. That statute presupposes the common-law rule as to fellow servants (Ryalls v. Mechanics' Mills, 150 Mass. 190, 191, 5 L.R.A. 667, 22 N. E. 766), and the Porto Rican copy would be hard to account for except upon the same presupposition. If a master were liable for injuries caused by the negligence of a fellow servant there would be no need of enacting that he should be liable for such injuries in specific cases, as the statute does, and no sense in the provision of § 10, that the act shall not apply to injuries caused to domestic servants, or farm laborers, by fellow employees. Therefore, while we might hesitate if we were deducing the rule from the considerations on which it originally was placed (Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 11, 12, 51 L. ed. 681, 685, 686, 27 Sup. Ct. Rep. 407), as indeed one might hesitate about the more general liability to which it is an exception, we must assume that it exists, even laying on one side the suggestion that the statute offers the only remedy for cases within it. We should add that this suggestion is not brought under the act.

It was argued, evidently as an afterthought for which no foundation was laid in the pleadings, that the defendant might have been liable on the ground that it employed an incompetent servant. This suggestion is based on a single expression concerning the driver, that it was his custom to drink while driving the machine. This neither stated nor meant, so far as we can judge, that it was the custom of the driver to drink to excess, or so as to unfit *him[695 for his work. The only other reference to the matter was by another of the plaintiff's witnesses, that the driver was "not in the mood or attitude which he usually had when we worked together in the shops," importing usual sobriety. It would have been permitting a mere guess to allow the jury to find for the plaintiff on this ground.

Judgment affirmed.

STANLEY FRANCIS, Petitioner,
v.
J. HECTOR McNEAL, Trustee in Bankruptcy of the Provident Investment Bureau.

(See S. C. Reporter's ed. 695–702.)

**Bankruptcy — partnership — property of partner.**

An individual partner who has not been adjudged a bankrupt may be required to turn over his separate estate for administration to the trustee in bankruptcy of the firm, where the partnership and individual estates together are not enough to pay the partnership debts,—especially where such partner has not objected that he should have been put into bankruptcy, and where, assuming that the case is within the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424), § 5*h*, that, "in the event of one or more but not all of the members of a partnership being adjudged bankrupt," the partnership property may be administered by the partners not so adjudged, and does not come into bankruptcy at all except by consent, such partner has never objected to the administration of the firm property by the trustee.

[No. 290.]

Argued May 5 and 6, 1913. Decided May 26, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed an order of the District Court for the Eastern District of Pennsylvania, requiring a partner to turn over his separate estate for administration to the trustee in bankruptcy of the partnership. Affirmed.

See same case below, 108 C. C. A. 459, 186 Fed. 481.

The facts are stated in the opinion.

Mr. Charles L. Frailey argued the cause, and, with Mr. Henry J. Scott, filed a brief for petitioner:

A partnership for the purpose of adjudication and administration in bankruptcy under the act of July 1, 1898, is an entity separate and distinct from the members which compose the partnership.

Fidelity Trust Co. v. Gaskell, 115 C. C. A. 527, 195 Fed. 865; Mills v. Fisher, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897; Re Bertenshaw, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986; Tumlin v. Bryan, 21 L.R.A.(N.S.) 960, 91 C. C. A. 200, 165 Fed. 166; Re Stein, 62 C. C. A. 272, 127 Fed. 547; Re Mercur, 58 C. C. A. 472, 122 Fed. 384; Re Sanderlin, 109 Fed. 857; Re Solomon, 163 Fed. 140; Re Everybody's Grocery & Meat Market, 173 Fed. 492; Re Meyer, 39 C. C. A. 368, 98 Fed. 976; Strauss v. Hooper, 105 Fed. 590; Re Farley, 115 Fed. 359; Re Barden, 101 Fed. 553; Re Hale, 107 Fed. 432.

Before a partnership can be adjudged a bankrupt for an act of bankruptcy involving insolvency, it is not necessary that the individual partners be insolvent also.

Re Bertenshaw, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986; Re Sanderlin, 109 Fed. 857; Re Everybody's Grocery & Meat Market, 173 Fed. 492.

Section 5h is applicable to a case where the partnership has been adjudicated a bankrupt as well as where it has not.

Re Bertenshaw, 17 L.R.A.(N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986; Re Solomon, 163 Fed. 140.

So distinct are the estates of the members of the firm from that of the firm, that when all the members of the firm are adjudged bankrupt individually, and the firm is not so adjudged, the trustee of the individual members is adjudged not to be entitled to administer the firm assets which are in the hands of the trustee under an assignment made by the firm.

Mills v. Fisher, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897; Re Mercur, 58 C. C. A. 472, 122 Fed. 384.

If, then, to summarize, a partnership is an entity separate and distinct from the members that compose it, and is a "person" which can commit any act of bankruptcy defined in the statute, including one involving insolvency, and can be discharged under § 14a and 14b; if it can be insolvent without its members being insolvent, and if, although adjudicated a bankrupt, together with one or more, but not all, of its members, an unadjudicated partner shall, unless he consent otherwise, administer the partnership business,—then it necessarily follows that the trustee of a partnership adjudicated a bankrupt because of the commission by it of any of the acts of bankruptcy defined in the act of 1898 cannot draw to himself for administration or administer in bankruptcy the estate of an unadjudicated partner.

Re Bertenshaw, supra; Re Stein, 62 C. C. A. 272, 127 Fed. 547; Strauss v. Hooper, 105 Fed. 590.

Mr. George Wharton Pepper argued the cause, and, with Mr. Edgar J. Pershing, filed a brief for respondent:

The court below was right in thinking

NOTE.—As to effect of adjudication of bankruptcy of partnership to subject the separate estates of the partners to administration in bankruptcy—see note to Dickas v. Barnes, 5 L.R.A.(N.S.) 654.

that subsection h of § 5 has no application whatever to a case in which the partnership has been adjudged bankrupt. It applies only to a case where less than all of the members of a partnership, but not the partnership, have been so adjudged.

Chemical Nat. Bank v. Meyer, 92 Fed. 896; Re Meyer, 39 C. C. A. 368, 98 Fed. 976.

It is said by the petitioner that whenever, for the purposes of adjudication, it becomes necessary to determine whether or not the partnership is insolvent, the court should merely weigh joint debts and joint assets against one another, and should disregard the individual liability of the partners to firm creditors. This view is inconsistent, not only with the decision below and with the view taken by the court of appeals, second circuit, in Re Meyer, supra, but also with the cogent reasoning of Mr. Justice Lurton in Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding to review an order of the bankruptcy court to the effect that the separate estate of Stanley Francis should be turned over for administration to the respondent, McNeal, trustee in bankruptcy of a firm of which Francis was a member. The order was made on the petition of the trustee, and was affirmed upon a petition for revision by the circuit court of appeals. 108 C. C. A. 459, 186 Fed. 481.

The facts are short. Creditors filed a petition against Latimer, Francis, and Mar-[699]rin, alleging that they were *partners trading as the Provident Investment Bureau, and that they were bankrupt individually and as a firm. McNeal was appointed receiver of the partnership and individual estates, but Francis denied that he was a partner, and sought to have the receiver discharged. Thereupon, on March 13, 1906, it was agreed between the counsel for the receiver and for Francis that McNeal should be discharged as receiver of the individual estate of Francis; that the question whether Francis was a partner should be referred to one of the regular referees; that until the determination of that question, his counsel, Scott, should collect the rents and retain possession of his estate; and that thereafter Scott should account and turn over the funds to such person as the court might direct. On April 17 an order was made embodying the agreement and naming a referee. The referee found that Francis was a partner, and that now stands admitted for the purposes of the present decision. The firm was adjudicated bankrupt in June, 1909. McNeal was appointed trustee in July, and forthwith filed the petition upon which the order in question was made. The order declared that the separate estate of Francis was subject to administration in bankruptcy, and ordered the real estate turned over to McNeal, with leave to sell. The firm, even with the separate estates of the partners, will not be able to pay its debts in full.

Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever *priorities there[700] may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by § 1, the word "person," as used in the act, includes partnerships; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by § 5a, a partnership may be adjudged a bankrupt, and that by § 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debt on partnership assets, and that of individual debts upon the individual estate. § 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from § 5, clauses e through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be adminis-

tered, and that the only exception was that in *h*, "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt." [30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.]

In that case, naturally, the partnership property may be administered by the part-701]ners not adjudged bankrupt, and *does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. § 5*f*. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within § 5*h*, it is enough that Francis never has objected to the firm property being administered by the trustee.

If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no such objection has been taken, but, on the contrary, Francis has consented and agreed to hand over his property according to the order 702]of the court. So far *as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority in Re Bertenshaw, 17 L.R.A. (N.S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct.

Decree affirmed.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

E. L. HESTERLY, Administrator of the Estate of W. B. Hesterly, Deceased.

(See S. C. Reporter's ed. 702-705.)

**Error to state court — Federal question — how raised.**

1. A Federal question must be deemed to have been presented with sufficient clearness to sustain a writ of error from the Federal Supreme Court to a state court, where the latter court has held that the question was sufficiently raised, and decided it.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — how raised — estoppel.**

2. The objection that a carrier sued for the death of an employee was estopped to rely upon the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), by having pleaded contributory negligence and thus having relied upon the state law, is not available to defeat a writ of error from the Federal Supreme Court to a state court, where the latter court held that the Federal question was sufficiently raised, and decided it.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

**Estoppel — inconsistent claims.**

3. A carrier sued for the death of an employee is not estopped to urge that its liability was measured by the Federal employers' liability act of April 22, 1908, by having pleaded contributory negligence, and thus having relied upon the state law, since the plaintiff, and not the defendant, had the election as to how the suit should be brought, and as he relied upon the state law, the defendant had no choice if it was to defend upon the facts.

[For other cases, see Estoppel, III. c, in Digest Sup. Ct. 1908.]

**Commerce — employers' liability — conflicting state and Federal regulations.**

4. The liability of an interstate railway carrier for personal injuries resulting in the death of a servant while employed in interstate commerce is measured by the Federal employers' liability act of April 22, 1908, which supersedes all applicable state laws.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

**Death — right of action for causing — injury and pain suffered by deceased.**

5. The only right of action given by the Federal employers' liability act of April 22, 1908, in case of the death of a railway

NOTE.—On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

employee while employed in interstate commerce, is one for the benefit of the next of kin, and no recovery can be had for the injury and pain suffered by the deceased.
[For other cases, see Death, II. a, in Digest Sup. Ct. 1908.]

[No. 297.]

Argued and submitted May 6, 1913. Decided May 26, 1913.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Crawford Circuit Court in that state, in favor of plaintiff in an action for death. Reversed.

See same case below, 98 Ark. 240, 135 S. W. 874.

The facts are stated in the opinion.

Mr. W. E. Hemingway argued the cause, and, with Messrs. Martin L. Clardy and Thomas B. Pryor, filed a brief for plaintiff in error:

The supreme court of Arkansas erred in holding and deciding that the act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroads to Their Employees in Certain Cases," approved April 22, 1908, did not supersede the constitutional and statutory provisions of the state of Oklahoma relating to and governing actions of tort based on negligence resulting in death or personal injury with respect to employees of railroad companies engaged in interstate commerce.

Fulgham v. Midland Valley R. Co. 167 Fed. 662; Thornton, Federal Employers' Liability, 2d ed. § 19, pp. 34 et seq.; Dewberry v. Southern R. Co. 175 Fed. 307; Taylor v. Southern R. Co. 178 Fed. 380; Bottoms v. St. Louis & S. F. R. Co. 179 Fed. 318; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Fithian v. St. Louis & S. F. R. Co. 188 Fed. 842; Doherty, Liability of Railroads to Interstate Employees, § 9, p. 65; Walsh v. New York, N. H. & H. R. Co. 173 Fed. 494; Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 527; Taylor v. Southern R. Co. 178 Fed. 380; Michigan C. R. R. Co. v. Vreeland, 227 U. S. 59, ante, 417, 33 Sup. Ct. Rep. 192; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 54, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, ante, 355, 33 Sup. Ct. Rep. 135; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, ante, 586, 33 Sup. Ct. Rep. 274; Eastern R. Co. v. Ellis, — Tex. Civ. App. —, 153 S. W. 701.

Messrs. Joseph M. Hill, James Brizzolara, and Henry L. Fitzhugh submitted the cause for defendant in error:

*No right was claimed* in the state court that is reviewable here under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), on account of the failure of the defendant railroad company specially to set up or claim any right under the Federal statute, or to deny the validity of the state statute.

Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 62 L.R.A. 33, 23 Sup. Ct. Rep. 375; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 291, 52 L. ed. 1066, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; El Paso & S. W. R. Co. v. Eichel, 226 U. S. 590, ante, 369, 33 Sup. Ct. Rep. 179; Louisville & N. R. Co. v. Smith, H. & Co. 204 U. S. 551, 51 L. ed. 612, 27 Sup. Ct. Rep. 401.

It was too late to assert the Federal question in the supreme court of Arkansas.

Southern Ins. Co. v. Hastings, 64 Ark. 253, 41 S. W. 1093; Martin v. McDiarmid, 55 Ark. 213, 17 S. W. 877; Robinson v. German Ins. Co. 51 Ark. 441, 4 L.R.A. 251, 11 S. W. 686; American Mortg. Co. v. Milam, 64 Ark. 305, 42 S. W. 417; St. Louis, I. M. & S. R. Co. v. Brown, 49 Ark. 253, 4 S. W. 781; Daniels v. Brodie, 54 Ark. 216, 11 L.R.A. 81, 15 S. W. 467; Fordyce v. Russell, 59 Ark. 312, 27 S. W. 82; State Mut. Ins. Co. v. Latourette, 71 Ark. 242, 100 Am. St. Rep. 63, 74 S. W. 300; Paris Mercantile Co. v. Hunter, 74 Ark. 615, 86 S. W. 808; Hartford F. Ins. Co. v. Enoch, 72 Ark. 47, 77 S. W. 899; Lowe v. Walker, 77 Ark. 103, 91 S. W. 22; Williams v. Bennett, 75 Ark. 312, 112 Am. St. Rep. 57, 88 S. W. 431; Allen-West Commission Co. v. People's Bank, 74 Ark. 41, 84 S. W. 1041; St. Louis, I. M. & S. R. Co. v. Boback, 71 Ark. 427, 75 S. W. 473; Radcliffe v. Scruggs, 46 Ark. 96; Newton v. Russian, 74 Ark. 88, 85 S. W. 407.

Did the supreme court of Arkansas so decide the Federal question that it is reviewable here?

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Sweringen v. St. Louis, 185 U. S. 46, 46 L. ed. 799, 22 Sup. Ct. Rep. 569; Stickney v. Kelsey, 209 U. S. 419, 52 L. ed. 863, 28 Sup. Ct. Rep. 508.

The plaintiff in error obtained the benefit of a defense to which it was not entitled if its present contentions are true that the Oklahoma law is superseded and the Federal law applicable, and is now estopped from claiming a right under the Federal act.

2 Cyc. 671; Louisville, N. A. & C. R. Co. v. Fox, 101 Ind. 416; Vose v. Cockroft, 44 N. Y. 415; Stockton v. Rogers, 17 Misc. 138, 39 N. Y. Supp. 400; Davis v. Wakelee, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555; Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 Sup Ct. Rep. 645.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for personal injuries resulting in the death of the plaintiff's intestate. There are two counts, the first for the pecuniary loss to the next of kin, laid at $5,000, the other for the injury and pain suffered by the intestate, laid at $25,000. The death was caused by a defect in a car on which the intestate was a brakeman, the car being part of a train running from Van Buren, Arkansas, to Coffeyville, Kansas. The jury found a verdict for the plaintiff for $2,000 on the first count, and for $10,000 on the second. The supreme court of the state sustained the judgment on condition of a remittitur of $5,000; this was entered and judgment was rendered for $7,000. At the trial the defendant asked for a ruling that the plaintiff could not recover damages for pain under the second count, which was denied, subject to exception. The supreme court treated the request as intended to raise the question whether the employers' liability act of Congress of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, displaced the state law, as undoubtedly 704]it was; stated that the suit was *not based upon that act, and held that the act of Congress was only supplementary, and that the judgment could be upheld under the state law. 98 Ark. 240, 135 S. W. 874.

The plaintiff contends that the claim of right under the law of the United States, and against that under the law of the state, was not presented with clearness enough to save it. But as the supreme court held the question sufficiently raised and decided it, that objection is not open here. San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 180, 47 L. ed. 765, 768, 23 Sup. Ct. Rep. 487; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 533, 51 L. ed. 596, 604, 27 Sup. Ct. Rep. 394.

The same answer may be given to the suggestion that the defendant is estopped by having pleaded contributory negligence, and thus having relied upon the state law. Moreover, the plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts. Whether the defendant could have defeated the first count also on the ground that the plaintiff was suing upon a statute of one jurisdiction, whereas the action could be maintained only on that of another, need not be decided, since the defendant asks reversal of only so much of the judgment as rests on the second count. Hence it is unnecessary to consider whether the principle of Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; or that of Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 577, ante, 355, 363, 33 Sup. Ct. Rep. 135, should be applied. See further, Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 442, ante, 586, 590, 33 Sup. Ct. Rep. 274; Northern P. R. Co. v. Slaght, 205 U. S. 122, 131, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442; United States v. Dalcour, 203 U. S. 408, 423, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58.

Coming to the merits, it now is decided that the act of Congress supersedes state laws in the matter with which it deals. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53-55, 56 L. ed. 327, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, ante, 355, 363, 33 Sup. Ct. Rep. 135; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 67, ante, 417, 420, 33 Sup. Ct. Rep. 192. The act deals with *the liability[705 of carriers, while engaged in commerce between the states, for defects in cars. § 1. In the case of death, the only action is one for the benefit of the next of kin. § 1. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 67, 68, ante, 417, 420, 33 Sup. Ct. Rep. 192; American R. Co. v. Didricksen, 227 U. S. 145, 149, ante, 456, 457, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 175, ante, 785, 786, 33 Sup. Ct. Rep. 426. Therefore the ruling of the state court was wrong. The amendment of April 5, 1910, chap. 143, § 2, 36 Stat. at L. 291, U. S. Comp. Stat. Supp. 1911, p. 1325, in like manner allows but one recovery, although it provides for survival of the right of the injured person. The amendment, however, does not apply to this case, as the death occurred in August, 1909.

Judgment reversed.

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ETTA L. SANFORD, Amo S. McKee, Fred McKee, et al., Appts.,
v.
SANTIAGO AINSA, Administrator with the Will Annexed of the Estate of Frank Ely, Deceased.

(See S. C. Reporter's ed. 705-707.)

Appeal — review of territorial decision — local practice.

1. A decision of a territorial supreme court, declining to review assignments of

error complaining of the overruling of motions for judgment in defendant's favor, and for a new trial, and in arrest of judgment, and of the admission of incompetent evidence, both because they were too general and because the abstract of record before the court did not contain the evidence, and therefore it would have been necessary to examine the original transcript of the reporter's notes, contrary to the rules and practice of the court,—will not be disturbed by the Federal Supreme Court.

[For other cases, see Appeal and Error, VIII. m, 1; Courts, VII. d, in Digest Sup. Ct. 1908.]

**Appeal—from territorial supreme court — findings.**

2. A territorial supreme court properly refuses to make findings of fact for the purpose of opening for reconsideration in the Federal Supreme Court certain assignments of error which the former court correctly declined to consider on grounds of local practice.

[For other cases, see Appeal and Error, V. o, in Digest Sup. Ct. 1908.]

**Courts — territorial jurisdiction — transfer to courts of new county — pending cases.**

3. The creation of Santa Cruz county by Ariz. Acts 1899, No. 44, which, in § 10, provided that all actions "now pending" in the district court of Pima county, where the property in controversy is situated in the new county of Santa Cruz, "shall be transferred to the proper courts of said county of Santa Cruz for trial," did not devest the jurisdiction of the Pima county district court of such a suit until the conditions of transfer were fulfilled.

[No. 504.]

Argued and submitted May 5, 1913. Decided May 26, 1913.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court for Santa Cruz County, in that territory, in favor of plaintiff in an action of ejectment. Affirmed.

See same case below, 13 Ariz. 287, 114 Pac. 560.

The facts are stated in the opinion.

Mr. William C. Prentiss argued the cause, and, with Mr. Fred McKee, filed a brief for appellants:

The refusal of the court below in the face of such a properly authenticated transcript of all of the evidence, to make findings of fact, is assigned as error, requiring the remanding of the case to the supreme court of the state of Arizona.

Nielsen v. Steinfeld, 224 U. S. 534, 56 L. ed. 872, 32 Sup. Ct. Rep. 609.

If a territorial court could refuse to perform its statutory duty because an appellant may have failed fully to comply with its rules in respect of the content of the abstract of record furnished for its convenience, then the mere rule of a territorial court would override and repeal the Federal statute.

Apache County v. Barth, 177 U. S. 538, 44 L. ed. 878, 20 Sup. Ct. Rep. 718.

The statute transferring pending causes to the courts of Santa Cruz county is mandatory.

Koch v. Bridges, 45 Miss. 258; 26 Am. & Eng. Enc. Law, 2d ed. 692.

Mrs. Sarah H. Sorin submitted the cause for appellee. Mr. Selim M. Franklin was on the brief:

In the absence of any findings by the supreme court of a territory, and of anything in the nature of a bill of exceptions, there is nothing on which to base a reversal of the judgment in the case on appeal to the Supreme Court of the United States, and the judgment must therefore be affirmed.

Armijo v. Armijo, 181 U. S. 558–561, 45 L. ed. 1000–1002, 21 Sup. Ct. Rep. 707.

Where there is no finding of facts by the district court or by the supreme court of the territory, and hence no statement of facts in the nature of a special verdict, this court will assume that the judgment of the district court was justified by the evidence, and the judgment of the territorial court sustaining it will be affirmed.

Marshall v. Burtis, 172 U. S. 630–635, 43 L. ed. 579–581, 19 Sup. Ct. Rep. 290.

A duly authorized rule of court has the force of law, and is binding upon the court as well as upon the parties to the action, and cannot be dispensed with to suit the circumstances of any particular case.

Rio Grande Irrig. & Colonization Co. v. Gildersleeve, 174 U. S. 603–610, 43 L. ed. 1103–1106, 19 Sup. Ct. Rep. 761; Price v. Swartz, — Ind. App. —, 97 N. E. 938.

The supreme court of the territory of Arizona, in construing its rules, has repeatedly held that where the abstract of record fails to contain the evidence, the original transcript of the reporter's notes will not be examined for the purpose of ascertaining whether error exists.

Sanford v. Ainsa, 13 Ariz. 287, 114 Pac. 560; Liberty Min. & Smelting Co. v. Geddes, 11 Ariz. 54, 90 Pac. 332; Donohoe v. El Paso & S. W. R. Co. 11 Ariz. 293, 94 Pac. 1091; Phœnix R. Co. v. Landis, 13 Ariz. 86, 108 Pac. 247.

Because the abstract of record did not contain all the evidence, the territorial su-

NOTE.—On review of decisions of territorial courts in Federal Supreme Court—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

preme court refused, in its consideration of the present case on appeal before it, to review the evidence. This decision is a part of the record on the present appeal, and also is printed in 13 Ariz. 86, supra.

The territorial supreme court having decided it would not review the evidence, by reason of the failure of appellants to present the evidence as prescribed by its rules, and this being a matter of practice, this honorable court will not review the same.

Armijo v. Armijo, supra; Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727.

The refusal of the trial court to allow appellant's motion to strike out a part of the complaint is not reversible error.

Nemaha County v. Frank, 120 U. S. 41-46, 30 L. ed. 584-586, 7 Sup. Ct. Rep. 395.

Mr. Justice Holmes delivered the opinion of the court:

This was a suit to recover possession of land conveyed by the father of the appellants to them, pending a prior suit prosecuted by the appellee to quiet title in a tract of which this land was part. Richardson v. Ainsa, 218 U. S. 289, 54 L. ed. 1044, 31 Sup. Ct. Rep. 23. The plaintiff (appellee) got a judgment for possession and damages, and the defendant took the case to the supreme court of the territory.

The errors assigned before that court seem to have been, first, the refusal of the court below to strike out a paragraph of the complaint that set up the decree in the former suit, the defendant contending that it appeared on its face to have been entered by a court having no jurisdiction; second, the overruling of a general demurrer; and besides these two, the overruling of a motion for judgment in defendant's favor, and of another motion for a new trial and in arrest of judgment, and the admission of incompetent evidence. The court declined to review the assignments other than the first two, both because they were too general and because the abstract of record before the court did not contain the evidence, and therefore it would have been necessary to examine the original transcript of the reporter's notes, contrary to the rules and practice of the court. Accordingly when the appellant moved for findings of fact in the nature of a special verdict, the motion was denied, and the first contention of the appellants is that the case should be sent back for findings of fact. Nielsen v. Steinfield, 224 U. S. 534, 56 L. ed. 872, 32 Sup. Ct. Rep. 609.

We assume that the findings of fact desired were findings sufficient to open the last-mentioned assignments of error for reconsideration here. But the only findings that the supreme court of the territory could have made in *order to submit[707 its rulings to revision would have been to the effect of what we have stated. It was not called on to reverse its decision that by correct local practice the merits were not before it in order to present the merits to this court. Therefore, unless its decision on the question of practice was wrong, its refusal to make the findings desired was right. But we rarely disturb local decisions on questions of local practice, and we see no reason to do so in this instance. Therefore, so far as all the assignments of error after the first two are concerned, the judgment must be affirmed. Armijo v. Armijo, 181 U. S. 558, 561, 45 L. ed. 1000, 1002, 21 Sup. Ct. Rep. 707.

We see no ground for the demurrer unless it was intended to raise the same question as the motion to strike out the averments touching the previous suit. The basis of this motion was that the jurisdiction of the court where that suit was pending was ended before judgment by § 10 of act 44, 20th Leg. Assembly, 1899. By that section all actions "now pending" in the district court of Pima county, where the property in controversy is situated in the new county of Santa Cruz, "shall be transferred to the proper courts of said county of Santa Cruz for trial;" and it is made the duty of the clerks of Pima county to transmit all papers, provided that it shall not be the clerk's duty to do so until his fees and compensation allowed by the act shall have been paid or tendered to him, and until all costs due to the clerk and sheriff have been paid. The court of Santa Cruz is to acquire jurisdiction upon receipt by its clerk of the papers in the actions transferred. It was held by the supreme court—and we should follow the decision even if it were less obviously correct (Gray v. Taylor, 227 U. S. 51, 57, ante, 413, 416, 33 Sup. Ct. Rep. 199)—that the jurisdiction of the Pima court remained until the conditions of transfer were fulfilled, and that no facts were alleged in the complaint showing that to be the case. No ground appears for disturbing the judgment below.

Judgment affirmed.

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*JAMES DONNELLY, Plff. in Err., [708

v.

UNITED STATES.

(See S. C. Reporter's ed. 708-712.)

Evidence — judicial notice — navigability.

1. Federal courts cannot take judicial notice that a stream is navigable in fact because of an apparently irregular traffic

in times of high water only, employing Indian canoes, dugouts, and at certain times small steamboats and gasolene launches,—especially in the face of a declaration by the legislature that such stream is not navigable.

[For other cases, see Evidence, I. d, in Digest Sup. Ct. 1908.]

**Appeal — rehearing — error in original opinion.**

2. The error, if any, on the part of the Federal Supreme Court in holding, when affirming a conviction in a Federal circuit court for the murder of an Indian at or near the edge of the Klamath river within the extension of the Hoopa Valley Indian Reservation, that title to the bed of such river was vested in the United States as riparian owner on a non-navigable stream by Cal. Acts of April 13, 1850, February 24, 1891, and March 11, 1891, does not require the granting of a petition for a rehearing, where the state of the record did not entitle the plaintiff in error to call upon the Supreme Court to decide the merits of the question of the navigability of the river, and its effect upon the jurisdiction of the circuit court over the homicide.

[For other cases, see Appeal and Error, X., in Digest Sup. Ct. 1908.]

[No. 97.]

Submitted May 31, 1913. Decided June 9, 1913.

ON PETITION for rehearing of an affirmance of a conviction in the Circuit Court of the United States for the Northern District of California for the murder of an Indian within the extension of the Hoopa Valley Indian Reservation. Denied.

See ante, 820.

The facts are stated in the opinion.

Mr. John F. Quinn in support of the petition. Mr. L. F. Puter was on the brief:

The decision of the court to the effect that a murder, by a white citizen, of an Indian on an Indian reservation within the limits of a state, is punishable under §§ 2145 and 5339 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 3627, is erroneous in that it is contrary to the long-established rule of this honorable court for interpreting Federal statutes, to wit,—"Where the language of an act is general, and broad enough to include wrongful acts without and within the constitutional power of Congress, the unconstitutional parts cannot be rejected and the constitutional parts retained in order to give effect to the statute; that words of limitation cannot be introduced into a penal statute to make it specific when, as expressed, it is general only."

United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 646; United States v. Reese, 92 U. S. 218, 23 L. ed. 565; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; Allen v. Louisiana, 103 U. S. 80, 84, 26 L. ed. 318, 319; United States v. Harris, 106 U. S. 629, 641, 642, 27 L. ed. 290, 294, 295, 1 Sup. St. Rep. 601; Poindexter v. Greenhow, 114 U. S. 270, 302, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Baldwin v. Franks, 120 U. S. 678, 685, 689, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763; Smiley v. Kansas, 196 U. S. 447, 455, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Chicago, M. & St. P. R. Co. v. Westby, 102 C. C. A. 65, 178 Fed. 632; Brooks v. Southern P. Co. 148 Fed. 995; Howard v. Illinois C. R. Co. 148 Fed. 1003; McCabe v. Atchison, T. & S. F. R. Co. 109 C. C. A. 110, 186 Fed. 987; Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 537, 78 C. C. A. 467, 147 Fed. 425; Karem v. United States, 61 L.R.A. 437, 57 C. C. A. 486, 121 Fed. 260.

The decision to the effect that it is the law of the state of California that no rivers in California are navigable except those enumerated in the act of March 11, 1891, chap. 92 (Political Code, § 2349), of said state, and that the riparian owner takes to the center of stream on all rivers not enumerated in said act, thereby giving the United States title to the bed of said Klamath river, is erroneous for three reasons, to wit:

(a) That it is contrary to the rules laid down by the supreme court of California, in the cases of People ex rel. Ricks Water v. Elk River Mill & Lumber Co. 107 Cal. 224, 48 Am. St. Rep. 125, 40 Pac. 531, and Forestier v. Johnson, 164 Cal. 24, 127 Pac. 156, which rules are that the state legislature cannot make a stream navigable by merely enacting a law declaring it to be such; and that the question of navigability always remains "open as a question of fact" in California.

See also Southern R. Co. v. Ferguson, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343; Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Martin v. Bliss, 5 Blackf. 35, 32 Am. Dec. 62.

(b) That it is contrary to the rule laid down in People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 878, in which the same court declared that where the public use is abandoned, such as the use of navigable waters

NOTE.—As to what waters are navigable—see note to Willow River Club v. Wade, 42 L.R.A. 305.

*On judicial* notice—see note to Olive v. *State, 4 L.R.A. 22.*

as a public highway, the title to the property is not lost to the state, but the state holds the same as a proprietor, even though it no longer holds the same as a public agent or sovereign in charge of a public use.

See also Chicago, B. & Q. R. Co. v. Porter, 72 Iowa, 426, 34 N. W. 288; Serrin v. Grefe, 67 Iowa, 196, 25 N. W. 227; Steele v. Sanchez, 72 Iowa, 65, 2 Am. St. Rep. 233, 33 N. W. 367; Wood v. Chicago, R. I. & P. R. Co. 60 Iowa, 456, 15 N. W. 285.

(c) That it is contrary to the Constitution of the state of California, directly applied in People ex rel. Harbor Comrs. v. Kerber, supra, which provides that no gift of any state property can be made by the legislature, which would result if, by repealing an act declaring a stream navigable, the riparian owners would be given the title to the bed of the stream, which before belonged to the state.

Mr. Justice Pitney delivered the opinion of the court:

A petition for rehearing is presented, which we permit to be filed in order to determine whether it ought to be entertained. 709] *The petition raises several points, only one of which is deemed worthy of mention; and that is the insistence that the court, in basing its decision herein (228 U. S. 243, 262, etc., ante, 820, 828, 33 Sup. Ct. Rep. 449) upon the California acts of February 24, 1891, chap. 14, and of March 11, 1891, chap. 92 (Political Code, § 2349), and the decision of the supreme court of that state in Cardwell v. Sacramento County, 79 Cal. 347, 349, 21 Pac. 763, to the effect that the enumeration of the navigable rivers of the state, as made by the legislature, is exclusive, and that no other rivers are navigable under the laws of California, overlooked the effect of the decisions of the supreme court of California in other cases (People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co. 107 Cal. 221, 224, 48 Am. St. Rep. 125, 40 Pac. 531; Forestier v. Johnson, 64 Cal. 24, 127 Pac. 156; and People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 878), and that our decision respecting the navigability of the Klamath river and state ownership of the bed thereof is so serious in its ulterior consequences that it ought not to be adhered to without further argument.

The judgment affirming the conviction of the plaintiff in error can be sustained, however, without regard to the question thus raised. It is conceded that whether the Klamath is navigable at the place where the homicide occurred is a question of fact. Of course the tide ebbs and flows at the river's mouth, but the *locus in quo* is approximately 25 miles from the mouth, and quite beyond any possible influence of the tide. As the opinion points out, there was evidence tending to show that the stream is navigable in fact at certain seasons from Requa (near its mouth), up to and above the *locus in quo*. But the evidence was by no means conclusive. It showed an apparently irregular traffic, in times of high water only, employing Indian canoes, "dug-outs," and at certain times small steamboats and gasolene launches. In this state of the evidence, the trial court could not, nor can we, take judicial notice of the stream [710 as being navigable in fact; especially in the face of a declaration by the legislature of the state that it is not navigable. United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 698, 43 L. ed. 1136, 1139, 19 Sup. Ct. Rep. 770.

Upon the argument, the government cited and relied upon the acts of February 24th and March 11th, 1891, and the decision in Cardwell v. Sacramento County, as showing that the state had abandoned any claim it might have had to the bed of the stream, and surrendered such rights to the riparian proprietors,—in this case to the United States, for the benefit of the Indians. Counsel for plaintiff in error did not in his brief (nor, so far as we recall, in the oral argument) make any reply to this contention, nor challenge the authority of Cardwell v. Sacramento County, or the effect of that decision upon the matter in controversy. Being unable to find that the case had been overruled or questioned, we accepted it as authoritative upon the question of state policy, with the result of concluding, upon the whole matter, that whether the river were or were not navigable in fact, its bed was to be deemed as included within the extension of the Hoopa Valley Reservation.

But the record shows that upon the trial, the plaintiff in error did not request or suggest that the question of the navigability of the river at the *locus in quo* should be considered as a question of fact, and disposed of accordingly. At the close of the evidence for the government, counsel moved for a dismissal of the action upon the ground that it had not been shown that the alleged offense happened within the limits of the Reservation. And at the close of all the evidence the trial court was requested to instruct the jury that the river was not within the limits of the Reservation, and that if the alleged crime was committed upon the river, the evidence had failed to establish the jurisdiction of the court to try the defendant. This insistence was repeated in different forms, but in each in-

711]stance *the court was in effect requested to rule as a matter of law that the Klamath river was not within the reservation. This contention was as properly attributable to the theory that the territorial limits as described in the Executive order of President Harrison, dated October 16, 1891, did not in terms include it, as to the theory that the river was not navigable. It was upon the former theory that plaintiff in error principally relied in this court. If the suggestion of excluding the river from the Reservation on the ground that it was navigable was intended to be made the subject of exception at the trial, this point should have been clearly raised; and it was not. Moreover, even assuming that the requests were intended to point to the question of navigability, they at best called upon the court to decide that question as a question of law, and not to determine it, or to have the jury determine it, as a question of fact.

The state of the record, therefore, did not entitle the plaintiff in error to call upon this court to decide the merits of the question of the navigability of the river and its effect upon the jurisdiction of the circuit court over the homicide. In discussing the merits we assumed (in favor of plaintiff in error) that the question was raised by the record. But since it is now suggested that in so doing we have passed upon a question that was not adequately argued, and which in its consequences involves important interests, other than those of the plaintiff in error, we prefer to and do recall so much of the opinion as holds that "by the acts of legislation mentioned, as construed by the highest court of the state,—(a) the act of 1850, adopting the common law, and thereby transferring to all riparian proprietors (or confirming in them) the ownership of the non-navigable streams and their beds; and (b) the acts of February 24 and of March 11, 1891, declaring in effect that the Klamath river is a non-navigable stream,—California has vested in the United States, as riparian owner, *the title to the bed of the[712 Klamath, if in fact it be a navigable river." That matter, therefore, we leave undecided.

But since, as already shown, the conviction of the plaintiff in error may properly stand without regard to that question, we deem that no useful purpose would be served by further oral argument.

Rehearing denied.

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ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1912.

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# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1912.

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1] *BAUER & CIE. and the Bauer Chemical Company,
v.
JAMES O'DONNELL.

(See S. C. Reporter's ed. 1-18.)

**Patents — restrictions on sales by purchasers.**

1. The exclusive right to "make, use, and vend the invention or discovery," granted by U. S. Rev. Stat. § 4884, U. S. Comp. Stat. 1901, p. 3381, to the patentee, his heirs and assigns, does not include the right to limit by notice the price at which the patented article may be resold at retail by a purchaser from jobbers who have paid to the patentee's agent the full price asked.

[For other cases, see Patents, XIII. f, in Digest Sup. Ct. 1908.]

**Patents — sale or license — notice of price restriction.**

2. Attaching a notice to a patented article which states that the article is licensed for sale and use at a specified price, that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in the event of a violation of the restriction, cannot convert an otherwise apparently unqualified sale into a mere license to use the invention.

[For other cases, see Patents, XIII. d, in Digest Sup. Ct. 1908.]

[No. 951.]

Argued April 10, 1913. Decided May 26, 1913.

ON A CERTIFICATE from the Court of Appeals of the District of Columbia presenting the question of the right of a patentee to limit by notice the price at which the patented article may be resold. Answered in the negative.

The facts are stated in the opinion.

Mr. Edwin J. Prindle argued the cause, and, with Mr. Arthur Wright, filed a brief for Bauer & Cie.:

A patentee may restrict the price at which the patented article shall be sold, when such restriction is contained in an express agreement with a licensor; and a violation of such restriction is an infringement of the patent.

Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

The right of a patentee to restrict the price at which his article shall be sold by a license-restriction notice attached to the article, of the same import as the notice in the present case, has been sustained by very many of the lower courts in the United States and by the courts of England.

Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; New Jersey Patent Co. v. Schaefer, 144 Fed. 437, 152 Fed. 171; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 358; Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. 92 C. C. A. 183, 166 Fed. 431; Edison v. Ira M. Smith Mercantile Co. 188 Fed. 925; Waltham Watch Co. v. Keene, 191 Fed. 855; Indiana Mfg. Co. v. Nichols & S. Co. 190 Fed. 579; Automatic Pencil Sharpener Co. v. Goldsmith Bros. 190 Fed. 205; Incandescent Gaslight Co. v. Cantelo, 12 Rep. Pat. Cas. 262; Incandescent Gaslight Co. v. Brodgen, 16 Rep. Pat. Cas. 183; Badische Anilin und Soda Fabrick v. Isler [1908] 1 Ch. 611, 75 L. J. Ch. N. S. 411

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NOTE.—As to validity of contract provision to control price at which patented article shall be resold—see note to Grogan v. Chaffee, 27 L.R.A.(N.S.) 395.

94 L. T. N. S. 367, 22 L. T. R. 326, 23 Rep. Pat. Cas. 173; McGruther v. Pitcher [1904] 2 Ch. 306, 3 B. R. C. —, 73 L. J. Ch. N. S. 653, 20 L. T. R. 652, 53 Week. Rep. 138, 91 L. T. N. S. 678; National Phonograph Co. v. Mench, 27 Times L. R. 239, [1911] A. C. 336, 80 L. J. P. C. N. S. 105, 104 L. T. N. S. 5, 28 Rep. Pat. Cas. 229, 48 Scot. L. R. 733; The Fair v. Dover Mfg. Co. 92 C. C. A. 43, 166 Fed. 117; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. Rep. 733; New Jersey Patent Co. v. Schaefer, 144 Fed. 437; Edison Phonograph Co. v. Pike, 116 Fed. 863; Ingersoll v. Snellenberg, 147 Fed. 522; Winchester Repeating Arms Co. v. Buengar, 199 Fed. 786; American Graphophone Co. v. Pickard, 201 Fed. 546; Lovell-McConnell Mfg. Co. v. International Automobile League, 202 Fed. 219.

The right of the patentee to restrict the price at which his article shall be sold comes within the principle decided in Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364.

The patentee's monoply of selling is coordinate with that of using his patented article, and subject to the same degree of control.

Adams v. Burke, 17 Wall, 453, 21 L. ed. 700; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

O'Donnell's purchase from a jobber instead of from plaintiffs does not relieve him from infringement, as he had notice through the price restriction on the label.

Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 427; New Jersey Patent Co. v. Schaefer, 144 Fed. 437, 159 Fed. 171; Edison v. Ira M. Smith Mercantile Co. 188 Fed. 925; Automatic Pencil Sharpener Co. v. Goldsmith Bros. 190 Fed. 205.

The Bobbs-Merrill decision (210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722) does not protect the defendant.

The Fair v. Dover Mfg. Co. 92 C. C. A. 43, 166 Fed. 117; Automatic Pencil Sharpener Co. v. Goldsmith Bros. 190 Fed. 205; Indiana Mfg. Co. v. Nichols & S. Co. 190 Fed. 579; Waltham Watch Co. v. Keene, 191 Fed. 855; Edison v. Ira M. Smith Mercantile Co. 188 Fed. 925.

Mr. Daniel W. Baker argued the cause, and, with Mr. Frank J. Hogan, filed a brief for O'Donnell:

When a patentee or his assignee has manufactured and sold for a satisfactory price the article protected by the patent, that article is thereafter "without the patent monopoly," and it is beyond the patentee's power to dictate its resale price.

Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532; Adams v. Burke, 17 Wall. 453, 21 L. ed. 700; Chaffee v. Boston Belting Co. 22 How. 217, 16 L. ed. 240; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738.

There is a distinction between the extent of a patentee's property in and authority over the patent (*i. e.*, patent rights), and the article manufactured thereunder (*i. e.*, specimen of the patented article).

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Cortelyou v. Charles Enew Johnson & Co. 207 U. S. 196, 52 L. ed. 167, 28 Sup. Ct. Rep. 105; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115.

The question presented by this certificate has already been settled in our favor by this court in the copyright decisions.

Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; Charles Scribner's Sons v. Straus, 210 U. S. 352, 52 L. ed. 1094, 28 Sup. Ct. Rep. 735.

Messrs. Frederick P. Fish and Thomas W. Pelham filed a brief for the Gillette Safety Razor Company:

The cases of the sale of a patented article without reservation or condition are entirely irrelevant.

Adams v. Burke, 17 Wall. 453, 21 L. ed. 700; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738.

Likewise irrelevant are the cases dealing with the right to use a patented article after the extension of the patent beyond its original term.

Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532; Chaffee v. Boston Belting Co. 22 How. 217, 16 L. ed. 240.

Cases concerning resale-price restrictions on an unpatented article are also irrelevant. They are simply questions of contract, and, if they savor of unlawful monopoly, may be within the Sherman act, while the essence of patent control is a lawful monopoly.

Dr. Miles Medical Co. v. D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 372.

Price restrictions in licenses for the sale of patented articles are lawful.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

A patentee reserves to himself all rights to his patent monopoly not granted by the license; and one dealing with the article

in a manner outside of the right granted is an infringer.

Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566; Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322; Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364.

There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute, and the rights secured to an inventor under the patent statutes, that the cases which relate to one subject are not altogether controlling as to the other.

John D. Park & Sons v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24.

Mr. Nathan Matthews filed a brief for the Waltham Watch Company.

Mr. Horace Pettit filed a brief for the Victor Talking Machine Company.

8] *Mr. Justice Day delivered the opinion of the court:

This case is on a certificate from the court of appeals of the District of Columbia. The facts stated in the certificate are:

"Bauer & Cie., of Berlin, Germany, copartners, being the assignees of letters patent of the United States, dated April 5, 1898, No. 601,995, covering a certain water soluble albumenoid known as 'Sanatogen,' and the process of manufacturing the same, about July, 1907, entered into an agreement with F. W. Hehmeyer, doing business in the city of New York, under the trade name of the Bauer Chemical Company, whereby Hehmeyer became and has since been the sole agent and licensee for the sale of said product in the United States, the agreement contemplating that Hehmeyer should have power to fix the price of sale to wholesalers or distributors and to retailers, and to the public. The agreement further contemplated that said product should be furnished Hehmeyer at manufacturing cost, the net profits obtained by him to be shared equally by the parties to the agreement. Since April, 1910, this product has been uniformly sold and supplied to the trade and to the public by the appellants and their licensees in sealed packages bearing the name 'Sanatogen,' the words 'Patented in U. S. A., No. 601,995,' and the following:

"Notice to the Retailer.

"This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"A purchase is an acceptance of this condition. All *rights revert to the un-[9 dersigned in the event of violation.

The Bauer Chemical Co.

"The appellee is the proprietor of a retail drug store at 904 F Street, N. W., in this city. He purchased of the Bauer Chemical Company for his retail trade original packages of said Sanatogen bearing the aforesaid notice. These packages he sold at retail at less than $1 and, persisting in such sales, appellants, in March, 1911, severed relations with him. Thereupon appellee, without the license or consent of the appellants, purchased from jobbers within the District of Columbia, said jobbers having purchased from appellants, original packages of said product, bearing the aforesaid notice, sold said packages at retail at less than the price fixed in said notice, and avers that he will continue such sales."

The question propounded is: "Did the acts of the appellee, in retailing at less than the price fixed in said notice, original packages of 'Sanatogen,' purchased of jobbers, as aforesaid, constitute infringement of appellants' patent?"

The protection given to inventors and authors in the United States originated in the Constitution, § 8 of article I. of which authorizes the Congress "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This protection, so far as inventors are concerned, has been conferred by an act of Congress passed April 10, 1790, and subsequent acts and amendments. The act of 1790 (1 Stat. at L. 109, chap. 7), granted "the sole and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery." In 1793 (1 Stat. at L. 318, chap. 11), the word "full" was substituted for the word "sole," and in 1836 (5 Stat. at L. 117, § 5, *chap. 357), the [10 word "constructing" was omitted. This legislation culminated in § 4884 of the Revised Statutes, the part with which we are dealing being practically identical with the act of 1870 (16 Stat. at L. 198, § 22, chap. 230, U. S. Comp. Stat. 1901, p. 3381). It provides that every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery."

The right to make, use, and sell an in-

vented article is not derived from the patent law. This right existed before and without the passage of the law, and was always the right of an inventor. The act secured to the inventor the *exclusive* right to make, use, and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee. Bloomer v. McQuewan, 14 How. 539, 549, 14 L. ed. 532, 537; Continental Paper Bag Co. v. Eastern Paper Bag Co. 210 U. S. 405, 425, 52 L. ed. 1122, 1130, 28 Sup. Ct. Rep. 748. It was passed for the purpose of encouraging useful invention and promoting new and useful improvements by the protection and stimulation thereby given to inventive genius, and was intended to secure to the public, after the lapse of the exclusive privileges granted, the benefit of such inventions and improvements. With these beneficent purposes in view the act of Congress should be fairly or even liberally construed; yet, while this principle is generally recognized, care should be taken not to extend by judicial construction the rights and privileges which it was the purpose of Congress to bestow.

In framing the act and defining the extent of the rights and privileges secured to a patentee, Congress did not use technical or occult phrases, but in simple terms gave an inventor the exclusive right to make, use, and vend his invention for a definite term of years. The right to make can scarcely be made plainer by definition, and embraces the construction of the thing invented. The right to use is a comprehensive term 11]and embraces within its meaning *the right to put into service any given invention. And Congress did not stop with the express grant of the rights to make and to use. Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the letters patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use, and vend, fairly construed, with a view to making the purpose of Congress effectual, reside the extent of the patent monopoly under the statutes of the United States. Bloomer v. McQuewan, 14 How. 549, 14 L. ed. 537. We need not now stop to consider the rights to sell and convey, and to license others to sell or use inventions, which rights have been the subject of consideration in the numerous reported cases to be found in the books. We are here concerned with the construction of the statute in the aspect and under the facts now presented.

The case presented pertains to goods purchased by jobbers within the District of Columbia, and sold to the appellee at prices not stated, and resold by him at retail at less than the price of $1 fixed in the notice. The question, therefore, now before this court for judicial determination, is: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of Dr. Miles Medical *Co. v. John D. Park & Sons Co. 220 U.[12 S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void. It was doubtless within the power of Congress to confer such right of restriction upon a patentee. Has it done so? The question has not been determined in any previous case in this court, so far as we are aware. It was dealt with under the copyright statute, however, in the case of Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722. In that case it was undertaken to limit the price of copyrighted books for sale at retail by a notice on each book, fixing the price at $1 and stating that no dealer was licensed to sell it for less, and that a sale at a less price would be treated as an infringement of the copyright. It was there held that the statute, in securing to the holder of the copyright the sole right to vend copies of the book, conferred a privilege which, when the book was sold, was exercised by the holder, and that the right secured by the statute was thereby exhausted. The court also held that it was not the purpose of the law to grant the further right to qualify the title of future purchasers by means of the printed notice affixed to the book, and that to give such right would extend the statute beyond its fair meaning, and secure privileges not intended to be covered by the act of Congress. In that case it was recognized that there are differences between the copyright statute and the patent statute, and the purpose to decide the question now before us was expressly disclaimed.

Section 4952, Revised Statutes (U. S. Comp. Stat. 1901, p. 3406), a part of the copyright act, secures to an author, inventor, designer, or proprietor of books, maps, charts, or dramatic or musical compositions, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending them. While that statute differs from the patent statute in terms and in the subject-matter intended to be protected, it is apparent that, in the respect involved in the present 13] *inquiry, there is a strong similarity between and identity of purpose in the two statutes. In the case of patents the exclusive right to vend the invention or discovery is added to the like right to make and use the subject-matter of the grant, and in the case of copyrights the sole right of multiplying and reproducing books and other compositions is coupled with the similar right of "vending the same." So far as the use of the terms "vend" and "vending" is concerned, the protection intended to be secured is substantially identical. The sale of a patented article is not essentially different from the sale of a book. In each case to vend is to part with the thing for a consideration. It is insisted that the purpose to be subserved by notices such as are now under consideration—keeping up prices and preventing competition—is more essential to the protection of patented inventions than of copyrighted articles; and it is said that the copyrighted article may be and usually is sold for a lump consideration by the author or composer, and that he has no interest in the subsequent sales of the work, while patented inventions require large outlays to create and maintain a market. To some extent this contention may be based upon fact; nevertheless it is well known that in many instances the compensation an author receives is the royalties upon sales of his book or a percentage of profits, which makes it desirable that he shall have the protection of devices intended to keep up the market and prevent the cutting of prices. But these considerations could have had little weight in framing the acts. In providing for grants of exclusive rights and privileges to inventors and authors we think Congress had no intention to use the term "vend" in one sense in the patent act and "vending" in another in the copyright law. Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same.

It is apparent that the principal differ-14]ence in the enactments *lies in the presence of the word "use" in the patent statute and its absence in the copyright law. An inventor has not only the exclusive right to make and vend his invention or discovery, but he has the like right to use it; and when a case comes fairly within the grant of the right to use, that use should be protected by all means properly within the scope of the statute. In E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747, the owner of a patent granted a license to the defendant to manufacture and sell harrows embodied in the invention covered by the patent. The license provided for the payment to the licensor by the licensee of a royalty of $1 for each harrow or frame sold, and stipulated that the licensee was not to sell to any person for a less price than that named, and that the license was subject to change from time to time. The case was one arising upon license agreements, originating in a state court, and did not involve the construction of the patent act in the circumstances now disclosed.

Chief reliance, however, of the plaintiff in this case, is upon the recent decision of this court in Henry v. A. B. Dick Co. 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364. An examination of the opinion in that case shows that the restriction was sustained because of the right to use the machine granted in the patent statute, distinguishing in that respect the patent from the copyright act. In that case a patented mimeograph had been sold which bore an inscription in the form of a notice that the machine was sold with the license restriction that it might only be used with stencil, ink, and other supplies made by the A. B. Dick Company, the owners of the patent. The alleged infringer sold to the purchaser of the mimeograph a can of ink suitable for use with the machine, with full knowledge of the restriction, and with the expectation that the ink sold would be used in connection with the machine. It is expressly stated in the opinion that the machine was sold at cost or less, and that the patentee depended upon the profit realized from the sale *of the nonpatented ar-[15 ticles to be used with the machine for the profit which he expected to realize from his invention (224 U. S. 26). After commenting upon the copyright statutes and the resemblance between the author's right to vend copies of his work and the patentee's right to vend the patented thing, it was said (p. 46):

"To the inventor, by § 4884, Revised Statutes (U. S. Comp. Stat. 1901, p. 3381), there is granted 'the exclusive right to make, *use*, and vend the invention or discovery.' This grant, as defined in Bloomer v. McQuewan, 14 How. 539, 549, 14 L. ed. 1043

532, 537, 'consists altogether in the right to exclude everyone from making, *using*, or vending the thing patented.' Thus, there are several substantive rights, and each is the subject of subdivision, so that one person may be permitted to make, but neither to sell nor use, the patented thing. To another may be conveyed the right to sell, but within a limited area, or for a particular use, while to another the patentee may grant only the right to make and use, or to use only for specific purposes. Adams v. Burke, 17 Wall. 453, 21 L. ed. 700; Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322; Providence Rubber Co. v. Goodyear, 9 Wall. 788, 799, 19 L. ed. 566, 569." (Italics in the original opinion.)

That case was distinguished from Bobbs-Merrill Co. v. Straus, supra, construing the copyright act, because of the difference in the terms of the copyright and patent statutes, the patent act conferring not only the right to make and sell, but the exclusive right to *use* the subject-matter of the patent. It was under the right to use that the license notice in question was sustained, and it is obvious that the notice in that case dealt with the use of the machine, and limited it to use only with the paper, ink, and supplies of the manufacture of the patentee. While the title was transferred, it was a qualified title, giving a right to use the machine only with certain specified supplies. It was said in the Dick Case that "there is no collision whatever between the decision in the Bobbs-Merrill Case and the present opinion. Each 16]rests upon a *construction of the applicable statute, and the special facts of the cases."

It is contended in argument that the notice in this case deals with the use of the invention, because the notice states that the package is licensed "for sale and use at a price not less than $1," that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in event of violation of the restriction. But in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon, or to participation in the profits thereof. The packages were sold with as full and complete *title as any article* could have when sold *in the open market*, excepting only the attempt to limit the sale or use when sold for not less than $1. In other words, the title transferred was full and complete, with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the Dick Case. There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words.

The real question is whether, in the exclusive right secured by statute to "vend" a patented article, there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. *The appellee[17 and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee, and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such facts as are now presented we think the right to *vend* secured in the patent statute is not distinguishable from the right of *vending* given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.

In Adams v. Burke, 17 Wall. 453, 21 L. ed. 700, Mr. Justice Miller, delivering the opinion of the court, pertinently said (p. 455):

"The vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care, and to decide in each case no more than what is directly in issue. . . .

"The true ground on which these decisions rest is that the sale by a person who has the full right to make, sell, and use such a machine carries with it the right to

the use of that machine to the full extent to which it can be used in point of time.

"The right to manufacture, the right to sell, and the right to use, are each substantive rights, and may be granted or conferred separately by the patentee.

18] *"But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the languge of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

Bloomer v. McQuewan, supra; Goodyear v. Beverly Rubber Co. 1 Cliff. 348, 354, Fed. Cas. No. 5,557; Chaffee v. Boston Belting Co. 22 How. 217, 223, 16 L. ed. 240, 242; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738.

Holding these views, the question propounded by the Court of Appeals will be answered in the negative, and it is so ordered.

Dissenting: Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Lurton, and Mr. Justice Van Devanter.

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19] *JAMES E. GORMAN, Appt.,
v.
CHARLES E. LITTLEFIELD, Trustee in Bankruptcy of Albert O. Brown et al., Coparteners, Trading under the Name of A. O. Brown & Company.

(See S. C. Reporter's ed. 19-25.)

**Bankruptcy — assets — shares of stock in possession of bankrupt broker.**

Shares of stock in a certain corporation, indorsed in blank, and found in the possession of a bankrupt firm of stock brokers in an amount greater than should have been on hand for a customer for whom shares in such corporation had been bought with the understanding that they were to be paid for in full, there being at the time of the purchase an ample credit balance with the firm in the customer's favor, applicable on its books to such payment, are not, up to the amount of such purchase, a part of the general bankrupt estate for the benefit of creditors, but should be turned over to such customer, where they are otherwise unclaimed, although they cannot be identified as the identical shares purchased for him.

[For other cases, see Bankruptcy, VI. a, in Digest Sup. Ct. 1908.]

[No. 243.]

Argued April 21 and 22, 1913. Decided May 26, 1913.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, holding certain shares of stock found in the possession of a bankrupt firm of stock brokers to be assets of the bankrupt estate. Reversed.

See same case below, 106 C. C. A. 536, 184 Fed. 454.

The facts are stated in the opinion.

Mr. James L. Coleman argued the cause, and, with Mr. Robert Dunlap, filed a brief for appellant:

A certificate of stock in a corporation is not the property itself, but only the evidence of the property in the shares; and as one share of stock is not different in kind or quality from every other share of the same issue and company, the return of a different certificate, or the right to substitute one certificate for another of the same number of shares, is not a material change in the property right held by the broker for his customer.

Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; Nourse v. Prime, 4 Johns. Ch. 497, 13 Am. Dec. 606; Caswell v. Putnam, 120 N. Y. 153, 24 N. E. 287; Stewart v. Drake, 46 N. Y. 453; Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Re T. A. McIntyre & Co. 98 C. C. A. 381, 174 Fed. 628; Sexton v. Kessler & Co. 225 U. S. 90-97, 56 L. ed. 995-1000, 32 Sup. Ct. Rep. 657; Markham v. Jaudon, 41 N. Y. 235; Skiff v. Stoddard, 63 Conn. 216, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104; Harding v. Field, 1 App. Div. 391, 37 N. Y. Supp. 399.

What the customer owned was not necessarily some specific certificate or certificates, but the number of shares of stock which such certificate or certificates might represent, and the individuality of such certificate was, in a transaction of that kind, a matter of indifference.

Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981.

If trust moneys be wrongfully mingled or changed, equity will follow the trust fund which has been mingled with property of the trustee, and fasten upon the whole of

the property a lien for the amount of the trust funds.

Taylor v. Plumer, 3 Maule & S. 575, 2 Rose, 457, 16 Revised Rep. 361; Hallett's Estate, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 68, 26 L. ed. 693, 699; Van Alen v. American Nat. Bank, 52 N. Y. 1; Re A. O. Brown & Co. 171 Fed. 254; Baker v. New York Nat. Exch. Bank, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452; American Sugar Ref. Co. v. Fancher, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; Re Berry, 77 C. C. A. 434, 147 Fed. 208; Re Graff, 117 Fed. 343; Smith v. Mottley, 150 Fed. 266; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 406.

The trustee stands in the shoes of the bankrupts. He takes the property subject to equities, and has no better rights than the bankrupts. The interposition of a trustee in bankruptcy does not give to general creditors any rights to property to which they are not entitled. As the 250 shares of stock claimed by Gorman always belonged to him, and never to the bankrupts, and as the general creditors never extended credit to the bankrupts on the faith of Gorman's stock, and certainly never extended credit to the bankrupts on the faith that said bankrupts would misappropriate Gorman's stock, it remains that to deny Gorman's claim would not only deprive him of his property, but would give to the general creditors that to which they are not entitled, and which they could not in equity or good conscience retain.

Knatchbull v. Hallett, L. R. 13 Ch. Div. 730, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Re Berry, 77 C. C. A. 434, 147 Fed. 208; American Sugar Ref. Co. v. Fancher, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 208; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 134, 53 L. ed. 734, 29 Sup. Ct. Rep. 466; Richardson v. Shaw, 209 U. S. 378, 52 L. ed. 842, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; Security Warehousing Co. v. Hand, 206 U. S. 415, 423, 51 L. ed. 1117, 1122, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Thompson v. Fairbanks, 196 U. S. 516, 526, 49 L. ed. 577, 586, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075.

Certainly Gorman has an equitable lien on 250 shares of Green Cananea stock in the hands of the trustee-appellee, which neither the bankruptcy law nor the right of general creditors can disturb.

Hurley v. Atchison, T. & S. F. R. Co. 214 U. S. 126, 131-135, 53 L. ed. 729, 733, 734, 29 Sup. Ct. Rep. 466; Sexton v. Kessler Co. 225 U. S. 90, 98, 99, 56 L. ed. 995, 1000, 1001, 32 Sup. Ct. Rep. 657.

Mr. Daniel P. Hays argued the cause, and, with Mr. Ralph Wolf, filed a brief for appellee:

The claim of the appellant is adverse to that of the general creditors. It is, of course, clear that the burden of proof was upon the appellant to show that his stocks, or the proceeds thereof, came into the possession of the receiver or trustee.

First Nat. Bank v. Littlefield, 226 U. S. 110, ante, 145, 33 Sup. Ct. Rep. 78; Peters v. Bain, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354.

The appellant cannot establish title to the specific 350 shares of Copper stock found after bankruptcy, unless he identifies such certificates as having been purchased for him. This appellant has not done.

Ibid; Empire State Surety Co. v. Carroll County, 114 C. C. A. 435, 194 Fed. 593; Crawford County v. Strawn, 15 L.R.A. (N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; City Bank v. Blackmore, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771; Re Hicks, 170 N. Y. 195, 63 N. E. 276; Lowe v. Jones, 192 Mass. 94, 6 L.R.A.(N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 Ann. Cas. 55.

The United States circuit court of appeals for the second circuit has uniformly applied this rule in determining the rights of owners reclaiming stocks from a receiver in bankruptcy of a brokerage firm.

Re Berry, 79 C. C. A. 124, 149 Fed. 176; Re T. A. McIntyre & Co. 104 C. C. A. 424, 181 Fed. 960; Re Brown, 107 C. C. A. 656, 185 Fed. 766; Re Ennis, 109 C. C. A. 476, 187 Fed. 728, 113 C. C. A. 354, 193 Fed. 30.

The concurrent action of two courts upon questions of fact will not be disturbed, except in case of manifest error,—a condition which does not here obtain.

First Nat. Bank v. Littlefield, 226 U. S. 110, ante, 145, 33 Sup. Ct. Rep. 78; Brainard v. Buck, 184 U. S. 99, 46 L. ed. 449, 22 Sup. Ct. Rep. 458; Stuart v. Hayden, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274.

The mere fact that there came into the possession of the receiver 350 shares of Green Cananea Copper stock does not, without further proof, entitle the appellant thereto.

Re T. A. McIntyre & Co. 104 C. C. A. 424, 181 Fed. 960; Re Berry, 79 C. C. A. 124, 149 Fed. 176; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519; Re Brown, 107 C. C. A. 656, 185 Fed. 766, 113 C. C. A. 354, 193 Fed. 30; Re Ennis, 109 C. C. A. 476, 187 Fed. 728; Peters

v. Bain, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; Crawford County v. Strawn, 15 L.R.A.(N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; Re Hicks, 170 N. Y. 195, 63 N. E. 276; Lowe v. Jones, 192 Mass. 94, 6 L.R.A.(N.S.) 489, 116 Am. St. Rep. 225, 78 N. E. 402, 7 Ann. Cas. 551; Empire State Surety Co. v. Carroll County, 114 C. C. A. 435, 194 Fed. 593.

Mr. Justice Day delivered the opinion of the court:

This case presents a controversy over 250 shares of Green Cananea Copper Company stock, which came into the possession of the trustee in bankruptcy of Albert O. Brown and others, copartners, trading under the name of A. O. Brown & Company. Appellant, James E. Gorman, claimed to be the owner of the shares of stock, and instituted proceedings in the district court to recover them. The matter was referred to a special master, who found the facts and recommended the transfer of the stock to the claimant. The district court, upon hearing, ruled otherwise, and, upon appeal to the circuit court of appeals, the ruling of the district court was sustained.

The claimant for a year or more before the failure of A. O. Brown & Company was a customer dealing with one of the Chicago offices of that firm, buying stocks on margin and also paying for them in full. On 22]or about April 14, 1908, *Gorman directed the Chicago office to buy 250 shares of Green Cananea Copper stock for him. The stock was bought on the understanding that it was to be paid for in full, and at the time that the order was executed the claimant had an ample credit balance with the firm, applicable on its books to the payment in full of the shares purchased. The certificates of stock were left by the claimant in the possession of the broker, subject to the claimant's future order. The books of the bankrupt firm show that on April 14, 1908, they bought for the account of Gorman, 100 shares of Green Cananea Copper stock, and received certificate A-335. This certificate was delivered to J. T. ———— on May 6, 1908, on account of a sale from H. Wright & Company, of Cleveland, Ohio. On April 14, 1908, the bankrupt firm bought for the claimant 50 shares of Green Cananea Copper stock, and received certificate Y-11083. This certificate was, on May 14, 1908, delivered to DeCoppet & Doremus, on account of balance of trade on that date. On April 14, 1908, the bankrupt firm bought for the claimant 50 shares of the same stock, and received certificate B-6589. This certificate was delivered to DeCoppet & Doremus on April 16, 1908, on account of the sale of L. E. Gorton, of Detroit, Michigan. On April 14, 1908, the bankrupt firm bought for the claimant 50 shares of the same stock, and received certificate B-6537. This certificate was delivered to Carpenter & Baggott on May 14, 1908, on account of a sale to Parson, Snyder, & Company, of Cleveland, Ohio. The receiver in bankruptcy, now the trustee, came into the possession of, and still has in his possession, certificates indorsed in blank for an aggregate of 350 shares of Green Cananea Copper stock. As to this stock no claim has been filed with the receiver or trustee, although the master says the time for filing claims has expired. The certificates of stock in question, with those purchased for other clients, which were paid for in full or were purchased on margin, were *placed with-[23 out discrimination in the same tin box. It was customary to take certificates to make delivery from that box, indiscriminately, unless the certificate had been transferred to the name of the customer. At no time before the failure did the claimant receive his shares of the Green Cananea Copper stock, nor did he order its sale.

Upon these facts the question is, Are these shares of stock a part of the general estate for the benefit of creditors, or should they be turned over to the claimants?

In Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981, the nature of this property was the subject of discussion and decision in this court. In that case a broker, who had been adjudicated a bankrupt, shortly before the bankruptcy, and after his insolvency, turned over upon demand to a customer shares of stock similar to those which had been held for the customer, and for an equal number of shares. It was contended that, under the circumstances, this delivery of certificates amounted to a preference under the bankruptcy act. This court therefore had to consider the legal relation of customer and broker, in buying and holding shares of stock, and it was held that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon, or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as

another. It was therefore concluded that the turning over of the certificates for the shares of stock belonging to the customer, 24]and *held by the broker for him, did not amount to a preferential transfer of the bankrupt's property.

In the subsequent case of Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657, this court, speaking of the relation of customer and broker, said (p. 97):

"When a broker agrees to carry stock for a customer, he may buy stock to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet, as he is bound to keep stock enough to satisfy his contracts, as the New York firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference. Richardson v. Shaw, supra; Markham v. Jaudon, 41 N. Y. 235. So, a depositor in a grain elevator may have a property in grain in a certain elevator, although the keeper is at liberty to mix his own or other grain with the deposit, and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned."

It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker. Richardson v. Shaw, supra.

It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy cer-25]tificates *were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind, and to keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant. Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the bankrupt.

The ground upon which the circuit court of appeals decided the case seems to have been that the certificates were not sufficiently identified; but, as we have said, they were on hand to an amount claimed by the appellant, and more, and were not claimed by any other customer. We think there should be no presumption that the stock was stolen or embezzled with intent to deprive the rightful owner of it, and when the unclaimed shares are found in the possession of the bankrupt it is only fair to accept the general presumption in favor of fair dealing, and to decide, in the absence of countervailing proof, that the broker, out of his funds, has supplied the deficiency for the benefit of his customer, which he had a perfect right to do.

Judgment reversed.

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*CHARLES E. BARRETT, Plff. in Err.,[26

v.

STATE OF INDIANA.

(See S. C. Reporter's ed. 26-31.)

**Constitutional law — police power — due process of law — regulating entries in coal mines.**

1. Requiring entries in coal mines, where drivers are required to drive with mine cars, to have an unobstructed space of at least 2 feet in width outside the rails, as is done by Burns's Anno. Stat. (Ind.) 1908, § 8582, is a valid exercise of the police power of the state, and does not violate the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. c, 3; IV. b, 7, in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — classification — regulating entries in coal mines.**

2. Singling out bituminous coal mines and omitting block coal mines when requiring entries to be of not less than a prescribed width, as is done by Burns's Anno. Stat.

NOTE.—On statutory regulations for the protection of workmen in mines—see note to Consolidated Coal & Min. Co. v. Floyd, 25 L.R.A. 848.

(Ind.) 1908, § 8582, does not deny the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, b, in Digest Sup. Ct. 1908.]

[No. 245.]

Submitted April 18, 1913. Decided May 26, 1913.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which, on a second appeal, affirmed a conviction in the Sullivan Circuit Court for violation of a statute requiring entries in coal mines to be of not less than a prescribed width. Affirmed.

See same case below, 175 Ind. 112, 93 N. E. 543.

The facts are stated in the opinion.

Messrs. John C. Chaney and Charles E. Barrett submitted the cause for plaintiff in error:

The act in question denies the equal protection of the law to the person or persons engaged in the mining of coal in certain districts of the state. It grants special privileges to another class of citizens engaged in mining coal in what is known as the block coal district, and denies these privileges to all other persons. This question is presented by the motion to quash the affidavit, by the demurrer of appellant to the affidavit, and by the special answers of appellant.

Chicago, M. & St. P. R. Co. v. Westby, 46 L.R.A.(N.S.) —, 102 C. C. A. 65, 178 Fed. 619; Bells Gap. R. Co. v. Pennsylvania, 134 U. S. 232–237, 33 L. ed. 892–895, 10 Sup. Ct. Rep. 533; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–159, 41 L. ed. 666–669, 17 Sup. Ct. Rep. 255; Yick Wo v. Hopkins, 118 U. S. 356–359, 30 L. ed. 220, 221, 6 Sup. Ct. Rep. 1064; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Barbier v. Connolly, 113 U. S. 27–31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Tiedeman, Pol. Power, 1886 § 3, pp. 12, 13. Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Lake View v. Rose Hill Cemetery Co. 70 Ill. 192, 22 Am. Rep. 71; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; State v. Gantz, 124 La. 535, 24 L.R.A.(N.S.) 1072, 50 So. 524; Armour & Co. v. Augusta, 134 Ga. 178, 27 L.R.A.(N.S.) 676, 67 S. E. 417; Henry v. Campbell, 133 Ga. 882, 27 L.R.A.(N.S.) 283, 67 S. E. 390, 10 Ann. Cas. 178; Mergen v. Denver, 46 Colo. 385, 104 Pac. 399.

The business of mining coal is not different in kind from the business of any large mercantile or manufacturing company whose capital, experience, and facilities may enable it to have a widely extended patronage; but such characteristics do not make the business one which is affected with a public interest.

State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91.

The purpose of the 14th Amendment to the Constitution is, among other things, to protect the rights of those engaged in private business, and protect them in the use of their own property, and prohibit unjust interference therewith by any person not entitled to share in the control or management thereof.

American Surety Co. v. Shallenberger, 183 Fed. 636; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895.

The second paragraph of appellant's special plea avers such a state of facts as clearly shows that appellant in the operation of the coal mine referred to in the affidavit fell within the exception or proviso clause of the act. The answer further shows the act of 1907 to be class legislation, and shows that appellant is, by its terms, denied the equal protection of the law. It was error for the lower court to sustain the demurrer of the appellee to this paragraph of answer.

Greene v. State , 83 Neb. 84, 131 Am. St. Rep. 626, 119 N. W. 6.

Mr. Thomas M. Honan, Attorney General of Indiana, submitted the cause for defendant in error: Messrs. Edwin Corr, Thomas H. Branaman, and James E. McCullough were on the brief:

The passing of our forests and the development of industry make the development of our coal deposits necessary and desirable. Necessity for the proper regulation of operations of such mines results for the protection of those who work therein; and

such regulation is too clearly within the police power to be questioned.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 312, 29 Sup. Ct. Rep. 206.

Mr. Justice Day delivered the opinion of the court:

The plaintiff in error was convicted in a circuit court of Indiana of the violation of a statute of that state, requiring entries in certain coal mines to be of not less than a 28]prescribed *width. The case was twice before the supreme court of Indiana. 172 Ind. 169, 87 N. E. 7; 175 Ind. 112, 93 N. E. 543. From the judgment in the latter case, affirming the conviction, a writ of error was prosecuted. The assignments of error raise the question of the validity of the statute under the 14th Amendment to the Constitution of the United States.

The statute provides (Burns's Anno. Stat. [Ind.] 1908):

"8582. Width of entries.—1. That it shall be unlawful for any owner, lessee, agent, or operator of any coal mine within the state of Indiana, to make, dig, construct, or cause to be made, dug, or constructed, any entry or trackway after the taking effect of this act, in any coal mine in the state of Indiana where drivers are required to drive with mine car or cars unless there shall be a space provided on one or both sides continuously of any track or tracks, measured from the rail, in any such entry, of at least two (2) feet in width, free from any props, loose slate, *débris*, or other obstruction, so that the driver may get away from the car or cars and track in event of collision, wreck, or other accident. It shall be unlawful for any employee, person, or persons to knowingly, purposely, or maliciously place any obstruction within said space as herein provided: Provided, That the geological veins of coal numbers three and four, commonly known as the lower and upper veins in the block coal fields of Indiana, shall be exempt from the provisions of this act."

The next section provides that anyone violating the act shall be guilty of a misdemeanor, and prescribes the penalty.

That the legislatures of the states may, in the exercise of the police power, regulate a lawful business, is too well settled to require more than a reference to some of the cases in this court in which that right has been sustained as against objections under 29]the 14th Amendment. *Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Schmidinger v. Chicago, 226 U. S. 578, ante, 364, 33 Sup. Ct. Rep. 182. That the mining of coal is a dangerous business and therefore subject to regulation is also well settled. It is an occupation carried on at varying depths beneath the surface of the earth, amidst surroundings entailing danger to life and limb, and has been, as it may be, the subject of regulation in the coal-mining states by statutes which seek to secure the safety of those thus employed. The legislature is itself the judge of the means necessary and proper to that end, and only such regulations as are palpably arbitrary can be set aside because of the requirements of due process of law under the Federal Constitution. When such regulations have a reasonable relation to the subject-matter, and are not arbitrary and oppressive, it is not for the courts to say that they are beyond the exercise of the legitimate power of legislation. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160.

We are unable to say that the requirement that entries shall have a certain width beyond the tracks, as prescribed by this statute, would not promote the safety of the employees engaged in that work. The legislature found, for reasons sufficient to itself, that such additional width, kept clear of obstructions, would promote the safety of the employees, and we are not prepared to say that in enacting such legislation it violated the Federal Constitution.

It is argued that the act in question is also violative of the equal protection clause of the 14th Amendment, in that it applies to bituminous coal mines, but not to block coal mines. The equal protection of the laws requires laws of like application to all similarly situated; but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, *allowed wide discretion.[30 It is the province of the legislature to make the laws, and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification, and before a court can inter-

fere with the exercise of its judgment, it must be able to say "that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." This was one test laid down in Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638, and has been quoted and followed with approval in Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865, and Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644. In noticing this contention the supreme court of Indiana, when the case was first before it (172 Ind. 169, 87 N. E. 7), reviewed the situation in that state, as evidenced by official reports concerning the coal-mining industry, and noted the great difference in the production and number of mines between what are called the block veins of coal and the bituminous veins of coal existing in the state, and also the different depths at which coal is mined in the strata of block and bituminous coal, and concluded its discussion of this subject, as follows:

"It is not unlikely that there is in fact a difference in the degree of danger in mining the two kinds of coal. We at least cannot say the contrary. If so, it must be presumed that the legislature informed itself upon that subject. It may be that mining coal at a distance of 165 feet from the surface is more hazardous than mining it at 90 feet. These matters, with the relative output, relative number of mines and persons employed, may have entered into the consideration as requiring the act in one case, and not in the other, and while the relative number of employees, mines, and the output might not be a proper classification if applied to persons in the same class of work, or under the same conditions, 31]we cannot say that *they are not different at different depths and in different kinds of coal, and must presume that they are; at least, we cannot say that, as applied to all persons alike employed in mining bituminous coal, the act is invalid because not applicable to block mining, and we cannot say that the act is unreasonable, or determine as to its propriety or impropriety, and to doubt its constitutionality is to resolve in favor of its constitutionality."

This is a reasonable disposition of the matter, and we concur in the conclusion reached by the supreme court of Indiana in this respect. We are unable to say that the application of the law to bituminous coal mines and the omission of block coal mines was such arbitrary discrimination as to render the act unconstitutional.

We find no error in the judgment of the Supreme Court in affirming the conviction, *and it is affirmed.*

BIG VEIN COAL COMPANY OF WEST VIRGINIA, Plff. in Err.,
v.
BENJAMIN H. READ.

(See S. C. Reporter's ed. 31-39.)

**Attachment — jurisdiction — against nonresident.**

1. The change in the law effected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), permitting suits to be brought in the Federal courts in the district of the residence either of the plaintiff or defendant, did not abrogate the settled rule that no attachment can issue out of a Federal court in a case where a defendant, by reason of his nonresidence, was not and could not be personally served with process, and did not appear.

[For other cases, see Attachment, II., in Digest Sup. Ct. 1908.]

**Special appearance — effect to give jurisdiction.**

2. A nonresident defendant not personally served in an attachment suit does not submit to the jurisdiction of the court by specially appearing for the purpose of objecting to the jurisdiction on the ground, among others, that the property in question was not subject to attachment or garnishment.

[For other cases, see Appearance, III., in Digest Sup. Ct. 1908.]

[No. 501.]

Argued April 11, 1913. Decided May 26, 1913.

IN ERROR to the Circuit Court of the United States for the Northern District of West Virginia to review a decree dismissing an attachment suit against a nonresident who was not personally served with process and who did not appear. Affirmed.

The facts are stated in the opinion.

Mr. Osborne I. Yellott argued the cause and filed a brief for plaintiff in error.

Messrs. William L. Rawls and Frank Gosnell argued the cause, and, with Mr. George Weems Williams, filed a brief for defendant in error.

Mr. Justice Day delivered the opinion of the court:

This case involves the jurisdiction of a circuit court of the United States to issue an order of attachment in a case where no personal service could be had upon the defendant, and wherein there was no personal appearance to the action.

The case was begun in the circuit court of the United *States for the northern dis-[33 trict of West Virginia to recover in debt upon certain promissory notes. A summons was issued against the defendant, Benjamin

H. Read, trading as Lynah & Read, and return was made by the marshal that the writ had not been served, as defendant was not found in his district. Thereafter an affidavit was filed for an attachment, setting forth that the defendant was one of the receivers of the circuit court of the United States for the northern district of West Virginia of the property of the Oakland Coal & Coke Company, and that there had been allowed to him for his services as such receiver the sum of $2,000. An order of attachment was issued, and the return of the marshal stated that he had been unable to locate any property in his district upon which to serve the attachment, and accordingly returned the writ, "No property found." Afterwards an order was made which, after reciting the beginning of the suit, and that the defendant was a nonresident of West Virginia; that the special master had found the sum of $2,000 due him as such receiver, and that an order of attachment had been issued and placed in the hands of the marshal for the purpose of attaching the estate of the defendant, provided that a copy of the order be served upon the defendant, that he appear before the court, and that a copy of the order served upon the defendant and one Slingluff, special receivers in a suit entitled "Baltimore Trust & Guaranty Co. v. Oakland Coal & Coke Co." should be notice to them of the proceedings, and that the claim of the defendant was sought to be attached therein.

A copy of the order was served upon the defendant in Baltimore, Maryland, who thereafter appeared by his counsel for the purpose only of objecting to the jurisdiction of the court, and moved the court to dismiss the suit and quash the attachment upon the following grounds:

"First. The record shows that this de-[34]fendant is not a *citizen of or resident in, nor found within, the northern district of West Virginia.

"Second. The record shows that the defendant has no property whatever within the said state or district.

"Third. That this court has no jurisdiction *in rem* or *in personam* in said action.

"Fourth. That at the time of the suing out of the writs of summons and of attachment herein on the 26th day of June, 1911, this defendant was not a citizen or resident or found within West Virginia, and he had no property in said state or district, and at no time since has this defendant been such citizen or resident, or had any property within the said district, although the return day of the said writs has long *since passed, and the* defendant makes the *said writs and returns* thereon by the marshal for the northern district of West Virginia a part of this motion.

"Fifth. The fund or compensation ordered by this honorable court to be paid to the defendant for services as receiver was not, at the time of the issuance of said writs or at any time since then, liable to be attached upon the alleged indebtedness of the plaintiff, or for the payment thereof, in this honorable court.

"Sixth. This honorable court has no jurisdiction either of property or person giving jurisdiction for the maintenance of the said action."

Thereafter, the case coming on to be heard, counsel appearing for the defendant for the purpose of objecting to the jurisdiction and for the purpose of the motions filed only, and further moving the court to vacate and set aside the orders issued, and to quash the service of summons in the action, and to dismiss the case, certain facts were found, without prejudice to any motion of the defendant, and without enlarging the appearance of the defendant, as follows:

"Messrs. Read and Slingluff were appointed receivers in the cause of the Baltimore Trust & Guarantee Co. *v. Oak-[35 land Coal & Coke Co. of West Virginia, a cause pending in the United States circuit court for the northern district of West Virginia, by an order in said cause passed on the 12th day of June, 1907, and the receivership estate being ready for distribution on June 20, 1910, this court passed a decree referring the cause to Special Master C. D. Merrick, with directions, among other things, to make a report 'including costs and allowances and fees, to the end that a full and complete decree might be made for the distribution and settlement of the estate.'

"On May 15th, 1911, the special master filed such report. Among other allowances were the following:

" 'That Benjamin H. Read, for his services as receiver, is entitled to and should be allowed the sum of $2,000.'

"That no objection had been taken or exceptions made to the above allowance at the time the attachment was laid in this cause.

"That on July 7, 1911, this court passed an order ratifying the report of the master as to the above and similar allowances, but directed that the allowance of $2,000 commissions to B. H. Read be retained by the receivers pending the determination of the questions arising out of such attachment.

Afterwards the court delivered an opinion in which the judge directed that the former order, amounting to an attachment, should be set aside, and held that, inas-

much as personal service upon the defendant in the action might yet be obtained by alias summons, he would not then dismiss the action. Later, the plaintiff refused to direct the issuance of alias summons, and upon motion judgment was entered dismissing the action, and a certificate was made by the court.

The certificate states that the judgment complained of in plaintiff's writ of error, which was set out, is based solely upon the ground that the court had no jurisdiction 36]as a *Federal court to grant relief to the plaintiff by subjecting to the claim of the plaintiff the assets and credits of the defendant, to be attached in the case, without personal service of summons upon him, or his voluntary appearance in the cause, and that the motion filed in the case did not constitute a voluntary appearance, and that the court, as a Federal court, had no jurisdiction to grant a personal judgment against the defendant, or to make a final judgment or order, subjecting to the claim of the plaintiff the assets and credits of the defendant so sought to be attached.

The attachment was sought to be levied and was claimed to be authorized under the act of June 1, 1872 (17 Stat. at L. 196, chap. 255), now § 915 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 684). It is as follows:

"In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

Assuming that the attachment could be issued under the laws of West Virginia, under this statute was there authority in the courts of the United States to issue the attachment, it appearing that no service had been or could be made upon the defendant, and that he had not appeared in the action?

Section 915 was before this court in Ex parte Des Moines R. Co. 103 U. S. 794, 26 L. ed. 461, and it was held that as, under § 739 of the Revised Statutes, act of March 37]3, 1875 (18 *Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), then in force, no civil action, not local in its nature, could be brought against anyone by original process in any United States circuit court other than that for the state of which he was an inhabitant or in which he was found at the time of serving the writ, an attachment could not be issued, the defendant being a nonresident, and not having been served with process. It was further held that an attachment was but an incident to a suit, and unless the suit could be maintained the attachment must fall. In other words, in cases where the defendant could not be sued and jurisdiction acquired over him personally, the auxiliary remedy by attachment could not be had, as attachment was not a means of acquiring jurisdiction. The same view was taken in Nazro v. Cragin, 3 Dill. 474, Fed. Cas. No. 10,062, by Mr. Justice Miller, on the circuit. Ex parte Des Moines R. Co. supra, was but an affirmance, as to the right of attachment where no personal service could be had, of the former case of Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093, wherein it was held that a person was not amenable to attachment against his property except where process could be served upon his person.

It is contended, however, that since the act of March 3, 1887, [24 Stat. at L. 552, chap. 373], as amended August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), the right of attachment should be held to exist in cases like the present. The statute of 1888 provides:

"And no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The argument is that the right to issue an attachment under the act of 1872 should obtain, since the law now permits suit in the district of the residence either of the *plaintiff or defendant, omitting the[38 provision of the act of 1875, that the defendant could be sued only in the district in which he was an inhabitant or could be found at the time of commencing the proceeding. But we are of the opinion that this amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to personal service, or voluntarily appear in the action. If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and

doubtless a method of service by publication in such cases would have been provided. We think the rule has not been changed; that an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court. See Laborde v. Ubarri, 214 U. S. 173, 53 L. ed. 955, 29 Sup. Ct. Rep. 552; United States v. Brooke, 184 Fed. 341.

Another contention is that the defendant, in appearing for the purpose of the motion submitting to the court the question of the right to attach his compensation as receiver in the court, had voluntarily submitted to the jurisdiction of the court; but we are of the opinion that this contention is untenable. It is the settled practice in the Federal courts that an appearance may be made for the sole purpose of raising jurisdictional questions, without thereby submitting to the jurisdiction of the court over the action. Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Shaw v. Quincy Min. Co. 145 U. S. 444, 453, 36 L. ed. 768, 772, 12 Sup. Ct. Rep. 935.

It is true that where the defendant appears by motion and objects to the jurisdiction, and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982, where a demurrer was interposed raising two grounds of jurisdiction, and the third going to the merits of the cause of action, and it was [39] held *that there had been a submission to the jurisdiction of the court. See also Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720.

In this case, however, the submission was not of any question involving the merits of the suit, but of one with reference to the jurisdiction of the court to issue the attachment; adding the further ground that the property in question was not subject to attachment or garnishment. No issue was made involving the merits of the action. This special appearance was sufficient to raise the question of jurisdiction only. Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

In our opinion the Circuit Court did not err in holding that it had no jurisdiction *to issue* the attachment in this case.

*Judgment affirmed.*

## DETROIT UNITED RAILWAY, Plff. in Err.,
## v.
## CITY OF DETROIT.

(See S. C. Reporter's ed. 39–46.)

**Street railways —franchise — extension of term.**

1. The life of street railway franchises granted respectively by a city and an adjoining township for a definite and fixed term was not extended until the date fixed by the township for the termination of other street railway franchises by the adoption of a municipal ordinance, after the annexation of a part of the township to the city, requiring the street railway company "for the full term of said township grants" to sell workmen's tickets at a reduced rate, good on the lines in question, the other provisions of the township grants to remain unchanged, since a fair construction of the ordinance required such service at the rates fixed only while the railway had a lawful right to use the streets under its grants.

[For other cases, see Street Railways, 17–27, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — right of street railway after franchise has expired.**

2. A street railway company whose franchise to use the city streets has, by its terms, expired, has no implied contract right to remain in the streets under such reasonable arrangements for public service as the situation may require, which would be impaired, contrary to U. S. Const., art. 1, § 10, by requiring the street railway company to cease operating its cars and to remove its tracks and other property from the streets within a reasonable time.

[For other cases, see Constitutional Law, 1201–1213, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — requiring removal of street railway tracks.**

3. The property of a street railway company whose franchise to operate in the city streets has, by its terms, expired, is not taken without due process of law by requiring it to remove its tracks and other property from the streets within a reasonable time.

[For other cases, see Constitutional Law, IV. b, 5, in Digest Sup. Ct. 1908.]

[No. 1047.]

Submitted May 5, 1913. Decided May 26, 1913.

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Note.—On privilege of using streets as a contract within constitutional provision against impairing obligations—see note to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142.

As to right of street railroads in public streets, generally—see note to Detroit Citizens' Street R. Co. v. Detroit R. Co. 43 L. ed. U. S. 67.

IN ERROR to the Supreme Court of the State of Michigan to review a decree which, affirming a decree of the Circuit Court for the County of Wayne, in that state, held that certain street railway franchises had expired, and that the municipality might require the street railway company to cease operation and to vacate the streets. Affirmed.

See same case below, 172 Mich. 136, 137 N. W. 645.

The facts are stated in the opinion.

**Messrs. John C. Donnelly and William L. Carpenter** submitted the cause for plaintiff in error:

The contract of the parties being silent as to the disposition of the property at the end of the grant, its disposition must be determined by an implication from the terms of the original contract.

Addison, Contr. p. 23.

But two implications are possible: One that the company shall remove the property, which means to the owner its reduction to scrap and the loss of substantially all its value, and to the public the loss of its use and a prolonged deprivation of the necessary means of public transportation. The other possible implication is that the property shall remain and continue devoted to the use for which it is designed, on terms which are reasonable and in conformity with the rights of the city, the public, and the company. One implication destroys private property and prejudices the public interest. The other conserves the property and preserves the public interest. Which of these implications is more consonant with the rule laid down by Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. 213, 341, 6 L. ed. 606, 650, that the "parties are supposed to have made those stipulations which as honest, fair and just men they ought to have made," and with the rule laid down by 3 Bl. Com. p. 158, that contracts "implied by law . . . are such as reason and justice dictate."

Messrs. **Fred A. Baker** also submitted the cause for plaintiff in error. Mr. John C. Donnelly was on the brief:

The grant of the right to occupy a street by the railway is the grant of an easement which constitutes a right of way, and is an interest in the lands, and in its legal characteristics is not in any sense different from the grant of a right of way over private lands by the owner thereof.

Detroit Citizens' Street R. Co. v. Detroit, 124 Mich. 453, 83 N. W. 104; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 643; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501.

A railway, whether it be a general railroad or a street railway, being a public highway created by authority of the state, its operation as a unit and a through line, for public use and in the public use and interest, cannot be interrupted or a portion of its track torn up and removed because its title to a part of the right of way has terminated by reason of limitations therein or lapse of time, but some remedy other than that of the destruction of the railroad must be sought for and applied for the protection of the interests of the party controlling the property upon which the right of way has expired.

Austin v. Rutland R. Co. 45 Vt. 239; New York v. Pine, 185 U. S. 100, 46 L. ed. 823, 22 Sup. Ct. Rep. 592; Charleston & W. C. R. Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972.

The plaintiff in error relies on the recent case of Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 663, 664, 56 L. ed. 934, 939, 940, 941, 32 Sup. Ct. Rep. 572, which is recognized and followed in the still more recent cases of Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, ante, 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303, and Southern P. Co. v. Portland, 227 U. S. 559, ante, 642, 33 Sup. Ct. Rep. 308, both decided at this term

Where the local contract fixing rates of fare expires, and the parties, from the perverseness of the one or the other, are not able to come to a new agreement, there is ample power in the state legislature, by its own action or by conferring authority on the state railroad commission or even on the common council of the city of Detroit itself, to fix reasonable fares, with the certainty that any reasonable action thus taken will not be disturbed by this court.

Louisville v. Cumberland Teleph. & Teleg. Co. 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741.

If the city of Detroit desires to own and operate the street railways now the property of the Detroit United Railway, and can show a public necessity therefor, it can secure title to the property by condemning it to the public use.

Cincinnati v. Louisville & N. R. Co. 223 U. S. 390, 56 L. ed. 481, 32 Sup. Ct. Rep. 267.

**Messrs. Richard I. Lawson and Alfred Lucking** submitted the cause for defendant in error:

Defendant had no contract rights to be impaired.

Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 139–141, 51 L. ed. 399, 409, 410, 27 Sup. Ct. Rep. 202, 137 Fed. 111, 169 Fed. 308.

Mr. Justice Day delivered the opinion of the court:

This is a suit in equity, originating in the circuit court for the county of Wayne, of the state of Michigan, brought by the city of Detroit against the Detroit United Railway, to determine that certain franchises of the railway have expired, and to require it to pay a temporary rental, or to vacate the streets operated under the franchises. The decree of the circuit court in favor of the city was affirmed by the supreme court of Michigan. The case comes here on writ of error, and is now before us on motion of the city to dismiss, affirm, or advance.

The Detroit United Railway owns and operates all the street railways in Detroit. Its principal east and west line is called the Fort Street Line, in connection with which three franchises have been granted to the [41] railway and *its predecessors. One of the franchises was granted by the township of Springwells, part of which has since been annexed to the city of Detroit by legislative act, and the other two were granted by the city. By their terms the franchises expired June 17, June 30, and July 24, 1910, respectively.

The township of Springwells had also granted certain other franchises (the part of the railway system covered by such franchises not being involved in this suit, however) to the railway in 1889 and 1891, to expire in 1921, naming a certain rate of fare, and providing that the tracks constructed under such grants should be deemed, for the purpose of collecting fares, an extension of the tracks theretofore laid in the township and city. Upon the inclusion of that part of the township of Springwells within the city which contained the lines of railway covered by the franchises of 1889 and 1891, the city, which had theretofore made certain contracts with the railway for the reduction of fare upon the lines then within the city limits at certain hours, under a system of tickets called workingmen's tickets, by an ordinance passed May 2, 1906, entitled, "An Ordinance in Relation to Rates of Fare on Fort Street Lines of the Detroit United Railway," amended the township franchises so that the agreement between the railway and the city with reference to workingmen's tickets should apply to the lines embraced in the grants of 1889 and 1891 for the term of such grants, but provided that the other provisions of the township grants should remain unchanged.

Shortly before the expiration of the three franchises involved in this suit the city passed three resolutions under date of June 14, June 21, and July 19, 1910, the third being like but superseding the other two. The resolution of July 19, 1910, after reciting the fact that two of the ordinances had expired and the other soon would expire; that, because of the pendency of a certain suit and *injunction issued there- [42] in, an ordinance prescribing the terms and conditions under which the railway might continue to operate its lines after the expiration of its franchises could not be enforced; that under the Constitution of Michigan it was impossible for the city to grant a term franchise without the affirmance of the electors of the city, and that the railway was denied the right to operate its lines without a franchise, provided that the railway might temporarily operate under the same terms and conditions as theretofore existed upon the payment of $200 a day, to the city, and that, except upon such terms, consent to operate its railway was denied and refused to the railway. The railway, by written communication, denied that the franchises had expired, insisted that the demands of the city were illegal, and declined to pay the sum named in the resolution.

The railway, among other defenses, asserted that the ordinance of 1906 had the effect of extending its franchises to 1921; that, the original franchises being silent upon the question of the rights of the parties upon the termination of the grants, an implied contract was created that the railway and other property of the railway should continue in place and in use for the public convenience, on reasonable terms, and in conformity to the rights of the city, public, and railway, and that the resolutions impaired the obligations of the contracts of the railway, in violation of § 10, article I, of the Constitution, and deprived it of its property without due process of law, in contravention of the 14th Amendment.

The circuit court held, among other things, that the franchises had expired, and ordered the railway to accept the terms of the resolution, and comply with its provisions or to vacate the streets. The supreme court of Michigan affirmed the decision of the circuit court, that the franchises had expired, and that all rights of the railway to occupy the streets and to maintain and operate its railway *had [43] terminated, and held that the common council of the city might require the railway to cease the operation of its cars, and might also require the railway to remove its tracks from the streets, and provided the minimum time in which the railway should be compelled to comply with the demands of the common council.

Certain Federal questions are made

which require consideration, upon this application to dismiss or affirm, the first of which is that the attempt to terminate the rights of the railway, and require the removal of its tracks and property from the streets of the city, impairs the obligation of a valid and subsisting contract for the continued use of the streets until 1921. This contention is based upon the ordinance of May 2, 1906, which, by its title, purports to be one in relation to rates of fare on the Fort Street Lines of the rail way, and which provides, after reciting the purpose of the ordinance, as we have mentioned above, and the intention that the grants from the township of Springwells may be modified in accordance with the ordinance, the terms and conditions of the township grants not to be otherwise affected by the agreement:

"That the Detroit United Railway shall, for the full term of said township grants, issue and sell tickets at the rate of eight tickets for 25 cents, each of said tickets to be good for a continuous ride between any two points on what are known as the routes of the Fort Wayne & Elmwood Railway lines, so called, whether constructed under grants from the township of Springwells or from the city of Detroit, between the hours of 5 A. M. to 6:30 A. M.; and the hours of 4:45 and 5:45 P. M.; but the terms of said township grants in all other respects shall not be modified or changed, nor shall this ordinance and the acceptance thereof be construed to abridge, enlarge, or extend any rights acquired by said railway company, or its assignors or predecessors in title under said several grants from the township of Springwells."

44] *The argument is that, as this ordinance obligates the railway for the full term of the township grants, which do not expire until December 14, 1921, to sell tickets and transport passengers over its railway, including the portion covered by the now expired grants, the last-named grants of the railway were thereby extended to expire at the same time with the township grants, because only by such construction can the obligation of the railway to furnish transportation for the full term of the township grants be complied with; that this was a contractual obligation proposed by the city and accepted by the railway, and necessarily extended the grants of the railway.

The principles upon which grants of this character are to be construed have been frequently declared in decisions of this court. They were stated by the late Mr. Justice Peckham, speaking for the court, in Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 129, 51 L. ed. 399, 405, 27 Sup. Ct. Rep. 202:

"The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, 'in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislatures with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed.' Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. Rep. 427."

Applying these principles, it is impossible to hold that the effect of this ordinance was to extend franchises which by their terms had definite and fixed duration. Such *effect is nowhere suggested in the [45 preamble of the ordinance, and does not necessarily inhere in the thing sought to be accomplished. Legislation concerning prior grants was not brought to the attention of the council, so that privileges enlarging them could be intelligently acted upon and clearly given or explicitly withheld. A fair construction of the ordinance requires such service at the rates fixed only while the railway had a lawful right to use the streets by grant from the city. Certainly it was not contemplated that the city would require such service after the grant which it had itself given to the railway had expired by its own limitation. Any other construction of this ordinance is forced and unnatural, and the construction contended for would have the effect to deprive the city of the right to control the use of its streets, and grant to the railway without any consideration or compensation rights which this record shows are of great value.

Nor do we find more force in the claim of an implied contract to permit the railway to remain in the streets under such reasonable arrangements for public service as the situation might require. The right to grant the use of the streets was in the city. It had exercised it, had fixed by agreement with the railway the definite period at which such rights should end. At their expiration the rights thus definitely granted terminated by force of the

terms of the instrument of grant. The railway took the several grants with knowledge of their duration, and has accepted and acted upon them with that fact clearly and distinctly evidenced by written contract. The rights of the parties were thus fixed, and cannot be enlarged by implication. Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Scott County Macadamized Road Co. v. Missouri, 215 U. S. 336, 54 L. ed. 221, 30 Sup. Ct. Rep. 110; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651.

We are of the opinion that where a street 46]railroad is *authorized to operate in the streets of a city for a definite and fixed time, and has enjoyed the full term granted, it may, upon failure to renew the grant, be required, within a reasonable time, to remove its tracks and other property from the streets. In this case the supreme court of Michigan held that if the city, by the resolution of its common council, should require the removal of the railway's property from the streets, the removal should be effected by the railway within ninety days after notice of the resolution, unless it be given a longer time or the time given be extended by like resolution. In thus providing for the removal of the property of the railway from the streets of the city, we are unable to see that any contractual obligation was impaired, or that the property of the railway was taken without due process of law, and these are the contentions as to Federal questions argued in this connection.

A number of other assignments of error are made, some of which do not appear to have been taken in the supreme court of Michigan and are consequently not reviewable here, and in none of them do we find any contention of the substantial impairment of rights secured by the Federal Constitution to the plaintiff in error.

We think the Federal rights relied upon are of such nature as to require no further argument for their determination, and the motion of the defendant in error to affirm will be granted.

Affirmed.

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47] *CHARLES DUMMER BARRY et al., Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 47-53.)

**Set-off — claim by government.**

*The difference in quality* and fuel value *between the coal called for* by the contract and a cargo of confessedly inferior coal furnished to the government and paid for at the contract price may be offset against the government's liability to the same contractors under a later contract, where the parties agreed at the time that the acceptance of the inferior coal should be a purchase outside the contract, to meet existing conditions brought about by the contractors' fault, and the latter were notified before delivery that they would be charged with the difference if the coal proved inferior.

[For other cases, see Set-Off and Counterclaim, IV., in Digest Sup. Ct. 1908.]

[No. 170.]

Argued March 6, 1913. Decided May 26, 1913.

APPEAL from the Court of Claims to review a judgment dismissing the petition for a balance alleged to be due from the government on account of coal furnished for the Army. Affirmed.

See same case below, 45 Ct. Cl. 532.

Statement by Mr. Justice Lurton:

This is a petition by appellants, partners under the style of Henry W. Peabody & Company, for a balance alleged to be due on account of coal furnished the Quartermaster's Department, Philippine Division of the Army. So much of the contract, which was in writing and duly signed and approved, as required by § 3744 of Revised Statutes (U. S. Comp. Stat. 1901, p. 2510), as is essential to a judgment, may be shortly stated: The contractors agreed to sell and deliver at Manila or certain other designated points, 70,000 tons of coal known as "Wallsend" coal, of good quality "for steaming purposes," at $5.15 per ton, deliveries not to exceed 800 tons per month. The contractors were required *to file an[48 official report of tests showing the quality of coal intended to be delivered, and a sufficient sample for test. The 6th provision of the contract was in these words:

"That the said parties of the second part shall file with the officer in charge of water transportation an official report of tests, showing the quality of the coal intended to be delivered, and a sufficient sample for test; and if at any time the coal offered under this contract shall fall below the report so filed or the quality of the sample submitted, then such coal will be rejected."

By article 4 of the contract it was agreed, "that all deliveries on this contract shall be subject to careful inspection, under in-

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Note.—On necessity that counterclaim, when based on a contract arising out of an independent transaction, be such as to qualify or defeat plaintiff's claim—see note to Bannerot v. McClure, 12 L.R.A.(N.S.) 126.

structions of the Chief Quartermaster, Philippine Division, United States Army," etc. Payment for coal delivered under the contract was to be made on discharge of each cargo.

By article 12 it was agreed:

"That in case of failure of the said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to purchase in the open market, at the lowest price obtainable, or by special contract, such quantity of coal of equal grade as may be required, not to exceed the amount herein stated, the difference in cost to be charged to and paid by the said parties of the second part, or their sureties."

The II., III., and IV. findings of fact are in these words:

II.

"Deliveries were begun under this contract in August, 1904, and averaged about one delivery a month, and were made at the times and places and to the amounts requested by the officers of the Quartermaster's Department, who did not require or wish the full amount specified in the contract to be delivered, and who also did not give and were not required to give the 49]amount of notice specified *in paragraph 2 of the contract for deliveries at ports outside of Manila bay.

"In the month of January, 1905, a strike took place at the Newcastle collieries in Australia, the source of supply of the coal known as Wallsend, specified in the contract, whereby the claimants became temporarily unable to supply that kind of coal. Being informed of this fact by cablegram dated January 21, 1905, and received at Manila on the same day, the agent of the claimants conveyed immediate notice thereof to Col. John L. Clem, Assistant Quartermaster General, United States Army, Chief Quartermaster of the Division of the Philippines at Manila, informing him at the same time that, as also stated in the same cablegram, an equal quantity of good Australian coal, known as mountain coal, could be supplied. It was stated in the conversation with Colonel Clem that this mountain coal was not fully equal to Wallsend, but that it was believed to be a good coal. Colonel Clem agreed to accept said mountain coal. It was then and there stated between said agent of the claimants and said Colonel Clem that the price to be paid for the 6,000 tons of mountain coal then required by the government should be $5.15 a ton, the same price as specified in the contract for Wallsend coal, and agreed that the same should be considered as a purchase outside of the contract to meet existing conditions. The agent of the claimants thereupon cabled to their office at Sydney, New South Wales, Australia, ordering the 6,000 tons of mountain coal, and the same was delivered by the claimants, accepted by the government, and paid for on a voucher of the disbursing quartermaster at Manila, at the rate of $5.15 a ton.

III.

"On the 3d of February, 1905, after the shipment, but before the delivery of said mountain coal, the claimants *addressed[50 a letter to Colonel Clem, asking to be furnished with an order for said coal as a purchase in accordance with the agreement and conversation referred to in the preceding finding. Colonel Clem thereupon informed the claimants, through the officer in charge of water transportation, that a sample of the mountain coal would be shipped to the Quartermaster General for test, and in case of its falling below the Wallsend coal, that difference would be charged against the claimants under the contract. The claimants, by letter of February 18, 1905, protested against this qualification, insisting that the agreement orally made with Colonel Clem was to accept mountain coal at the same price as that specified in the contract for Wallsend coal, without reserve as to quality. The mountain coal was inferior to Wallsend coal, but its market value at Manila at that time, owning in part to said strike, was $5.15 a ton, the price orally agreed upon and paid to the claimants.

IV.

"A sample taken from the cargo of mountain coal above mentioned was sent to the Quartermaster General at Washington, and, on being subjected to test, was found to be of less value than the Wallsend coal, as provided by the contract, the *pro rata* reduction in price of the cargo being found to be $3,193.32, or of the value of $4.63 a ton instead of $5.15.

"Thereafter claimant entered into a second contract with the Chief Quartermaster of the Division of the Philippines to deliver 60,000 tons of West Wallsend coal for the fiscal year beginning July 1, 1905. In the month of April, 1906, the Quartermaster deducted from the price of a cargo of coal delivered under said contract the sum of $3,193.32, due the United States, the difference in value between the Wallsend coal as provided by the contract, and the mountain coal delivered by the claimant."

Mr. George A. King argued the cause, and, with Mr. William B. King, filed a brief for appellants:

The transaction was an open market purchase.

Clark v. United States, 95 U. S. 539, 542, 24 L. ed. 518, 519; 15 Comp. Dec. 65, 499.

But if the delivery and acceptance of this coal be regarded as taking place under the contract, it was regular and lawful.

District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; United States v. Shrewsbury, 23 Wall. 508, 517, 23 L. ed. 78, 81; Salomon v. United States, 19 Wall. 17, 22 L. ed. 46; Thomas W. Finucane Co. v. Board of Education, 190 N. Y. 76, 82 N. E. 737; Brabazon v. Seymour, 42 Conn. 551; Talbot Paving Co. v. Gorman, 103 Mich. 403, 27 L.R.A. 96, 61 N. W. 655; Kingsley v. Brooklyn, 78 N. Y. 212; Sirch Electrical & Testing Laboratories v. Garbutt, 13 Cal. App. 435, 110 Pac. 140; Merriam v. United States, 20 Ct. Cl. 290; National Contracting Co. v. Sewerage & Water Board, 72 C. C. A. 473, 141 Fed. 325.

Outside of any question on the original merits of the transaction, the purchase of the coal was closed by the payment made for it at the time.

St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 163, 48 L. ed. 130, 132, 24 Sup. Ct. Rep. 47; Lyons v. United States, 30 Ct. Cl. 352; United States v. State Nat. Bank, 96 U. S. 30, 36, 24 L. ed. 647, 648.

Mr. Frederick De Courcy Faust argued the cause, and, with Assistant Attorney General John Q. Thompson, filed a brief for appellee:

The appellants having bound themselves by the terms of the written contract to deliver a certain quantity of Wallsend coal of an ascertained quality during the fiscal year 1905, the chief quartermaster as agent of the government was without authority to modify that requirement except as specifically provided in the contract.

Hawkins v. United States, 96 U. S. 691, 24 L. ed. 608.

The oral agreement between the parties was not binding upon the United States as a contract, under § 3744 of the Revised Statutes.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518; South Boston Iron Co. v. United States, 118 U. S. 37, 30 L. ed. 69, 6 Sup. Ct. Rep. 928; Monroe v. United States, 184 U. S. 524, 46 L. ed. 670, 22 Sup. Ct. Rep. 444; St. Louis Hay & Grain Co. v. United States, 191 U. S. 163, 48 L. ed. 132, 24 Sup. Ct. Rep. 47.

Implied promises, or promises in law, exist only when there is no express promise between the parties.

Hawkins v. United States, 96 U. S. 691, 24 L. ed. 608.

The deduction made by the quartermaster from money due appellants under their second contract for the succeeding fiscal year was authorized upon the principle that parties receiving moneys improperly paid by a public officer are liable *ex æquo et bono* to refund them.

Wisconsin C. R. Co. v. United States, 164 U. S. 190, 212, 41 L. ed. 399, 407, 17 Sup. Ct. Rep. 45; Logan County v. United States, 169 U. S. 257, 42 L. ed. 738, 18 Sup. Ct. Rep. 361; United States v. Saunders, 24 C. C. A. 649, 50 U. S. App. 24, 79 Fed. 407; United States v. Utz, 26 C. C. A. 181, 39 U. S. App. 630, 80 Fed. 852; Huse v. United States, 222 U. S. 504, 56 L. ed. 287, 32 Sup. Ct. Rep. 119.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:

From the facts it is plain that the contractors could not and did not deliver a cargo of "Wallsend" coal in January, 1905, as their contract obligated them to do. This temporary inability was due to a strike at the colliery. This did not excuse them, since the contract did not so provide. The cargo of mountain coal which was bought to meet the immediate demand, though the same price was paid for it, had a fuel value of $3,193.32 less than that of the same quantity of Wallsend coal, as determined by tests and comparisons with the sample of Wallsend coal, and the question is whether this loss shall be borne by the government or by the contractor.

Appellants say that if any cargo did not conform to the standard, the only right of the government was to reject it. But it was not pretended that this cargo was Wallsend coal, or equal to that coal in quality, nor was it accepted as a delivery under the contract. That the Chief Quartermaster agreed to accept it and pay for it the price fixed for Wallsend coal under the contract, and did so accept and pay for it, constitutes the ground upon which the claim of appellants must rest.

The situation was one brought about by the inability of the contractors to carry out their contract. The coal was needed

for present necessities. The deficiency in Wallsend coal had to be made up. There was thus presented one of the emergency 52]conditions contemplated by *the law then in force, the act of April 23, 1904, 33 Stat. at L. 268, 269, chap. 1485 and the 548th and 549th paragraphs of the Army Regulations of 1904, providing for "open market emergency purchases." Under this condition and under this authority, the Chief Quartermaster agreed to accept a cargo of confessedly inferior coal, and pay the market price for that quality of coal in Manila at the time. That this cargo was not to be accepted as a fulfilment of the contract, and as a waiver of any difference in value between that and Wallsend coal, is demonstrated by the finding that it was agreed "that the same should be considered as a purchase outside of the contract, to meet existing conditions." It could not be regarded as an "outside purchase" to meet conditions brought about by the contractors' fault, and at the same time be regarded as accepted in fulfilment of the contract.

The finding that the Chief Quartermaster, after the coal had been shipped, but before it arrived or was delivered, gave notice that he would send a sample of the coal to the Quartermaster General to be tested, and that if it fell below the Wallsend coal, the difference would be charged against the contractors, operated to put them upon guard. They might have refused delivery. They did not, although they protested and asserted views in opposition to that of the officer. The payment made was for that cargo as an "outside purchase," and not a payment under the contract for Wallsend coal. Neither is the agreement to take that cargo, and the payment made for it, to be regarded as a waiver of any difference that might exist between the quality and fuel value of the coal so purchased and the coal which should have been supplied. That it does not constitute a waiver results from the agreement that it should be considered "an outside purchase," and the express notice before delivery that the contractors would be charged with that difference. When that difference was ascertained, it was charged 53]up and *retained from money due under a later contract. The liability might have been asserted by the government in an action; but it might, as it did, charge it up as a setoff against its own liability. It would be folly to require the government to pay under the one contract what it must eventually recover for a breach of the other.

Judgment affirmed.

UNITED STATES, Plff. in Err.,
v.
CHANDLER-DUNBAR WATER POWER COMPANY et al. (No. 783.)

CHANDLER-DUNBAR WATER POWER COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 784.)

St. MARYS POWER COMPANY, Plff. in Err.,
v.
UNITED STATES. (No. 785.)

CLARENCE M. BROWN, Sole Receiver of the Michigan Lake Superior Power Company, Plff. in Err.,
v.
UNITED STATES. (No. 786.)

(See S. C. Reporter's ed. 53-81.)

**Courts — relation to legislative department — eminent domain — improving navigation — extent.**

1. Congress having determined, as it did by the act of March 3, 1909 (35 Stat. at L. 815, chap. 264, U. S. Comp. Stat. Supp. 1911, p. 1536), § 11, that the entire St. Marys river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was "necessary for the purposes of navigation of said waters, and the waters connected therewith," that determination is conclusive in condemnation proceedings instituted by the United States under that act, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible needed navigation, or for a determination that, if in excess,

NOTE.—As to judicial power over the right of eminent domain—see note to Grafton v. St. Paul M. & M. R. Co. 22 L.R.A.(N.S.) 1.

On right to take property by eminent domain generally—see note to Searl v. School Dist. 33 L. ed. U. S. 740.

For what purpose property may be taken—see note to Sweet v. Rechel, 40 L. ed. U. S. 188.

On right, in improving navigation, to destroy access of riparian owner—see note to Scranton v. Wheeler, 45 L. ed. U. S. 126.

On necessity of payment for private property taken for public use—see notes to Withers v. Buckley, 15 L. ed. U. S. 816, and Sweet v. Rechel, 40 L. ed. U. S. 188.

On right to obstruct or destroy wharf rights in navigable waters for public purposes without compensation—see note to Northern P. R. Co. v. S. E. Slade Lumber Co. 34 L.R.A.(N.S.) 423.

Right of government to divert water from non-tidal stream without compensation to riparian owner—see note to Fulton Light, Heat & P. Co. v. State, 37 L.R.A.(N.S.) 307.

the riparian owners, having title under the local law to the bed up to the middle thread of the stream, had any private right in such excess which must be paid for if they have been excluded from its use.

[For other cases, see Courts, I. e, 3, c, in Digest Sup. Ct. 1908.]

**Waters — right of navigation — power of Congress.**

2. Congress did not act arbitrarily in determining by the act of March 3, 1909, § 11, that, for the purposes of navigation of the waters, and the waters connected therewith, the entire flow of the rapids and falls of the St. Marys river should be devoted exclusively to that end.

[For other cases, see Waters, I. d, 3, in Digest Sup. Ct. 1908.]

**Damages — eminent domain — compensation — revocation of license.**

3. Compensation for loss and damage to a riparian owner because of the revocation made by the act of March 3, 1909, § 11, of permits issued by the Secretary of War to place in the rapids of St. Marys river the dams, dykes, and forebays necessary to control the current, and to use its power for commercial purposes, was not contemplated by the provisions of that section for compensating the owners of the property taken under the authority conferred therein to condemn, in the interests of navigation, all lands and property of every kind and description north of the St. Marys Falls ship canal, throughout its entire length, and lying between said ship canal and the international boundary line, since these provisions relate only to compensation for private property taken for public use.

[For other cases, see Damages, VI. m, in Digest Sup. Ct. 1908.]

**Eminent domain — private property — water power in navigable stream.**

4. Riparian owners of the shore and appurtenant bed of the St. Marys river have no right of private property in the water power of the stream for which compensation must be made by the United States when condemning, in the interests of navigation, under the act of March 3, 1909, § 11, all lands and property of every kind and description north of the St. Marys Falls ship canal, throughout its entire length, and lying between such canal and the international boundary line.

[For other cases, see Eminent Domain, II.; Waters, I. d, 3, in Digest Sup. Ct. 1908.]

**Eminent domain — private property — water power in navigable stream.**

5. Any right which a riparian owner, having title to the bed of the St. Marys river to the middle thread of the stream, may have to construct and maintain therein the structures necessary for the commercial use of the water power, is not a right of private property for which compensation must be made by the United States when condemning, in the interests of navigation, under the act of March 3, 1909, § 11, all lands and property of every kind and description north of the St. Marys Falls ship canal, throughout its entire length, and lying between such canal and the international boundary line.

[For other cases, see Eminent Domain, II.; Waters, I. d, 3, in Digest Sup. Ct. 1908.]

**Eminent domain — public use — improving navigation — lease of water power.**

6. The taking by the United States, in the avowed interests of navigation, conformably to the act of March 3, 1909, § 11, of all lands and property of every kind and description north of the St. Marys Falls ship canal, throughout its entire length, and lying between such canal and the international boundary line, is none the less for a public use because § 12 of that act, which declares that the conservation of the flow of the river is "primarily for the benefit of navigation, and incidentally for the purpose of having the water power developed," permits the lease by the Secretary of War of any excess of water power which may result from such conservation and the works which the government may construct.

[For other cases, see Eminent Domain, I. d, in Digest Sup. Ct. 1908.]

**Statutes — who may assail validity.**

7. An owner of the bed and shore of the St. Marys river, who has no property right in the flow of the river which has been taken by the United States conformably to the act of March 3, 1909, § 11, declaring that government ownership of all lands and property of every kind and description north of St. Marys Falls ship canal, throughout its entire length, and lying between such canal and the international boundary line, is necessary for the purposes of navigation, cannot complain because, under § 12 of that act, the Secretary of War may lease any excess of water power which results from the conservation of the flow of the river and the works which the government may construct.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

**Damages — eminent domain — value.**

8. The award to riparian owners of the bed and shore of the St. Marys river for the upland taken by the United States in condemnation proceedings had conformably to the act of March 3, 1909, § 11, for the benefit of navigation, should not include the additional value of the land because of its availability for use as factory sites in connection with the development of water power by the owners, where they have no vested property right in the water power inherent in the falls and rapids, and no right to place in the river the works essential to any practical use of the flow.

[For other cases, see Damages, VI. m, in Digest Sup. Ct. 1908.]

**Damages — eminent domain — compensation — time for fixing.**

9. The value of property taken by eminent domain should be fixed as of the date of the proceedings, and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken, and not as enhanced by the purpose for which it is taken.

[For other cases, see Damages, VI. m, in Digest Sup. Ct. 1908.]

**Damages — eminent domain — availability for public purpose.**

10. The availability for lock and canal purposes of the land between the canals in use and the bank of St. Marys river, taken by the United States in condemnation proceedings instituted for the benefit of navigation under the act of March 3, 1909, § 11, is properly included as an element of value in fixing the compensation to be awarded to the owner.

[For other cases, see Damages, VI. m, in Digest Sup. Ct. 1908.]

**Dedication — highway on public land — survey — adverse possession.**

11. Title to a part of a street laid off by a survey made of a town which had grown up on public land never passed out of the United States, where the survey was never carried into a patent, and the village never accepted such part of the street, and having been thus abandoned the land was privately occupied for a time, but not long enough to acquire title.

[For other cases, see Dedication, I. b; Adverse Possession, I. h, in Digest Sup. Ct. 1908.]

**Damages — eminent domain — strategic value.**

12. The so-called strategic value of an island lying in the St. Marys river, growing out of the necessity of including it as a tailrace site, if not otherwise, in any completely efficient plan of water development by any owner, private or public, should not be included as an element of value in awarding compensation for the property condemned by the United States, under the authority of the act of March 3, 1909, § 11, in the interests of navigation.

[For other cases, see Damages, VI. m, in Digest Sup. Ct. 1908.]

[Nos. 783, 784, 785, and 786.]

Argued and submitted April 8, 1913. Decided May 26, 1913.

IN ERROR to the District Court of the United States for the Western District of Michigan to review an award in condemnation proceedings instituted by the United States in the interest of navigation. Reversed and remanded for the entry of judgment in accordance with the opinion.

Assistant to the Attorney General **Fowler** and Mr. Reeves T. Strickland for the United States.

Statement by Mr. Justice **Lurton**:

These writs of error are for the purpose of reviewing a judgment in a condemnation proceeding instituted by the United States [56] under the 11th section of an act of *Congress of March 3, 1909, being chapter 264, 35 Stat. at L. pp. 815, 820, U. S. Comp. Stat. Supp. 1911, p. 1536. The section referred to is set out in the margin.†

The notice of condemnation required by the statute was duly given by the Secretary of War, and this proceeding *was insti- [57] tuted against all the corporations and persons supposed to have any interest in the property sought to be condemned. A jury was waived and the *evidence submitted [58] to the court, which, at the request of all the parties, made specific findings of fact and law.

By an agreement, the property of the International Bridge Company required by the government was acquired by deed, and later, in the progress of the case, the property of the Edison-Sault Electric Company involved in the proceeding was acquired by stipulation. This eliminates from the cases every question except those arising in respect to the compensation to be awarded to the Chandler-Dunbar Water Power Company, the St. Marys Power Company, and Clarence M. Brown, receiver of the Michigan Lake Superior Power Company. The final judgment of the court was:

1. That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls ship canal, throughout its entire length, and lying between the said ship canal and the international line at Sault St. Marie, in the state of Michigan, was necessary for the purposes of navigation of said waters and the waters connected therewith, as declared by the act of March 3, 1909.

The compensation awarded was as follows:

a. To the Chandler-Dunbar Company, $652,332. Of this $550,000 was the estimated value of the water power.

b. To the St. Marys Falls Power Company, $21,000.

c. To the Edison-Sault Electric Company, $300,000, which has, however, been settled by stipulation.

d. To the Michigan Lake Superior Power Company, nothing.

From these awards the government, the Chandler-Dunbar Company, the St. Marys Falls Power Company, and the Michigan Lake Superior Power Company, have sued out writs of error.

*The errors assigned by the United [59] States challenge the allowance of any compensation whatever on account of any water power right claimed by any of the owners of the condemned upland, and also the principles adopted by the district court for the valuation of the upland taken. The several corporations, who have sued out writs of

†Sec. 11. That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls ship canal, throughout its entire length, and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the state of Michigan, is necessary

error, complain of the inadequacy of the award on account of water power claimed to have been taken, and also of the valuation placed upon the several parcels of upland condemned.

The errors assigned by the United States deny that any water power in which the defendants below had any private property right has been taken, and also deny the claim that riparian owners must be compensated for exclusion from the use of the water power inherent in the falls and rapids of the St. Marys river, whether the flow of the river be larger than the needs of navigation or not. The award of $550,000 on account of the claim of the Chandler-Dunbar Company to the undeveloped water power of the river at the St. Marys rapids in excess of the supposed requirements of navigation constitutes the prime question

for the purposes of navigation of said waters and the waters connected therewith.

The Secretary of War is hereby directed to take proceedings immediately for the acquisition, by condemnation or otherwise, of all of said lands and property of every kind and description, in fee simple absolute. He shall proceed in such taking by filing in the officer of the register of deeds of Chippewa county, in the state of Michigan, a writing, stating the purpose for which the same is taken under the provisions of this section, and giving a full description of all the lands and property of every kind and decription thus to be taken. After the filing of said writing, and ten days after publication thereof in one or more newspapers in the city of Sault Sainte Marie, in the state of Michigan, the United States shall be entitled to, and shall take immediate possession of, the property described, and may at once proceed with such public works thereon as have been authorized by Congress for the uses of navigation.

The circuit court of the United States for the western district of Michigan is hereby given exclusive jurisdiction to hear condemnation proceedings and to determine what compensation shall be awarded for property taken under authority of this section. After the taking of any property by the government of the United States, as herein provided for, the United States, by its proper officials, shall begin condemnation proceedings in the aforesaid court, and the practice shall be in accordance with the practice in the courts of the state of Michigan for the condemnation of lands by the state for public buildings of such state, so far as the same may be followed without conflicting with the provisions hereof. Possession may be taken by the United States prior to a determination by a court of any necessity of taking, and prior to any determination of the amount of compensation.

Any money payable by the government under the provisions of this section shall be payable out of any money heretofore authorized or appropriated for the purpose of improving Saint Marys river at the falls, Michigan.

All that part of "An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes" [34 Stat. at L. 1098, chap. 2509], approved March second, nineteen hundred and seven, beginning with the words "and all lands and waters north of the present Saint Marys Falls ship canal throughout its length," and ending with the words, "to comply with the provisions of the river and harbor act of nineteen hundred and two, but such lands, if so acquired, shall be obtained without expense to the United States," is hereby repealed.

Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company, the Edison-Sault Light & Power Company, the Edison-Sault Electric Company, or the Saint Marys Power Company, shall cease and determine and become null and void on January first, nineteen hundred and eleven, and the Secretary of War is hereby authorized and instructed to revoke, cancel, and annul every such permit, license, or authority, to take effect on January first, nineteen hundred and eleven.

The Secretary of War may, in his discretion, permit the Chandler-Dunbar Water Power Company and the Edison-Sault Electric Company to maintain their present works and utilize the water power in said river at said rapids, in so far as the same does not interfere with navigation, or retard the construction of government works in said river, under such rules or regulations as have been or hereafter shall be imposed by the Secretary of War, until they shall be paid the compensation awarded by the court for their property condemned under the provisions of this section; but said permit shall not extend beyond January first, nineteen hundred and eleven.

The President of the United States is respectfully requested to open negotiations with the government of Great Britain for the purpose of effectually providing, by suitable treaty with said government, for maintaining ample water levels for the uses of navigation in the Great Lakes and the waters connected therewith, by the construction of such controlling and remedial works in the connecting rivers and channels of such lakes as may be agreed upon by the said governments under the provisions of said treaty.

The Secretary of War is further authorized and instructed to cause to be made a preliminary examination and survey to ascertain and determine a proper plan and the probable expense for constructing in the rapids of the Saint Marys river a filling basin or forebay, from which the ship locks shall be filled: Provided, that such survey shall in no way delay or interfere with the plans for construction already under way.

in the case, and its importance is increased by the contention of that company that the assessment of damages on that account is grossly inadequate and should have been $3,450,000.

Each of the several plaintiffs in error also challenge the awards made on account of the several parcels of upland taken,—the government insisting that the awards are excessive, and the owners, that they are inadequate.

Assistant to the Attorney General Fowler argued the cause, and, with Mr. Reeves T. Strickland, filed a brief for the United States:

The dominion of the United States over the navigable waters for the purpose of commerce is the same as over the public domain.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

The navigable waters of the United States, with their beds, for the purpose of commerce and navigation, being the public property of the nation, when any portion of this property is required by the United States for its uses in aid of navigation there is no condemnation necessary. It is only necessary for Congress to order the taking of the part needed for the specified use.

Hawkins Point Light-House Case, 39 Fed. 77; Lorman v. Benson, 8 Mich. 32, 77 Am. Dec. 435.

The necessity or expediency of appropriating a part or all the waters of St. Marys River for public use cannot be the subject of judicial cognizance.

Mississippi & R. River Boon Co. v. Patterson, 98 U. S. 406, 25 L. ed. 207; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 568, 42 L. ed. 858, 18 Sup. Ct. Rep. 445; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; McCray v. United States, 195 U. S. 38, 49 L. ed. 80, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Hayburn's Case, 2 Dall. 410, 1 L. ed. 436; Veazie Bank v. Fenno, 8 Wall. 548, 19 L. ed. 487; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Lottery Case (Champion v. Ames) 188 U. S. 363, 47 L. ed. 504, 23 Sup. Ct. Rep. 321; Bird v. United States, 187 U. S. 124, 47 L. ed. 103, 23 Sup. Ct. Rep. 42; Shoemaker v. United States, 147 U. S. 282, 298, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361; Gilman v. Philadelphia, 3 Wall. 725, 18 L. ed. 99; United States v. New Bedford Bridge, 1 Woodb. & M. 420; Fed. Cas. No. 15,867; United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004.

While the submerged lands remain a part of the bed of the river, it is not private property in the sense of the 5th Amendment to the Federal Constitution.

Gilman v. Philadelphia, 3 Wall. 725, 18 L. ed. 99; Hawkins Point Light-House Case, 39 Fed. 87; Scranton v. Wheeler, 179 U. S. 160, 45 L. ed. 136, 21 Sup. Ct. Rep. 48.

As early as the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, it was held that "the power to regulate commerce comprehends the control . . . of all the navigable waters . . . and includes . . . the power to keep them open and free from any obstructions."

South Carolina v. Georgia, 93 U. S. 10, 23 L. ed. 783; Wisconsin v. Duluth, 96 U. S. 387, 24 L. ed. 671.

The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a state other than that in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the states, or otherwise; to remove obstructions where they exist; and to provide, by such sanction as is deemed proper, against the occurrence of the evil, and for punishment of the offenders.

South Carolina v. Georgia, 93 U. S. 10, 23 L. ed. 783; Wisconsin v. Duluth, 96 U. S. 387, 24 L. ed. 671.

The decision as to granting permits rests solely with Congress, for as said in McCray v. United States, 195 U. S. 38, 49 L. ed. 80, 24 Sup. Ct. Rep. 769, the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers and as illustrated by the case of Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143, although a permit was granted to erect a bridge the court decided that the company was not entitled to compensation by reason of the permit being revoked.

New York & E. R. Co. v. Young, 33 Pa. 175; Pratt v. Brown, 3 Wis. 603.

The use for which the land is taken having been determined to be a public use, the quantity which should be taken is a legislative, and not a judicial, question.

Shoemaker v. United States, 147 U. S. 282, 298, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361.

The common-law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers.

Carson v. Blazer, 2 Binn. 475, 4 Am. Dec. 463; Shively v. Bowlby, 152 U. S. 31, 33, 38 L. ed. 343, 344, 14 Sup. Ct. Rep. 548.

In estimating the value of land taken for a public use, its value for such use is not to be considered.

United States v. Seufert Bros. Co. 78 Fed. 523; Gilmer v. Lime Point, 19 Cal. 47; Central P. R. Co. v. Pearson, 35 Cal. 247; San Diego Land & Town Co. v. Neale, 88 Cal. 65, 11 L.R.A. 604, 25 Pac. 977; Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

The St. Marys River being a navigable stream, its waters and subaqueous lands are, in the language of the Supreme Court in South Carolina v. Georgia, 93 U. S. 10, 23 L. ed. 783, "the public property of the nation, and subject to all the requisite legislation by Congress."

The riparian owner on a navigable stream has no right as against the public, or persons or corporations acting in behalf of the public, making improvements of such navigable stream, to have the waters of such stream flow in their accustomed course in front of his lands.

Black River Improv. Co. v. La Crosse Boom. & Transp. Co. 54 Wis. 679, 41 Am. Rep. 66, 11 N. W. 443; Canal Appraisers v. People, 17 Wend. 571; People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 500; Lansing v. Smith, 8 Cow. 146; People v. Tibbetts, 19 N. Y. 527.

Riparian rights are appurtenant to the ownership of the land on the shore or bank of a stream, without reference to the title in the bed. The word "riparian" is relative to the bank, and not the bed of the stream, and the title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream.

Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 229, 24 Am. Rep. 386.

Everyone who buys property upon a navigable stream purchases subject to the superior right of the commonwealth to regulate and improve it for the benefit of all her citizens. If, therefore, he chooses to place his mills or his works, for the qualified use he may make of the water, within the limits or influence of high water, he does so at his own risk, and cannot complain when the commonwealth, for the purpose of improvement, chooses to maintain the waters of the stream at a given height within its channel.

McKeen v. Delaware Division Canal Co. 49 Pa. 424; Black River Improv. Co. v. La Crosse Boom. & Transp. Co. 54 Wis. 680, 41 Am. Rep. 66, 11 N. W. 443; Fitchburg R. Co. v. Boston & M. R. Co. 3 Cush. 88.

As against the state the riparian owner is not entitled to have the waters of a navigable stream flow past his land.

Withers v. Buckley, 20 How. 84, 15 L. ed. *816;* South Carolina v. Georgia, 93 U. S. 10, *23 L. ed. 783.*

*In ascertaining* actual value, generally everything which actually enhances its present worth should be taken into consideration; not, however, the fact that it is necessary or indispensable for the purpose for which it is claimed by the public. Those necessities which induce it to be claimed, or the fact that it is desired for public use, should in no wise enter into the consideration of its value. To allow that would be to measure its value by the immediate necessities of the public rather than its actual worth.

Virginia & T. R. Co. v. Elliott, 5 Nev. 358.

The public, being the owners of the river, have an unquestionable right to improve the navigation of it, without any liability for remote and consequential damages to individuals.

Hollister v. Union Co. 9 Conn. 444, 25 Am. Dec. 36; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Lansing v. Smith, 8 Cow. 146.

The jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country, even against state action.

United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 703, 43 L. ed. 1141, 19 Sup. Ct. Rep. 770.

No riparian owner has any title to the waters but a simple usufruct as it passes along his land (Minnesota Loan & T. Co. v. St. Anthony Falls Water-Power Co. 82 Minn. 505, 85 N. W. 523, and Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Mor. Min. Rep. 90), and such usufruct is subordinate to the public right, and is not private property for which compensation should be made (Re State Reservation, 37 Hun, 545).

Whatever private rights may be claimed by the defendant are subordinate to the public right.

Scranton v. Wheeler, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 813.

In the installation in part, in said river bed appurtenant to these uplands, of public works of the government primarily intended by Congress as improvements of the methods of navigation on said river in connection with the Great Lakes system, devised and constructed pursuant to the provisions of §§ 11 and 12 of the act of March 3, 1909, if there be found from time to time a quantity of water which may be availed of for developing power, it is competent for the government to conserve and lease or use the said power, from the economic policy of preventing waste of natural resources.

Kaukauna Water Power Co. v. Green Bay

& M. Canal Co. 142 U. S. 281, 35 L. ed. 1013, 12 Sup. Ct. Rep. 173.

"Strategy" is a term ordinarily used in the operations of armies, and is not very appropriate to the transactions of civil life.

Fortune v. Watkins, 94 N. C. 317.

A strategic value is a speculative value, upon which an award cannot be based.

Shoemaker v. United States, 147 U. S. 305, 37 L. ed. 187, 13 Sup. Ct. Rep. 361; Kerr v. South Park Comrs. 117 U. S. 385, 29 L. ed. 926, 6 Sup. Ct. Rep. 801.

The court erred in awarding and allowing 5 per cent upon said award, or upon any part thereof, after January 1, 1910.

7 Ops. Atty. Gen. 523; 20 Ops. Atty. Gen. 423.

It was within the power of Congress to declare that the ownership of all properties lying between the canal and the boundary line is essential for the purposes of navigation, and to require the removal of all obstructions from all parts of the stream lying within the United States; and Congress having spoken, it is not for the courts to decide whether any part of said waters may be used for private purposes.

Newport & C. Bridge Co. v. United States, 105 U. S. 470, 480, 26 L. ed. 1143, 1147; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 251, 7 L. ed. 412, 414; Pound v. Turck, 95 U. S. 459, 464, 24 L. ed. 525, 527; South Carolina v. Georgia, 93 U. S. 4, 10, 23 L. ed. 782, 783; Gilman v. Philadelphia, 3 Wall. 713, 724, 731, 18 L. ed. 96, 99, 101; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 578, 14 L. ed. 249, 274, 18 How. 421, 15 L. ed. 435; The Clinton Bridge (Gray v. Chicago, I. & N. R. Co.) 10 Wall. 454, 463, 19 L. ed. 969, 971; Wisconsin v. Duluth, 96 U. S. 379, 383, 387, 24 L. ed. 668, 670, 671; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 657, 34 L. ed. 295, 302, 10 Sup. Ct. Rep. 965; Scranton v. Wheeler, 179 U. S. 141, 162, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 80, 43 L. ed. 364, 373, 19 Sup. Ct. Rep. 97; McCray v. United States, 195 U. S. 27, 53, 49 L. ed. 78, 94, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

The revocation of the license to the Chandler-Dunbar Water Power Company, and its exclusion from thereafter using any waters from the St. Marys River adjacent to the lands owned by it, was not a taking of its property within the constitutional sense, and hence it was error to make any allowance for damages to said company in consequence thereof.

West v. Kansas Natural Gas Co. 221 U. S. 229, 258, 55 L. ed. 716, 727, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed 557; Monongahela Nav. Co. v. United States, 148 U. S. 312, 341, 37 L. ed. 463, 473, 13 Sup. Ct. Rep. 622; McKeen v. Delaware Division Canal Co. 49 Pa. 425; Fox v. Cincinnati, 104 U. S. 783, 26 L. ed. 928; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 524, 50 L. ed. 845, 852, 26 Sup. Ct. Rep. 518; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Scranton v. Wheeler, 179 U. S. 141, 163, 164, 45 L. ed. 126, 137, 138, 21 Sup. Ct. Rep. 48; Gibson v. United States, 166 U. S. 269, 275, 41 L. ed. 996, 1002, 17 Sup. Ct. Rep. 578; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 707, 43 L. ed. 1136, 1143, 19 Sup. Ct. Rep. 770; Nichols, Em. Dom. §§ 156, 157.

The court erred in adopting the method which it did in fixing the value of the water power.

2 Lewis, Em. Dom. 2d ed. §§ 463, 478, 480.

The use of the surplus waters for the creation of power is merely an incident to the main use of the same for purposes of navigation.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 272, 35 L. ed. 1004, 1010, 12 Sup. Ct. Rep. 173.

The Chandler-Dunbar Company cannot claim title as against the United States, by adverse possession.

Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; United States v. Verdier, 164 U. S. 219, 41 L. ed. 409, 17 Sup. Ct. Rep. 42.

The dedication of Portage street never having been accepted by the village or city of Sault Ste. Marie, the title reposes in the Federal government. Even had the village or city accepted it, it would have made no difference. The same being dedicated to the public, the public held it in trust for the uses of a street, and for no other purpose.

Simplot v. Chicago, M. & St. P. R. Co. 5 McCrary, 158, 16 Fed. 350; Bennett v. Chicago, M. & St. P. R. Co. 73 Fed. 696; People v. Williams, 64 Cal. 498, 2 Pac. 393.

Mr. Moses Hooper argued the cause, and, with Messrs. John H. Goff and A. B. Eldredge, filed a brief for the Chandler-Dunbar Water Company et al.:

It was within the power of Congress to provide for compensation for all the water power of respondent, even though a small

fraction thereof could have been appropriated without compensation.

Dow v. Electric Co. 68 N. H. 59, 31 Atl. 22, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; 1 Lewis, Em. Dom. 3d ed. § 410; Re New York, 190 N. Y. 350, 16 L.R.A. (N.S.) 335, 83 N. E. 299, 13 Ann. Cas. 598; Dodge v. Rockport, 199 Mass. 274, 85 N. E. 172; Earle v. Com. 180 Mass. 579, 57 L.R.A. 292, 91 Am. St. Rep. 326, 63 N. E. 10.

The court always presume that the legislature acts advisedly and with full knowledge of the situation.

Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 245, 46 L. ed. 1147, 22 Sup. Ct. Rep. 881.

If there is any about about the construction of the act of March 3, 1909, the court may refer to the report of the committee on rivers and harbors which accompanied the bill that became the condemnation law.

The Collector v. Richards (Arthur v. Richards) 23 Wall. 246–258, 23 L. ed. 95, 96; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55.

We search in vain in the act of Congress and instrument of appropriation, for any claim that the water power was not taken, but was appropriated by virtue of the easement of navigation. Some such statement should appear to support the contention of the United States.

Chicago Sanitary Dist. v. Pittsburgh, Ft. W. & C. R. Co. 216 Ill. 575, 75 N. E. 248.

If Congress did not intend to pay for the water power of the Chandler-Dunbar Company, unless compelled so to do by the Constitution, then it should be valued, in behalf of the riparian owner, in view of the fact that, when taken, it was subject to the right of the United States to use it for purposes of navigation. Subject to such right, the property was in the riparian owner. As against the United States the rights of a riparian owner are irrefragable, except so far as in conflict with the public right of navigation.

Avery v. Fox, 1 Abb. (U. S.) 246, Fed. Cas. No. 674; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Bigham Bros. v. Port Arthur Channel & Dock Co. 100 Tex. 192, 13 L.R.A. (N.S.) 656, 97 S. W. 686; Union Depot, Street R. & Transfer Co. v. Brunswick, 31 Minn. 301, 47 Am. Rep. 789, 17 N. W. 626; 1 Lewis, Em. Dom. § 69; Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; Ex parte Jennings, 6 Cow. 519, 16 Am. Dec. 447; Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417; Varick v. Smith, 9 Paige, 547; Canal Fund Comrs. v. Kempshall, 26 Wend. 404; Dermott v. State, 99 N. Y. 101, 1 N. E. 242; Walker v. Board of Public Works, 16 Ohio, 540; State v. Minneapolis Mill. Co. 26 Minn. 229, 2 N. W. 839; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Great Falls Mfg. Co. v. Atty. Gen. (Great Falls Mfg. Co. v. Garland) 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; Haslam v. Galena & S. W. R. Co. 64 Ill. 353; Beidler v. Chicago Sanitary Dist. 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Grand Rapids v. Powers, 89 Mich. 115, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 33 L.R.A. 645, 67 N. W. 918; King v. United States, 59 Fed. 9; Williams v. United States, 104 Fed. 50; 1 Farnham, Waters, §§ 29, 86, pp. 137, 138, 410; People's Ice Co. v. The Excelsior, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636; Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 547, 33 L.R.A. 645, 67 N. W. 918; Middleton v. Flat River Boom. Co. 27 Mich 535; Pearson v. Rolfe, 76 Me. 386; Koopman v. Blodgett, 70 Mich. 615, 14 Am. St. Rep. 527, 38 N. W. 649; Monongahela Nav. Co. v. United States, 148 U. S. 312, 334–338, 37 L. ed. 463, 470–472, 13 Sup. Ct. Rep. 622.

All the control of Congress over navigable water grows out of the simple provision of the Constitution granting to Congress the right to regulate commerce with foreign nations and among the several states. Otherwise than so far as necessary to regulate commerce with foreign nations and among the several states, Congress has no control over navigable waters. Beyond that the control rests with the state and with the riparian owner.

Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 582, 583, 14 L. ed. 249; 276, 277; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 430, 15 L. ed. 435, 436; Gilman v. Philadelphia, 3 Wall. 713, 724, 725, 18 L. ed. 96, 99; McCready v. Virginia, 94 U. S. 391, 394, 395, 24 L. ed. 248, 249; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 489, 506, 26 L. ed. 1143, 1157, 1155; Monongahela Nav. Co. v. United States, 148 U. S. 312, 335, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Shively v. Bowlby, 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct.

Rep. 157; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 709, 43 L. ed. 1136, 1143, 19 Sup. Ct. Rep. 770; United States v. Rio Grande Dam & Irrig. Co. 184 U. S. 416, 46 L. ed. 619, 22 Sup. Ct. Rep. 428; Leovy v. United States, 177 U. S. 621, 632, 633, 44 L. ed. 914, 919, 920, 20 Sup. Ct. Rep. 797; Union Bridge Co. v. United States, 204 U. S. 364, 400, 51 L. ed. 523, 539, 27 Sup. Ct. Rep. 367; 27 Ops. Atty. Gen. 327, 330, 331; 1 Farnham, Waters, p. 137, § 29.

The owner cannot be deprived of the right of reversion after termination of the easement, except upon payment of just compensation.

Remey v. Iowa C. R. Co. 116 Iowa, 133, 89 N. W. 218; Pittsburgh & L. E. R. Co. v. Bruce, 102 Pa. 33; Heard v. Brooklyn, 60 N. Y. 246; Lewis, Em. Dom. § 861 (596) note 38.

Water power is not an easement, but the body of the estate inseparably annexed to the soil itself.

Johnson v. Jordan, 2 Met. 234, 37 Am. Dec. 85; Cary v. Daniels, 8 Met. 466, 41 Am. Dec. 532; Standen v. New Rochelle Water Co. 91 Hun, 272, 36 N. Y. Supp. 92; Tourtellot v. Phelps, 4 Gray, 376; Gould v. Boston Duck Co. 13 Gray, 450; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Crittenton v. Alger, 11 Met. 281; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Tillotson v. Smith, 32 N. H. 94, 64 Am. Dec. 355; Keeney & W. Mfg. Co. v. Union Mfg. Co. 39 Conn. 582; Brown v. Bush, 45 Pa. 61; Gould, Waters, § 204.

This rule holds good on public navigable streams as well as on private streams.

Morrill v. St. Anthony Falls Water Power Co. 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 70 Wis. 649, 35 N. W. 529, 36 N. W. 828; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 75 Wis. 390, 44 N. W. 638; Kimberly & C. Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 276, 35 L. ed. 1004, 1011, 12 Sup. Ct. Rep. 173; Varick v. Smith, 9 Paige, 547; Walker v. Board of Public Works, 16 Ohio, 543; 1 Lewis, Em. Dom. §§ 61, 69; Avery v. Fox, 1 Abb. (U. S.) 246, Fed. Cas. No. 674; Holyoke Water Power Co. v. Connecticut River Co. 52 Conn. 570; Great Falls Mfg. Co. v. Atty Gen. (Great Falls Mfg. Co. v. Garland) 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306.

The easement of the United States is paramount, but not exclusive. Where, as in this case, there is an estate—water power—subject to a dominant easement,—right of navigation and to improve same,—the relation of the parties requires that the easement shall be so enjoyed as to be least burdensome to the servient estate. Hence the question is not, How much might the servient estate—water power—be burdened by operations in aid of navigation and thereby diminished in value? but this: How might operations in aid of navigation be so carried on as to leave the water power of the most value to the owner?

McKell v. Collins Colliery Co. 46 W. Va. 633, 33 S. E. 765; Chandler v. Goodridge, 23 Me. 78; Bissell v. Grant, 35 Conn. 288; Wille v. Bartz, 88 Wis. 428, 60 N. W. 79; Dyer v. Walker, 99 Wis. 404, 75 N. W. 79; Bennett v. Seligman, 32 Mich. 501; Grafton v. Moir, 130 N. Y. 471, 27 Am. St. Rep. 533, 29 N. E. 974; Wilson v. Scranton, 141 Pa. 621, 21 Atl. 779; Butchers Slaughtering & Melting Asso. v. Com. 169 Mass. 117, 47 N. E. 599; Clark v. Worcester, 125 Mass. 231; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

Is the sovereign—the guardian of the law—superior to the law?

McKell v. Collins Colliery Co. 46 W. Va. 633, 33 S. E. 765; Chandler v. Goodridge, 23 Me. 83; Bissell v. Grant, 35 Conn. 288; Wille v. Bartz, 88 Wis. 424, 60 N. W. 789; Dyer v. Walker, 99 Wis. 407, 75 N. W. 79; Bennett v. Seligman, 32 Mich. 501; Grafton v. Moir, 130 N. Y. 471, 27 Am. St. Rep. 533, 29 N. E. 974; Wilson v. Scranton, 141 Pa. 621, 21 Atl. 779; Butchers Slaughtering & Melting Asso. v. Com. 169 Mass. 117, 47 N. E. 599; Clark v. Worcester, 125 Mass. 231; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Woodruff v. Trapnall, 10 How. 190, 13 L. ed. 383; United States v. Willamette Valley & C. M. Wagon-Road Co. 54 Fed. 807; Indiana v. Milk, 11 Fed. 389; People ex rel. Atty. Gen. v. Michigan C. R. Co. 145 Mich. 140, 108 N. W. 772; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 549; United States v. Walker, 139 Fed. 409; United States v. Chandler-Dunbar Water Power Co. 81 C. C. A. 221, 152 Fed. 25.

The public right of navigation, and the private right to water power, are in a certain sense correlative, notwithstanding the paramountcy of the public right.

Buchanan v. Grand River & G. Log Running Co. 48 Mich. 364, 12 N. W. 490; Woodin v. Wentworth, 57 Mich. 282, 23 N. W. 813; Koopman v. Blodgett, 70 Mich. 616, 14 Am. St. Rep. 527, 38 N. W. 649; Pearson v. Rolfe, 76 Me. 385; Stratton v. Currier, 81 Me. 504, 3 L.R.A. 809, 17 Atl. 579; Thompson v. Androscoggin River Improv. Co. 58 N. H. 110; Connecticut River Lum-

ber Co. v. Olcott Falls Co. 65 N. H. 384, 13 L.R.A. 826, 21 Atl. 1090; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407; Barclay R. & Coal Co. v. Ingham, 36 Pa. 202; Newbold v. Mead, 57 Pa. 487; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723.

The right of navigation, though paramount, is not exclusive in waters navigable in the largest sense.

People's Ice Co. v. The Excelsior, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636; Bishop v. Baldwin, 147 Mich. 22, 110 N. W. 139; Wright v. Mulvaney, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045; Cobb v. Bennett, 75 Pa. 329, 15 Am. Rep. 752; Hopkins v. Norfolk & S. R. Co. 131 N. C. 465, 42 S. E. 902.

If the sovereign, the United States, intended to take the water power without compensation, by declaring that the same is necessary for the purposes of navigation, as was urged below, the lawmaking power is not supreme. The courts are not powerless to protect the subject.

Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Stevens Point Boom Co. v. Reilly, 46 Wis. 237, 49 N. W. 978; Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N. W. 546; A. C. Conn Co. v. Little Suamico Lumber Mfg. Co. 74 Wis. 652, 43 N. W. 660; Grand Rapids v. Powers, 89 Mich. 102, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407; Lewis, Em. Dom. § 70; Knoxville v. Knoxville Water Co. 212 U. S. 1, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148.

In case of plain attempts to do injustice, courts do not hesitate to interfere with official action within the sphere of official control.

Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 552, 33 L.R.A. 645, 67 N. W. 918, 103 Wis. 549, 74 Am. St. Rep. 904, 79 N. W. 780; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Henderson v. New York, 92 U. S. 259, 268, 23 L. ed. 543, 547; New York v. Compagnie Generalé Transatlantique, 107 U. S. 59, 63, 27 L. ed. 383, 385, 2 Sup. Ct. Rep. 87; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed 205, 210, 8 Sup. Ct. Rep. 273; Goodfellow Tire Co. v. Parks & B. Commissioner (Goodfellow Tire Co. v. Hurlbut) 163 Mich. 249, 30 L.R.A.(N.S.) 1074, 128 N. W. 410.

Practically, the value of the property is not diminished by the fact that license, or certificate of noninterference, must be obtained from the War Department to make such improvements as will not interfere with navigation. It does not appear on what grounds Congress or the War Department could rightfully refuse a certificate of noninterference with navigation in any case wherein that was the fact. Presumably it may always be obtained.

27 Ops. Atty. Gen. 286; Cobb v. Lincoln Park Comrs. 202 Ill. 427, 63 L.R.A. 264, 95 Am. St. Rep. 258, 67 N. E. 5; People ex rel. Bird v. Grand Rapids-Muskegon Power Co. 164 Mich. 131, 129 N. W. 211.

The fact that the licenses ordinarily issued are nominally revocable at the pleasure of the Secretary of War does not probably invalidate the license, even when revoked. The license itself is a certificate that the work will not, in the opinion of the War Department, interfere with navigation. The fact that the licenses were taken, revocable at the pleasure of the Secretary of War, can be explained only on the ground of duress. The Secretary of War, on account of his official position, refuses a license on other terms, and the party entitled as of right to the license revocable only upon the arising of conditions under which it ought not to stand takes it revocable at the pleasure of the Secretary of War under duress. Hence that clause in the license is void.

Swift & C. & B. Co. v. United States, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; Lonergan v. Buford, 148 U. S. 581, 37 L. ed. 569, 13 Sup. Ct. Rep. 684; Robertson v. Frank Bros. Co. 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; United States v. Edmondston, 181 U. S. 500, 45 L. ed. 971, 21 Sup. Ct. Rep. 718; Maxwell v. Griswold, 10 How. 242, 256, 13 L. ed. 405, 411; McPherson v. Cox, 86 N. Y. 472; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Silsbee v. Webber, 171 Mass. 378, 50 N. E. 555.

If the act of March 3, 1899, should be construed as vesting arbitrary power in the Secretary of War, and subjecting every riparian owner to his will, and giving him power to discriminate,—that is, to impose or omit to impose different conditions on different owners,—then the statute would be void.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Little Chute v. Van Camp, 136 Wis. 526, 128 Am. St. Rep. 1100, 117 N. W. 1012; Brenke v. Belle Plaine, 105 Minn. 84, 117 N. W. 157; Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423.

When a proprietor of lands, whether the sovereign or an individual, plats lands, and gives patents or deeds to lots, and refers therein to and bounds the lots by a street shown in the plat, the adjoining owners take title to the center of the street;

and it is immaterial whether the public have acquired a right of way or not.

Smith v. Lock, 18 Mich. 56; Smeberg v. Cunningham, 96 Mich. 385, 35 Am. St. Rep. 613, 56 N. W. 73; White v. Smith, 37 Mich. 294; Re Albers, 113 Mich. 640, 71 N. W. 1110; Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; 13 Cyc. p. 463.

Even if the improvements and occupations of Portage street south of the canal constituted an acceptance of the offer of dedication of the whole street, then the Chandler-Dunbar Water Power Company was entitled to substantial award for the taking.

Buffalo v. Pratt, 131 N. Y. 300, 15 L.R.A. 413, 27 Am. St. Rep. 592, 30 N. E. 233.

The rule of valuation of property upon condemnation forbids the taking into account of speculative aspects of value. Analogy seems to require that when property is condemned, in cases wherein the party taking has an easement, the reduction in value on account of the easement should rest on certainties or strong probabilities, and not on speculative aspects of possible interference with the use of the fee arising out of the exercise of the easement.

Grand Rapids Boom. Co. v. Jarvis, 30 Mich. 308; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Atlantic Coast Line R. Co. v. Postal Teleg.-Cable Co. 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734.

Water power is appurtenant to the bank, and not to the bed of the stream.

Diedrich v. Northwestern Union R. Co. 42 Wis. 248, 24 Am. Rep. 399; Fox River Flour & Paper Co. v. Kelley, 70 Wis. 294, 35 N. W. 744; Lyon v. Fishmongers' Co. L. R. 10 Ch. 679, L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165, 23 Eng. Rul. Cas. 141; Canal Appraisers v. People, 17 Wend. 571; People v. Tibbetts, 19 N. Y. 523; Brisbine v. St. Paul & S. C. R. Co. 23 Minn. 114; Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; Canal Fund Comrs. v. Kempshall, 26 Wend. 418; Walker v. Board of Public Works, 16 Ohio, 540; Morrill v. St. Anthony Falls Water-Power Co. 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; State v. Minneapolis Mill. Co. 26 Minn. 229, 2 N. W. 839; United States v. Chandler-Dunbar Water Power Co. 81 C. C. A. 221, 152 Fed. 25, 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 70 Wis. 653, 35 N. W. 529, 36 N. W. 828; Kimberly & C. Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373; Wilts & B. Canal & Nav. Co. v. Swindon Waterworks Co. L. R. 9 Ch. 451; 1 Lewis, Em. Dom. § 61b, p. 74; Coulson & F. Waters, 62–64, 110–112; 3 Kent, Com. 11th ed. *439; Gould, Waters, § 148; 2 Farnham, Waters, § 463, pp. 1568–1570; Wiel, Waters, § 148. Contra: Re State Reservation, 16 Abb. N. C. 159; Re State Reservation, 37 Hun, 537.

The opposite riparian owners take the use of the flow in halves, and not in such proportions as may from point to point run over their subaqueous lands.

Pratt v. Lamson, 2 Allen, 275; Dyer v. Cranston Print Works Co. 22 R. I. 506, 48 Atl. 791; Arthur v. Case, 1 Paige, 447; Webb v. Portland Mfg. Co. 3 Sumn. 189, Fed. Cas. No. 17,322; Illinois & M. Canal v. Havens, 11 Ill. 554; Stolp v. Hoyt, 44 Ill. 219; West v. Fox River Paper Co. 82 Wis. 647, 52 N. W. 803; Warren v. Westbrook Mfg. Co. 86 Me. 39, 26 L.R.A. 284, 29 Atl. 927, 88 Me. 58, 35 L.R.A. 388, 51 Am. St. Rep. 372, 33 Atl. 665; Angell, Watercourses, 101a.

Did not the judge overlook the true rule for adjusting compensation in cases of doubt and uncertainty?

Parks & Boulevards Comrs. v. Moesta, 91 Mich. 154, 51 N. W. 903; Bauman v. Ross, 167 U. S. 548, 582, 42 L. ed. 270, 285, 17 Sup. Ct. Rep. 966; Bigelow v. West Wisconsin R. Co. 27 Wis. 487; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 398, 11 N. W. 212; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 536, 28 Pac. 681; Metropolitan West Side Elev. R. Co. v. Stickney, 150 Ill. 362, 26 L.R.A. 773, 37 N. E. 1098; Chicago Sanitary Dist. v. Pittsburgh, Ft. W. & C. R. Co. 216 Ill. 584, 75 N. E. 248; Chase v. Portland, 86 Me. 375, 29 Atl. 1104.

The easement of the United States to preserve and improve navigation is a public right held in trust for all the people. Congress is not at liberty to substantially impair the easement.

Mobile v. Eslava, 16 Pet. 234, 10 L. ed. 948.

The doctrine has long been maintained, that when the taking of any interest in private property is necessary for public use, neither the extent of the taking nor the interest to be taken is absolutely limited to the amount of property, nor interest therein, absolutely necessary for the intended use. It frequently happens that to limit the amount of property, or estate in property, by the exact lines of public use, would bring about intricate complications and the expenditure of public moneys upon private property to the enrichment of the owner at the expense of the public. Where the primary object of a taking is a public use, the fact that a private use, not alone justifying the taking, is also served, does not invalidate the taking.

Dingley v. Boston, 100 Mass. 544; Heyward v. New York, 7 N. Y. 314; Mahona v.

Toledo, 34 Ohio St. 547; Rexford v. Knight, 11 N. Y. 313; Haldeman v. Pennsylvania C. R. Co. 50 Pa. 425; Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Atty. Gen. v. Eau Claire, 37 Wis. 435; Moore v. Sanford, 151 Mass. 290, 7 L.R.A. 151, 24 N. E. 323; Spaulding v. Lowell, 23 Pick. 80; Rothschild v. Chicago, 227 Ill. 205, 81 N. E. 407; Re Southern Wisconsin Power Co. 140 Wis. 245.

The location or quality of land taken, on account of which it is especially valuable for public use, can be considered by the court in fixing just compensation.

Young v. Harrison, 17 Ga. 30; Mississippi & R River Boom Co. v. Patterson, 98 U. S. 403, 407, 408, 25 L. ed. 206, 208; Goodin v. Cincinnati & W. Canal Co. 18 Ohio St. 169, 98 Am. Dec. 95.

The "bed" of the St. Marys river, herein taken, was adjudged by this court in United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579, to be the private property of the Chandler-Dunbar Company.

Under the treaty between New York and Massachusetts the water power passed to Massachusetts as soil or property, and not to New York as the right and title of government, sovereignty, and jurisdiction.

Canal Fund Comrs. v. Kempshall, 26 Wend. 420; Smith v. Rochester, 92 N. Y. 476, 44 Am. Rep. 393.

An unbroken line of Michigan decisions proceeds on the basis that the water power of public navigable rivers is the property of the riparian owner.

Middleton v. Flat River Boom. Co. 27 Mich. 533; People's Ice Co. v. The Excelsior, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636; Buchanan v. Grand River & G. Log Running Co. 48 Mich. 364, 12 N. W. 490; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. 813; Koopman v. Blodgett, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649.

Wisconsin decisions are uniform and to the same purport.

Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; Koenig v. Watertown, 104 Wis. 409, 80 N. W. 728; Kimberly & C. Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373; West v. Fox River Paper Co. 82 Wis. 647, 52 N. W. 803; Fox River Flour & Paper Co. v. Kelley, 70 Wis. 287, 35 N. W. 744; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 75 Wis. 385, 44 N. W. 638; A. C. Conn Co. v. Little Suamico Lumber Mfg. Co. 74 Wis. 652, 43 N. W. 660; Wisconsin River Improv. Co. v. Pier, 137 Wis. 325, 21 L.R.A.(N.S.) 538, 118 N. W. 857; State ex rel. Wausau Street R. Co. v. Bancroft, 148 Wis. 124, 38 L.R.A.(N.S.) 526, 134 N. W. 330.

Mr. William L. Carpenter submitted the cause for the St. Marys Power Company:

A party will not be permitted at one time to take one position or course of action, and at another time a different and inconsistent position or course of action, with reference to the same subject-matter.

Bigelow, Estoppel, 5th ed. chap. 21, § 2, pp. 683, 687; Princeton v. Templeton, 71 Ill. 68; Re New York, 155 App. Div. 905, 140 N. Y. Supp. 124.

The same rules should be applied to the situation in the case at bar as were considered and determined by this court in Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

The case of Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459, we think should be considered as being one of "exceptional circumstances," which, as stated in Mississippi & R. River Boom Co. v. Patterson, supra, "will modify the most carefully guarded rule."

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:

From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys river which has been "taken," and for which compensation must be made under the 5th Amendment to the Constitution; and, second, if so, what is the extent of its water power right and how shall the compensation be measured?

That compensation must be made for the upland taken is not disputable. The measure of compensation may in a degree turn upon the relation of that species of property to the alleged water power rights claimed by the Chandler-Dunbar Company. We therefore pass for the present the errors assigned which concern the awards made for such upland.

The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. Shively v. Bowlby, 152 U. S. 1, 31, 38 L. ed. 331, 343, 14 Sup. Ct. Rep. 548; Philadelphia Co. v. Stimson, 223 U. S. 605, 624, 632, 56 L. ed. 570, 578, 581, 32 Sup. Ct. Rep. 340; Scott v. Lattig, 227 U. S. 229, 44 L.R.A.(N.S.) 101, ante, 490, 33 Sup. Ct.

Rep. 242. Upon the admission of the state of Michigan into the Union the bed of the St. Marys river passed to the state, and un-
61]der the law *of that state the conveyance of a tract of land upon a navigable river carries the title to the middle thread. Webber v. Pere Marquette Boom Co. 62 Mich. 626, 30 N. W. 469; Scranton v. Wheeler, 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579.

The technical title of the Chandler-Dunbar Company, therefore, includes the bed of the river opposite its upland on the bank to the middle thread of the stream, being the boundary line at that point between the United States and the Dominion of Canada. Over this bed flows about two thirds of the volume of water constituting the falls and rapids of the St. Marys river. By reason of that fact, and the ownership of the shore, the company's claim is, that it is the owner of the river and of the inherent power in the falls and rapids, subject only to the public right of navigation. While not denying that this right of navigation is the dominating right, yet the claim is that the United States, in the exercise of the power to regulate commerce, may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation, and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future. This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed, to the extent that such flow is in excess of the wants of navigation, constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the 5th Amendment, compensation must be made.

This is the view which was entertained by Circuit Judge Denison in the court be-
62]low, and is supported by most *careful findings of fact and law and an elaborate and able opinion. The question is therefore one which, from every standpoint, deserves careful consideration.

This title of the owner of fast land upon the shore of a navigable river to the bed of the river is, at best, a qualified one. It is a title which inheres in the ownership of the shore; and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which, in its judgment, is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be removed *or altered as an obstruc-[63
tion to navigation. In Gilman v. Philadelphia, 3 Wall. 713, 724, 18 L. ed. 96, 99, this court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament in England.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

In Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, it is said:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."

Thus, in Scranton v. Wheeler, 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48, the government constructed a long dyke or pier upon such submerged lands in the river here involved, for the purpose of aiding its navigation. This cut the riparian owner off from direct access to deep water, 64]and he claimed that his rights had *been invaded and his property taken without compensation. This court held that the government had not "taken" any property which was not primarily subject to the very use to which it had been put, and therefore denied his claim. Touching the nature and character of a riparian owner in the submerged land in front of his upland bounding upon a public navigable river such as the St. Marys, this court said:

"The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all time subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

*In Pennsylvania* v. Wheeling & B. Bridge *Co. 18 How. 421, 430,* 15 L. ed. 435, 436, this court, upon the facts in evidence, held that a bridge over the Ohio river, constructed under an act of the state of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed, Congress declared the bridge a lawful structure, and not an obstruction. This court thereupon *refused to issue a mandate for carry-[65 ing into effect its own decree, saying:

"Although it still may be an obstruction in fact, [it] is not so in contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and Federal, which, if not sufficient, certainly none can be found in our system of government."

In Philadelphia Co. v. Stimson, 223 U. S. 605, 624, 56 L. ed. 570, 578, 32 Sup. Ct. Rep. 340, and in Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367, many of the cases are cited and reviewed, and we need add nothing more to the discussion.

The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was "necessary for the purposes of navigation of said waters and the waters connected therewith," that determination was conclusive.

So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. *But the flow of the stream was in[66 no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that, if in excess, the riparian owners had any private property right in such excess which must

be paid for if they have been excluded from the use of the same.

That Congress did not act arbitrarily in determining that "for the purposes of navigation of said waters and the waters connected therewith," the whole flow of the stream should be devoted exclusively to that end, is most evident when we consider the character of this stream and its relation to the whole problem of lake navigation. The river St. Marys is the only outlet for the waters of Lake Superior. The stretch of water called the falls and rapids of the river is about 3,000 feet long, and from bank to bank has a width of about 4,000 feet. About two-thirds of the volume of the stream flows over the submerged lands of the Chandler-Dunbar Company, the rest over like lands on the Canadian side of the boundary. The fall in the rapids is about 18 feet. This turbulent water, substantially unnavigable without the artificial aid of canals around the stream, constitutes both a tremendous obstacle to navigation and an equally great source of water power, if devoted to commercial purposes. That the wider needs of navigation might not be hindered by the presence in the river of the construction works necessary to use it for the development of water power for commercial uses under private ownership was the judgment and determination of Congress. There was also present in the mind of Congress the necessity of controlling the outflow from Lake Superior, which averages some 64,000 cubic feet per second. That outflow has great influence both upon the water level of Lake Superior and also upon the level of the great system of lakes below, which receive that outflow. A difference of a foot 67 in the level of Lake *Superior may influence adversely access to the harbors on that lake. The same fall in the water level of the lower lakes will perceptibly affect access to their ports. This was a matter of international consideration, for Canada, as well as the United States, was interested in the control and regulation of the lake water levels. And so we find in the act of 1909 a request that the President of the United States will open negotiations with the government of Great Britain, "for the purpose of effectually providing, by suitable treaty . . . for maintaining ample water levels for the uses of navigation in the Great Lakes and the waters connected therewith, by the construction of such controlling and remedial works in the connecting rivers and channels of such lakes as may be agreed upon by the said governments under the provisions of said treaty."

The falls and rapids are at the exit of the river from the lake. Millions of public money have already been expended in the construction of canals and locks, by this government upon the American side, and by the Canadian government upon its own side of the rapids, as a means by which water craft may pass around the falls and rapids in the river. The commerce using these facilities has increased by leaps and bounds. The first canal had hardly been finished before it became inadequate. A second upon the American side was constructed parallel with the first. The two together are insufficient, though the canal upon the Canadian side accommodates much of the commerce. The main purpose of the act of 1909 was to clear the way for generally widening and enlarging facilities for the ever growing commerce of the Great Lakes. The act, therefore, looks to the construction of one or more canals and locks, paralleling those in use, and directs a survey "to ascertain and determine the proper plan, . . . for constructing in the rapids . . . a filling basin or forebay from which the ship locks may be filled."

*The upland belonging to the Chand- [68
ler-Dunbar Company consists of a strip of land some 2,500 feet long and from 50 to 150 feet wide. It borders upon the river on one side, and on the government canal strip on the other. Under permits from the Secretary of War, revocable at will, it placed in the rapids, in connection with its upland facilities, the necessary dams, dykes, and forebays for the purpose of controlling the current and using its power for commercial purposes, and has been for some years engaged in using and selling water power. What it did was by the revocable permission of the Secretary of War, and every such permit or license was revoked by the act of 1909. (See act of September 19, 1890, 26 Stat. at L. pp. 426, 454, chap. 907, forbidding the construction of any dam, pier, or breakwater in any navigable river without permission of the Secretary of War, or the creation of any obstruction, not affirmatively authorized by law, "to the navigable capacity of such rivers." See also the later act of March 3, 1899, 30 Stat. at L. pp. 1151, 1155, chap. 425, U. S. Comp. Stat. 1901, p. 3540, and United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770, construing and applying the act of 1890.) That it did not thereby acquire any right to maintain these constructions in the river longer than the government should continue the license needs no argument. They were placed in the river under a permit which the company knew was likely to be revoked at any time. There is nothing in the facts which savors of estoppel in law or equity. The suggestion by counsel that the act of 1909 con-

templates that the owner should be compensated not only for its tangible property, movable or real, but for its loss and damage by the discontinuance of the company's license and its exclusion from the right to use the water power inherent in the falls and rapids, for commercial purposes, is without merit. The provisions of the act in respect of compensation apply only to compensation for such "property described" as shall be held private property taken for 69] *public uses. Unless, therefore, the water power rights asserted by the Chandler-Dunbar Company are determined to be private property, the court below was not authorized to award compensation for such rights.

It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the government not only takes the land, but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows, has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows, or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is cable of private ownership is inconceivable.

Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. We may put out of view altogether the class of cases which deal with the right of riparian owners upon non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but if the effect was not injurious to the property of those above, or 70]to the equal rights of those *below, none could complain, since no public interest would be affected. We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or non-navigable streams as between each other. Nor need we consider cases cited which deal with the rights of riparian owners under state laws and private or public charters conferring rights. That riparian owners upon public navigable rivers have in addition to the rights common to the public, certain rights to the use and enjoyment of the stream, which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in the navigation of the river. Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336. It is for Congress to decide what is and what is not an obstruction to navigation. Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Philadelphia Co. v. Stimson. 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340.

To utilize the rapids and fall of the river which flows by the upland of the Chandler-Dunbar Company, it has been and will be necessary to construct and maintain in the river the structures necessary to control and direct *the flow so that it may be used[71 for commercial purposes. The 34th findings of fact includes this:

"For about twenty years the Chandler-Dunbar Company, or its predecessors, or someone claiming under it, has been devoloping power at this part of the rapids. This was accomplished by a short transverse dam near the lower boundary of its land, extending out a short distance into the stream, and then extending up along the bed of the stream (substantially) parallel to the bank up to the head of the rapids. This dam or wall toward its upper end diverged out into the stream, the better to divert water into the headrace and into the forebay formed by its lower part.

Earlier structures of this character were replaced about 1901 by those more extensive ones which existed when this condemnation was made. While considerable in extent and cost, they are inconsiderable as compared with the structures now proposed to utilize the whole power, and they were, comparatively speaking, along the bank rather than across the stream."

The 71st finding of fact was in these words:

"All the development works ever constructed upon the Chandler-Dunbar submerged lands by anyone have been constructed after obtaining from the Secretary of War a permit therefor, and each such permit has been expressly revocable by right of revocation reserved on its face, to be exercised with or without cause. Each such permit was revoked before the commencement of this proceeding."

Upon what principle can it be said that, in requiring the removal of the development works which were in the river upon sufferance, Congress has taken private property for public use without compensation? In deciding that a necessity existed for absolute control of the river at the rapids, Congress has, of course, excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for 72]the betterment of navigation. "The qualified title to the bed of the river affords no ground for any claim of a right to construct and maintain therein any structure which Congress has, by the act of 1909, decided in effect to be an obstruction to navigation, and a hindrance to its plans for improvement. That title is absolutely subordinate to the right of navigation, and no right of private property would have been invaded if such submerged lands were occupied by structures in aid of navigation, or kept free from such obstructions in the interest of navigation. Scranton v. Wheeler, 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; Hawkins Point Light-House Case, 39 Fed. 83. We need not consider whether the entire flow of the river is necessary for the purposes of navigation, or whether there is a surplus which is to be paid for, if the Chandler-Dunbar Company is to be excluded from the commercial use of that surplus. The answer is found in the fact that Congress has determined that the stream from the upland, taken to the international boundary, is necessary for the purposes of navigation. That determination operates to exclude from the river forever the structures necessary for the commercial use of the water power. That it does not deprive the Chandler-Dunbar Company of private property rights follows from the considerations before stated.

It is said that the 12th section of the act of 1909 authorizes the Secretary of War to lease upon terms agreed upon, any excess of water power which results from the conservation of the flow of the river, and the works which the government may construct. This, it is said, is a taking of private property for commercial uses, and not for the improvement of navigation. But, aside from the exclusive public purpose declared by the 11th section of the act, the 12th section declares that the conservation of the flow of the river is "primarily for the purposes of navigation, and incidentally for the purpose of having the water power developed, either for the direct "use of the[73 United States, or by lease . . . through the Secretary of War." If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the government. The practice is not unusual in respect to similar public works constructed by state governments. In Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 273, 35 L. ed. 1004, 1010, 12 Sup. Ct. Rep. 173, respecting a Wisconsin act to which this objection was made, the court said:

"But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw,—controversies which could only be avoided by the state reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the state to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement."

It is at best not clear how the Chandler-Dunbar Company can be heard to object to the selling of any excess of water power which may result from the construction of such controlling or remedial works as shall be found advisable for the improvement of navigation, inasmuch as "it had no property right in the river which has been

"taken." It has therefore no interest whether the government permit the excess of power to go to waste or be made the means of producing some return upon the great expenditure.

The conclusion, therefore, is that the court below erred in awarding $550,000, or any other sum, for the value of what is called "raw water," that is, the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land.

Coming now to the award for the upland taken:

The court below awarded to the Chandler-Dunbar Company on this account—

a. For the narrow strip of upland bordering on the river, having an area of something more than 8 acres, excluding the small parcels described in the pleadings and judgment as claims 95 and 96, $65,000, less 7 per cent of that sum on account of Portage street, which the court later found belonged to the United States, and not to that company, $60,450.

b. For the small parcels covered by claims 95 and 96, $25,000.

c. For a half interest in lot on bridge property, $338.

These awards include certain sums for special values: The value of the upland strip fixed at $60,450 was arrived at in this manner—

a. For its value, including railroad side tracks, buildings, and cable terminal, including also its use, "wholly disconnected with power development or public improvement, that is to say, for all general purposes, like residences, or hotels, factory sites, disconnected with water power, etc., $20,000."

b. For use as factory site in connection with the development of 6,500 horse power, either as a single site or for several factories to use the surplus of 6,500 horse 75] *power not now used in the city, an additional value of $20,000.

c. For use for canal and lock purposes, an additional value of $25,000.

The small parcels constituting claims 95 and 96 were valued at $25,000.

These two parcels seem to have been connected by a costly fill. They fronted upon deep water above the head of the rapids. They had therefore a special value for wharfs, docks, etc., and had been so used. The gross sum awarded included the following elements:

a. For general wharfage, dock, and warehouse purposes, disconnected with development of power in the rapids, $10,000.

*b. For its special* value for canal and lock *purposes an additional* sum of $10,000.

c. In connection with the canal along the rapids, if used as a part of the development of 4,500 (6.500) horse power, an additional value of $5,000.

The United States excepted to the additional value allowed in consequence of the availability of these parcels in connection with the water power supposed to be the property of the Chandler-Dunbar Company, and supposed to have been taken by the government in this case. It also excepted to so much of the awards as constituted an additional value by reason of availability for lock and canal purposes.

These exceptions, so far as they complain of the additional value to be attached to these parcels for use as factory sites in connection with the development of horse power by the Chandler-Dunbar Company, must be sustained. These "additional" values were based upon the erroneous hypothesis that that company had a private property interest in the water power of the river, not possibly needed now or in the future for purposes of navigation, and that that excess or surplus water was capable, *by[76 some extension of their works already in the river, of producing 6,500 horse power.

Having decided that the Chandler-Dunbar Company, as riparian owners, had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland. The government had dominion over the water power of the rapids and falls, and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss, and there would be no justice in paying for a loss suffered by no one in fact. "The requirement of the 5th Amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained." Boston Chamber of Commerce v. Boston, 217 U. S. 189, 194, 195, 54 L. ed. 725, 727, 30 Sup. Ct. Rep. 459.

Neither can consideration be given to probable advancement in the value of such riparian property by reason of the works to be constructed in the river by the government, or the use to which the flow of the stream might be directed by the government. The value should be fixed as of the date of the proceedings, and with reference to the loss the owner sustains, considering the property in its condition and

situation at the time it is taken, and not as enhanced by the purpose for which it was taken. Kerr v. South Park Comrs. 117 U. S. 379, 387, 29 L. ed. 924, 927, 6 Sup. Ct. Rep. 801; Shoemaker v. United States, 147 U. S. 282, 304, 305, 37 L. ed. 170, 186, 187, 13 Sup. Ct. Rep. 361.

The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of 77]constructing *a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose. Lewis, Em. Dom. § 707; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. ed. 206, 208; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; Young v. Harrison, 17 Ga. 30; Alloway v. Nashville, 88 Tenn. 510, 8 L.R.A. 123, 13 S. W. 123; Sargent v. Merrimac, 196 Mass. 171, 11 L.R.A.(N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970. Mississippi & R. River Boom Co. v. Patterson was this: A boom company sought to condemn three small islands in the Mississippi river, so situated with reference to each other and the river bank as to be perculiarly adapted to form a boom a mile in length. The question in the case was whether their adaptability for that purpose gave the property a special value which might be considered. This court held that the adaptability of the land for the purposes of a boom was an element which should be considered in estimating the value of the lands condemned. The court said, touching the rule for estimating damages in such cases:

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, *or such as[78 may be reasonably expected in the immediate future."

In Shoemaker v. United States, supra, lands were condemned for park purposes. In the court below the commissioners were instructed to estimate each piece of land at its market value, and that, "the market value of the land includes its value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement, or its intrinsic character, it is peculiarly adapted to some particular use,—*e. g.*, to the use of a public park,—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation." The court approved this instruction.

The Chandler-Dunbar Company has also assigned as error the denial of any award on account of a portion of Portage street to which it claimed title. The title to that parcel has never passed out of the United States. It was part of a street laid off by a survey made of the village of Sault Sainte Marie, a town which had grown up on public land of the United States. But that survey was never carried into a patent and the village never accepted this part of the street. Thus abandoned, it was occupied for a time by the Chandler-Dunbar Company, but not long enough to acquire title. The court did not err in holding that the company had acquired no title, and that title was already in the United States.

The award to the St. Marys Power Company, as owner of island No. 5, is excepted to. The value of that island was fixed at $21,000. That amount was reached, as shown by the 70th finding of fact, in this manner:

| | |
|---|---|
| *a. "As a base value, for general purposes, as for a cottage or fishing station ..... | [79 $ 1,000 |
| b. As a strategic value, growing out of the extent to which it may control or block the most available development by up-stream owners | 15,000 |
| c. As an additional value, by reason of its special suitability for lock or canal purposes"..... | 5,000 |

This island No. 5, otherwise known as Oshawano island, is on the American edge of the rapids and below the Chandler-Dun-

bar property, and opposite that part of the shore belonging to the United States. It has an area of about one third of an acre. The court found that it had no appreciable water power which was in any sense appurtenant, and so no allowance was made on that account. Because none was made, the St. Marys Power Company sued out a writ of error. The reasons which have induced us to deny such an allowanee in respect of upland upon the bank of the river, require the assignment referred to to be held bad. The court below held, however, that the island had value in other ways, being those mentioned above. In respect to the allowance of $15,000 as its "strategic value," the court below in its opinion said:

"Owing to its location, this property had, and always has had, a strategic value with reference to any general scheme of water development in the river, and because it must be included as a tail race site, if not otherwise, in any completely efficient plan of development by any owner, private or public. This value is denied, because it is, as government counsel say, of the 'hold up' character. It should not be permitted to assume the latter character, nor should the fair strategic value be denied because there might be an attempt at exaggeration or abuse. I fix this so-called strategic value at 80]$10,000 *(afterwards raised to $15,000), and it should be awarded under the circumstances of this case to whomsoever the owner may be."

This allowance has no solid basis upon which it may stand. That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive. It is not proper to attribute to it any part of the value which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. The principle applied in Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459, is applicable. In that case it appeared that one person owned the land condemned, subject to servitudes to others. It was sought to have damages assessed upon a bill in which all of the interests joined for the purpose of having a lump sum awarded, to be divided as the parties might or had agreed. If this could be done, it was agreed that the estate, considered as the sole unencumbered estate of a single person, was worth many times more than if the damage should be assessed according to the condition of the title at the time. This court held that the requirement of compensation when land is taken for a public purpose "does not require a disregard of the mode of ownership. It does not require a parcel of land to be valued as an unencumbered whole."

The "strategic value" for which $15,000 has been allowed is altogether speculative. It is based not upon the actual market value for all reasonable uses and demands, but the possible worth of the property to the government.

A "strategic value" might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse, as the price suited. But in a condemnation *proceeding, the value of the[81 property to the government for its particular use is not a criterion. The owner must be compensated for what is taken from him; but that is done when he is paid its fair market value for all available uses and purposes. Lewis, Em. Dom. 3d ed. § 706; Moulton v. Newburyport Water Co. 137 Mass. 163, 167; United States v. Seufert Bros. Co. 78 Fed. 520; Alloway v. Nashville, 88 Tenn. 510, 514, 8 L.R.A. 123, 13 S. W. 123; United States v. Honolulu Plantation Co. 58 C. C. A. 279, 122 Fed. 581.

The exception must be sustained.

One other assignment by the St. Marys Power Company needs to be specially noticed. The title to Oshawano island is in litigation between the United States and the St. Marys Power Company. For this reason the award to that company was ordered to remain in the registry of the court until that litigation was ended. The St. Marys Power Company contends that when the United States sought the condemnation of the property in this proceeding it thereby conceded the title to be in it. But the pleadings show that no such concession was made. The state of the title and of the pending litigation was set up, and we think all rights were thereby reserved.

The assignments of error by the Michigan Lake Superior Power Company must be overruled. No property, real or hypothetical, has been taken from it.

Other assignments of error by one or another of the several plaintiffs in error need not be specially noticed. They are all overruled as either covered by the views we have expressed, or as having no merit.

The judgment of the court below must be reversed and the cases remanded with direction to enter a judgment in accordance with this opinion.

82] *LEWIS BLUE POINT OYSTER CULTIVATION COMPANY, Plff. in Err.,
v.
J. MARVIN BRIGGS.

(See S. C. Reporter's ed. 82–90.)

**Eminent domain — private property — title to submerged lands.**

The owner of the legal title to land under the water of Great South bay, whether derived from the state of New York or from royal patents antedating the state's right, has no such right of private property therein as entitles him or his lessee to compensation for the taking or incidental destruction of an oyster plantation thereon by the dredging of a deep water channel across the bay by the United States, in the interests of navigation.

[For other cases, see Eminent Domain, II.; Waters, I. d, 8, in Digest Sup. Ct. 1908.]

[No. 272.]

**Argued April 30 and May 1, 1913. Decided May 26, 1913.**

IN ERROR to the Supreme Court of the State of New York in and for the County of Suffolk, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, Second Department, which had in turn affirmed a judgment at Special Term, dismissing the complaint in an action to restrain the dredging upon certain lands under navigable waters. Affirmed.

See same case below in appellate division, 129 App. Div. 574, 114 N. Y. Supp. 313; in court of appeals, 198 N. Y. 287, 34 L.R.A.(N.S.) 1084, 91 N. E. 846, 19 Ann. Cas. 694.

The facts are stated in the opinion.

Mr. **Howard Taylor** argued the cause and filed a brief for plaintiff in error:

The power of Congress to regulate commerce, and incidentally navigation, goes hand in hand with the other powers of and limitations upon the government set forth in the Constitution, and is obviously to be exercised in conformity to such limitations.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445, 471, 47 L. ed. 539, 549, 23 Sup. Ct. Rep. 349.

The right of compensation to the owner of private property when it has been taken for public use is a fundamental, inherent right, which, under the decisions of the courts, exists even independently of the national or state Constitutions, and has merely been declared therein.

Sinnickson v. Johnson, 17 N. J. L. 145, 34 Am. Dec. 184.

So far as there have been decisions upon this question, they have been, until this present case, in favor of the plaintiff in error's claim.

Richardson v. United States, 100 Fed. 714, Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340; 5 Pom. Eq. Jur. §§ 493, 499; 26 Ops. Atty. Gen. p. 441; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Avery v. Fox, 1 Abb. (U. S.) 246, Fed. Cas. No. 674.

Assistant Attorney General **Denison** argued the cause, and, with Mr. Louis G. Bissell, filed a brief for defendant in error:

The New York law limits the plaintiff's title by the servitude in favor of navigation.

Sage v. New York, 154 N. Y. 79, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A. (N.S.) 326, 80 N. E. 665, 11 Ann. Cas. 1; Scranton v. Wheeler, 179 U. S. 141, 161, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Shively v. Bowlby, 152 U. S. 1, 20, 21, 38 L. ed. 331, 339, 14 Sup. Ct. Rep. 548.

The same rule existed in England at the time of the grant to the plaintiff's predecessors in title.

Shively v. Bowlby, 152 U. S. 1, 11–14, 38 L. ed. 331, 336, 337, 14 Sup. Ct. Rep. 548; Atty. Gen. v. Parmeter, 10 Price, 378, 24 Revised Rep. 723, 23 Eng. Rul. Cas. 672; Nottingham v. Lambert, Willes, Rep. 111; Colchester v. Brooke, 7 Q. B. 339, 15 L. J. Q. B. N. S. 59, 9 Jur. 1090; Gann v. Whitstable, 11 H. L. Cas. 192, 20 C. B. N. S. 11, 35 L. J. C. P. N. S. 29, 12 L. T. N. S. 150, 13 Week. Rep. 589; Hargrave Law Tracts, pp. 11, 12, 25, 36, 84, 89.

And it was continued in England, as in New York, until a change was effected by statute.

Atty. Gen. v. Lonsdale, L. R. 7 Eq. 377, 38 L. J. Ch. N. S. 335, 20 L. T. N. S. 64, 17 Week. Rep. 219; Atty. Gen. v. Terry, L. R. 9 Ch. 430, 30 L. T. N. S. 215, 22 Week. Rep. 395.

The similar rule for Illinois land titles was stated and recognized in West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518, and the

NOTE.—On right to compensation for damages to oyster beds by improvement of navigation—see note to decision of the New York court of appeals in this case as reported in 34 L.R.A.(N.S.) 1084.

rules of other states were collected and discussed in Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

In Louisiana the *jus publicum* extends even to the fast land, to erect levees thereon, without compensation.

Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345.

Necessarily the plaintiff stands upon an assertion of property rights, and necessarily his property rights are concluded, as between him and his state, by the New York law defining his title.

Lowndes v. Huntington, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

But were the law of New York otherwise as to the nature of these property rights, the plaintiff in error still cannot succeed, because a portion of the *jus publicum* over the soil under navigable streams went, under the Constitution, to the United States, and that restriction upon the title is paramount.

Barnes v. Midland R. Terminal Co. 193 N. Y. 378, 127 Am. St. Rep. 962, 85 N. E. 1093; Weber v. State Harbor Comrs. 18 Wall. 57, 65, 21 L. ed. 798, 802; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 435, 36 L. ed. 1018, 1036, 13 Sup. Ct. Rep. 110; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340; Scranton v. Wheeler, 179 U. S. 156, 157, 159–161, 45 L. ed. 134–137, 21 Sup. Ct. Rep. 48; Shively v. Bowlby, 152 U. S. 1, 40, 47, 38 L. ed. 331, 346, 348, 14 Sup. Ct. Rep. 548.

The *jus publicum* extends to the improvements of a channel by dredges.

West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Hill v. United States, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 726, 21 Sup. Ct. Rep. 48; Gibson v. United States, 166 U. S. 269, 271, 275, 276, 41 L. ed. 996, 998, 1002, 17 Sup. Ct. Rep. 578; South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Chappell v. Waterworth, 39 Fed. 77; Lane v. Harbor Comrs. 70 Conn. 685, 40 Atl. 1058; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 20; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 700, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Barnes v. Midland R. Terminal Co. 193 N. Y. 378, 127 Am. St. Rep. 962, 85 N. E. 1093; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Hannibal Bridge Co. v. United States, 221 U. S. 194, 55 L. ed. 699, 31 Sup. Ct. Rep. 603; Lane v. Smith, 71 Conn. 65, 41 Atl. 18.

*Mr. Justice Lurton delivered the[85 opinion of the court:

This was an action to restrain the defendant in error from dredging upon certain lands under the waters of Great South bay, in the state of New York. The defense was that the lands upon which he was engaged in dredging were under the navigable waters of the bay, which was a navigable area of the sea, over which enrolled and registered vessels passed in interstate commerce; that Congress had provided for the dredging of a channel some 2,000 feet long and 200 feet wide across said bay, and that defendant was engaged as a contractor with the United States in dredging the channel so authorized. The plaintiff in error, plaintiff below, averred that this channel would pass diagonally across submerged land in said bay which it held as lessee under the owner of the fee in the bed of the bay. The land so held under lease had been planted with oysters and had been long used for the cultivation of that variety of oyster known as the "Blue Point." The claim was that the dredging of such a channel would destroy the oysters of the plaintiff, not only along the line of excavation, but for some distance on either side, and greatly impair the value of his leasehold for oyster cultivation.

The New York court of appeals held that the title of every owner of lands beneath navigable waters was a qualified one, and subject to the right of Congress to deepen the channel in the interest of navigation, and such a "taking" was not a "taking" of private property for which compensation could be required. The judgment of the courts below discharging the injunction and dismissing the action was therefore affirmed.

The case comes here upon the claim that the dredging of such a channel, although in the interest of navigation, is a taking of private property without just compensation, forbidden by the 5th Amendment to the Constitution of the United States.

*The foundation of the title to a large[86 portion of the soil lying under the water of Great South bay is found in certain royal patents made when the state of New York was a colonial dependency of Great Britain. Through the patents referred to and certain mesne conveyances, the lessors

of the oyster company have been adjudged to be seised of the legal title to a large part of the land which lies at the bottom of that bay. That determination of title under the local law is not complained of, and must, of course, be accepted and followed by this court. The single question, therefore, is whether the deepening of the channel across the bay, in the interest of navigation, with the incidental consequence to the oyster plantation of the lessee company, is a taking of private property which may be enjoined unless provision for compensation has been made.

The cultivation of oysters upon the beds of the shallow waters of bays and inlets of the sea, and of the rivers affected by the tides, has become an industry of great importance. In many localities the business is regulated by the laws of the states in which such waters are situated, and the beds of such waters are parceled out among those owning the bottom or holding licenses from the state, and marked off by stakes indicating the boundaries of each cultivator. The contention is that whether title to such an area at the bottom of navigable salt waters comes from the state, or, as in the case here, from royal patents antedating the state's right, such actual interest is thereby acquired that when such area so planted and cultivated is invaded for the purpose of deepening the water in aid of navigation, private property is taken. For this, counsel cite the cases of Brown v. United States, 81 Fed. 55, decided by Circuit Court Judge Simonton; and Richardson v. United States, 100 Fed. 714, also decided by the same eminent judge. They also cite and rely upon Monongahela Nav. 87]Co. v. United States, 148 *U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622. In the Brown Case, Judge Simonton, while recognizing that the navigable waters of the United States were within the jurisdiction of the United States, which has control over their improvement for navigation, was of opinion that, so long as the owner of the bed of such bodies of water did not use it "for the erection of structures impeding or obstructing navigation," his ownership of the bottom, and his right to put it to such use as did not obstruct navigation, was a property right, which could not be destroyed or taken without compensation. From these considerations he held that "when the government, for the purpose of adding to the navigability of a stream, changes its natural channel, and, in doing so, occupies and assumes exclusive possession of the land of a citizen, it takes private property." In that case the government had, in the exercise of its power of improving navigation, erected a dike on the oyster beds of the complainant in the shallow salt water of York river, for the purpose of directing the current of the river and maintaining the channel. The effect of this was to destroy the property of the owner or lessee of the bed of the river at that point for the purpose to which it was devoted. This the learned judge ruled was a "taking" which was not lawful without compensation.

That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. This right to control, improve, and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. Whatever power the several *states had before the[88 Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress, in which, therefore, is centered all of the governmental power over the subject, restricted only by such limitations as are found in other clauses of the Constitution.

By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands, or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep-water channel across it, entitles him to demand compensation as a condition.

In the Hawkins Point Light-House Case, 39 Fed. 77, it was held that the occupation of the lands under navigable waters for the purpose of erecting a lighthouse thereon in aid of navigation was not a taking of private property requiring compensation, the owner's title being, by necessary implication, subject to the use which the United States had made of it. In Scranton v. Wheeler, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 803, 813, 814, it appeared that the United States had erected a long dike or pier upon the submerged lands of a riparian owner on the St. Marys river, Michigan, cutting off his access to deep water. It was held that his title was subject to whatever use the government found appropriate for improving navigation.

The case referred to had been removed from a state court to the circuit court of the United States. Upon a writ of error to this court, the case was held to have been improperly removed and was remanded, with direction to remand to the court from which it had been removed. It was there heard, and upon review by the supreme court of Michigan, the plaintiff's action was dismissed upon the same ground 89]upon which the circuit *court had dismissed it. The case then came to this court upon a writ of error to the Michigan court and the judgment was affirmed. Concerning the nature of the title of a riparian owner to submerged lands over which his boundary extends this court said:

"Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." Scranton v. Wheeler, 179 U. S. 141, 144, 146, 163, 45 L. ed. 126, 128, 129, 137, 21 Sup. Ct. Rep. 48.

The whole subject of the nature and character of the interest of the owner of such a title and the scope of the control of the Congress over navigable rivers has been fully considered by this court in Chandler-Dunbar Water Power Co. v. United States, just decided [229 U. S. 53, ante, 1063, 33 Sup. Ct. Rep. 667], where the decision in Scranton v. Wheeler was fully affirmed.

The case of the Monongahela Nav. Co. v. United States, 148 U. S. 312, 334, 37 L. ed. 463, 470, 13 Sup. Ct. Rep. 622, has been cited as a case in which the owners of a lock and canal and a franchise to take tolls were awarded compensation not only for the tangible property taken, but for the value to the company of the state's franchise to take tolls. That case really rests upon estoppel. The lock and dam had been constructed "at the instance and implied invitation of Congress." After stating the action of Congress, the court said:

"This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when, in pursuance of that invitation, and under authority given by the state of 90]Pennsylvania, *the company has constructed the lock and dam, it does not lie in the power of the state or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company."

Compare Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

The conclusion we reach is that the court below did not err in dismissing the action of the plaintiff in error, and the judgment is accordingly affirmed.

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JEAN L. SHELTON et al., Appts.,
v.
FRANK B. KING et al.

(See S. C. Reporter's ed. 90-101.)

**Trusts — control of trustee — premature payment of legacy.**

1. Premature payment to the beneficiaries in a testamentary trust will not be ordered by a court of equity in the absence of circumstances and conditions arising for which the testatrix made no provision, if the postponement directed by the will does not offend against some principle of positive law or settled rule of public policy.

[For other cases, see Trusts, III. b, in Digest Sup. Ct. 1908.]

**Wills — postponement of payment of legacy — restraint upon alienation.**

2. A testator is not forbidden by any rule of public policy to direct that vested and absolute legacies shall be held in trust, and not paid over until the youngest legatee shall reach the age of twenty-five years.

[Devise and legacy, see Wills, III., in Digest Sup. Ct. 1908.]

**Trusts — rights of creditors — spendthrift trusts.**

3. A testator may so dispose of his property that it may be enjoyed by the recipient without liability to the latter's creditors.

[For other cases, see Trusts, III. b, in Digest Sup. Ct. 1908.]

[No. 180.]

Argued March 11 and 12, 1913. Decided May 26, 1913.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which, reversing a decree of the Supreme Court of the District, ordered the dismissal of a bill to terminate a testamentary trust. Affirmed.

See same case below, 36 App. D. C. 1.

The facts are stated in the opinion.

Mr. Henry F. Woodard argued the cause, and, with Mr. Arthur A. Birney, filed a brief for appellants:

The legatees took a vested and indefeasible interest in their legacies.

224 U. S. 224, 56 L. ed. 741, 32 Sup. Ct. Rep. 421; McArthur v. Scott, 113 U. S. 340–380, 28 L. ed. 1015–1027, 5 Sup. Ct. Rep. 652.

In this situation may the legatees, if they so desire, presently enjoy their gifts? What sound reason can be urged against their present enjoyment?

Rector v. Dalby, 98 Mo. App. 189, 71 S. W. 1078; Sanford v. Lackland, 2 Dill. 6, Fed. Cas. No. 12,312.

Such trusts are void, or, if not void, voidable.

Saunders v. Vautier, 4 Beav. 115; Wharton v. Masterman [1895] A. C. 186, 64 L. J. Ch. N. S. 369, 11 Reports, 169, 72 L. T. N. S. 431, 43 Week. Rep. 449; Josselyn v. Josselyn, 9 Sim. 64; Marsden, Perpetuities & Accumulation, p. 206; Gray, Perpetuities, § 120; Re Jacob, 29 Beav. 402; Rocke v. Rocke, 9 Beav. 66; Jackson v. Marjoribanks, 12 Sim. 93, 5 Jur. N. S. 885; Croxton v. May, L. R. 9 Ch. Div. 388, 39 L. T. N. S. 461, 27 Week. Rep. 327; Magrath v. Morehead, L. R. 12 Eq. 491, 41 L. J. Ch. N. S. 120; 22 Am. & Eng. Enc. Law, 2d ed. 735; 30 Cyc. 1497; Rector v. Dalby, 98 Mo. App. 189, 71 S. W. 1078; Claflin v. Claflin, 149 Mass. 19, 3 L.R.A. 370, 14 Am. St. Rep. 393, 20 N. E. 454; Sears v. Choate, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; Bennett v. Chapin, 77 Mich. 526, 7 L.R.A. 377, 43 N. W. 893; Mandlebaum v. McDonell, 29 Mich. 87, 18 Am. Rep. 61; Hall v. Tufts, 18 Pick. 459; Blackstone Bank v. Davis, 21 Pick. 42, 32 Am. Dec. 241; Brandon v. Robinson, 18 Ves. Jr. 429, 1 Rose, 197, 11 Revised Rep. 226; Doebler's Appeal, 64 Pa. 9; Craig v. Wells, 11 N. Y. 315; Huber v. Donoghue, 49 N. J. Eq. 125, 23 Atl. 495; Sanford v. Lackland, 2 Dill, 6, Fed. Cas. No. 12,312; Kimball v. Crocker, 53 Me. 263.

Mrs. Ellen S. Mussey and Mr. J. J. Darlington argued the cause and filed a brief for appellees:

The weight of American authority in the states, it is believed, is decisively in accord with the doctrine of this court in—

Nichols v. Eaton, 91 U. S. 716, 725, 23 L. ed. 254, 256; Leigh v. Harrison, 69 Miss. 934, 18 L.R.A. 49, 11 So. 604; Rhoads v. Rhoads, 43 Ill. 251; Bennett v. Bennett, 217 Ill. 434, 4 L.R.A.(N.S.) 470, 75 N. E. 339; Pearson v. Hanson, 230 Ill. 610, 82 N. E. 813; Stewart v. Brady, 3 Bush, 623; Stewart v. Barrow, 7 Bush, 368; Wallace v. Smith, 113 Ky. 263, 68 S. W. 131; M'Williams v. Nisly, 2 Serg. & R. 507, 7 Am. Dec. 654; Re Macleay, L. R. 20 Eq. 186, 44 L. J. Ch. N. S. 441, 32 L. T. N. S. 682, 23 Week. Rep. 718; Spindle v. Shreve, 9 Biss. 199, 4 Fed. 136; Seymour v. McAvoy, 121 Cal. 442, 41 L.R.A. 544, 53 Pac. 946; Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075; Guernsey v. Lazear, 51 W. Va. 328, 41 S. E. 405; Mason v. Rhode Island Hospital Trust Co. 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; Roberts v. Stevens, 84 Me. 325, 17 L.R.A. 266, 24 Atl. 873; Williams v. Williams, 73 Cal. 99, 14 Pac. 394; Jourolmon v. Massengill, 86 Tenn. 115, 5 S. W. 719; Hyde v. Woods, 94 U. S. 523, 526, 24 L. ed. 264, 265; Cowell v. Springs Co. 100 U. S. 55, 57, 25 L ed. 547, 548.

*Mr. Justice Lurton delivered the [93 opinion of the court:

This is a bill to terminate a trust under the will of Anna Smith Mallett. The material clauses are in these words:

"3. I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin John Consider Shelton, deceased, all of Bridgeport, Connecticut: the sum of Seventy-five Thousand dollars, being Twenty-five Thousand to each.

"10. I give, bequeath and devise all the rest, residue and remainder of my estate, real and personal wheresoever and whatsoever, of which I may die possessed to the aforesaid Jean Louisa, Anna Gertrude, and R. Philo Shelton.

Codicil.

. . . . . .

"In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, Northwest, and George W. White, Paying Teller of the National Metropolitan Bank, co-trustees with the said F. B. King,—to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton,—said trusteeship to terminate when these legatees shall receive their portions of my estate.

"And it is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

The complainants are the three legatees, Jean L. Shelton, now more than twenty-one years of age, and Anna Gertrude and Robert Philo Shelton, not yet twenty-one, who sue by their guardian. As the youngest of the legatees *was not born until [94 1896, the bill is premature by many years, if the trust created by the codicil is to be regarded.

That the respective legacies are vested and absolute is undeniable. No other per-

son has any interest in them, and if the trustees should disregard the time of payment, and pay over to each legatee his or her legacy when they are competent to give a valid discharge, there would be no one who could call them to account. But the trustees, having regard to the express wish of the testatrix, have refused to terminate the trust, and the object of this proceeding is to compel them to pay over the shares of the legatees as they reach the age of twenty-one years.

The objects of the bounty of the testatrix were distant kinspeople. Besides their postponed legacies they were given the residuum of the estate. What that was does not appear. It is not claimed that they are in want, nor that anything has happened since the will which was not anticipated by the testatrix, and no special reasons are claimed for terminating the trust because of new conditions which she did not take into account. In Sears v. Choate, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786, a situation arose after the will, which the court thought had not been contemplated by the testator, and for which no provision had been made. The court therefore saw in that a reason for terminating a like trust. In the case at bar no ground, aside from the alleged illegality of the trust, is suggested for defeating the wishes of Miss Mallett, other than that it will be convenient and will save the cost of continuing the trust.

The trust is not dry, but is active, and must continue, if not invalid, until the time of payment arrives. Upon what principle, then, is a court of equity to control the trustee by compelling a premature payment? It is a settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting bona fide. To do so would be 95 ]to substitute *the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator. Lewin, Trusts, 2d Am. ed. 448; Nichols v. Eaton, 91 U. S. 716, 724, 23 L. ed. 254, 256.

There being in this case no ground for saying that there have arisen circumstances and conditions for which the testatrix made no provision, we may not control the trustee, if the postponement directed by the will does not offend against some principle of positive law or settled rule of public policy.

There is no pretense of perpetuity. Creditors are in no way concerned. If the testatrix saw fit to have this fund accumulate in the hands of trustees, and thereby postpone the enjoyment of her gift, why shall her will be disregarded? The restriction she imposed may protect her bounty against ill-advised investments and waste or extravagance. She did not undertake to guard against alienation, except in so far as the alienees will take subject to the same postponement of payment. Stier v. Nashville Trust Co. 85 C. C. A. 422, 158 Fed. 601. Nor did she undertake to protect against creditors as in Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254. The single restriction she imposed upon her gift was that the legacies should not be paid until the time named, and in the meantime should be held in trust.

The appellants contend that whether the trust be active or dry, it is one for the benefit of the legatees, and, as no other person has any interest in the legacies, may be waived by them. For this they cite Saunders v. Vautier, 4 Beav. 115, and Wharton v. Masterman [1895] A. C. pp. 186, 193. In Saunders v. Vautier it was laid down, without argument, that "where a legacy is directed to accumulate for a certain period, or where *the payment is[96 postponed, the legatee, if he has an absolute, indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge." The point thus decided in Saunders v. Vautier was followed in Wharton v. Masterman, where Lord Herschell said very significantly: "The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

"It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it."

The doctrine thus stated is the plain outgrowth of certain earlier English decisions in the interest of creditors, which hold, in substance, that the necessary incidents of beneficial ownership in property are liability to creditors and the power of alienation. Having concluded that a testator could not so bestow that which was his own to

an object of his bounty as not to be subject to the claims of creditors of the latter, it was a logical conclusion that a testator could not postpone the payment of a vested and absolute legacy beyond the time when the legatee should be able to give a valid discharge. But the acceptance of the principle upon which Saunders v. Vautier and Wharton v. Masterman rest involves the acceptance of the limitation which the earlier English cases place upon the powers of a testator in so disposing of his property 97] *that it may be enjoyed by the recipient without liability to creditors. The foundation of the English doctrine in both classes of cases is an assumption that there is some settled principle of public policy which subjects all property in which one has a beneficial ownership to the claims of creditors, and forbids restraint upon alienation. That this theory of public policy is not of universal application, at least, in this country, is manifest from the numerous exemption statutes existing which protect to a limited extent the acquisitions of a debtor from the claims of his creditors, and restrain his power of alienation in the interest of his family. Neither do we for a moment question the rule that one may not by his own act preserve to himself the enjoyment of property in such manner that it shall not be subject to the claims of creditors, or placed beyond his own power of alienation.

But a very different question is presented when we come to the powers of a testator to so bestow that which is absolutely his own as to secure its beneficial enjoyment by an object of his bounty without being subject to the claims of assignees or creditors. This court, and the courts of a number of the states of the Union, have not accepted the limitation which the English courts have placed upon the right of testamentary disposition, and have sustained trusts having as an object the application of a testator's bequest to the support and maintenance of the recipient of his bounty. They have therefore rejected the assumption that liability to creditors and freedom of alienation are necessary incidents to the right to enjoy the rents and profits of real estate, or the income from other property.

In the leading case of Nichols v. Eaton, 91 U. S. 716, 727, 23 L. ed. 254, 257, Mr. Justice Miller, speaking of the unanimous voice of this court, said of the English doctrine to which we have referred, and upon which Saunders v. Vautier must in principle rest:

98] *"We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English chancery court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

Touching the theory that public policy forbids restraints upon the disposition of a testator's bounty, the court said:

"Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, *and wishes to use his own[99 property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

In Hyde v. Woods, 94 U. S. 523, 526, 24 L. ed. 264, 265, this court said of Nichols v. Eaton, supra:

"In that case, the mother of the bankrupt, Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground

that this condition was void as against public policy.

"But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

If such a trust as that upheld in Nichols v. Eaton was not in violation of principles of public policy, it must follow that one which neither restrains creditors nor alienation is not. If that case is to stand, the decree of the court below was right.

The principle upon which Nichols v. Eaton stands is in line with the views of a number of other courts. Many of them are cited in that opinion, and to those we add: Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Mason v. Rhode Island Hospital Trust Co. 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719; Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035; Brooks v. Raynolds, 8 C. C. A. 370, 16 U. S. App. 679, 713, 59 Fed. 923; Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 100]92; *Keyser v. Mitchell, 67 Pa. 473; Seymour v. McAvoy, 121 Cal. 438, 41 L.R.A. 544, 53 Pac. 946; Steib v. Whitehead, 111 Ill. 247; Wallace v. Campbell, 53 Tex. 229; Garland v. Garland (Day v. Slaughter), 87 Va. 758, 13 L.R.A. 212, 24 Am. St. Rep. 682, 13 S. E. 478; Lampert v. Haydel, 96 Mo. 439, 2 L.R.A. 113, 9 Am. St. Rep. 358, 9 S. W. 780.

Claflin v. Claflin, 149 Mass. 19, 3 L.R.A. 370, 14 Am. St. Rep. 393, 20 N. E. 454, was a case, on its facts, like the case at bar. The testator gave the residue of his estate to trustees in trust to sell and dispose of as follows: $10,000 to a son when of age; a like sum when he reached twenty-five years, and the balance when he should reach the age of thirty years. When the son reached the age of twenty-one the trustee paid him $10,000, and thereupon he filed a bill in equity to obtain the whole of the fund. The Massachusetts court held the trust valid and dismissed the bill. Referring to Broadway Nat. Bank v. Adams, supra, where a trust for support and maintenance had been upheld against creditors, the court said:

"The decision in Broadway Nat. Bank v. Adams, supra, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he *sees fit*, and that his intentions ought to *be carried out unless* they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the *plain-[101 tiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own."

Stier v. Nashville Trust Co., decided by the sixth circuit court of appeals (85 C. C. A. 422, 158 Fed. 601), is also directly in point.

The case of Sears v. Choate, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786, has been cited as in conflict with Claflin v. Claflin. It is not. In the former case it appeared that there had occurred circumstances which the testator had not contemplated, on account of which the court saw no reason for not terminating the trust. The case was distinguished in Claflin v. Claflin.

In the case at bar nothing has happened since the will which was not anticipated by the testatrix. The case falls, therefore, precisely within the later case of Claflin v. Claflin. There is no reason for declaring the trust invalid. There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid.

Decree affirmed.

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*CHICAGO, ROCK ISLAND, & PA-[102 CIFIC RAILWAY COMPANY et al., Plffs. in Err.,

v.

ALBERT M. DOWELL.

(See S. C. Reporter's ed. 102–114.)

**Removal of causes — separable controversy — joint action.**

1. An action in tort, brought jointly in

NOTE.—As to removal of causes in cases of separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Butler v. National Home, 36 L. ed. U. S.

a state court against a nonresident railway company and a resident employee whose concurrent negligence is alleged to have caused the injury complained of, does not present a separable controversy between plaintiff and the corporation, for the purpose of removal to a Federal court, because plaintiff might have sued defendants separately.

[For other cases, see Removal of Causes, IV. c, in Digest Sup. Ct. 1908.]

**Removal of causes — fraudulent joinder — sufficiency of petition.**

2. Allegations in a removal petition that a resident railway employee was fraudulently joined with the nonresident railway company as a party defendant in a personal injury suit on behalf of another employee, solely to prevent a removal to a Federal court for diverse citizenship, are not sufficient to entitle petitioner to a removal of the case, where, under the local law, the facts alleged stated a case of concurring negligence of master and servant for which they might be jointly sued, notwithstanding that the liability of the railway company was statutory in so far as the common-law fellow-servant rule had been abolished by statute, while the liability of the employee was dependent upon the common law.

[For other cases, see Removal of Causes, IV. c; VI. d, in Digest Sup. Ct. 1908.]

**Removal of causes — fraudulent joinder — sufficiency of petition.**

3. An averment that a resident railway employee, made a party defendant in a personal injury suit brought against a nonresident railway company by another employee, was a man of small means, and that the responsibility of the railway company was unquestioned, does not serve to show any actual fraudulent joinder for the purpose of preventing the removal of the action from a state to a Federal court for diverse citizenship.

[For other cases, see Removal of Causes, IV. c; VI. d, in Digest Sup. Ct. 1908.]

[No. 208.]

Submitted April 14, 1913. Decided May 26, 1913.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court for Seward County, in that state, in favor of plaintiff in a negligence action which defendant sought to remove to a Federal court. Affirmed.

See same case below, 83 Kan. 562, 112 Pac. 136.

The facts are stated in the opinion.

Messrs. F. C. Dillard and Paul E. Walker submitted the cause for plaintiff in error:

The state of Kansas prohibited the joinder of the several causes of action.

Benson v. Battey, 70 Kan. 288, 78 Pac. 844, 3 Ann. Cas. 283; Atchison, T. & S. F. R. Co. v. Sumner County, 51 Kan. 617, 33 Pac. 312; Enos v. Kentucky Distilleries & Warehouse Co. 189 Fed. 342; Griffith v. Griffith, 71 Kan. 547, 81 Pac. 178; Harrod v. Farrar, 68 Kan. 153, 74 Pac. 624; Haskell County Bank v. Bank of Santa Fe, 51 Kan. 39, 32 Pac. 634; Hentig v. Southwestern Mut. Benev. Asso. 45 Kan. 462, 25 Pac. 878; Hudson v. Atchison County, 12 Kan. 141; Hurd v. Simpson, 47 Kan. 372, 27 Pac. 961; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Jeffers v. Forbes, 28 Kan. 174; Lindh v. Crowley, 26 Kan. 47; Marshall v. Saline River Land & Mineral Co. 75 Kan. 445, 89 Pac. 905; Mentzer v. Burlingame, 71 Kan. 581, 81 Pac. 196; McAllister v. Chesapeake & O. R. Co. 198 Fed. 660; New v. Smith, 68 Kan. 807, 74 Pac. 610; Nichols v. Chesapeake & O. R. Co. 115 C. C. A. 601, 195 Fed. 913; Palmer v. Waddell, 22 Kan. 352; Rizer v. Davis County, 48 Kan. 389, 29 Pac. 595; State ex rel. Taggart v. Addison, 76 Kan. 699, 92 Pac. 581; State ex rel. Bradford v. Reno County, 38 Kan. 317, 16 Pac. 337; State ex rel. Cherokee-Lanyon Spelter Co. v. Shufford, 77 Kan. 263, 94 Pac. 137; Stewart v. Rosengren, 66 Neb. 445, 92 N. W. 586; Swenson v. Moline Plow Co. 14 Kan. 387; Veariel v. United Engineering & Foundry Co. 197 Fed. 877.

The removing defendant was liable, if at all, under the terms of the Kansas statute; the resident defendant, if at all, only under the rules of the common law. The cause of action was therefore separable.

Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; Hillman v. Georgia R. & Bkg. Co. 126 Ga. 814, 56 S. E. 68, 8 Ann. Cas. 223; Ayers v. Trego County, 37 Kan. 240, 15 Pac. 229; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Beutler v. Grand Trunk Junction R. Co. 224 U. S. 85, 56 L. ed. 679, 32 Sup. Ct. Rep. 402; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; Chicago, R. I. & P. R. Co. v. Stepp, 151 Fed. 908; Henry v. Illinois C. R. Co. 132 Fed. 715; Hoye v. Raymond, 25 Kan. 665; Jack-

346; Torrence v. Shedd, 36 L. ed. U. S. 528; and Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195.

As to removal by a nonresident corporation joined with a resident employee—see notes to Illinois C. R. Co. v. Coley, 1 L.R.A. 57 L. ed.

(N.S.) 370; and Illinois C. R. Co. v. Houchins, 1 L.R.A.(N.S.) 375.

On fraud in joining a resident as codefendant with a nonresident defendant for purpose of preventing removal to Federal court—see note to Boatmen's Bank v. Fritzlen, 22 L.R.A.(N.S.) 1235.

son v. Chicago, R. I. & P. R. Co. 102 C. C. A. 159, 178 Fed. 432; Larned v. Boyd, 76 Kan. 37, 90 Pac. 814; Lockard v. St. Louis & S. F. R. Co. 167 Fed. 675; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, 1 Am. Neg. Rep. 747; McAllister v. Fair, 72 Kan. 533, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973; Northern P. R. Co. v. Charless, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Northern P. R. Co. v. Poirier, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, 1 Am. Neg. Rep. 751; Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683, 16 Am. Neg. Rep. 645; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, 7 Am. Neg. Rep. 182; Prince v. Illinois C. R. Co. 98 Fed. 1; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13; St. Paul, M. & M. R. Co. v. Sage, 17 C. C. A. 558, 36 U. S. App. 340, 71 Fed. 40; State ex rel. Iba v. Mosman, 231 Mo. 474, 133 S. W. 38; Texas & P. R. Co. v. Bourman, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; Veariel v. United Engineering & Foundry Co. 197 Fed. 877; Webber v. St. Paul City R. Co. 38 C. C. A. 79, 97 Fed. 140.

The decisions of this court do not establish principles in conflict with the contention of the plaintiff in error.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 Ann. Cas. 1152; Dowell v. Chicago, R. I. & P. R. Co. 83 Kan. 562, 112 Pac. 136; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Little v. Giles, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Pirie v. Tvedt, 115 U. S. 41, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Sloane v. Anderson, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248.

The allegations of fact contained in the petition for removal were matters for exclusive determination of the Federal court.

Arapahoe County v. Kansas P. R. Co. 4 Dill. 277, Fed. Cas. No. 502; Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; Carson v. Hyatt, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Dudley v. Illinois C. R. Co. 29 Ky. L. Rep. 1029, 13 L.R.A.(N.S.) 1186, 96 S. W. 835; Illinois C. R. Co. v. Sheebog, 215 U. S. 308, 54 L ed. 208, 30 Sup. Ct. Rep. 101; Illinois C. R. Co. v. Coley, 121 Ky. 385, 1 L.R.A.(N.S.) 370, 89 S. W. 234; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; Kansas City Suburban Belt R. Co. v. Herman, 187 U. S. 63, 47 L. ed. 76, 23 Sup. Ct. Rep. 24; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Schwyhart v. Barrett, 145 Mo. App. 332, 130 S. W. 388; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; Underwood v. Illinois C. R. Co. 31 Ky. L. Rep. 595, 103 S. W. 322; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757.

Apart from the allegations of negligence with which the resident defendant was charged, the petition contained other and distinct controversies between the plaintiff and the removing defendant.

Adderson v. Southern R. Co. 177 Fed. 571; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Batey v. Nashville, C. & St. L. R. Co. 95 Fed. 368; Beuttel v. Chicago, M. & St. P. R. Co. 26 Fed. 50; Boatmen's Bank v. Fritzlen, 68 C. C. A. 288, 135 Fed. 650; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 53 L. ed. 551, 29 Sup. Ct. Rep. 366; Chicago & A. R. Co. v. New York, L. E. & W. R. Co. 24 Fed. 516; Connell v. Smiley, 156 U. S. 335, 39 L. ed. 443, 15 Sup. Ct. Rep. 353;

Elkins v. Howell, 140 Fed. 157; Erb. v. Popritz, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871; Fergason v. Chicago, M. & St. P. R. Co. 63 Fed. 177; Fraser v. Jennison, 106 U. S. 191, 27 L. ed. 131, 1 Sup. Ct. Rep. 171; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Gudger v. Western N. C. R. Co. 21 Fed. 81; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; Harter Twp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Hartshorn v. Atchison, T. & S. F. R. Co. 77 Fed. 9; Henry v. Illinois C. R. Co. 132 Fed. 715; Hoye v. Raymond, 25 Kan. 665; Leavenworth, N. & S. R. Co. v. Wilkins, 45 Kan. 674, 26 Pac. 16; McAllister v. Chesapeake & O. R. Co. 198 Fed. 660; McGuire v. Great Northern R. Co. 153 Fed. 434; Nichols v. Chesapeake & O. R. Co. 115 C. C. A. 601, 195 Fed. 913; Southern R. Co. v. Edwards, 115 Ga. 1022, 42 S. E. 375; Southern Kansas R. Co. v. Robbins, 43 Kan. 145, 23 Pac. 113; Missouri & K. Teleph. Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771, 14 Am. Neg. Rep. 291; Wheeling Creek Gas, Coal & Coke Co. v. Elder, 170 Fed. 215; Williard v. Spartanburg, U. & C. R. Co. 124 Fed. 796.

Messrs. **David Smyth, J. D. Houston,** and **F. S. Macy** submitted the cause for defendant in error. Mr. C. H. Brooks was on the brief:

A cause of action is alleged against Johnson where it is charged that he injured plaintiff by carelessly running his engine over him while handling the same in the course of his duties as defendant's engineer, as this is a charge of misfeasance, and not of mere nonfeasance.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Charman v. Lake Erie & W. R. Co. 105 Fed. 449; Dowell v. Chicago, R. I. & P. R. Co. 83 Kan. 562, 112 Pac. 136; Cooley, Torts, 1888, 2d ed. p. 164, 31 Cyc. 1559; 33 Cyc. 726, 728; Davenport v. Southern R. Co. 68 C. C. A. 444, 135 Fed. 960; 1 Am. & Eng. Enc. Law, 1132; Mechem, Agency, 572; Note to Hagerty v. Wilson, 25 L.R.A.(N.S.) 356; Riser v. Southern R. Co. 116 Fed. 215; 5 Words & Phrases, 4537; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450.

Under the decisions of the supreme court of Kansas and the Kansas statutes, the railway company and its engineer, Johnson, were jointly and severally liable for the injury thus inflicted, and were properly joined as defendants in this case.

Arnold v. C. Hoffman & Son Milling Co. 86 Kan. 12, 119 Pac. 373; 31 Cyc. 1159; Chicago, R. I. & P. R. Co. v. Durand, 65 Kan. 380, 69 Pac. 356, 12 Am. Neg. Rep. 29; Kansas City v. File, 60 Kan. 157, 55 Pac. 877; Luengene v. Consumers Light, Heat & P. Co. 86 Kan. 866, 122 Pac. 1032; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450; Wichita & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. 502.

Even though the plaintiff misconceived his cause of action, and had no right to prosecute the defendants jointly, yet it does not even then become a separable controversy, or removable, if he attempted to join them in good faith.

Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Dougherty v. Yazoo & M. Valley R. Co. 58 C. C. A. 651, 122 Fed. 205; Enos v. Kentucky Distilleries & Warehouse Co. 111 C. C. A. 74, 189 Fed. 342; Jacobson v. Chicago, R. I. & P. R. Co. 176 Fed. 1004; Keller v. Kansas City, St. L. & C. R. Co. 135 Fed. 202; McGarvey v. Butte Miner Co. 199 Fed. 671.

Johnson was at least liable under the common law, and the railway company both at common law and under the statutes; but the case is not thereby made removable nor the controversy separable.

American Bridge Co. v. Hunt, 64 C. C. A. 548, 130 Fed. 302; Arnold v. C. Hoffman & Son Milling Co. 86 Kan. 12, 119 Pac. 373; Brown v. Cox Bros. & Co. 75 Fed. 689; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; 33 Cyc. 726; Charman v. Lake Erie & W. R. Co. 105 Fed. 449; 38 Cyc. 488; Chicago, R. I. & P. R. Co. v. Durand, 65 Kan. 380, 69 Pac. 356, 12 Am. Neg. Rep. 29; Dougherty v. Yazoo & M. Valley R. Co. 58 C. C. A. 651, 122 Fed. 205; Hough v. Southern R. Co. 144 N. C. 692, 57 S. E. 469; Hoye v. Great Northern R. Co. 120 Fed. 712; Jacobson v. Chicago, R. I. & P. R. Co. 176 Fed. 1004; Luengene v. Consumers Light, Heat & P. Co. 86 Kan. 866, 122 Pac. 1032; Painter v. Chicago, B. &. Q. R. Co. 177 Fed. 517; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450.

The petition for removal herein was wholly insufficient as to the charge of fraudulent joinder, as held by the Kansas supreme court and also in like cases in Federal courts. It is a statement of conclusions, and not of specific facts constituting the fraud.

Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 426, 55 L. ed. 526, 31 Sup. Ct. Rep. 460; Dowell v. Chicago, R. I. & P. R. Co. 83 Kan. 562, 112 Pac. 136; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Jacobson v. Chicago, R. I. & P. R. Co. 176 Fed. 1004; Kingman, P. & W. R. Co. v. Quinn, 45 Kan. 477, 25 Pac. 865; Ladd v. Nystol, 63 Kan. 23, 64 Pac. 1002

985; Offner v. Chicago, & E. R. Co. 78 C. C. A. 359, 148 Fed. 201; Schwyhart v. Barrett, 145 Mo. App. 348, 130 S. W. 388; Stearns v. Page, 7 How. 819, 829, 12 L. ed. 928, 932; Blackwell's Durham Tobacco Co. v. American Tobacco Co. 144 N. C. 352, 9 L.R.A. (N.S.) 270, 57 S. E. 5; Ward v. Pullman Car Corp. 131 Ky. 142, 25 L.R.A.(N.S.) 343, 114 S. W. 754; Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Southern R. Co. v. Sittasen, — Ind. App. —, 74 N. E. 898.

The charge that engineer Johnson was financially irresponsible, and was joined as defendant merely to prevent removal of the case to the Federal court, even if true, is no evidence of fraudulent joinder, if plaintiff in good faith thought he had a right to join him as defendant.

Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Deere, W. & Co. v. Chicago, M. & St. P. R. Co. 85 Fed. 876; Hough v. Southern R. Co. 144 N. C. 692, 57 S. E. 469; Schwyhart v. Barrett, 145 Mo. App. 332, 130 S. W. 388; Shane v. Butte Electric R. Co. 150 Fed. 801; Welch v. Cincinnati, N. O. & T. P. R. Co. 177 Fed. 760; Dowell v. Chicago, R. I. & P. R. Co. 83 Kan. 570, 112 Pac. 136.

Whether there is a controversy warranting a removal to the circuit court must be determined by the state of the pleadings and the record of the case at the time of filing the application for removal.

Cleveland v. Cleveland, C. C. & St. L. R. Co. 77 C. C. A. 467, 147 Fed. 171; Laden v. Meck, 65 C. C. A. 361, 130 Fed. 877; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 83; Wilson v. Oswego Twp. 151 U. S. 67, 38 L. ed. 75, 14 Sup. Ct. Rep. 259.

Federal courts will not take cognizance where the record does not affirmatively show jurisdiction to be in those courts, and the presumption at every stage of the case is that it is without their jurisdiction, unless the contrary appears from the record.

Bors v. Preston, 111 U. S. 253, 28 L. ed. 420, 4 Sup. Ct. Rep. 407; Carson v. Hyatt, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 225, 226, 50 L. ed. 448, 450, 451, 26 Sup. Ct. Rep. 166, 4 Ann. Cas. 1152.

Mr. Justice Lurton delivered the opinion of the court:

This writ of error is sued out to review a judgment in a personal-injury case because a petition to remove the case to the circuit court of the United States is said to have been erroneously denied.

The plaintiff, Albert M. Dowell, was a laborer in the employ of the railroad company, his work being to remove cinders and other *débris* from the tracks and yards of the company in the town of Liberal, Kansas. He was a resident and citizen of that state. The railroad company was a corporation of the states of Illinois and Iowa, but not of Kansas. The plaintiff, while engaged in his proper work, was run down by an engine, upon which one Ed. Johnson was the engineer in control, sustaining serious and permanent injuries.

To recover damages for his hurt, Dowell sued the railroad company and Johnson as jointly and severally liable. Johnson was alleged to be, and was in fact, a citizen of the state of Kansas. The railroad company in due time filed its petition and bond, to remove the action of the plaintiff against it to the circuit court of the United States, as presenting a separable controversy between the plaintiff and the corporation, which could be tried out and determined without the presence of its codefendant, Johnson. *It also averred that John-[110 son was a man of no means, who had been joined as a defendant "for the sole and fraudulent purpose of defeating and preventing" the removal of the case by the nonresident railroad company to the circuit court of the United States. The application was denied and the suit was tried before a jury upon the issues made, which found for the plaintiff, against both of the defendants, in the sum of $15,000, for which sum a judgment was entered. This judgment was later affirmed by the supreme court of the state. 83 Kan. 562, 112 Pac. 136. The only error assigned in this court is that the Kansas court erred in denying the application for removal.

Shortly stated, the plaintiff's grounds for recovery, as averred in his petition, were these:

a. That the engine which ran over him was old, worn, and defective. "That it leaked steam into its cylinder and would not stand when left alone, but would move without the interposition of any human or outside agency. That the appliances and machinery of the said engine for starting and stopping the same were so defective

that it would start and stop without reference to said machinery, and would not respond to the operation of said machinery." That it was without sufficient or safe driving-wheel brakes, all of which was averred to be well known to the defendants, and not known to the plaintiff.

b. That the defendant Johnson, in charge and control of the said engine at the time of its collision with plaintiff, "was incompetent, unskilled, and unfit to discharge his duties as an engineer at the time he was employed, . . . as said railway company well knew, and that he has been unskilled, unfit, and incompetent, as the railway company well knew, but all of which the plaintiff was at all times ignorant."

c. "That the injury to plaintiff was the direct and proximate result of the unfitness [111] and incompetency of *the defendant, Ed. Johnson, and of the negligence and carelessness of said Ed. Johnson in carelessly, recklessly, and needlessly running said engine upon and against the said plaintiff, and of the careless failure of said Ed. Johnson in neglecting to use proper precaution to observe and avoid running upon and injuring the said plaintiff at the time and place in question, and in the carelessness of the defendant railway company in employing the said Ed. Johnson as engineer, and in retaining him and allowing him to act as engineer at the time and place in question, and in the carelessness of the defendant railway company in knowingly retaining and using said defective engine at said time and place, and in carelessly failing to take proper precaution to prevent injury to said plaintiff at said time and place while engaged in the discharge of his duty as employee of said defendant railway company; and each and every act of omission and commission of the defendants and of each of them as above were the joint, proximate, and concurrent cause of said injury, and each of said acts of the said defendants materially, concurrently, and jointly contributed to the injuries of said plaintiff, and plaintiff says that he was without fault or negligence in the premises."

The claim of a right to have the cause removed to the circuit court of the United States was that the requisite diversity of citizenship existed as between the plaintiff and the petitioning railroad company, and that there existed as between them a separable controversy.

But if the plaintiff alleges that the concurrent negligence of the railroad company and its employee, Johnson, was the cause of his injury, he has a right to join them in one action. If he elects to do so, it supplies no ground for removal because he might have sued them separately. Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 601, 33 L. ed. 474, 475, 10 Sup. Ct. Rep. 203; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147.

*The petition of the plaintiff below [112] was in substance that the defective character of the engine, the unfitness and incompetency of Johnson, the engineer controlling it, and his negligence and carelessness in needlessly running the engine over him without the exercise of proper care and caution, "concurrently and jointly contributed to the injuries of said plaintiff," who was at the time in the exercise of due care.

But it is said that some of the matters charged against Johnson consisted in acts of nonfeasance, and that an employer is not liable to a third person for conduct of that character.

Whether liability to a third person against a master may result from the servant's neglect of some duty owing to the employer alone may be debatable. But we need not consider that question, since the plaintiff's declaration averred positive acts of negligence on the part of Johnson toward the plaintiff; namely, that while engaged in the company's service in the movement of the engine, he did not exercise that decree of care and skill which he was bound to exercise toward another servant engaged upon the tracks in the company's work. This was an act of misfeasance, for which he would be primarily liable, notwithstanding his contract relation to the employer, and the liability of the latter for his negligent act under the Kansas statute abolishing the common-law rule in respect of fellow servants.

The state court held that the allegations of the petition stated a case of concurring negligence of master and servant for which they might be jointly sued. That court, also, aside from any positive acts of negligence, such as the retention of an incompetent servant in the control and management of an unmanageable engine, must be regarded as necessarily holding that under the law and practice of the state, it was admissible to jointly sue the company with the servant for whose negligent act it was *liable. Southern R. Co. v. Miller, [113] 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450; Alabama G. S. R. Co. v. Thompson,

200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147.

Whether there was a joint liability or not was a question to be determined upon the averments of the plaintiff's statement of his cause of action, and is a question for the state court to decide. Alabama G. S. R. Co. v. Thompson, supra; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101.

That the liability of the railroad company was statutory in so far as the common-law fellow-servant rule had been abolished by statute, and the liability of Johnson dependent upon common law, was held by the Kansas court not to preclude a joinder. "It is enough," said the court below, "if the concurrent acts of negligence of each contributed to the injury inflicted upon the plaintiff." Southern R. Co. v. Miller, supra.

But the petition for removal averred that the sole reason in joining Johnson was for the fraudulent purpose of defeating the right of the railroad company to remove the action. It is further insisted that this averment presented a question of fact which could be tried only in the circuit court of the United States.

Allegations of fact, if controverted, arising upon such a petition, are triable only in the court to which it is sought to be removed. Illinois C. R. Co. v. Sheegog, supra. But if the petition was insufficient upon its face, the state court might for that reason deny it. It is well settled that the mere averment that a particular defendant had been joined for the fraudulent purpose of defeating the right of removal which would otherwise exist is not in law sufficient. If the plaintiff had a right to elect whether he would join two joint tort feasors, or sue them separately, his motive in joining them is not fraudulent, unless the mere epithet "fraudulent" is backed up by some other charge or statement of fact. Ibid.

Neither did the allegation that the de 114]fendant Johnson *was a man of small means, and the responsibility of the railroad company unquestioned, serve to show any actual fraudulent purpose in joining him as a defendant. If the plaintiff had a cause of action which was joint, and had elected to sue both tort feasors in one action, his motive in doing so is of no importance. Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, ante, 473, 33 Sup. Ct. Rep. 250; Deere, W. & Co. v. Chicago, M. & St. P. R. Co. 85 Fed. 876; Welch v. Cincinnati, N. O. & T. P. R. Co. 177 Fed. 760.

There was no error in denying the petition to remove.

*Judgment affirmed.*

NORFOLK & WESTERN RAILWAY COMPANY, Plff. in Err.,

v.

D. E. EARNEST.

(See S. C. Reporter's ed. 114–122.)

**Master and servant — negligence of fellow servant.**

1. A railway engineer could not, by reason of any custom or practice governing his conduct and that of another employee who was piloting a locomotive at night through the switches in the yard to a main track, be said, as a matter of law, to have been in the exercise of due care if he made no effort to see whether the pilot was on the track, and took no precautions for his protection, there being evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the nighttime, and that all this was known to the engineer.

[For other cases, see Master and Servant, I. d, in Digest Sup. Ct. 1908.]

**Trial — requested instructions — assumption of risk.**

2. A requested instruction upon the subject of the assumption of risk is properly refused where it is couched in such general and sweeping terms that it is not calculated to give the jury an accurate understanding of the law upon that subject, or to direct their attention to the particular phase of the case to which it is deemed applicable.

[For other cases, see Trial, VII. d, in Digest Sup. Ct. 1908.]

**Appeal — sufficiency of exception to instruction.**

3. A general exception to an instruction dealing at some length with the question of the measure of damages in a negligence suit does not cover the specific objection that the statement therein that, if the verdict be for the plaintiff, he shall be awarded "such an amount of damages, not exceeding $20,000, as" will compensate him for the injury, erroneously conveys to the jury an intimation that a finding that the plaintiff's damages amounted to that sum is justified by the evidence.

[For other cases, see Appeal and Error, VI. a, 3, in Digest Sup. Ct. 1908.]

**Trial — instruction — comparative negligence.**

4. An instruction that the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), requires that where the plaintiff has been guilty of contributory negligence, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, is not objectionable because the court further said that such negligence "goes by way of diminution of damages," since this statement must not be regarded as a qualifying one, but merely as intended to repeat the statutory requirement in somewhat different terms.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

**Damages — diminution — comparative negligence.**

5. The direction in the employers' liability act of April 22, 1908, that the diminution of damages in case of plaintiff's contributory negligence shall be in proportion to the amount of negligence attributable to the injured employee, can only mean that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.

**Appeal — sufficiency of exceptions to instruction.**

6. Excepting generally to an entire instruction which embodies several propositions of law, to some of which no objection properly can be taken, does not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein.

[For other cases, see Appeal and Error, VI. a, 8, in Digest Sup. Ct. 1908.]

[No. 153.]

Argued January 29, 30, 1913. Decided May 26, 1913.

IN ERROR to the Circuit Court of the United States for the Western District of Virginia, to review a judgment in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

The facts are stated in the opinion.

Messrs. **John H. Holt** and **Roy B. Smith** argued the cause, and, with Mr. Theodore W. Reath, filed a brief for plaintiff in error:

To say to the jury that contributory negligence "goes by way of diminution of damages" is not equivalent to saying that the jury shall or must, or some equivalent mandatory word, diminish the damages.

Nashville & C. R. Co. v. Nowlin, 1 Lea, 523.

The jury was instructed upon the erroneous rule of comparative negligence.

32 Cyc. 681; Murray's New English Dict. "Proportion;" The Max Morris, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; The Explorer, 20 Fed. 135; The New World v. King, 16 How. 469, 14 L. ed. 1019, 10 Am. Neg. Cas. 614; Alabama G. S. R. Co. v. Coggins, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455, 5 Am. Neg. Rep. 534; Seaboard Air Line R. v. Duvall, 225 U. S. 477, 56 L. ed. 1171. 32 Sup. Ct. Rep. 790.

Upon the uncontradicted evidence Earnest was guilty of contributory negligence such as occupied a large part, perhaps all, of the field of causation of his injury.

Kotefka v. Chicago, St. P. M. & O. R. Co. 114 Minn. 403, 131 N. W. 482; Cain v. Southern R. Co. 199 Fed. 211.

To say to the jury, as was done by plaintiff's instructions, that they might find a verdict "not exceeding $20,000," was an intimation to them that a verdict of that amount might under the evidence be reasonable and proper. Such a verdict would have been unsupported by the evidence, and must have been set aside as excessive. The mention, therefore, of $20,000 as a possible maximum, was, we think, calculated to mislead the jury.

Gilbertson v. 42d Street, M. & St. N. Ave. R. Co. 14 App. Div. 294, 43 N. Y. Supp. 782, 1 Am. Neg. Rep. 513.

The court erred in refusing defendant's instruction on assumed risk.

Choctaw, O. & G. R. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Bohn Mfg. Co. v. Erickson, 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943; Atchison, T. & S. F. R. Co. v. Myers, 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793; Denver & R. G. R. Co. v. Norgate, 6 L.R.A.(N.S.) 981, 72 C. C. A. 365, 141 Fed. 247, 5 Ann. Cas. 448; Peirce v. Clavin, 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. 550; Terry v. Schmidt, 54 C. C. A. 83, 116 Fed. 627; Southern R. Co. v. Carr, 82 C. C. A. 240, 153 Fed. 106; Haines v. Spencer, 92 C. C. A. 658, 167 Fed. 266; Southern R. v. Foster, 111 Va. 763, 69 S. E. 972.

No higher duty was owed to Earnest than that laid down in Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835.

Messrs. **Bynum E. Hinton** and **Thomas Lee Moore** argued the cause, and, with Messrs. Harold J. Pack and Samuel B. Pack, filed a brief for defendant in error:

An exception of a general character to an instruction covering a number of elements of damages will not cover specific objections, which in fairness to the court should be called to its attention in order that it may, if necessary, correct or modify its instructions.

McDermott v. Severe, 202 U. S. 600, 610, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 86, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491.

Earnest was not guilty of contributory negligence as a matter of law.

Paine v. Eastern R. Co. 91 Wis. 348, 64 1897

N. W. 1005; Lake Shore & M. S. R. Co. v. O'Conner, 115 Ill. 262, 3 N. E. 501.

The engineer was negligent.

Illinois C. R. Co. v. Stewart, 23 Ky. L. Rep. 637, 63 S. W. 596; Richards v. Louisville & N. R. Co. 20 Ky. L. Rep. 1478, 49 S. W. 419.

If the defendant upon the trial was concerned lest the jury might be misled by the words "not exceeding $20,000," it should have requested an explanation of them.

United States Smelting Co. v. Parry, 92 C. C. A. 159, 166 Fed. 407; McDermott v. Severe, 202 U. S. 600, 611, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709; Southern P. Co. v. Maloney, 69 C. C. A. 83, 136 Fed. 171; Chicago G. W. Co. v. McDonough, 88 C C. A. 517, 161 Fed. 657; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 76, 39 L. ed. 624, 626, 15 Sup. Ct. Rep. 491; Dotson v. Miliken, 209 U. S. 237, 242, 52 L. ed. 768, 774, 28 Sup. Ct. Rep. 489; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898, 7 Am. Neg. Cas. 331.

In the absence of statutory enactment the servant assumes the usual or ordinary risks of the service, such as are apparent to ordinary observation.

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 673, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746.

If a custom or practice is unreasonable, the employee will not be held to have assumed the risk of it.

Assumption of risk is a matter of contract, express or implied.

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Davis Coal Co. v. Polland, 158 Ind. 614, 92 Am. St. Rep. 319, 62 N. E. 492.

If an express contract, the purpose or intent of which is to exempt the carrier from any liability created by this act, is unavailing, a special defense predicted upon an implied contract (assumption of risk) must also fail.

Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 942; Wright v. Yazoo & M. Valley R. Co. 197 Fed. 94; Philadelphia, B & W. R. Co. v. Tucker, 35 App. D. C. 123, affirmed in 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725; O'Maley v. South Boston Gaslight Co. 158 Mass. 135, 47 L.R.A. 161, 32 N. E. 1119; Malloy v. Northern P. R. Co. 151 Fed. 1019; Coley v. North Carolina R. Co. 128 N. C. 538, 57 L.R.A. 817, 39 S. E. 43.

The employers' liability act is undoubtedly remedial and humanitarian, and should be so administered as to give relief to the injured employee, and impel carriers and their servants to avoid or prevent the negligent acts and omissions which are made the basis of the rights of recovery which the statute creates and defines; and whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462, 12 Am. Neg. Rep. 398; United States v. Central of Georgia R. Co. 157 Fed. 893; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A 264, 65 C. C. A. 226, 129 Fed. 522; United States v. Chicago, M. & St. P. R. Co. 149 Fed. 486; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. Chicago, R. I. & P. R. Co. 173 Fed. 684; United States v. Southern R. Co. 170 Fed. 1014; Gray v. Louisville & N. R. Co. 197 Fed. 876.

If the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further.

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 295, 23 L. ed. 898, 899, 7 Am. Neg. Cas. 331.

Ruch v. Rock Island, 97 U. S. 693, 695, 24 L. ed. 1101, 1102.

Where the charge to the jury, taken as a whole, fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification.

Evanston v. Gunn, 99 U. S. 660, 667, 25 L. ed. 306, 307; Belsea v. Tindall, 111 C. C. A. 244, 190 Fed. 445; Chicago G. W. R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657; North Jersey Street R. Co. v. Purdy, 74 C. C. A. 125, 142 Fed. 957.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action against a railroad company to recover for personal injuries sustained by an employee while both were engaged in interstate commerce. The plaintiff secured a verdict and judgment in the circuit court, and the defendant sued out this direct writ of error, claiming *that [116 the employers' liability act of April 22, 1908, 35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, upon which the right of action was based, was repugnant to the Constitution of the United States. After the writ of error was allowed, our decision in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327,

38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep 169, settled the constitutional questions in favor of the validity of the statute, but it is still necessary that we pass upon other questions presented in the case. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 63, ante, 417, 33 Sup. Ct. Rep. 192.

The injury to the plaintiff occurred in the nighttime, in the month of February, in the railroad yards of the defendant at North Fork, West Virginia, while he was piloting a locomotive through several switches to a main track, where the locomotive was to be attached to an interstate train to assist in moving it over an upgrade in the direction of the next station. He carried a torch and was proceeding in advance of the locomotive to see whether the switches were in proper position, and, if not, to change them. Upon reaching the first switch, known as No. 3, he found it in proper position, signaled the engineer accordingly, and advanced along the track, between the rails, to a point near the next switch, known as No. 2, where the engine overtook him and inflicted serious injuries upon him, resulting in the loss of his right leg. He had not yet signaled to the engineer whether that switch was in a proper position, and one of the questions controverted at the trial was whether the engineer was negligent in attempting to pass over that switch without waiting for a signal. The evidence for the plaintiff was to the effect that it was the established custom in that yard for the engineer to await a signal from the pilot before proceeding over a switch, and that the pilot was entitled to rely upon the engineer's conforming to that custom; while the evidence for the defendant was to the effect that by the settled custom the engineer, although required to await a signal before passing over the first 117] *switch, was not required to await a signal before passing over the others, and that it was incumbent upon the pilot to govern himself accordingly. The evidence was likewise contradictory as to whether it was usual for pilots, in advancing before the engine, to walk between the rails, and also as to whether the conditions outside the track made it necessary to do so in the nighttime. But although the evidence was conflicting in these particulars, it established without any contradiction that it was the duty of the pilot to go ahead and see that the switches were lined up properly, and, if not, to put them in position for the engine to pass, and that it was the duty of the engineer to keep control of his engine and to follow at a rate of not more than 3 or 4 miles an hour. Both the plaintiff and the engineer had been in this service for a long time, and were familiar with the manner in which it was conducted, and with all the conditions surrounding it. The plaintiff admitted that as he advanced from the first to the second switch, a distance of 130 feet, he made no attempt to see where the engine was, and the engineer substantially admitted that in covering that distance he made no attempt to see where the plaintiff was. Each justified his action or nonaction in this regard by what he described as the usage in that service.

In its charge to the jury the court, after saying that the mere occurrence of the injury was no evidence of negligence on the part of the defendant or its engineer, and that the burden was on the plaintiff to establish such negligence by affirmative evidence, gave the following instructions at the defendant's request:

"The court further instructs the jury that if they believe from the evidence that the custom and practice in the North Fork yard was for the engineer to follow the fireman with his engine as he lined up the switches, and not to wait for a signal to proceed after the first switch, then it was not the duty of the engineer to wait for such *signal, and he had the right to pro-[118 ceed without any being given; and the fact that engineer Drawbond did approach switch No. 2, where the plaintiff was injured, without any further signal from him, is no evidence of negligence against defendant company.

"The court instructs the jury that if they shall believe from the evidence that it was the custom and practice in the North Fork yard for the fireman to line up the switches, and for the engineer to follow him at a rate of 3 or 4 miles per hour without signals, or upon signal to proceed given at switch No. 3 [the first one], and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that at and before the accident which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom, then they are told that said engineer Drawbond had the right to act on the assumption and belief that the plaintiff, in lining up the switches, would take reasonable precaution for his own safety against the approaching engine."

The defendant complains that the court refused to say to the jury in that connection that the engineer was not required to keep any lookout for the plaintiff. We think the refusal was right. As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the nighttime, and that all this was known to the engineer.

Whether this evidence was true was for the jury to determine; and if it was true, it certainly could not be said as matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him, if he made no effort to see whether the plaintiff was on the track, and took no precautions for his protection. Upon that question the court rightly gave the following instruction:

119] *"If the jury believes from the evidence that it was necessary or usual, within the knowledge of John Drawbond [the engineer], for the plaintiff to walk on, along, or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine, and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution, and his failure so to do was the proximate cause of the accident, then they must find for the plaintiff."

Complaint is also made of the refusal to give an instruction requested by the defendant upon the subject of assumption of risk. But the instruction was couched in such general and sweeping terms that it was not calculated to give the jury an accurate understanding of the law upon that subject, or to direct their attention to the particular phase of the case to which it was deemed applicable. Consequently, the refusal to give it was not error.

The declaration alleged that the plaintiff's damages amounted to $20,000, and prayed judgment for that sum. One paragraph of the charge to the jury dealt at some length with the question of the measure of damages, and contained the statement that, if the verdict was for the plaintiff, he should be awarded "such an amount of damages, not exceeding $20,000, as" would compensate him for the injury. An exception was taken to this paragraph, without indicating wherein it was deemed objectionable, and complaint is now made that it erroneously conveyed to the jury an intimation that a finding that the plain-120]tiff's *damages amounted to $20,000 was justified by the evidence. Looking at the entire paragraph we think it could not have been understood by the jury as conveying such an intimation, and that the *words now criticized* could only have been *understood as marking* a limit beyond which the jury could not go. Besides, if the defendant entertained any fear that the jury would be misled in that regard, it should, in fairness to the court and the plaintiff, have called special attention to those words, in order that they might be so modified or explained as to leave no doubt of their purpose and meaning. McDermott v. Severe, 202 U. S. 600, 610, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709.

The 3d section of the employers' liability act declares, subject to a proviso not material here, that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;" and in its charge the court dealt with the subject of contributory negligence as follows:

"Contributory negligence is the negligent act of a plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the negligence of the defendant. If the defendant relies upon the defense of contributory *negli- [121 gence, the burden is upon it to establish that defense by a preponderance of the evidence."

An exception to this instruction was reserved, without suggesting any other objection to it than that the employers' liability act was deemed unconstitutional. It is now criticized (a) because, instead of saying that, if the plaintiff was guilty of contributory negligence, the jury "must diminish the damages," it merely said that such negligence "goes by way of diminution of damages," and (b) because it prescribed a wrong rule for the diminution in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant. Both criticisms were advanced in the circuit court in support of a motion for a new trial which was overruled. the court stating that neither criticism had been suggested before.

We think there is no merit whatever in the first criticism. In one sentence the in-

struction plainly stated that the statute requires, where the plaintiff has been guilty of contributory negligence, that "the damages *shall* be diminished by the jury;" and the statement in the next sentence that such negligence "goes by way of diminution of damages" was evidently intended as a mere repetition of the statutory requirement in somewhat different words. Its purpose was to give effect to what went before, not to qualify it, and it is not reasonable to believe that the jury could have thought otherwise.

The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words "as compared with the negligence of the defendant" there would be 122]no room for criticism. *Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, "as compared with the combined negligence of himself and the defendant." We say this because the statutory direction that the diminution shall be "in proportion to the amount of negligence attributable to such employee" means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169.

Not improbably the mistake in the instruction was purely verbal, and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant. But, be that as it may, the record discloses that full opportunity for presenting objections was afforded, and that the one now pointed out was not made. We must therefore apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 86, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491; McDermott v. Severe, supra.

Judgment affirmed.

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*CITY AND COUNTY OF DENVER[123
et al., Petitioners,
v.
NEW YORK TRUST COMPANY et al.
(No. 642.)

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CITY AND COUNTY OF DENVER et al.,
Petitioners,
v.
DENVER UNION WATER COMPANY et al. (No. 643.)

(See S. C. Reporter's ed. 123–145.)

**Certiorari — to circuit court of appeals — interlocutory order.**

1. Certiorari lies, under the Judicial Code, § 240, to review a decision of a circuit court of appeals, rendered on an appeal from an interlocutory order, where, under § 128, no appeal would lie from a final decree of that court, because the case is one in which the jurisdiction of the court of first instance depended entirely upon diverse citizenship.

[For other cases, see Certiorari, II. a, in Digest Sup. Ct. 1908.]

**Appeal — from circuit court of appeals — diverse citizenship case.**

2. The jurisdiction of the court of first instance depended entirely upon the diverse citizenship alleged in the bill, so as to preclude any appeal to the Federal Supreme Court from the decree of the circuit court of appeals, although the bill contains a general allegation that the suit arises under the Federal Constitution, and other averments referring to supposed and conjectured violations of the contract and due-process-of-law clauses of that instrument which are either without color of merit or are not a necessary part of the statement of the cause of action, but are in anticipation of defenses which it is thought the defendants may possibly interpose.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

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NOTE.—As to certiorari in United States courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On establishment and regulation of municipal water supply generally—see note to State ex rel. Hallauer v. Gounell, 61 L.R.A. 33.

**Appeal — from circuit court of appeals — diverse citizenship case.**

3. The circuit court's jurisdiction is none the less dependent entirely upon diverse citizenship, so as to preclude an appeal to the Federal Supreme Court from the decree of the circuit court of appeals, because the cross bill may be broader than the original bill, and may seek relief on a Federal ground, while the case as made by the original bill disclosed diverse citizenship as the sole ground for jurisdiction.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

**Certiorari — to circuit court of appeals — scope of review — disposition of case.**

4. The Federal Supreme Court, when reviewing by certiorari the decree of a circuit court of appeals which affirmed an interlocutory order granting temporary injunctions upon bill and cross bill, is not confined to a consideration of the act of granting the injunctions, but may determine as well, whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of either bill, and, if so, may direct a final decree dismissing it.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

**Waters — franchise of water company — term.**

5. The term of a franchise granted by a municipal ordinance to a water company must be regarded as limited to twenty years, despite any provisions in the ordinance which, taken in themselves, might make for a different conclusion, where the city charter expressly declared that "all franchises and privileges" granted by it should "be limited to twenty years from the granting of the same."

[For other cases, see Waters, III., in Digest Sup. Ct. 1908.]

**Municipal corporations — water supply — expiration of franchise — option of city — exercise.**

6. Separate provisions in a franchise granted by a municipality to a water company that, at the expiration of the term, the plant "may be purchased" by the city if it "shall then elect so to do," and that, at the expiration of that period, the city "may, at its election, renew the contract hereby made," with a reduction in the rental for hydrants, do not impose upon the municipality the duty to exercise either option so reserved, but leave it free to reject both.

[For other cases, see Municipal Corporations, II. f, in Digest Sup. Ct. 1908.]

**Municipal corporations — water supply — expiration of franchise — option of city — exercise.**

7. An election by a municipality to exercise its reserved option to purchase the plant of a waterworks company at the expiration of the company's franchise, or to purchase if the franchise should not be renewed, cannot be inferred from the adoption of an ordinance providing for an appraisement of the plant in advance of the expiration of the franchise, for the fixing of a reasonable schedule of rates, and for submitting to the electors by special election the question whether the city should purchase at the appraisement, and whether a new franchise should be granted for a further period on the basis of the rates so fixed, where nothing was done under the ordinance after the appraisers chosen for the purpose, having made an appraisement, had failed to fix the schedule of rates,—especially since, under Colo. Const. art. 20, § 4, then in force, no franchise relating to the city streets could be granted except upon a vote of the electors, and the city charter made a like vote a prerequisite to the acquisition by the city of any public utility.

[For other cases, see Municipal Corporations, II. f, in Digest Sup. Ct. 1908.]

**Municipal corporations — water supply — expiration of franchise — option of city — exercise.**

8. A municipality cannot be deemed to have elected to exercise its option to purchase the plant of a water company, reserved in the ordinance granting the franchise, by the adoption of a charter amendment contemplating a purchase of such plant independent of such option, and upon altogether different terms. Instead of being an exercise of the option, this was a rejection of it.

[For other cases, see Municipal Corporations, II. f, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — taking property of water company.**

9. Subjecting a water company whose franchise has expired to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant does not take property without due process of law, contrary to U. S. Const., 14th Amend., where the municipality is not only under no legal obligation either to renew the franchise or to purchase the plant, but is free to construct and operate its own plant.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — discrimination — municipal water supply.**

10. A charter amendment dealing with the municipal construction, acquisition, maintenance, and operation of a water plant, with especial reference to the acquisition of the existing privately owned waterworks system, does not deny the equal protection of the laws to the waterworks company whose franchise has expired, because it leaves all other public utilities to be dealt with under general charter provisions, and cuts off all opportunity to obtain future franchises to occupy and use the city streets for the purpose of supplying water to the city and its inhabitants, while leaving full opportunity to obtain such franchises for other purposes, such as supplying light, heat, power, transportation, or telephone service.

[For other cases, see Constitutional Law, IV. a, 2, in Digest Sup. Ct. 1908.]

**Municipal corporations — charter — amendment or revision — initiative and referendum.**

11. A change in a city charter which does not alter the form of the city government, or make extensive changes in the existing charter, but is confined to matters pertaining to public utilities, more especially to the acquisition, maintenance, and operation of a municipal water plant, is an amendment, and not a revision, within the meaning of Colo. Const., art. 20, which, while investing the people of the city, by § 4, with "exclusive power in the making, altering, revising, or amending their charter," makes a distinction in § 5 between the modes of amending it and of revising it *in extenso*, the difference being that an amendment may be initiated by petition and directly voted upon and adopted by the electors, while a revised or new charter requires the intervention of a charter convention.

[City charter, see Municipal Corporations, I. b, in Digest Sup. Ct. 1908.]

**Municipal corporations — charter — amendment — establishing municipal water plant.**

12. Amending a municipal charter so as to prevent the granting of any franchise for the purpose of furnishing a supply of water, as part of a plan to establish and maintain a municipal water plant expressly authorized by Colo. Const., art. 20, § 1, does not violate § 4 of that article, which provides that the question of granting a desired franchise shall be submitted to the electors upon the deposit with the city treasurer of the expense of the submission, since this provision is a subordinate part of a limitation that no franchise to occupy or use the city streets shall be granted except upon an approving vote of the electors, and is intended to be merely regulatory of the payment of the expense of taking a vote, and not to make such payment the only test of the right to have the vote taken.

[City charter, see Municipal Corporations, I. b, in Digest Sup. Ct. 1908.]

**Municipal corporations — charter — amendment — conflict with original charter.**

13. Amendments to a municipal charter, adopted conformably to the state constitutional and charter requirements, supersede *pro tanto* the original provisions of the charter with which they are not in accord.

[City charter, see Municipal Corporations, I. b, in Digest Sup. Ct. 1908.]

[Nos. 642 and 643.]

Argued October 28 and 29, 1912. Decided May 26, 1913.

ON WRITS of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which affirmed interlocutory orders of the Circuit Court for the District of Colorado, enjoining under bill and cross bill the municipal construction of a water plant, and interference with a private water company in the exercise and enjoyment of rights asserted under a franchise. Reversed and remanded, with a direction to dismiss both bills on the merits.

See same case below, 110 C. C. A. 24, 187 Fed. 890.

The facts are stated in the opinion.

Messrs. William H. Bryant and Charles W. Waterman argued the cause, and, with Messrs. William P. Malburn and William A. Jackson, filed a brief for petitioners:

The court, in determining whether there is the requisite diversity of citizenship to give jurisdiction to a Federal court, will arrange the parties with respect to their interest in the controversy, looking beyond the formal arrangement made by the bill.

Helm v. Zarecor, 222 U. S. 32, 56 L. ed. 77, 32 Sup. Ct. Rep. 10; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Steele v. Culver, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9.

It is difficult to escape the conclusion that the "controversy" between these parties was pretended, and that their alignment upon opposite sides was a mere contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist.

Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 181, 49 L. ed. 713, 716, 25 Sup. Ct. Rep. 420; National Hollow Brake Beam Co. v. Chicago R. Equipment Co. 94 C. C. A. 152, 168 Fed. 666; Stephens v. Smartt, 172 Fed. 466.

Averments made by way of anticipation of a defense may not be considered by the court in determining whether a Federal question is stated.

Joy v. St. Louis, 201 U. S. 332, 340, 50 L. ed. 776, 780, 26 Sup. Ct. Rep. 478; Devine v. Los Angeles, 202 U. S. 313, 332, 333, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652; Boston & M. Consol. Copper & Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 638, 639, 47 L. ed. 626, 631, 632, 23 Sup. Ct. Rep. 434; New Orleans v. Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905; Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; Florida C.

& P. R. Co. v. Bell, 176 U. S. 321, 329, 44 L. ed. 486, 490, 20 Sup. Ct. Rep. 399.

The exhibits to the bill, which are a part thereof, control the allegations which are merely conclusions, and these exhibits disclose no contract or agreement whatever, the obligation of which is in any way impaired by the city's refusal to purchase, or its authorization of bonds and the construction of its own water system.

Continental Securities Co. v. Interborough Rapid Transit Co. 165 Fed. 955; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 43, 53 L. ed. 682, 689, 29 Sup. Ct. Rep. 404.

A municipality may grant a waterworks franchise to an individual or private corporation; and if the grant contains no words of exclusion, or confers no exclusive right, the municipality is not thereby prevented from building and operating its own competitive system at the same time.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 32, 35, 50 L. ed. 353, 358, 359, 26 Sup. Ct. Rep. 224; Bienville Water Supply Co. v. Mobile, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Stein v. Bienville Water Supply Co. 141 U. S. 67, 81, 35 L. ed. 622, 628, 11 Sup. Ct. Rep. 892; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 157, 48 L. ed. 127, 130, 24 Sup. Ct. Rep. 43; Mobile v. Bienville Water Supply Co. 130 Ala. 379, 30 So. 446; Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 686, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Water, Light, & Gas Co. v. Hutchinson, 207 U. S. 385, 396, 397, 52 L. ed. 257, 263, 264, 28 Sup. Ct. Rep. 135; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 577, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; Lehigh Water Co.'s Appeal, 102 Pa. 528; Re Millvale, 162 Pa. 374, 29 Atl. 641, 644; Brummitt v. Ogden Waterworks Co. 33 Utah, 289, 93 Atl. 828; Donahue v. Morgan, 24 Colo. 389, 50 Atl. 1038; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335; Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820.

Assuming that the water company is entitled to the "street rights" it claims in perpetuity, there is no limitation imposed thereby on the city's right to construct a municipal plant. That right can only be restricted by contract.

Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400.

Nothing is to be taken against a municipality by implication, and any ambiguity is to be resolved in favor of the public.

Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 129, 51 L. ed. 399, 405, 27 Sup. Ct. Rep. 202; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 268, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90; Blair v. Chicago, 201 U. S. 400, 463, 467, 50 L. ed. 801, 827, 829, 26 Sup. Ct. Rep. 427; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 33, 50 L. ed. 353, 359, 26 Sup. Ct. Rep. 224; Slidell v. Grandjean, 111 U. S. 412, 438, 28 L. ed. 321, 330, 4 Sup. Ct. Rep. 475; Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 41 L. ed. 1165, 1168, 17 Sup. Ct. Rep. 718; Stein v. Bienville Water Supply Co. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 157, 48 L. ed. 127, 130, 24 Sup. Ct. Rep. 43; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 469, 50 L. ed. 1102, 1111, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Lake County v. Rollins, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651.

The city may do the one thing or the other, if it so determines, but is not bound to do either.

Colby University v. Canandaigua, 96 Fed. 449; Castle Creek Water Co. v. Aspen, 76 C. C. A. 516, 146 Fed. 8, 8 Ann. Cas. 660; Denver v. New York Trust Co. 110 C. C. A. 24, 187 Fed. 890; Long v. Duluth, 49 Minn. 280, 32 Am. St. Rep. 547, 51 N. W. 913; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; Thomas v. Grand Junction, 13 Colo. App. 89, 56 Pac. 665.

The position of the court below amounts to a restriction on the city's power to provide itself with a water supply, by limiting such supply to one particular plant. The grant of the power to limit itself in this respect, and the exercise of the power, must both appear, either expressly or by necessary implication.

Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Hamilton Co. v. Los

182, 29 Sup. Ct. Rep. 50; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 156, 48 L. ed. 127, 129, 24 Sup. Ct. Rep. 43; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Water, Light, & Gas. Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135; Leadville v. Leadville Sewer Co. 47 Colo. 118, 107 Pac. 801.

If § 12 of ordinance 44 only reserved an option, the substitution of the voters of the city as the proper persons to exercise that option, in place of the council, does not impair the obligation of any contract.

Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82.

Authorizing the incurring of an indebtedness for a municipal plant, in case the water company refuses to sell, can only be an impairment if the city had power to grant, and had granted, an exclusive contract to the water company, or had agreed not to compete with it, which it did not do.

Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Blair v. Chicago, 201 U. S. 400, 463, 467, 50 L. ed. 801, 827, 829, 26 Sup. Ct. Rep. 427; Helena Waterworks Co. v. Helena, 195 U. S. 383–392, 49 L. ed. 245–250, 25 Sup. Ct. Rep. 40.

If the city had the right to erect a municipal plant, it might vote upon the question, and authorize it, even though by so doing it might decrease the value of the water company's plant.

Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 363, 46 L. ed. 585, 590, 22 Sup. Ct. Rep. 400; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 268, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90.

A city may own two waterworks systems if it may own one.

Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335.

The right is as unquestioned as the right of a city to own a municipal plant after having granted a franchise (neither exclusive nor noncompetitive) to a private company.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Water, Light, & Gas Co. v. Hutchinson, 207 U. S. 385, 50 L. ed. 257, 28 Sup. Ct. Rep. 135; Donahue v. Morgan, 24 Colo. 389, 50 Pac. 1038.

The intent of the voters who adopted § 264a of the Denver charter, except as it is gathered from the language thereof, is immaterial, and does not establish the legal relations between the parties. The duty of the court is to give a statute a construction that will enable it to uphold its constitutionality, rather than a construction which would make it void (Wellmaker v. Terrell, 3 Ga. App. 791, 60 S. E. 464; Re Burnette, 73 Kan. 609, 85 Pac. 575; State, Brown, Prosecutor, v. Union, 62 N. J. L. 142, 40 Atl. 632), and to say whether the effect of § 264a as adopted impairs the obligation of the contract. Does it impair the obligation of the contract to buy? Does it impair the obligation of the contract to renew? Does it impair the obligation of the contract to buy or renew? There can only be one answer. If the city was obligated, before the adoption of § 264a, to do any of these things, it is still obligated, and § 264a can, at the most, be construed as a refusal to perform, and as such it constitutes no impairment.

Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

Furthermore, if the city was obligated either to purchase or to renew, it was obligated to do so prior to the expiration of the contract evidenced by Ordinance 44 of 1890—April 10, 1910. As it had not performed by that date, it follows that on the 11th day of April, 1910, the city's breach of its contract was complete, or else, by failing to renew, it had automatically elected to purchase. In either event the city's breach occurred and the company's right of action accrued on that day. No subsequent legislation can alter this fact.

Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178–181, 49 L. ed. 713–716, 25 Sup. Ct. Rep. 420.

If the act of a municipality which is claimed to impair the obligation of a contract is done pursuant to statutory authority given prior to the execution of the contract, there is no impairment.

Shawnee Sewerage & Drainage Co. v. Stearns, 220 U. S. 462, 55 L. ed. 544, 31 Sup. Ct. Rep. 452.

Mere impairment of the value of a contract is not impairment of its obligation (Curtis v. Whitney, 13 Wall. 68, 70, 20 L. ed. 513, 514); and a mere refusal of a city to perform a contract is not an impairment (Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420).

Hence the mere fact that the city has refused to pay the purchase price for the plant which the bill alleges it has agreed to buy is no impairment (St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 149, 45 L. ed. 788, 792, 21 Sup. Ct. Rep. 575); and the construction of, or the attempt to construct, a municipal plant, when the city has not agreed not to do so, is no impairment.

Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135.

If § 264a is not adopted pursuant to authority of the state, there can be no "impairment" in the sense in which that term is used in the Federal Constitution, for such "impairment" must be the act of or authorized by the state.

Hamilton Gaslight Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502.

As it is alleged that the city has already elected to purchase, even if the city has no power to obtain by purchase a water plant already constructed, and at the same time to construct a municipal plant, all that is stated is a lack of power in the city to construct its own plant, and its attempt to do so, being unauthorized, is void for want of power, and can in no wise interfere with its obligation to purchase.

Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644.

As there is no exclusive or noncompetitive contract, the city may erect a municipal plant without depriving the company of its property without due process of law.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224

And as it may construct a municipal plant without offering a company supplying water anything for its plant, it may, *a fortiori*, offer it $7,000,000 therefor. As a matter of fact, this offer was perfectly gratuitous. There was no obligation on the city to offer the water company anything for its property. How, then, can it be said that the offer deprives the company of its property?

Seattle Electric Co. v. Seattle, R. & S. R. Co. 107 C. C. A. 421, 185 Fed. 365; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 367, 46 L. ed. 585, 592, 22 Sup. Ct. Rep. 400; Hamilton Gaslight Co. v. Hamilton, 146 U. S. 258, 268, 269, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90; Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 219, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820; Lehigh Water Co. v. Easton, 121 U. S. 388, 390, 391, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916.

It may be that the attempt by a city to act under a void law is not acting under due process of law, but it is not the deprivation of property without due process of law (McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644); and even if the law is void because unauthorized, the complainant in this case has no right to attack it on that ground.

Meridian v. Farmers' Loan & T. Co. 74 C. C. A. 221, 143 Fed. 67, 6 Ann. Cas. 599.

In the absence of a special inhibition, several distinct and separate subjects may be submitted for consideration. And this is the law as to all Constitutions, charters, amendments, statutes, ordinances, or laws of any kind whatever.

People ex rel. Elder v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174.

The revision of an act incorporating a municipality has always been construed as embracing but one subject, as has an act to revise and consolidate the several acts in relation to the charter of a city.

Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; Atty. Gen. ex rel. Crane v. Amos, 60 Mich. 372, 27 N. W. 571; Harris v. People, 59 N. Y. 599.

Denver was made a "home-rule" city by article 20 of the Constitution of Colorado. When that amendment was adopted, and the city and county was granted thereby the power to make and amend its own charter, it succeeded to all of the powers of the legislature in that respect.

Kiernan v. Portland, 57 Or. 454, 37 L.R.A. (N.S.) 332, 111 Pac. 379, 112 Pac. 402; Platt v. San Francisco, 158 Cal. 74, 110 Pac. 304; Ex parte Smith, 231 Mo. 111, 132 S. W. 607; Eugene v. Willamette Valley Co. 52 Or. 490, 97 Pac. 817.

A proposed amendment to a city charter consisting of several sections, all relating to the same subject, a description of the amendment on the ballots, which required the voter to vote for or against the entire amendment was not objectionable for failure to submit in such form that each section of the amendment might be voted on separately.

State ex rel. Lowman & H. Stationery & Printing Co. v. Riplinger, 30 Wash. 281, 70 Pac. 748.

If all the provisions of the bill have a natural relation and connection, then the subject is single, and this, too, though the bill contains many provisions.

People ex rel. Elder v. Sours, 31 Colo. 401, 102 Am. St. Rep. 34, 74 Pac. 167.

The enactment or amendment of a municipal charter by voting for separate sections might destroy the efficacy of the proposed plan of city government, or very much delay its adoption.

Eugene v. Willamette Valley Co. 52 Or. 490, 97 Pac. 817.

The court must ask: Had the city the power to submit the amendment in the form in which it did submit it? and not: Had the voters the right to require each separate matter provided for in the amendment submitted to them separately?

C. B. Nash Co. v. Council Bluffs, 174 Fed. 182; Farmers' Loan & T. Co. v. Sioux Falls, 69 C. C. A. 373, 136 Fed. 721; Garrigus v. Parke County, 39 Ind. 66; Swann v. Murray, 146 Ky. 148, 142 S. W. 244; State ex rel. Columbia v. Allen, 183 Mo. 283, 82 S. W. 103.

And, furthermore, we may well question the right of the water company to complain of any wrong done to the voter.

Kiernan v. Portland, 223 U. S. 151, 164, 56 L. ed. 386, 388, 32 Sup. Ct. Rep. 231.

Where there is a repugnancy between a constitutional amendment and some provision in the original, which cannot be so construed as to have them both stand, the original must be deemed to have been repealed by the amendment.

Board of Public Instructions v. Polk County, 58 Fla. 391, 50 So. 574; People ex rel. Killeen v. Angle, 109 N. Y. 564, 17 N. E. 413; Popfinger v. Yutte, 102 N. Y. 38, 6 N. E. 259; State v. Cox, 8 Ark. 436; Austin v. McCall, — Tex. Civ. App. —, 67 S. W. 192; State ex rel. Lowman & H. Stationery & Printing Co. v. Riplinger, 30 Wash. 281, 70 Pac. 748; State ex rel. Rudolph v. Hutchinson, 134 Wis. 283, 114 N. W. 453.

To construct and maintain a municipal plant is not to deprive a private water company of its property without due process of law.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224.

By the adoption of article 20 of the Constitution of Colorado, which creates the city and county of Denver, the republican form of government established by the Federal Constitution is not destroyed.

Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1000; Luther v. Borden, 7 How. 1, 12 L. ed. 581.

The people have all the powers of the legislature with reference to the Constitution.

People ex rel. Atty. Gen. v. Cassiday, 50 Colo. 503, 117 Pac. 357; Londoner v. Denver, 52 Colo. 15, 119 Pac. 156.

If this were an act of the legislature, a title to the amendment to the effect that it was an act to amend the charter of the city of Denver would be sufficient to cover anything that the legislature might see fit to include concerning the city of Denver.

Rice v. Colorado Smelting Co. 28 Colo. 519, 66 Pac. 894; Edwards v. Denver & R. G. R. Co. 13 Colo. 59, 21 Pac. 1011; Trozzo v. People, 51 Colo. 325, 117 Pac. 150; Heller v. People, 2 Colo. App. 459, 31 Pac. 773; State ex rel. Lowman & H. Stationery & Printing Co. v. Riplinger, 30 Wash. 281, 70 Pac. 748; People ex rel. Rochester v. Briggs, 50 N. Y. 554.

The grants of 1870 and 1874 contained no clause as to successors or assigns, but were limited to the water company itself. As no time was mentioned, it is settled law that the grant certainly expired when the corporation ceased to exist.

Virginia Canon Toll Road Co. v. People, 22 Colo. 429, 37 L.R.A. 711, 45 Pac. 398; Leadville v. Leadville Sewer Co. 47 Colo. 118, 107 Pac. 801; Omaha Electric Light & P. Co. v. Omaha, 102 C. C. A. 601, 179 Fed. 455; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

The grants of 1870, 1874, and 1890 are franchises, and not perpetual street rights, or contracts free from limitations imposed by provisions as to franchises.

McPhee & M. Co. v. Union P. R. Co. 87 C. C. A. 619, 158 Fed. 5.

Messrs. Clayton C. Dorsey and Gerald Hughes argued the cause and filed a brief for the Denver Union Water Company et al.:

In contracting for a water supply for itself and its inhabitants, a city is not exercising its governmental or legislative powers, but its business or proprietary powers. Such powers are plenary and unlimited, save by the duty to exercise them with reasonable discretion, or as they may be expressly limited by statute or charter.

Dill. Mun. Corp. 5th ed. §§ 109, 1303, p. 2134, note 3; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 8, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Pikes Peak Power Co. v. Colorado

Springs, 44 C. C. A. 333, 105 Fed. 1; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Omaha Water Co. v. Omaha, 89 C. C. A. 205, 162 Fed. 225, 15 Ann. Cas. 498; Tuttle Bros. v. Cedar Rapids, 99 C. C. A. 606, 176 Fed. 86; Colorado Springs v. Colorado City, 42 Colo. 75, 94 Pac. 316; Colorado Springs v. Colorado & S. R. Co. 38 Colo. 112, 89 Pac. 820; Denver Tramway Co. v. Londoner, 20 Colo. 157, 37 Pac. 723.

Every arrangement between a city and a private individual or corporation relative to the furnishing of a water supply for the municipality and its inhabitants involves, at the commencement of such relation, three distinct features. These are: (a) The grant by the city to the private individual or corporation of the right to lay, maintain, and operate in the streets and public ways of the city the pipes and other apparatus for the distribution of water; (b) the contract with the municipality with reference to the furnishing of a supply for municipal purposes, the price to be paid therefor, and the other conditions thereof; (c) also, ordinarily, an agreement that the municipality will for a certain period of time refrain from exercising its powers to regulate rates, and that during said period the rates to be charged private consumers shall not exceed a certain maximum fixed by the agreement.

Dill. Mun. Corp. § 1304, p. 2145; Vincennes v. Citizens' Gaslight Co. 132 Ind. 114, 16 L.R.A. 485, 31 N. E. 573; Kaukauna Electric Light Co. v. Kaukauna, 114 Wis. 327, 89 N. W. 542.

The street right, when granted, is a vested property right,—an easement in the street. It has sometimes been said, because the power to make such a grant in respect of public highways rests primarily in the state, therefore when the municipality, as agent of the state, and by its authority, makes such a grant, it acts in its public or governmental capacity. But under recent decisions of this court, and those of other courts which it has approved and adopted, it seems clear that such a grant is not different in legal effect from the conveyance of an easement by a private individual. Therefore it is proper to say that even in respect to this the municipality acts in its proprietary capacity.

Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 664, 56 L. ed. 934, 939, 940, 32 Sup. Ct. Rep. 572; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 395; 46 L. ed. 592, 610, 22 Sup. Ct. Rep. 410; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118.

On December 16, 1870, the easement in the streets was granted. It ever since has been and is now a vested property right. The relation then begun has continued without interruption to the present day.

Dill. Mun. Corp. § 1212; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Atchison Street R. Co. v. Missouri P. R. Co. 31 Kan. 660, 3 Pac. 284; Whitsett v. Union Depot & R. Co. 10 Colo. 243, 15 Pac. 339; Colorado C. Co. v. Mollandin, 4 Colo. 154; Levis v. Newton, 75 Fed. 884, 25 C. C. A. 161, 49 U. S. App. 266, 79 Fed. 715; Andrews v. National Foundry & Pipe Works, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 782; Columbus v. Union P. Co. 70 C. C. A. 207, 137 Fed. 869; Owensboro v. Cumberland Teleph. & Teleg. Co. 99 C. C. A. 1, 174 Fed. 739; Quincy v. Bull, 106 Ill. 337; Gregsten v. Chicago, 145 Ill. 461, 36 Am. St. Rep. 496, 34 N. E. 426; Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co. 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602; Brown v. Duplessis, 14 La. Ann. 854; Shreveport Traction Co. v. Shreveport, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40.

The grant of street rights covered not only the city as it then existed, but any additions that might thereafter be made thereto. This was proper, effective, and enforceable.

Dill. Mun. Corp. § 1304, p. 2143; Seattle Lighting Co. v. Seattle, 54 Wash. 9, 102 Pac. 767, 18 Ann. Cas. 1117; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Grand Rapids v. Grand Rapids Hydraulic Co. 66 Mich. 606, 33 N. W. 749.

By the acceptance of this grant, and the occupation thereunder, with pipes and distributing apparatus, of a substantial part of the streets covered thereby, the street right became a vested and irrevocable property right, not only in respect of the territory actually then occupied, but also in respect of all territory authorized to be occupied, including additions thereafter to be made to the city.

Mercantile Trust Co. v. Denver, 161 Fed. 769; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 617; Indianapolis Cable Street R. Co. v. Citizens' Street R. Co. 127 Ind. 369, 8 L.R.A. 539, 24 N. E. 1054, 26 N. E. 893; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Elliott, Roads & Streets, 2d ed. § 752; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A.

365, 22 U. S. App. 570, 64 Fed. 628; Miner v. New York C. R. Co. 123 N. Y. 242, 25 N. E. 339; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 430, 54 L. ed. 259, 269, 30 Sup. Ct. Rep. 118; Dill. Mun. Corp. § 1265, pp. 2050, 2154; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 56 L. ed. 934, 939, 32 Sup. Ct. Rep. 572.

Such right was assignable, and passed to the water company's corporate successors.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 662, 56 L. ed. 934, 940, 32 Sup. Ct. Rep. 572; Colorado Springs v. Colorado & S. R. Co. 38 Colo. 113, 89 Pac. 820; Austin v. Bartholomew, 46 C. C. A. 327, 107 Fed. 349.

From and after the date of the ordinance of December 16, 1870, and by virtue thereof, the Denver City Water Company and its successors had a vested right to lay, maintain, and operate pipes, mains, and apparatus for the distribution of water in the streets, alleys, and public places of Denver and all additions thereto; and such right was not limited by the corporate life of the original grantee, nor by the period of seventeen years mentioned in the contract of 1874, but was unlimited in its duration. Even if, for the purpose of argument only, we should take that view of the situation most unfavorable to the contentions of the water company, the result would be that, prior to the expiration of the seventeen-year period mentioned in the contract of May 9, 1874, the street right was irrevocable, but might have been revoked thereafter, except for the express agreement contained in ordinance No. 44 of the series of 1890, to the effect that it should never be revoked unless and until the city should purchase the plant.

Des Moines City R. Co. v. Des Moines, 151 Fed. 854; Farmers' Loan & T. Co. v. Sioux Falls, 131 Fed. 890.

The circumstances and conditions which preceded, surrounded, and induced the making of the contract should be considered.

Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 609, 36 L. ed. 277, 281, 12 Sup. Ct. Rep. 479; Rockefeller v. Merritt, 35 L.R.A. 633, 22 C. C. A. 608, 40 U. S. App. 666, 76 Fed. 909; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 531, 40 L. ed. 247, 249, 16 Sup. Ct. Rep. 83; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 582, 41 L. ed. 265, 271, 16 Sup. Ct. Rep. 1173; United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 423, 50 L. ed. 251, 255, 26 Sup. Ct. Rep. 69; United States v. Gibbons, 109 U. S. 200, 201, 27 L. ed. 906, 3 Sup. Ct. Rep. 117; Accumulator Co. v. Dubuque Street R. Co. 12 C. C. A. 37, 57 L. ed. 27 U. S. App. 364, 64 Fed. 70; Cook v. Foley, 81 C. C. A. 237, 152 Fed. 41; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 663, 56 L. ed. 934, 940, 32 Sup. Ct. Rep. 572.

Contracts between water companies and municipalities, imposing an unconditional obligation upon the city to purchase the water company's plant at the end of the contract period, are by no means unusual.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 863; Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711.

In contracting for a water supply for itself and its inhabitants, a city exercises its private or proprietary, and not its governmental, powers, and is subject to the same rules of ethics, morals, and law as would control between private individuals.

Des Moines City R. Co. v. Des Moines, 151 Fed. 854; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

At the expiration of the twenty-year period the city must either purchase or allow the contract to continue; and a failure to purchase at the time specified in the contract brought into operation the alternative obligation of the city to continue, and to recognize and effectuate the continuance of, the contract for an additional period of twenty years.

Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

Instances are very common where the word "may" is used as a synonym for "shall" or "must."

Northwestern Mut. L. Ins. Co. v. Keith, 23 C. C. A. 196, 40 U. S. App. 706, 77 Fed. 374; Long Island R. Co. v. Conklin, 32 Barb. 381; Den ex dem. Snowhill v. Snowhill, 23 N. J. L. 447.

Provisions in leases, giving the option to the landlord, at the expiration of a fixed term, of purchasing the improvements which the tenant may make, and likewise giving the option to the landlord of renewing the term, all framed in permissive language only, are uniformly held to require the landlord either to purchase or to renew, and to prohibit him from refusing to do one or the other.

Bullock v. Grinstead, 95 Ky. 261, 24 S. W. 867; Hopkins v. Gilman, 22 Wis. 476; King v. Wilson, 98 Va. 259, 35 S. E. 727.

Any doubt whatever as to the meaning of contract evidenced by ordinance 44 would be

entirely removed by the practical construction placed upon the contract both by the city and the water company, contemporaneously with its execution and ever since, which has, by operation of the doctrine of estoppel, become fixed and irrevocable, and not subject to change by any such reversal of position as was attempted by the city in May, 1910.

Cavazos v. Trevino, 6 Wall. 773, 785, 18 L. ed. 813, 815; Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. ed. 594, 596; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 273, 24 L. ed. 410, 411; Steinbach v. Stewart, 11 Wall. 566, 576, 20 L. ed. 56, 58; Paige v. Banks, 13 Wall. 608, 616, 20 L. ed. 709, 711; Topliff v. Topliff, 122 U. S. 121, 131, 30 L. ed. 1110, 1114, 7 Sup. Ct. Rep. 1057; District of Columbia v. Gallaher, 124 U. S. 505, 510, 31 L. ed. 526, 527, 8 Sup. Ct. Rep. 585; Knox County v. Ninth Nat. Bank, 147 U. S. 91, 99, 37 L. ed. 93, 96, 13 Sup. Ct. Rep. 267; Constable v. National S. S. Co. 154 U. S. 51, 95, 38 L. ed. 903, 921, 14 Sup. Ct. Rep. 1062; Hunting Elevator Co. v. Bosworth, 179 U. S. 415, 435, 45 L. ed. 256, 265, 21 Sup. Ct. Rep. 183; Lowrey v. Hawaii, 206 U. S. 206, 218, 51 L. ed. 1026, 1032, 27 Sup. Ct. Rep. 622; Long-Bell Lumber Co. v. Stump, 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574; Chicago G. W. R. Co. Co. v. Northern P. R. Co. 42 C. C. A. 25, 101 Fed. 792; Fitzgerald v. First Nat. Bank, 52 C. C. A. 276, 114 Fed. 474; Manhattan L. Ins. Co. v. Wright, 61 C. C. A. 138, 126 Fed. 82; Cook v. Foley, 81 C. C. A. 237, 152 Fed. 41; Colorado Springs v. Colorado & S. R. Co. 38 Colo. 112, 89 Pac. 820; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 720, 24 L. ed. 743, 744; Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. ed. 618, 619; Union P. R. Co. v. McAlpine, 129 U. S. 314, 32 L. ed. 676, 9 Sup. Ct. Rep. 286; Given v. Times-Republican Printing Co. 52 C. C. A. 40, 114 Fed. 92; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Leete v. Pacific Mill & Min. Co. 88 Fed. 957; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; 3 Abbott, Mun. Corp. p. 2165; Zabriskie v. Cleveland, C. & C. R. Co. 23 How. 381, 400, 16 L. ed. 488, 497; Bissell v. Jeffersonville, 24 How. 287, 300, 16 L. ed. 664, 672; Moran v. Miami County, 2 Black, 722, 723, 17 L. ed. 342, 344; Randolph County v. Post, 93 U. S. 502, 513, 23 L. ed. 957, 959; Indiana v. Milk, 11 Biss. 197, 11 Fed. 389; Woodruff v. Trapnall, 10 How. 190, 208, 13 L. ed. 383, 390; Beadles v. Smyser, 209 U. S. 393, 402, 52 L. ed. 849, 853, 28 Sup. Ct. Rep. 522; Clark v. Washington, 12 Wheat. 40, 6 L. ed. 544; Knox County v. Aspinwall, 21 How. 539, 16 L. ed. 208; Mercer County v. Hacket, 1 Wall. 83, 17 L. ed. 548; Van Hostrup v. Madison, 1 Wall. 291, 17 L. ed. 538; Meyer v. Muscatine, 1 Wall. 384, 17 L. ed. 564; Marshall County v. Schenck, 5 Wall. 772, 18 L. ed. 556; Kenicott v. Wayne County, 16 Wall. 452, 21 L. ed. 319; Pendleton County v. Amy, 13 Wall. 297, 20 L. ed. 579; Nugent v. Putnam County, 19 Wall. 241, 22 L. ed. 83; Converse v. Ft. Scott, 92 U. S. 503, 23 L. ed. 621; Moultrie County v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631, 23 L. ed. 631; Hitchcock v. Galveston, 96 U. S. 341, 351, 24 L. ed. 659, 662; Boone County v. Burlington & M. River R. Co. 139 U. S. 684, 35 L. ed. 319, 11 Sup. Ct. Rep. 687; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 566, 41 L. ed. 1114, 1117, 17 Sup. Ct. Rep. 653; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720, affirmed in 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Thomas v. Cincinnati, N. O. & T. P. R. Co. 81 Fed. 911; State Trust Co. v. Duluth, 104 Fed. 632; Austin v. Bartholomew, 46 C. C. A. 327, 107 Fed. 349; McGonigale v. Defiance, 140 Fed. 621; Des Moines City R. Co. v. Des Moines, 151 Fed. 854; Denver Tramway Co. v. Londoner, 20 Colo. 150, 37 Pac. 723; Colorado Springs v. Colorado & S. R. Co. 38 Colo. 113, 89 Pac. 820; Colorado Springs v. Colorado City, 42 Colo. 84, 94 Pac. 316; Grand Junction Water Co. v. Grand Junction, 14 Colo. App. 424, 60 Pac. 196; Seattle v. Stirrat, 55 Wash. 560, 24 L.R.A. (N.S.) 1275, 104 Pac. 834; Ogden City v. Bear Lake & River Waterworks & Irrig. Co. 28 Utah, 25, 76 Pac. 1069.

The stipulations relied upon by the water company are such as this court has designated as "limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party."

Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 468, 50 L. ed. 1102, 1110, 26 Sup. Ct. Rep. 660; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 18, 43 L. ed. 341, 348, 19 Sup. Ct. Rep. 77.

The twenty-year limitation does not relate to the contract.

Denver v. Hubbard, 17 Colo. App. 346, 68 Pac. 993.

Under the circumstances existing in 1890, the necessity of obtaining new capital in large sums, and of affording adequate protection to its investment, no court can say that the discretion of the city council was not properly exercised when it entered into the contract evidenced by ordinance No. 44.

Illinois Trust Co. v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; New Orleans v. Warner, 175 U. S. 145, 44 L. ed. 108, 20 Sup. Ct. Rep.

44; Fidelity Trust & G. Co. v. Fowler Water Co. 113 Fed. 560; Biddeford v. Yates, 104 Me. 506, 72 Atl. 335, 15 Ann. Cas. 1091.

Contracts for much longer periods, and containing terms much more burdensome to the city, have been upheld.

Tahlequah v. Guinn, 5 Ind. Terr. 497, 82 S. W. 886; California Reduction Co. v. Sanitary Reduction Works, 61 C. C. A. 91, 126 Fed. 29, 190 U. S. 306; Minneapolis Street R. Co. v. Minneapolis, 155 Fed. 989; Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. 314; Reed v. Anoka, 85 Minn. 294, 88 N. W. 981; Fergus Falls Water Co. v. Fergus Falls, 65 Fed. 586; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720, 177 U. S. 579, 44 L. ed. 895, 20 Sup. Ct. Rep. 736; Little Falls Electric & Water Co. v. Little Falls, 102 Fed. 663; Oconto City Water Supply Co. v. Oconto, 105 Wis. 76, 80 N. W. 1113; Hurley Water Co. v. Vaughn, 115 Wis. 470, 91 N. W. 971; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Vincennes v. Citizens' Gaslight Co. 132 Ind. 114, 16 L.R.A. 485, 31 N. E. 573; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Duluth v. Duluth Gas & Water Co. 45 Minn. 210, 47 N. W. 781; Stein v. Bienville Water Supply Co. 34 Fed. 145; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, 65 Fed. 691; Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711.

Even where the ordinance contains a specific time limitation, the grant of street rights, aswell as the contract, remains irrevocable for the period stated in the ordinance; but both continue thereafter subject to revocation.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, 65 Fed. 691; Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711; Farmers' Loan & T. Co. v. Sioux Falls, 131 Fed. 890; Louisville & N. R. Co. v. Bowling Green R. Co. 110 Ky. 788, 63 S. W. 4; Brummitt v. Ogden Waterworks Co. 33 Utah, 289, 93 Pac. 828.

When a water company holds a contract with a city, which obligates the city for the period of twenty years to obtain its municipal water supply from the works of said company, a subsequent enactment obligating the city to obtain its water supply elsewhere, and for that purpose authorizing it to erect its own waterworks, to be the exclusive source of supply, impairs the obligation of the contract.

Helena Waterworks Co. v. Helena, 195 U. S. 383, 391, 392, 49 L. ed. 245, 249, 250, 25 Sup. Ct. Rep. 40.

Section 264a is a manifest attempt by legislative act of the city, through its electors, to amend and change the terms of a prior existing contract in a most important particular, and in a manner exceedingly detrimental to the water company. Clearly, this impairs the obligation of the prior contract.

Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 320, 21 L. ed. 179, 187; Murray v. Charleston, 96 U. S. 432, 448, 24 L. ed. 760, 764; Farrington v. Tennessee, 95 U. S. 683, 24 L. ed. 559; Louisiana v. New Orleans, 102 U. S. 207, 26 L. ed. 133; Green v. Biddle, 8 Wheat. 84, 5 L. ed. 568; Planters' Bank v. Sharp, 6 How. 327, 12 L. ed. 458; Lamb v. Powder River Live Stock Co. 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434; Gamble v. Rural Independent School Dist. 76 C. C. A. 539, 146 Fed. 113; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Citizens' Street R. Co. v. Memphis, 53 Fed. 715; Missouri, K. & T. R. Co. v. Olathe, 156 Fed. 624; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 369, 46 L. ed. 595, 22 Sup. Ct. Rep. 410; Graham v. Folsom, 200 U. S. 248, 253, 50 L. ed. 464, 469, 26 Sup. Ct. Rep. 245; American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 Ann. Cas. 978; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Pacific R. Co. v. Maguire, 20 Wall. 36, 22 L. ed. 282; Iron Mountain R. Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 128; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 30, 31, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 418; Shapleigh v. San Angelo, 167 U. S. 646, 657, 42 L. ed. 310, 314, 17 Sup. Ct. Rep. 957.

Contract rights are property rights, within the protection of the 14th Amendment.

Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748; St. Louis & S. F. R. Co. v. Cross, 171 Fed. 480; Lamb v. Powder River Live Stock Co. 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434.

Legislative action is not necessary to bring into operation the provisions of the 14th Amendment.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 581; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 36, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

One who, by authority of law, has con-

structed and is maintaining a plant to be used for the benefit of the public has such a property right as will entitle him, because of its invasion, to restrain any person or corporation from attempting to exercise such right in competition with him without legislative or municipal authority, although his right is not exclusive in the sense that the lawful grant of a franchise, to be exercised and enjoyed at the same place, was forbidden, and although his right be not of definite duration, or be subject to revocation.

Raritan & D. B. R. Co. v. Delaware & R. Canal Co. 18 N. J. Eq. 546; Pennsylvania R. Co. v. National R. Co. 23 N. J. Eq. 441; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475; Millville Gaslight Co. v. Vineland Light & P. Co. 72 N. J. Eq. 305, 65 Atl. 504; Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83; Patterson v. Wollmann, 5 N. D. 608, 33 L.R.A. 536, 67 N. W. 1040; Douglass's Appeal, 118 Pa. 65, 12 Atl. 834; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654; Green v. Ivey, 45 Fla. 338, 33 So. 711; Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770; McInnis v. Pace, 78 Miss. 550, 29 So. 835; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; Cauble v. Craig, 94 Mo. App. 675, 69 S. W. 49; Bartlesville Electric Light & P. Co. v. Bartlesville Interurban R. Co. 26 Okla. 453, 29 L.R.A.(N.S.) 77, 109 Pac. 228; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 11, 18, 43 L. ed. 341, 346, 348, 19 Sup. Ct. Rep. 77; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 367, 46 L. ed. 585, 592, 22 Sup. Ct. Rep. 400; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Mobile v. Bienville Water Supply Co. 130 Ala. 379, 30 So. 445.

The right to engage in a lawful business or occupation, without molestation or interference, is a property right, and is guaranteed and protected by the 14th Amendment. In the protection of this right, courts frequently issue the writ of injunction to prevent wrongful or unlawful interference with or damage to the business, although no tangible property has been or is threatened to be taken or interfered with.

National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; McDearmott Commission Co. v. Chicago Board of Trade, 7 L.R.A.(N.S.) 889, 77 C. C. A. 479, 146 Fed. 961, 8 Ann. Cas. 759; Board of Trade v. L. A. Kinsey Co. 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 507, 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637.

*What could be* a more effectual boycott against the business of the Denver Union Water Company than the attempted procedure of the city as evidenced by § 264a? And if it be unlawful, the case is a proper one for injunction, as the courts have repeatedly held. In all of these cases it is the business right of the complainant which is protected, and not its tangible property.

American Federation of Labor v. Buck's Stove & Range Co. 33 App. D. C. 83, 32 L.R.A.(N.S.) 749; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

The fixing of rates to be charged pertains to, and is an interference with, and restriction upon, the conduct of the business; but whenever it appears that the authority which has undertaken to fix such rates was without power to do so, or that power, though possessed, has been improperly or illegally exercised, the courts do not hesitate to issue injunctions at the instance of the one whose business is thereby injured, though no tangible property is interfered with.

Ex parte Young, 209 U. S. 123, 167, 52 L. ed. 714, 732, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The numerous injunctions against unfair competition are based upon the same principle.

38 Cyc. 760.

And injunctions, which have frequently been issued, prohibiting the business of ticket brokerage, are of like character.

Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Louisville & W. R. Co. v. Bitterman, 75 C. C. A. 192, 144 Fed. 34, 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693.

Even though it should be held that ordinance 44, series of 1890, had by its express terms, or for any other reason, terminated, the rule would be no different.

Farmers' Loan & T. Co. v. Sioux Falls, 131 Fed. 890; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, 65 Fed. 691; Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711; Stein v. Bienville Water Supply Co. 34 Fed. 145, 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; Leavenworth v. Leavenworth City & Ft. L. Water Co. 69 Kan. 82, 76 Pac. 451; Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 90 N. W. 746; Stein v. McGrath, 128 Ala. 175, 30 So. 792.

Propositions submitted to popular vote for adoption must be single, and the submis-

sion of a dual or manifold proposition requiring a "yes" or "no" vote is invalid.

Denver v. Hayes, 28 Colo. 110, 63 Pac. 311; Speer v. People, 52 Colo. 325, 122 Pac. 768; Brown v. Carl, 111 Iowa, 608, 82 N. W. 1033; State ex rel. Bethany v. Allen, 186 Mo. 673, 85 S. W. 531; Leavenworth v. Wilson, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335; Truelsen v. Duluth, 61 Minn. 48, 63 N. W. 714; North v. Platte County, 29 Neb. 447, 26 Am. St. Rep. 395, 45 N. W. 692; Lewis v. Bourbon County, 12 Kan. 186; Marcellus v. Garfield, 71 N. J. L. 373, 58 Atl. 1099; Cain v. Smith, 117 Ga. 902, 44 S. E. 5; State ex rel. Wiesenthal v. Denny, 4 Wash. 135, 16 L.R.A. 214, 29 Pac. 991; McBee v. Brady, 15 Idaho, 761, 100 Pac. 97; Armstrong v. Berkey, 23 Okla. 176, 99 Pac. 921; Lozier v. Alexander Drug Co. 23 Okla. 1, 99 Pac. 808; Gray v. Mount, 45 Iowa, 591.

Section 264a is void because, in attempting to acquire a municipal water plant, either by purchase or construction, it failed to comply with a single provision of art. 9 of the existing charter.

Smith v. State, 28 Okla. 235, 113 Pac. 933.

Once the jurisdiction of Federal courts attaches, the jurisdiction is complete and coextensive with the entire controversy.

Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451.

Section 264a is void because it, and the acts of the city thereunder, amount to a denial of the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution.

Cooley, Const. Lim. 5th ed. 484; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 109, 46 L. ed. 92, 108, 22 Sup. Ct. Rep. 30; Chicago, M. & St. P. R. Co. v. Westby, — L.R.A.(N.S.) —, 102 C. C. A. 65, 178 Fed. 619; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 552, 46 L. ed. 679, 686, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

Any act or series of acts which constitutes a substantial impairment of the value of property, if done without due process of law, is violative of the Constitution.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; 2 Abbott, Mun. Corp. § 457, p. 1155; Laighton v. Carthage, 175 Fed. 145; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

It is, of course, unnecessary that the state action should be legislative in character.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 35, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Riverside & N. R. Co. v. Riverside, 118 Fed. 736; First State Bank v. Shallenberger, 172 Fed. 999.

The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction, or some other appropriate form of proceeding.

Hartog v. Memory, 116 U. S. 588, 590, 29 L. ed. 725, 726, 6 Sup. Ct. Rep. 521; National Masonic Acci. Asso. v. Sparks, 28 C. C. A. 399, 49 U. S. App. 681, 83 Fed. 225; Gaddie v. Mann, 147 Fed. 955; Bates, Fed. Eq. Proc. § 252.

A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the facts when made to appear on the record create a legal certainty of the conclusion.

Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Howe v. Howe & O. Ball Bearing Co. 83 C. C. A. 536, 154 Fed. 820; Hill v. Walker, 92 C. C. A. 633, 167 Fed. 241.

Where it appeared that the managing officers of the defendant corporation were opposed to the object of the suit, and so had refused to bring the action in the name of the corporation, a realignment could not be made by the court, and jurisdiction on the ground of diversity of citizenship was properly invoked.

Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Venner v. Great Northern R. Co. 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938; Central R. Co. v. Mills, 113 U. S. 249, 28 L. ed. 949, 5 Sup. Ct. Rep. 456; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 529; Reagan v. Farmers Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Bowdoin College v. Merritt, 63 Fed. 213; New Albany Waterworks v. Louisville Bkg. Co. 58 C. C. A. 576, 122 Fed. 776; Groel v. United Electric Co. 132 Fed. 252; Loose v. Hartford Pulp Plaster Corp. 159 Fed. 318; Kelly v. Mississippi River Coaling Co. 175 Fed. 482; Howard v. National Teleph. Co. 182 Fed. 215; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269; Blair v. Chicago, 201 U.

S. 400, 448, 50 L. ed. 801, 821, 26 Sup. Ct. Rep. 427; Re Metropolitan R. Receivership (Re Reisenberg) 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. Rep. 219; Re Cleland, 218 U. S. 120, 54 L. ed. 962, 30 Sup. Ct. Rep. 647; Knickerbocker Trust Co. v. Kalamazoo, 182 Fed. 865.

Mr. Henry McAllister, Jr., argued the cause, and with Messrs. Joel F. Vaile, William N. Vaile, and J. Markham Marshall, filed a brief for the New York Trust Company et al.:

If the case presents a bona fide justiciable controversy between the complainant and the defendants, it is immaterial that in the creation thereof it was desired and contemplated that resort should be had to the Federal courts, or that counsel acting for the complainant should previously have been employed by the alleged collusively joined defendant; or that the real interests of such defendant may be advanced by the success of the complainant; or that the controversy may be merely one as to the policy of instituting the suit; or that there was concert of action prior to or in the bringing of the suit and the preparation and filing of pleadings; or that all of the allegations of the bill may be admitted by the answer of such defendant, filed concurrently therewith.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 393, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Dickerman v. Northern Trust Co. 176 U. S. 181, 189, 44 L. ed. 423, 429, 20 Sup. Ct. Rep. 311; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269; Doctor v. Harrington, 196 U. S. 579, 588, 49 L. ed. 606, 610, 25 Sup. Ct. Rep. 355; Blair v. Chicago, 201 U. S. 400, 408, 50 L. ed. 801, 805, 26 Sup. Ct. Rep. 427; Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; Re Metropolitan R. Receivership (Re Reisenberg) 208 U. S. 90, 110, 52 L. ed. 403, 412, 28 Sup. Ct. Rep. 219; Venner v. Great Northern R. Co. 209 U. S. 24, 32, 52 L. ed. 666, 669, 28 Sup. Ct. Rep. 328.

In any event, the bill presents a Federal question over which the circuit court has jurisdiction, independent of the question of diverse citizenship.

Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 319, 51 L. ed. 198, 202, 27 Sup. Ct. Rep. 83.

In ascertaining whether a Federal question is presented, the court will not determine whether there was an existing valid contract to be impaired, or whether it has, in fact or in law, been impaired by subsequent legislation. The only question for consideration is whether, according to the face of the bill, it appears that it is in good faith contended that there was such a contract, and that it has been so impaired.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 563, 41 L. ed. 1114, 1116, 17 Sup. Ct. Rep. 653; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 656, 44 L. ed. 622, 626, 2 Sup. Ct. Rep. 509; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 15, 45 L. ed. 395, 404, 21 Sup. Ct. Rep. 240; Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 117, 48 L. ed. 896, 898, 24 Sup. Ct. Rep. 586; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 320, 51 L. ed. 198, 202, 27 Sup. Ct. Rep. 83; Illinois C. R. Co. v. Adams, 180 U. S. 28, 36, 45 L. ed. 410, 413, 21 Sup. Ct. Rep. 251.

Charter amendment, § 264a, and ordinance 98 of 1910, calling for the bond election, are laws within the meaning of art. 1, § 10, of the Federal Constitution, prohibiting laws impairing the obligation of contracts.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 320, 51 L. ed. 198, 202, 27 Sup. Ct. Rep. 83; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341.

In order that the charter amendment and succeeding ordinance may have the impairing effect, it is not necessary that the contract in question should be an exclusive franchise for the supplying of the city with water.

Fletcher v. Peck, 6 Cranch. 87, 137, 3 L. ed. 162, 178; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 392, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 589, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341.

Where the bill states all the facts (as the one at bar does), a court of equity will grant the proper relief upon its own conclusions, drawn from the facts pleaded, respecting the contractual obligations of the parties, although such relief may be inconsistent with that prayed for.

Lockhart v. Leeds, 195 U. S. 427, 436, 49 L. ed. 263, 268, 25 Sup. Ct. Rep. 76; Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398; Tayloe v. Merchants' F. Ins. Co. 9 How. 390, 406, 13 L. ed. 187, 193; Texas v. Hardenberg (Texas v. White) 10 Wall. 68,

86, 19 L. ed. 839, 841; Mitchell v. Moore, 95 U. S. 587, 590, 24 L. ed. 492, 493; Tyler v. Savage, 143 U. S. 79, 98, 36 L. ed. 82, 90, 12 Sup. Ct. Rep. 340; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

A contract entered into by the city in its business or proprietary capacity, and which, if carried out, will give the city what it pretends to want, is subject to the same rules of construction which govern contracts between man and man.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 8, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Safety Insulated Wire Co. v. Baltimore, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; Wills v. Wyandotte County, 30 C. C. A. 445, 58 U. S. App. 665, 86 Fed. 872; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720; Speer v. Kearney County, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749; Cunningham v. Cleveland, 39 C. C. A. 211, 98 Fed. 657; Little Falls Electric & Water Co. v. Little Falls, 102 Fed. 663; Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711; Ouray County v. Geer, 47 C. C. A. 450, 108 Fed. 478; City Water Supply Co. v. Ottumwa, 120 Fed. 309; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Winona v. Botzet, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445; Wykes v. City Water Co. 184 Fed. 752; Des Moines v. Welsbach Street Lighting Co. 110 C. C. A. 540, 188 Fed. 906; Pike's Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 1; Colorado Springs v. Colorado City, 42 Colo. 75, 94 Pac. 316; Cripple Creek v. Adams, 36 Colo. 320, 85 Pac. 184; Denver v. Hubbard, 17 Colo. App. 346, 68 Pac. 993; Leadville Illuminating Gas Co. v. Leadville, 9 Colo. App. 400, 49 Pac. 268.

The city had the power to enter into a contract definitely to purchase, if it did not extend.

Cripple Creek v. Adams, 36 Colo. 325, 85 Pac. 184; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Stein v. Bienville Water Supply Co. 34 Fed. 145, 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; Duluth v. Duluth Gas & Water Co. 45 Minn. 210; 47 N. W. 781; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 681, 29 L. ed. 525, 527, 6 Sup. Ct. Rep. 273; Castle Creek Water Co. v. Aspen, 76 C. C. A. 516, 146 Fed. 8, 8 Ann. Cas. 660.

In the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.

Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; Scott v. United States, 12 Wall. 443, 445, 20 L. ed. 438, 439; United States v. Gibbons, 109 U. S. 200, 203, 27 L. ed. 906, 907, 3 Sup. Ct. Rep. 117; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 609, 36 L. ed. 277, 281, 12 Sup. Ct. Rep. 479; Walker v. Brown, 165 U. S. 654, 668, 41 L. ed. 865, 872, 17 Sup. Ct. Rep. 453; United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228.

And in determining the question of the reasonableness of such agreements upon the part of municipalities, the contract should be construed, not in the light of developments that have since been made, but with reference to the conditions which confronted the parties at the date of the contract.

Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720; United States v. Union P. R. Co. 91 U. S. 72, 81, 23 L. ed. 224, 229; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

Where the context or other circumstances require it, the word "may" shall be construed as "must," and will be given a peremptory significance.

Rock Island County v. United States, 4 Wall. 435, 446, 18 L. ed. 419, 422; Galena v. Amy (Galena v. United States) 5 Wall. 705, 18 L. ed. 560; United States v. Cornell S. B. Co. 202 U. S. 184, 192, 50 L. ed. 987, 991, 26 Sup. Ct. Rep. 648; Northwestern Mut. L. Ins. Co. v. Keith, 23 C. C. A. 196, 40 U. S. App. 706, 77 Fed. 374; Kent v. United States, 51 C. C. A. 189, 113 Fed. 232.

The practical interpretation of the parties themselves is entitled to great, if not controlling, influence.

Topliff v. Topliff, 122 U. S. 121, 131, 30 L. ed. 1110, 1114, 7 Sup. Ct. Rep. 1057; Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. ed. 594, 596; District of Columbia v. Gallaher, 124 U. S. 505, 510, 31 L. ed. 528, 527, 5 Sup. Ct. Rep. 585; Lowrey v. Hawaii,

206 U. S. 206, 222, 51 L. ed. 1026, 1033, 27 Sup. Ct. Rep. 622; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Detroit v. Detroit City R. Co. 56 Fed. 867; Henry v. Mason City & Ft. D. R. Co. 140 Iowa, 201, 118 N. W. 310; St. Louis v. Laclede Gaslight Co. 155 Mo. 1, 55 S. W. 1003.

A court of equity will estop the city from now changing front and assuming a contrary position.

Beadles v. Smyser, 209 U. S. 393, 402, 52 L. ed. 849, 853, 28 Sup. Ct. Rep. 522; Colorado Springs v. Colorado City, 42 Colo. 88, 94 Pac. 316; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 271, 40 U. S. App. 257, 76 Fed. 271; Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. ed. 618, 619; Baker v. Humphrey, 101 U. S. 494, 499, 25 L. ed. 1065, 1067; Kirk v. Hamilton, 102 U. S. 68, 76, 26 L. ed. 79, 82; Leather Mfrs.' Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 720, 24 L. ed. 743, 744.

If no obligation to purchase was created or existed prior to the adoption of the charter amendment, § 264a, that portion thereof providing for the payment of $7,000,000 in bonds for the water plant constituted in itself an election to purchase and an offer of that amount, under the terms of § 11 of ordinance 44 of 1890; and thereupon there arose either an obligation to purchase at the appraised price, or a failure to agree upon the purchase price, which became subject to settlement by appraisement or arbitration, as specified in § 11.

Castle Creek Water Co. v. Aspen, 76 C. C. A. 516, 146 Fed. 8, 8 Ann. Cas. 660.

The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.

Green v. Biddle, 8 Wheat. 1, 83, 5 L. ed. 547, 567.

But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings *with new conditions* and restrictions, so as *to make the remedy* hardly worth pursuing.

Bronson v. Kinzie, 1 How. 311, 317, 11 L. ed. 143, 145.

The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.

McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399.

One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.

Planters' Bank v. Sharp, 6 How. 301, 327, 12 L. ed. 447, 458.

The laws which subsist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract is the law which binds the parties to perform their agreement. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden.

Von Hoffman v. Quincy, 4 Wall. 535,

550, 552, 18 L. ed. 403, 408, 409; Farrington v. Tennessee, 95 U. S. 679, 683, 24 L. ed. 558, 559.

A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement.

Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 320, 21 L. ed. 179, 187; Murray v. Charleston, 96 U. S. 432, 448, 24 L. ed. 760, 764.

The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract the obligation of the latter is to that extent weakened.

Louisiana v. New Orleans, 102 U. S. 203, 206, 26 L. ed. 132, 133.

The contract to purchase and to pay, howsoever arising, is impaired by certain provisions of the charter, § 264a, and ordinance 98 of 1910, enacted in pursuance thereof.

Shapleigh v. San Angelo, 167 U. S. 646, 657, 42 L. ed. 310, 314, 17 Sup. Ct. Rep. 957; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 320, 51 L. ed. 198, 202, 27 Sup. Ct. Rep. 83; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 591, 52 L. ed. 630, 634, 28 Sup. Ct. Rep. 341; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 82, 46 L. ed. 808, 815, 22 Sup. Ct. Rep. 585.

The court having jurisdiction of the case because of the Federal question, all controversies involved therein may be adjudicated, even though the Federal question be not decided, or be decided adversely to the contention of this respondent.

Siler v. Louisville & N. R. Co. 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 141, 26 L. ed. 96, 98; Horner v. United States, 143 U. S. 570, 576, 36 L. ed. 266, 268, 12 Sup. Ct. Rep. 522; Williamson v. United States, 207 U. S. 425, 433, 52 L. ed. 278, 284, 28 Sup. Ct. Rep. 163; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829.

Mr. Justice Van Devanter delivered the opinion of the court:

This suit presents a threefold controversy, to which the New York Trust Company (a New York corporation), the city and county of Denver (a municipal corporation in Colorado), and the Denver Union Water Company (a Colorado corporation), are the principal parties. They are respectively the successors of similar corporations whose acts, together with their own, created the situation out of which the controversy arose, but it will be convenient to treat them as if they were the original participants in all those acts. Although formerly controlled by a charter enacted by the legislature of the state, the city, in pursuance of an amendment of the state Constitution, came in 1904 to be governed by a charter framed and adopted by the people of the city, and over which they possessed an exclusive power of alteration and amendment. Laws 1889, p. 124; Laws 1893, p. 131; Const. art. 20, Rev. Stat. 1908, p. 55.

By the charter from the state legislature (Laws 1889) the city was given power (§ 9) "to construct or purchase *water-[126 works for the use of the city," and generally to do whatever was "needful . . . in order to supply the city with water for fire, irrigating, domestic, and other purposes," subject to the qualification (§ 12) that *"all franchises or privileges"* granted by the city should *"be limited to twenty years from the granting of the same."* April 10, 1890, while that charter was in force, the city, by an ordinance designated as No. 44, and duly accepted by the water company, granted to the latter, its successors and assigns, the right and privilege of laying down, continuing, and maintaining pipes and other apparatus for the conveyance and distribution of water along and through designated streets, alleys, and public places of the city, *"to such extent as the city may lawfully grant the same,"* and subject to termination as therein provided. The ordinance contained various provisions regulatory of the right and privilege so granted, the duty of the water company to supply water for private use and for fire and other public purposes, the rates to be charged private users, and the hydrant rentals to be paid by the city. There were also the following sections:

"Sec. 11. At the expiration of *the period of twenty years* from and after the date of the passage and approval of the ordinance, *in case the city shall then elect so to do*, the said works *may be purchased* by the said city, and in case the parties cannot agree, after such election, upon the price to be paid by the city for the waterworks of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case

of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having 127]equity *jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city, the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights, and privileges which have been at any time theretofore granted said company, its successors, or assigns, and which it may then possess, shall cease and be at an end.

"Sec. 12. At the expiration of the said *period of twenty years* the said city *may, at its election, renew the contract hereby made,* by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent less than mentioned in § 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years, at the price last aforesaid, as often and as long as the city *may choose.* This section is conditioned, however, upon the full performance by the city of the provisions of § 2 hereof.

"Sec. 19. This ordinance, when the same shall be in writing accepted by the Denver Water Company, becomes a contract between the city of Denver and the said the Denver Water Company, its successors and assigns, and the same shall, as to every provision herein contained, as fully bind and inure to the benefit of the successors and assigns of the said the Denver Water Company as to the said company. And it is expressly understood that by the acceptance of this ordinance the said the Denver Water Company loses no rights in regard to the occupation of the streets, alleys, and public places, or as to the rights of any other person or persons thereto which it 128]now *possesses, but the same are hereby recognized and confirmed, and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained.

"Sec. 20. All mains, pipes, valves, and other apparatus now owned by said the Denver Water Company, and composing its plant, and all such mains, pipes, valves, *hydrants, and other* apparatus as said the *Denver Water Company,* its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys, or other public places within said city, shall be and remain the sole and absolute property of said the Denver Water Company, its successors and assigns, and the said the Denver Water Company, its successors or assigns, shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance, or some agreement between said city and said company, its successors or assigns, when all rights of whatsoever nature of said company, its successors or assigns, in and to the subject-matter hereof, shall vest in said city.

"Sec. 21. While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts, and agreements in this ordinance contained are to deemed independent agreements, with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

By a written contract made in 1870 the city had granted to the water company a sole and exclusive right to lay pipes within the city, for use in the distribution and sale of water, but that contract had been expressly annulled by another, made in 1874, whereby the city granted to the company a right of like character, expressly limited to a period of seventeen years from May 1 of that year. What was said in §§ 19 and 20 of the ordinance of 1890 about rights and a water plant already possessed by the water *company had reference[129 to the rights then held and the plant then operated under the seventeen-year contract, which was within a year of expiration, and to some other rights mentioned in the record and equally without material bearing here.

By an amendment of the state Constitution in 1902,—it being the amendment under which the home-rule charter was framed and adopted two years later,—the city was empowered to construct, purchase, maintain, and operate waterworks, for the use of itself and its inhabitants, and to issue bonds, after an approving vote of the taxpaying electors, in any amount necessary to carry out that power; and this amendment declared that "no franchise relating to any street, alley, or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors." Article 20, §§ 1 and 4.

October 2, 1907, about two and one-half years before the expiration of the twenty-year period specified in the ordinance of 1890, the city adopted and the water com-

pany accepted an ordinance designated as No. 163, providing, first, for an immediate appraisement, by appraisers selected conformably to § 11 of the ordinance of 1890, of the fair cash value of all the property of the water company and its auxiliary companies, then used in supplying the city and its inhabitants with water; second, for the immediate fixing by the appraisers of a schedule of reasonable rates for water for private and public purposes for a further period of twenty years; third, that the decision of any three of the appraisers should be binding as to the questions submitted to them for determination; fourth, for the submission to the electors of the city, at a single special election, of the questions (a) whether the city should purchase the property at the value fixed by such appraisement, and (b) whether a new contract or franchise should be granted to the water company for a further period of twenty years on the basis of the rates fixed 130]by the *appraisers; fifth, for carrying into effect either of said propositions if approved by the electors; and, sixth, that if the electors should *"refuse to accept either proposition,"* no prejudice should result to the rights of either party under the ordinance of 1890, but such rights should remain as if the ordinance of 1907 had not been adopted or accepted. That ordinance recited that the water company would agree with the city to put in new temporary rates to be charged private consumers of water after November 1, 1907, for the remainder of the term specified in the then-existing contract or ordinance of 1890, "in the event that the city . . . shall *not* at said election . . . *determine to purchase said plant, or to extend or renew said contract* for a further period of twenty years."

March 20, 1909, the appraisers, acting under the ordinance of 1907, appraised the property at $14,400,000, but they failed to fix the schedule of rates which was to be a part of the proposition to renew the existing contract or franchise of 1890 for a further period of twenty years, and this failure operated, without fault on the part of the city or the water company, to prevent any further action under the ordinance of 1907, which called for the submission of both propositions at a single special election.

May 17, 1910, over a month after the expiration of the twenty-year period specified in the ordinance of 1890, the people of the city amended its charter by adding a new section, known as § 264a. Briefly described, this amendment created a public utilities commission, named its first members, and transferred to it the authority theretofore given to the board of public works as to all public utilities; particularly invested it with large powers in respect of the construction, acquisition, maintenance, and operation of a water plant; declared that the city should never exercise any option to purchase such a plant, or to renew any contract with reference thereto, otherwise than through an approving vote of the qualified electors; *authorized the is-[131 suance of bonds in the sum of $8,000,000, if sanctioned by a vote of the taxpaying electors, to provide a municipal water plant; provided for the use, subject to the approving vote of such electors, of $7,000,000 of these bonds in the purchase of the plant of the water company, if it should, on or before July 1, 1910, elect to accept that sum, and for the use of the remaining $1,000,000 of bonds in improving, repairing, and adding to the plant; and directed that, if the water company did not so elect, a special election should be held on the first Tuesday in September, 1910, to enable the taxpaying electors to vote upon the question of issuing the $8,000,000 of bonds for the purpose of constructing and putting into operation a municipal plant.

The water company did not elect to accept the $7,000,000 for its plant, and the city officers took the necessary preliminary steps to hold the special election called for by the charter amendment.

There was at no time an election by the city to purchase the water company's plant, pursuant to the option reserved in § 11 of the ordinance of 1890, unless the ordinance of 1907, the charter amendment of 1910, or the failure to renew the contract or franchise pursuant to the option reserved in § 12, operated as such an election; and there was no election by the city to renew the contract or franchise pursuant to the latter option, unless the failure to exercise the other one was such an election.

The positions of the city and the water company in that regard came to be as follows: The city was insisting that the contract or franchise granted by the ordinance of 1890 was limited to twenty years in duration by the legislative charter in force when the ordinance was adopted; that the options reserved in §§ 11 and 12 of that ordinance were not alternative in the sense that one or the other must be exercised, but were independent in the sense that there was no obligation to exercise either; that neither *was exercised, and there-[132 fore that, the twenty-year limitation having expired, the contract or franchise was at an end. The water company, on the other hand, although not conceding the twenty-year limitation, was insisting that the options were alternative, in that the city was

bound to exercise one or the other, that it had elected not to purchase the company's plant, and that in so doing it necessarily had elected and become obligated to renew the contract or franchise for another period of twenty years.

In this situation the trust company, being the trustee in a subsisting mortgage given in 1894 by the water company upon all of its property, including franchises, contracts, rentals, and the right to receive the purchase price in the event of a purchase by the city, brought this suit against the city, certain of the city officers, the water company, and the South Platte Canal & Reservoir Company, a subsidiary of the latter, holding the title to an important part of its property, to obtain a decree which should, among other things, declare that the city had elected and become obligated to purchase the property, direct a specific performance of that obligation and of the correlative obligation of the water company to sell, compel the payment of the purchase price to the trust company under the mortgage, and restrain and enjoin the city and its officers from meanwhile constructing a new municipal water plant, as also from taking any steps towards issuing bonds for that purpose. A cross bill against the other defendants and the trust company was interposed by the water company, wherein it prayed, among other things, that its right to a renewed contract or franchise for another term of twenty years be established, and that the city and its officers be directed to take such steps as might be necessary to effect the renewal. Upon applications submitted upon the bill, cross bill, and divers proofs, the circuit court granted interlocutory orders upon both bills, temporarily enjoining the city 133]and its *officers from taking any steps towards the construction of a municipal water plant, or issuing bonds for that purpose, and, in the instance of the cross bill, from interfering with the water company in the exercise and enjoyment of the rights asserted by it under the contract or franchise of 1890. Appeals were taken to the circuit court of appeals, where the interlocutory orders were affirmed (110 C. C. A. 24, 187 Fed. 890), and the case is now here upon certiorari.

The exceptional power to review, upon certiorari, a decision of a circuit court of appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised. But there can be no doubt that the power exists where no appeal would lie from a final decree of that court, as is the case where the suit is one in which the jurisdiction of the court of first instance depended entirely upon diverse citizenship. Judicial Code, §§ 128, 240 [36 Stat. at L. 1133, 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, pp. 193, 228]; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 385, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665. We think this is such a suit. The bill states that the trust company is a citizen of New York, that all the defendants are citizens of Colorado, and that "this is a controversy wholly between citizens of different states." True, it also alleges that the suit is one arising under the Constitution of the United States, and attempts to support this general allegation by others referring to supposed and conjectured infractions of the contract and due-process-of-law clauses of that instrument; but, when the true nature of the trust company's cause of action is considered, it is apparent that these allegations must be disregarded,—some because they are without color of merit, and others because they are not a necessary part of the statement of that cause of action, but are in anticipation of defenses which it is thought the defendants may possibly interpose. See Colorado C. Consol. Min. Co. v. Turck, 150 U. S. 138, 143, 37 L. ed. 1030, 1032, 14 Sup. Ct. Rep. 35; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 459, 38 L. ed. 511, 513, 14 Sup. Ct. Rep. 654; New Orleans v. Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905; Boston *& M. Consol. Copper & S.[134 Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 638, 639, 47 L. ed. 626, 631, 632, 23 Sup. Ct. Rep. 434; Defiance Water Co. v. Defiance, 191 U. S. 184, 191, 48 L. ed. 140, 143, 24 Sup. Ct. Rep. 63; Newbury Port Water Co. v. Newbury Port, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553; Devine v. Los Angeles, 202 U. S. 313, 333, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

The gravamen of the trust company's cause of action is that the ordinance of 1890 restricted the city to a choice between two options,—one to purchase the water plant, and the other to renew the contract or franchise; that by the ordinance of 1907, and again by the charter amendment of 1910, the city made a binding election to purchase, which it now disregards and refuses to carry into effect; that the city is authorized by law to acquire a water plant by purchase or to construct one of its own, but not to do both; that, having elected and become obligated to purchase the existing plant, it is without authority to construct a new one; that the water company

erroneously maintains that it is entitled to a renewal of the existing contract or franchise, and wrongfully refuses to insist upon a purchase by the city; and that in this situation the trust company is entitled, in virtue of its mortgage, to enforce the city's election and obligation to purchase, and meanwhile to have the city enjoined from placing an obstacle in the way of the purchase by constructing a new plant. It is not asserted that the contract or franchise of 1890 was exclusive, or contained any stipulation restraining the city from constructing and operating a plant of its own, or that the trust company is a property holder or taxpayer of the city; and so, the company can have no legal concern with what is done by the city in the premises, if only it performs its alleged obligation to purchase. It hardly needs statement that a suit to enforce such a cause of action is not one arising under the Constitution of the United States. "As has been stated, the rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement 135]of his cause of *action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense." Joy v. St. Louis, 201 U. S. 332, 341, 50 L. ed. 776, 781, 26 Sup. Ct. Rep. 478.

But if we go beyond the trust company's statement of its cause of action, and consider the attitude which it attributes to the city, the result is still the same, for the bill expressly shows that the city puts its refusal to purchase upon the ground that it was not restricted by the ordinance of 1890 to a choice between the two options, but left free to exercise either or neither; that it did not, by the ordinance of 1907, the charter amendment of 1910, or otherwise, exercise the option to purchase; and therefore that it has incurred no obligation in that regard. In other words, the bill discloses that the city's position is, that the trust company's claim is refuted by the very ordinances and charter amendment which are relied upon to sustain it. Of course, if this were the city's defense, the controversy would be solved by merely ascertaining the proper construction of the ordinances and charter amendment, and there would be no occasion to consider the Constitution of the United States at all.

That the cross bill may be broader than the original and seek relief on a Federal ground does not affect the question of the circuit court's jurisdiction, for a cross bill is a mere auxiliary or dependency of the original, and is entertained and disposed of in the exercise of the jurisdiction invoked by the latter. Ayres v. Carver, 17 How. 591, 595, 15 L. ed. 179, 180; Ex parte South & North Ala. R. Co. 95 U. S. 221, 225, 24 L. ed. 355, 356; Rouse v. Letcher, 156 U. S. 47, 50, 39 L. ed. 341, 342, 15 Sup. Ct. Rep. 266; Shulthis v. McDougal, 225 U. S. 561, 568, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

It follows that the jurisdiction of the circuit court depended entirely upon diverse citizenship, and therefore that the suit is one in which no appeal would lie from a final decree of the circuit court of appeals.

*We come, then, to the objections[136 made to the orders granting the temporary injunctions, and as these objections are addressed, not merely to the injunctions, but to the merits of both the bill and the cross bill, it is well to observe at the outset that our power of review, like that of the circuit court of appeals, is not confined to the act of granting the injunctions, but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of either bill, and, if so, to directing a final decree dismissing it. Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 41 L. ed. 810, 812, 17 Sup. Ct. Rep. 407; Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 494, 44 L. ed. 856, 860, 20 Sup. Ct. Rep. 708; Harriman v. Northern Securities Co. 197 U. S. 244, 287, 49 L. ed. 739, 760, 25 Sup. Ct. Rep. 493; United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 214, 56 L. ed. 1055, 1061, 32 Sup. Ct. Rep. 620.

Whether the trust company is merely an assignee seeking to recover the contents of a chose in action, and whether its interest in the litigation is so far identical and in accord with that of the water company as to require that they be aligned on the same side, are questions upon which the record is not entirely clear, and it therefore will be assumed, as is expressly or impliedly affirmed by both companies, that these questions should be resolved favorably to the jurisdiction of the circuit court. See act August 13, 1888, 25 Stat. at L. 433, chap. 866, § 1, U. S. Comp. Stat. 1901, p. 508; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 181, 49 L. ed. 713, 716, 25 Sup. Ct. Rep. 420; Shoecraft v. Bloxham, 124 U. S. 730, 735, 31 L. ed. 574, 576, 8 Sup. Ct. Rep. 686.

What is the proper construction of the ordinance of 1890? Was the contract or franchise granted by it limited to twenty years? Did the city obligate itself thereby to purchase the plant or to renew the contract or franchise at the end of that period, or did it merely reserve the privilege of

doing one or the other or neither, as to it should seem best at the time? These are the questions which must first be considered. It is not asserted that the ordinance granted an exclusive franchise or re-137]strained the city from constructing *a plant of its own, nor would such an assertion, if made, have any support in the terms of the ordinance. But it is said that no time was fixed for the duration of the franchise. This may be taken as true so far as the actual terms of the ordinance are concerned, although it ought not to be overlooked that it contained some recognition of a limitation elsewhere imposed, for the granting clause was qualified by the words "to such extent as the city may lawfully grant the same," and §§ 11 and 12, before set forth, proceeded as if the period would be twenty years. But the term of the franchise was not left undefined or in doubt, for the charter of the city explicitly declared that "all franchises and privileges" granted by it should "be limited to twenty years from the granting of the same," and the context made it perfectly plain that this limitation was intended to apply to rights to occupy and use the streets, alleys, and public places of the city, such as were granted in this instance. The limitation became a part of the ordinance quite as much as if written into it. No doubt it was intended that the franchise should endure for the full period of twenty years. The qualifying words in the granting clause and the reference to that period in §§ 11 and 12 leave no doubt of this, but it was not intended, because it could not be, that it should endure longer. True, some of the provisions in §§ 19 and 20, if taken by themselves, might possibly make for a different conclusion, but they must be read with other parts of the ordinance, and all must be read with and subordinated to the charter limitation.

The principal controversy is over the purpose and effect of §§ 11 and 12 of that ordinance. As before shown, § 11 states that at the expiration of the period of twenty years the plant "may be purchased" by the city, if it "shall then elect so to do," and § 12 says that at the expiration of that period, the city "may, at its election, renew the contract hereby made," with a reduc-138]tion of 10 per cent in the *rental for hydrants. The word "contract" is used here, as elsewhere in the ordinance, as inclusive of the franchise to occupy and use the streets. Each section reserves or gives to the city a pure option. Under one it may purchase the plant, if it so elects, and under the other it may, at its election, renew the contract; but neither imposes any duty or obligation upon it, unless it exercises the privilege therein given. Such is the natural import of the terms employed, and they are plain and unequivocal. But it is said that the presence of the two options imposes on the city the duty of accepting one. Indeed, it is said in support of the bill that a failure to renew is an election to purchase, and in support of the cross bill that a failure to purchase is an election to renew. We are clearly of opinion that these claims are ill-founded. In the absence of some stipulations to that end the city would be under no obligation to purchase or to renew, nor would it be entitled to do either. There is no stipulation purporting to impose such an obligation. All that is done is to reserve or give to the city the right to purchase or to renew, if it so elects. In other words, it is given a privilege to do either, but with no obligation to exercise it. Its situation is not unlike that of one who has sold real property, with a reserved privilege of repurchasing it or of taking a lease upon it after the expiration of a term of years. Although entitled to avail himself of either phase of the privilege, he is free to reject both.

As suggesting that the purpose of §§ 11 and 12 is different from what we hold it to be, we are referred to an ordinance of December 15, 1894, leasing to the water company a water plant formerly owned by the town of South Denver, and acquired by the city through the annexation of that town. At most his ordinance has only an indirect bearing here, and the inferences drawn from it by counsel, even if justified, are quite inadequate to overcome the plain and unequivocal terms of those sections.

*Whether, consistently with the [139 powers conferred and the limitations imposed by the city charter then in force, the city could have bound itself, when the ordinance of 1890 was adopted, to purchase the plant or to renew the franchise at the expiration of the twenty-year period, is a question extensively discussed by counsel; but as we are fully persuaded that there was no attempt or purpose to create such an obligation by that ordinance, the point may be passed without further notice.

The trust company relies upon the ordinance of 1907 as showing an election by the city to purchase, or at least to purchase if the franchise was not renewed. That ordinance, we have seen, provided for an appraisement of the water company's property in advance of the expiration of the existing franchise, for the fixing of a reasonable schedule of rates to be charged during a further period of twenty years, and for submitting to the electors of the city, at a single special election, the questions (a) whether the city should purchase at the

appraisement, and (b) whether a new franchise should be granted to the water company for a further period of twenty years on the basis of the rates so fixed. The appraisers chosen for the purpose made an appraisement, but failed to fix the schedule of rates, and so, without any fault of the city or the water company, nothing further was done under that ordinance. It did not purport to make an election to purchase or to renew, either conditionally or otherwise. On the contrary, it affirmatively contemplated that the election, if any, was to be by the electors of the city, and that they might reject both propositions. Besides, article 20, § 4, of the state Constitution then in force, provided that no franchise relating to the streets of the city should be granted except upon a vote of the electors, and article 9 of the city charter then in force made a like vote a prerequisite to the acquisition by the city of any public utility. So, had the council attempted by 140]the ordinance of 1907 to make an *election to purchase or to renew, the attempt would have gone for nothing. No doubt, the difficulty arising from the failure to fix a schedule of rates could have been adjusted between the city and the water company, and the two propositions (the second in a modified form) submitted to the electors at an election called through a new ordinance. But this was not done, possibly because, as the record discloses, both parties were dissatisfied with the appraisement, the city claiming that it proceeded upon erroneous principles and was grossly excessive, and the water company that it was inadequate and insufficient. But, however this may have been, it is plain that the ordinance of 1907 was not an election to purchase, either conditionally or at all.

The trust company also relies upon the charter amendment of May 17, 1910, § 264a, as showing an election to purchase under the option reserved in the ordinance of 1890. The amendment did not contemplate a purchase in accordance with that option, but independently of it and upon altogether different terms. Instead, therefore, of being an exercise of the option, it was a rejection of it. Minneapolis & St. L. R. Co. v. Columbus Rolling Mill, 119 U. S. 149, 151, 30 L. ed. 376, 377, 7 Sup. Ct. Rep. 168.

The circuit court of appeals, having stated the conflicting claims of the trust company and the water company, the one, that the city had elected to purchase, and the other, that it had elected to renew, said: "The facts are stated upon which these claims are based, and it does not appear to us that the city has done either." With that conclusion we fully agree. In so far, then, as the bill and cross bill are founded upon contractual relations claimed to have arisen out of the ordinance of 1890, they must fail; and, as the bill has no other basis, it manifestly cannot be maintained.

As an additional ground for enjoining the issuing of bonds and the construction of a municipal water plant *under the[141 charter amendment, § 264a, the cross bill, after stating that the water company is a large property holder and taxpayer of the city, and must share in the burdens which will be placed upon all its property holders and taxpayers by issuing the bonds and constructing the municipal plant, challenges the validity of the amendment, and therefore the authority of the city to carry it into effect. It remains to consider the objections upon which this challenge is rested.

Two objections named in the cross bill are, that article 20 of the state Constitution (adopted as an amendment in 1902), upon which the charter amendment is based, (a) is repugnant to article 4, § 4, of the Constitution of the United States, guarantying to the state a republican form of government, in that it takes from the state legislature and vests directly in the people of the city legislative power over all subjects of purely municipal concern, and (b) is repugnant to § 2 of article 2, § 1 of article 5, and § 2 of article 19 of the state Constitution. These objections are not now insisted upon; the first doubtless because it is deemed sufficiently covered and disposed of, as undoubtedly it is, by our recent decision in Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224, and the second because it appears to be foreclosed by decisions of the supreme court of the state, in People ex rel. Elder v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167, and other cases. Both may therefore be passed without further notice.

The next objection invokes the due-process-of-law clause of the 14th Amendment to the Constitution of the United States, and is, that the charter amendment subjects the water company to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant, and that this amounts to an unlawful deprivation of property. The objection is faulty in that it fails to recognize the real situation to which the *charter amendment applies. The[142 water company, although the undoubted owner of the physical property constituting its plant, is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired; and the city not only is under no legal obligation to renew the franchise or to purchase

the plant, but is free to construct and operate a plant of its own. How, then, can it be said that the proposal, expressed in the amendment, to purchase the company's plant at $7,000,000, and to devote $1,000,000 more to its betterment or else to construct a new one at a cost of $8,000,000 involves an unlawful deprivation of property or any right? See Madera Waterworks v. Madera (April 28, 1913 [228 U. S. 454, ante, 915, 33 Sup. Ct. Rep. 571]); Detroit United R. Co. v. Detroit (May 26, 1913 [229 U. S. 39, ante, 1056, 33 Sup. Ct. Rep. 697]). Whether $7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard for its own interests. That the city, mindful of its interests, offered $7,000,000 for the water company's plant, when it could have proceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 577, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553.

Another objection invokes the equal protection clause of the 14th Amendment, and is, that the charter amendment singles out and deals with the subject of a water supply and with the plant of the water company, leaving all other public utilities to be dealt with under general charter provisions, and also cuts off all opportunity to obtain future franchises to occupy and use 143]the streets *for the purpose of supplying water to the city and its inhabitants, while leaving full opportunity to obtain such franchises for other purposes, such as supplying light, heat, power, transportation, or telephone service. There is no merit in this objection. The equal protection clause is directed only against arbitrary discrimination; that is, such as is without any reasonable basis. Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160. It does not prevent a city from applying the scheme of municipal ownership and maintenance to one public utility without applying it to all; nor does it prevent a city, owning and maintaining a municipal water plant, from refusing to grant franchises which will bring privately owned plants into competition with its own. *There is nothing* unequal in this in the *sense of that clause.* And if it was essential that there be a reasonable basis for dealing especially and directly, as was done, with the question of purchasing the company's plant, the situation before recited shows that such a basis was not wanting.

Article 20 of the state Constitution, under which the present home-rule charter was adopted, while investing the people of the city (§ 4) with "exclusive power in the making, altering, revising, or amending their charter," makes a distinction (§ 5) between the modes of amending it and of revising it *in extenso* or making a new one, the difference being that an amendment may be initiated by petition and directly voted upon and adopted by the electors, while a revised or new charter requires the intervention of a charter convention. Relying upon this, it is objected that § 264a, now under consideration, is not an amendment, but partakes of the nature of a revised or new charter, and is invalid because, as is the fact, it was not framed and approved by a charter convention before being submitted to the electors. The point cannot be sustained. The section is in form and in substance a mere amendment. It does not alter the form of the city government, or make *extensive changes in the exist-[144 ing charter, but is confined to matters pertaining to public utilities, more especially the acquisition, maintenance, and operation of a municipal water plant. In the briefs some reference is made to Speer v. People, 52 Colo. 325, 122 Pac. 768, where the supreme court of the state recently had before it a proposed amendment radically and extensively changing the form of the city government. The opinions rendered in the case disclose some differences of opinion upon the question whether what was proposed could be regarded as a mere amendment, but the question was not decided and nothing was said in the opinions that tends to sustain the objection now made to § 264a.

Another objection urged against that section is, that it is in conflict with article 20, § 4, of the state Constitution, in that, while that article provides that the question of granting a desired franchise shall be submitted to the electors upon the deposit with the city treasurer of the expense of the submission, § 264a prevents the granting of any franchise for the purpose of furnishing a supply of water. Assuming that § 264a does do this, it is done as part of the plan of establishing and maintaining a municipal water plant expressly authorized by article 20, § 1. Besides, the provision in article 20, § 4, which is relied upon, is a subordinate part of a limitation or restriction to the effect that no franchise to occupy or use the streets of the city shall be granted except upon an approving vote of

the electors, and is evidently intended to be merely regulatory of the payment of the expense of taking the vote, and not to make such payment the only test of the right to have the vote taken.

Finally, it is objected that the submission and adoption of § 264a were in contravention of the existing charter, (a) because the section deals with several independent and unrelated subjects, (b) because it designates the first members of the public 145]utilities commission, instead of *leaving them to be elected in accordance with the general provision in § 178 of the charter, and (c) because it prescribes a different mode of acquiring a municipal water plant than that provided in article 9 of the charter. In disposing of a preceding objection, we have held that § 264a was merely an amendment of the charter, and that the mode of its submission and adoption was in accord with the applicable restrictions of the state Constitution. No additional restrictions were prescribed by the charter, its only provision upon the subject being (§ 20), "any measure, charter amendment, or proposal for a charter convention, may be submitted to a vote of the qualified electors in the manner provided by the Constitution." In passing upon the preceding objection, therefore, we have passed upon the first branch of the one just stated; but it may be added that we think all the provisions of the amendment have such a relation to the principal subject, namely, the public utilities of the city, as to permit their inclusion in a single amendment. Of the other two branches of this objection it is enough to say that the amendment supersedes *pro tanto* the original provisions of the charter with which it is not in accord. The purpose in adopting it was to introduce something new,—to make a change in existing provisions,—and being adopted conformably to the constitutional and charter requirements, the new or changed provisions became at once a part of the charter, thereby supplanting or modifying the original provisions to the extent of any conflict.

Having now considered all the claims advanced in support of the cross bill, and finding, as we do, that it has no support in any of them, it follows that, like the original bill, it cannot be maintained. The interlocutory decrees of the Circuit Court of Appeals and the Circuit Court are accordingly reversed, and the case is remanded with a direction to dismiss both bills on the merits.

Reversed.

*MARTIN PEDERSEN, Plff. in Err.,[146

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY.

(See S. C. Reporter's ed. 146-155.)

**Master and servant — employers' liability act — fellow servant engaged in intrastate commerce.**

1. Instances where the causal negligence is that of a fellow servant engaged in intrastate commerce are embraced by the provisions of the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), giving a right of recovery against an interstate railway carrier for the death or injury of an employee while engaged in interstate commerce, which may result from the negligence of any of the employees of such company.

[For other cases, see Master and Servant, II. d, 4, in Digest Sup. Ct. 1908.]

**Master and servant — employers' liability act — when employee is employed in interstate commerce.**

2. An employee of an interstate railway carrier, killed while carrying a sack of bolts or rivets to be used in repairing a bridge which was regularly in use in both interstate and intrastate commerce, was employed in interstate commerce within the meaning of the employers' liability act of April 22, 1908, giving a right of recovery against the carrier for the death of an employee while so employed.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

**Trial by jury — infringement of right — entering judgment non obstante veredicto.**

3. A Federal court cannot, consistently with the provisions of U. S. Const., 7th Amend., preserving the right of trial by jury, enter judgment for defendant notwithstanding a verdict for plaintiff, on the ground that the latter was not sustained by the evidence.

[For other cases, see Jury, I. d, in Digest Sup. Ct. 1908.]

[No. 698.]

Argued January 14, 1913. Decided May 26, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania, entered in favor of defendant *non obstante veredicto*, in an action under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, 117 C. C. A. 33, 197 Fed. 537.

The facts are stated in the opinion.

Mr. Benjamin Patterson argued the cause, and, with Mr. George Bell, filed a brief for plaintiff in error:

Congress has power to regulate all the instrumentalities of interstate commerce, and is not limited to the regulation of the mere movement of goods, that is, to transportation, pure and simple.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Luxton v. North River Bridge Co. 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891; The Clinton Bridge (Gray v. Chicago, I. & N. R. Co.) 10 Wall. 454, 19 L. ed. 969; Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Smith v. Alabama, 124 U. S. 465, 479, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Spraigue v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

Those whose work calls them upon those highways of commerce over which transportation by railroad is going on are in at least as great danger of physical injury as those who are upon the trains and operating them. The injury of persons engaged in repairing such highways is as great an interference with interstate commerce as is the injury of a trainman. There are classes of employees, such as track walkers, switch tenders, track and bridge repairers, who are employed upon such instrumentalities of interstate commerce, and who are subject to the risks of injuries by negligent operation of trains, for which injuries, we submit, it was the purpose of the act to provide a remedy.

Colasurdo v. Central R. Co. 180 Fed. 832.

The defendant was engaged in commerce between states at the time of the injuries.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Southern R. Co. v. United States, 222 U. S. 22, 27, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2; Colasurdo v. Central R. Co. 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

The "engaging" by a railroad in interstate commerce, and the employment in such commerce, contemplated by the act, comprehend all its activities and instrumentalities upon the highway over which it conducts such commerce, and exclude all other activities and instrumentalities.

Southern R. Co. v. United States, 222 U. S. 22, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Colasurdo v. Central R. Co. 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Lamphere v. Oregon R. & Nav. Co. — L.R.A.(N.S.) —, 116 C. C. A. 156, 196 Fed. 336; Behrens v. Illinois C. R. Co. 192 Fed. 581; Snead v. Central of Georgia R. Co. 151 Fed. 608; Carr v. New York C. & H. R. R. Co. 77 Misc. 346, 136 N. Y. Supp. 501.

Mr. James F. Campbell argued the cause, and, with Mr. William S. Jenney, filed a brief for defendant in error:

Giving the act its proper construction, it means that the employee must be engaged in commerce; that is, traffic or intercourse between the states; and an employee not engaged in transportation, traffic, or intercourse between the states is certainly not engaged in commerce.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 232, 21 L. ed. 146: New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Judson, Interstate Commerce, §§ 6, 7; 7 Cyc. 413.

If Congress meant to take care of employees not engaged in traffic or commerce, but simply about the instrumentalities of commerce, it should have said so; but it is strenuously urged that, even giving the words of the act their broadest significance, it has no such meaning.

7 Cyc. 414; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 24 Sup. Ct. Rep. 128.

In the case at bar, Pedersen, the plaintiff, was engaged about some construction work; that is, manufacturing something new; although it is true such creation or result was afterwards to be used as a means whereby interstate commerce was to be carried on. That these acts are not such interstate commerce as is contemplated by the act is plain.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Tay-

lor v. Southern R. Co. 178 Fed. 380; Van Brimmer v. Texas & P. R. Co. 190 Fed. 394; Bennett v. Lehigh Valley R. Co. 197 Fed. 578; Heimbach v. Lehigh Valley R. Co. 197 Fed. 579; Feaster v. Philadelphia & R. R. Co. 197 Fed. 580.

Where a recovery has been allowed under the act, the railroad employee had some direct connection with interstate commerce, either as part of a crew upon a train engaged in interstate commerce, or about the tracks and switches which were in active use in conducting interstate commerce.

Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Colasurdo v. Central R. Co. 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901; Behrens v. Illinois C. R. Co. 192 Fed. 581; Lamphere v. Oregon R. & Nav. Co. — L.R.A.(N.S.) —, 116 C. C. A. 156, 196 Fed. 336; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action under the employers' liability act† of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), to recover for personal injuries sustained by the plaintiff through the negligence of a coemployee while both were in the defendant's service. At the trial the circuit court refused to direct a verdict in the defendant's favor, and the jury returned a verdict for the plaintiff, assessing his damages at $6,190. Subsequently the court, following a local statute (Pa. Laws 1905, p. 286, chap. 198), entered judgment for the defendant notwithstanding the verdict, on the ground that the latter was not sustained by the evidence. 184 Fed. 737. The judgment 150]was affirmed *by the circuit court of appeals (117 C. C. A. 33, 197 Fed. 537), and the plaintiff sued out this writ of error.

The evidence, in that view of it which must be taken here, was to the following effect: The defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks at or near Hoboken, New Jersey. On the afternoon of his injury the plaintiff and another employee, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning in "repairing that bridge," the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer negligently failed to give any warning.

The circuit court ruled that an injury resulting from the negligence of a coemployee engaged in intrastate commerce was not within the terms of the Federal act, and the circuit court of appeals, although disapproving that ruling, held that under the evidence it could not be said that the plaintiff was employed in interstate commerce, and therefore he was not entitled to recover under the act.

Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce, and while the employee is employed by the carrier in such commerce; but it is not essential, *where[151 the causal negligence is that of a coemployee, that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence "of *any* of the . . . employees of such carrier," and this includes an employee engaged in intrastate commerce. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 51, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169.

That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled

†The act and the amendment of April 5, 1910 [36 Stat. at L. 291, chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324], are printed in full in 223 U. S. p. 6, 56 L. ed. 329, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169.

rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct "any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by 152]railroad can *be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See McCall v. California, 136 U. S. 104, 109, 111, 34 L. ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 6, 59, 56 L. ed. 329, 350, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893, 897, 898; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See Lamphere v. Oregon *R. & Nav. Co. — L.R.A.(N.S.) —,[153 116 C. C. A. 156, 196 Fed. 336; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 130 Pac. 897; Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158.

What has been said shows that there was evidence to sustain a finding that at the time of the plaintiff's injury the defendant was engaged, and he was employed by it, in interstate commerce; and, as in other respects the case was one for the jury, the court rightly denied the defendant's request that a verdict in its favor be directed. A motion for a new trial was interposed by the defendant, but no ruling was had upon it, doubtless because the court concluded that it could and should render judgment for the defendant on the evidence notwithstanding the verdict. In this the court was in error, first, because it was without authority so to do (Slocum v. New York L. Ins. Co. decided April 21, 1913 [228 U. S. 364, ante, 879, 33 Sup. Ct. Rep. 523]), and, second, because the evidence did not warrant such a judgment. Unless the motion for a new trial was well taken, judgment should have been given for the plaintiff on the verdict; and, subject to that qualification, the plaintiff is now entitled to such a judgment.

The judgments of the Circuit Court and the Circuit Court of Appeals are reversed, and the case is remanded for further proceedings in accordance with this opinion.

Judgment reversed.

Mr. Justice Lamar, dissenting:

I am unable to assent to the proposition that a man carrying bolts to be used by him in repairing a railroad bridge was employed in interstate commerce.

Transportation has been defined as commerce, and those engaged in transportation are employed in commerce. But in building the bridge originally, the carrier was not "engaging in commerce between the states," and the plaintiff, in subsequently repairing it, was not *em-[154 ployed in such commerce. Such work was not a part of commerce, but an incident which preceded it.

The act provides that "every common carrier by railroad, while engaging in commerce between any of the several states or territories . . . shall be liable in dam-

ages to any person suffering injury while he is employed by such carrier in such commerce." [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322.]

The defendant, though engaged in both interstate and intrastate commerce, was also engaged in many other incidental activities which were not commerce in any sense.

The railroad had to be surveyed and built, bridges had to be constructed and renewed, cars had to be manufactured and repaired, warehouses had to be built and painted, wages had to be paid and books kept; but these transactions, though incident to it, were not transportation, and, therefore, not within the purview of the statute limited to persons employed in commerce. Otherwise the law would embrace "all of the activities in any way connected with trade between the states, and exclude state control over matters purely domestic in their nature." Hooper v. California, 155 U. S. 655, 39 L. ed. 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. Acts burdening interstate commerce can, of course, be prohibited by Congress. But when Congress itself limits the operation of the statute to persons injured while employed in interstate commerce, the statute does not extend to its incidents, and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents.

It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise there is no logical reason why it should not include every 155] *agent of the company; for there is no other test by which to determine when we must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers.

This view is supported by the two cognate statutes. The hours of service law applies only to those "engaged in the movement of trains;" and the safety appliance law refers not to machines in the shop, but to cars and locomotives, which are the immediate instruments of transportation. The employers' liability act in like manner applies to those engaged in transportation, and not to those employed in building, manufacturing, or repairing.

The plaintiff was carrying bolts to be used in repairing a bridge. That was not interstate commerce, and in my opinion the court below properly held that his rights were to be determined by the laws of the state of New Jersey, and not by the act of Congress.

Mr. Justice Holmes and Mr. Justice Lurton concur in this dissent.

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*ST. LOUIS, SAN FRANCISCO, &[156
TEXAS RAILWAY COMPANY, Plff. in Err.,

v.

MAUDE SEALE et al.

(See S. C. Reporter's ed. 156-162.)

**Error to state court — Federal question — rights asserted under a Federal statute.**

1. The contentions of the defendant railway company sued in the state courts under a state statute, for the death of an employee, that the injuries which caused the death were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and that, if liable, it was liable only to his personal representatives, and not to the plaintiffs,—present Federal questions which, when decided by the state court, will support a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1751, 2049, in Digest Sup. Ct. 1908.]

**Master and servant — employers' liability act — when employee is employed in interstate commerce.**

2. A yard clerk killed while proceeding through the railway yards to meet an incoming interstate freight train for the purpose of taking down the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with a conductor's list, and of labeling them to guide the switching crews, was employed in interstate commerce within the meaning of the employers' liability act of April 22, 1908, giving a right of recovery against a carrier for the death of an employee while so employed, although the yard may be a terminal for that par-

NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Amer. Transp. Co. v. Carbada, 62 L.R.A. 512.

rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct "any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by 152]railroad can *be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See McCall v. California, 136 U. S. 104, 109, 111, 34 L. ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 6, 59, 56 L. ed. 329, 350, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893, 897, 898; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See Lamphere v. Oregon *R. & Nav. Co. — L.R.A.(N.S.) —,[153 116 C. C. A. 156, 196 Fed. 336; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 130 Pac. 897; Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158.

What has been said shows that there was evidence to sustain a finding that at the time of the plaintiff's injury the defendant was engaged, and he was employed by it, in interstate commerce; and, as in other respects the case was one for the jury, the court rightly denied the defendant's request that a verdict in its favor be directed. A motion for a new trial was interposed by the defendant, but no ruling was had upon it, doubtless because the court concluded that it could and should render judgment for the defendant on the evidence notwithstanding the verdict. In this the court was in error, first, because it was without authority so to do (Slocum v. New York L. Ins. Co. decided April 21, 1913 [228 U. S. 364, ante, 879, 33 Sup. Ct. Rep. 523]), and, second, because the evidence did not warrant such a judgment. Unless the motion for a new trial was well taken, judgment should have been given for the plaintiff on the verdict; and, subject to that qualification, the plaintiff is now entitled to such a judgment.

The judgments of the Circuit Court and the Circuit Court of Appeals are reversed, and the case is remanded for further proceedings in accordance with this opinion.

Judgment reversed.

Mr. Justice Lamar, dissenting:

I am unable to assent to the proposition that a man carrying bolts to be used by him in repairing a railroad bridge was employed in interstate commerce.

Transportation has been defined as commerce, and those engaged in transportation are employed in commerce. But in building the bridge originally, the carrier was not "engaging in commerce between the states," and the plaintiff, in subsequently repairing it, was not *em-[154 ployed in such commerce. Such work was not a part of commerce, but an incident which preceded it.

The act provides that "every common carrier by railroad, while engaging in commerce between any of the several states or territories . . . shall be liable in dam-

ages to any person suffering injury while he is employed by such carrier in such commerce." [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322.]

The defendant, though engaged in both interstate and intrastate commerce, was also engaged in many other incidental activities which were not commerce in any sense.

The railroad had to be surveyed and built, bridges had to be constructed and renewed, cars had to be manufactured and repaired, warehouses had to be built and painted, wages had to be paid and books kept; but these transactions, though incident to it, were not transportation, and, therefore, not within the purview of the statute limited to persons employed in commerce. Otherwise the law would embrace "all of the activities in any way connected with trade between the states, and exclude state control over matters purely domestic in their nature." Hooper v. California, 155 U. S. 655, 39 L. ed. 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. Acts burdening interstate commerce can, of course, be prohibited by Congress. But when Congress itself limits the operation of the statute to persons injured while employed in interstate commerce, the statute does not extend to its incidents, and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents.

It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise there is no logical reason why it should not include every 155] *agent of the company; for there is no other test by which to determine when we must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers.

This view is supported by the two cognate statutes. The hours of service law applies only to those "engaged in the movement of trains;" and the safety appliance law refers not to machines in the shop, but to cars and locomotives, which are the immediate instruments of transportation. The employers' liability act in like manner applies to those engaged in transportation, and not to those employed in building, manufacturing, or repairing.

The plaintiff was carrying bolts to be used in repairing a bridge. That was not interstate commerce, and in my opinion the court below properly held that his rights were to be determined by the laws of the state of New Jersey, and not by the act of Congress.

Mr. Justice Holmes and Mr. Justice Lurton concur in this dissent.

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*ST. LOUIS, SAN FRANCISCO, &[156
TEXAS RAILWAY COMPANY, Plff. in Err.,

v.

MAUDE SEALE et al.

(See S. C. Reporter's ed. 156-162.)

**Error to state court — Federal question — rights asserted under a Federal statute.**

1. The contentions of the defendant railway company sued in the state courts under a state statute, for the death of an employee, that the injuries which caused the death were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and that, if liable, it was liable only to his personal representatives, and not to the plaintiffs,—present Federal questions which, when decided by the state court, will support a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1751, 2049, in Digest Sup. Ct. 1908.]

**Master and servant — employers' liability act — when employee is employed in interstate commerce.**

2. A yard clerk killed while proceeding through the railway yards to meet an incoming interstate freight train for the purpose of taking down the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with a conductor's list, and of labeling them to guide the switching crews, was employed in interstate commerce within the meaning of the employers' liability act of April 22, 1908, giving a right of recovery against a carrier for the death of an employee while so employed, although the yard may be a terminal for that par-

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NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Amer. Transp. Co. v. Carbada, 62 L.R.A. 512.

ticular train, and none of the cars were going to points beyond.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

**Error to state court — time for objecting — applicability of Federal statute.**

2. An objection by an interstate railway carrier sued for the death of an employee that, if liable at all, it was, under the Federal employers' liability act of April 22, 1908, liable only to the personal representatives of the deceased, and not to the plaintiffs, who were his widow and parents, was interposed in time, so that the state courts erred in overruling it, where the petition stated a case under the state statute, and the carrier, having called attention to the Federal statute by special exceptions, and having suggested that the state statute might not be the applicable one, made the specific objection, grounded on the Federal statute, after the evidence disclosed that the real case was controlled by such statute.

[For other cases, see Appeal and Error, VI. c; III. d, 9 f, in Digest Sup. Ct. 1908.]

[No. 857.]

Argued May 5, 1913. Decided May 26, 1913.

IN ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court for Grayson County, in that state, in plaintiffs' favor, in an action against an interstate carrier to recover damages for the death of an employee. Reversed and remanded for further proceedings.

See same case below, — Tex. Civ. App. —, 148 S. W. 1099.

The facts are stated in the opinion.

Mr. Cecil H. Smith argued the cause, and, with Mr. W. F. Evans, filed a brief for plaintiff in error:

In this case, rights under Federal statute were duly set up in the state court, and were denied by the judgment sought to be reviewed.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 293, 52 L. ed. 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Erie R. Co. v. Purdy, 185 U. S. 153, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; Nutt v. Knut, 200 U. S. 13, 50 L. ed. 350, 26 Sup. Ct. Rep. 216; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153.

It is not necessary, in order to set up a Federal right, that it be asserted in the pleadings.

Sweringen v. St. Louis, 185 U. S. 45, 46 L. ed. 799, 22 Sup. Ct. Rep. 569; Erie R. Co. v. Purdy, 185 U. S. 152, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517.

Whether rights under a Federal statute were sufficiently brought to the notice of the state court, and were involved in a decision of such court, is a Federal question, which Federal courts will determine.

Carter v. Texas, 177 U. S. 447, 44 L. ed. 841, 20 Sup. Ct. Rep. 687; Erie R. Co. v. Purdy, 185 U. S. 152, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 646, 48 L. ed. 828, 24 Sup. Ct. Rep. 532.

This case is not like those cases wherein this court has declined to review a judgment of an appellate state court which did not pass on Federal questions because they were not raised in the trial court, or not properly brought before it on appeal, as in—

Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Erie R. Co. v. Purdy, 185 U. S. 151, 46 L. ed. 849, 22 Sup. Ct. Rep. 605.

It has been frequently held to be a sufficient compliance with the words "specially set up and claimed," that the questions were considered in the opinion of the state court, and ruled against the plaintiff in error.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 487; Kentucky Union Co. v. Kentucky, 219 U. S. 158, 55 L. ed. 156, 31 Sup. Ct. Rep. 171; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup Ct. Rep. 730, 15 Am. Crim. Rep. 241; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517.

The Federal questions in this case were presented in accordance with the principles and rules of law as announced by the Texas courts.

Blair v. Cisneros, 10 Tex. 40; Holliman v. Rogers, 6 Tex. 97; Hanner v. Summerhill, 7 Tex. Civ. App. 235, 26 S. W. 908; Stachely v. Peirce, 28 Tex. 328; Anderson v. Chandler, 18 Tex. 436; Ebell v. Bursinger, 70 Tex. 122, 8 S. W. 77; Willis v. Hudson, 63 Tex. 682; Altgelt v. Emilienburg, 64 Tex. 150; Security Mortg. & T. Co. v. Caruthers, 11 Tex. Civ. App. 430, 32 S. W. 842; The Edith (Poole v. Tyler) 94 U. S. 518, 24 L. ed. 167; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 8, 58 L. ed. 684, 27 Sup. Ct. Rep. 407; United States v. Perryman, 100 U. S. 235,

25 L. ed. 645; Gulf, C. & S. F. R. Co. v. Lester, — Tex. Civ. App. —, 149 S. W. 841; Kansas City, M. & O. R. Co. v. Pope, — Tex. Civ. App. —, 152 S. W. 185.

At the time of his injury and death, deceased was an employee of a common carrier by railroad engaged in interstate commerce.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Colasurdo v. Central R. Co. 180 Fed. 832; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; L. Miller & Co. v. Goodman, 91 Tex. 43, 40 S. W. 718; Houston Direct Nav. Co. v. Ins. Co. of N. A. 89 Tex. 1, 30 L.R.A. 713, 59 Am. St. Rep. 17, 32 S. W. 889; State v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 44 S. W. 542.

The cause of action for damages for injuries resulting in the death of an employee of a common carrier by railroad, killed while engaged in interstate commerce, is governed by the Federal employers' liability acts, which as to such cases supersede state statutes authorizing recovery for injuries resulting in death.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, ante, 355, 33 Sup. Ct. Rep. 135.

Under the provisions of the Federal employers' liability acts, a cause of action for damages for injuries resulting in the death of an employee of a common carrier by railroad engaged in interstate commerce is given to the personal representative of deceased, and the widow and parents of such deceased person cannot maintain a suit in their individual capacities.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, ante, 305, 33 Sup. Ct. Rep. 135; American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; Briggs v. Walker, 171 U. S. 471, 43 L. ed. 245, 19 Sup. Ct. Rep. 1; Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; Major v. Burlington, C. R. & N. R. Co. 115 Iowa, 309, 88 N. W. 816; Kansas City, M. & O. R. Co. v. Pope, — Tex. Civ. App. —, 152 S. W. 185, — Tex. Civ. App. —, 153 S. W. 163; Gulf, C. & S. F. R. Co. v. Lester, — Tex. Civ. App. —, 149 S. W. 841.

A state court is without power to apply a state law to a subject lying within the domain of Federal jurisdiction, which is regulated and controlled by Federal law.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 53, 56 L. ed. 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Mr. Judson H. Wood argued the cause, and, with Mr. James P. Haven, filed a brief for defendants in error:

The record fails to disclose a petition for writ of error from the Texas supreme court to the Texas court of civil appeals, and therefore it is not shown that the Federal question relied on by plaintiff in error was presented to said court, or that the decision of said court thereon was adverse to appellant; and it follows that there is no basis for the jurisdiction of the Supreme Court of the United States.

Louisville & N. R. Co. v. Smith, H. & Co. 204 U. S. 557, 51 L. ed. 616, 27 Sup. Ct. Rep. 401; Erie R. Co. v. Purdy, 185 U. S. 153, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; Mutual L. Ins. Co. v. McGrew, 188 U. S. 308, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

At the time of the granting of the writ of error by a justice of this court to the Texas court, there was no final judgment in the cause in the Texas state court that would authorize the granting of said writ.

Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 37, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; Brockett v. Brockett, 2 How. 238, 11 L. ed. 251; Texas & P. R. Co. v. Murphy, 111 U. S. 488, 28 L. ed. 492, 4 Sup. Ct. Rep. 497; Memphis v. Brown, 94 U. S. 718, 24 L. ed. 245.

Neither the pleadings of the plaintiff nor those of the defendant presented any issue for the construction or application of the Federal employers' liability act; and as plaintiff in error relies solely upon that theory to give the court jurisdiction, there is no Federal question upon which to base said jurisdiction.

Louisville & N. R. Co. v. Smith, H. & Co. 204 U. S. 557, 51 L. ed. 616, 27 Sup. Ct. Rep. 401; Erie R. Co. v. Purdy, 185 U. S. 153, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; Mutual L. Ins. Co. v. McGrew, 188 U. S. 308, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Kipley v. Illinois, 170 U. S. 186, 42 L. ed. 1001, 18 Sup. Ct. Rep. 550; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct.

Rep. 21, 22; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Re Buchanan, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723.

No Federal question was raised in this case, in the manner required by the practice of the Texas courts.

Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 413; Missouri P. R. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608; Gulf, C. & S. F. R. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104; East Line & R. River R. Co. v. Brinker, 68 Tex. 500, 3 S. W. 99; Texas & P. R. Co. v. Easton, 2 Tex. Civ. App. 378, 21 S. W. 575; Missouri, K. & T. R. Co. v. Hawley, — Tex. Civ. App. —, 123 S. W. 726; State v. Goodnight, 70 Tex. 688, 11 S. W. 119; Moody v. Rowland, 100 Tex. 370, 99 S. W. 1112; Western U. Teleg. Co. v. Smith, 88 Tex. 13, 28 S. W. 931, 30 S. W. 549; Cooper v. Loughlin, 75 Tex. 527, 13 S. W. 37; Mann v. Falcon, 25 Tex. 271; Hall v. Jackson, 3 Tex. 309; Guess v. Lubbock, 5 Tex. 535; Texas Bkg. & Ins. Co. v. Stone, 49 Tex. 4; Texas Mut. L. Ins. Co. v. Davidge, 51 Tex. 244; Wright v. Wright, 6 Tex. 19; Parker v. Leman, 10 Tex. 116; Allen v. Stovall, 94 Tex. 628, 63 S. W. 863, 64 S. W. 777; Carey v. Brown, 92 U. S. 171, 23 L. ed. 469; Greenleaf v. Queen, 1 Pet. 138, 7 L. ed. 85; Conner v. Hawkins, 64 Tex. 545; Tryon v. Butler, 9 Tex. 553; Blum v. Strong, 71 Tex. 329, 6 S. W. 167; Texas & P. R. Co. v. Lacey, 107 C. C. A. 331, 185 Fed. 227; Texas & P. R. Co. v. Jackson, 113 C. C. A. 576, 193 Fed. 949; Missouri, K. & T. R. Co. v. Blalack, — Tex. —, 147 S. W. 559; Martel v. Somers, 26 Tex. 551; Hudson v. Morriss, 55 Tex. 605; Rabb v. Rogers, 67 Tex. 339, 3 S. W. 303; Connolly v. Hammond, 51 Tex. 647; Killebrew v. Stockdale, 51 Tex. 531; Tarkinton v. Broussard, 51 Tex. 554; Scoby v. Sweatt, 28 Tex. 713; Becton v. Alexander, 27 Tex. 659; Thouvenin v. Lea, 26 Tex. 614; Texas P. R. Co. v. Davidson, 68 Tex. 370, 4 S. W. 636, 6 Am. Neg. Cas. 542.

According to the issue as shown by the pleadings, the cause was tried according to the Texas statute, and the Federal employers' liability act was not in any manner passed on and considered by the Texas court. Therefore there is no Federal question raised which would authorize the court to take jurisdiction.

Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733; Gibson v. Chouteau, 8 Wall. 314, 19 L. ed. 317; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811.

The court of civil appeals of the state of Texas found that the facts surrounding the death of the deceased were such that the case was not controlled by the Federal employers' liability act, and its judgment on that finding is conclusive under the Texas statutes.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 411, 51 L. ed. 546, 27 Sup. Ct. Rep. 360; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632.

The court cannot take judicial knowledge as to whether the stations purporting to represent the points from which and to which the cars were billed were in the state of Texas, Oklahoma, or elsewhere, in the absence of proof.

Fields v. State, — Tex. Crim. Rep. —, 24 S. W. 407; Hoffman v. State, 12 Tex. App. 406; Galveston, H. & S. A. R. Co. v. Gage, 63 Tex. 568; Yale v. Ward, 30 Tex. 17.

If it be admitted, for the sake of argument, that the train to which deceased was going when he was killed was an interstate train when it arrived in the yards at Sherman, yet deceased was not engaged in interstate commerce at the time he was killed, because at that time the train had reached its final destination and had been delivered to the switch crew in the yards, and the record does not disclose that there was anything further to be done with the cars that were incorporated in the train.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; McNeill v. Southern R. Co. 202 U. S. 559, 50 L. ed. 1147, 26 Sup. Ct. Rep. 722; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 404, 51 L. ed. 541, 27 Sup. Ct. Rep. 360.

If, for the sake of argument, it be admitted that the train to which deceased was going at the time he was killed was an interstate train, and the cars therein had come from the state of Oklahoma to Texas to be transferred to some other railway at Sherman for further transportation, yet the right of action of deceased would not come within the Federal employers' act, for the reason that the character

of service that he was performing at that time was not within the purview of the act.

Thornton, Federal Employers' Liability & Safety Appliance Acts, § 38, p. 76; Pederson v. Delaware, L. & W. R. Co. 117 C. C. A. 33, 197 Fed. 537; Heimbach v. Lehigh Valley R. Co. 197 Fed. 579.

There is no issue in the case at bar except a question of pleading in the state court, which this court has, time and again, said it will not review.

Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 413.

If the court finds error on the part of the state courts, it can modify the judgment of the state courts, and enter such judgment as, in its discretion, should have been entered in the state courts.

Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Fairfax v. Hunter, 7 Cranch, 603, 3 L. ed. 453; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action against a railroad company, by the widow and parents of one of its employees, to recover damages for his death while in its service in its railroad yard at North Sherman, Texas, the death being caused, as was alleged, by the negligence of other employees. The action was begun in one of the courts of the state, and resulted in a judgment for the plaintiffs, which was affirmed by the court of civil appeals. 148 S. W. 1099. A petition for a writ of error was denied by the supreme court of the state, and the present writ of error to the court of civil appeals was then allowed. See Bacon v. Texas, 163 U. S. 207, 215, 41 L. ed. 132, 135, 16 Sup. Ct. Rep. 1023; Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 269, 56 L. ed. 1082, 1086, 32 Sup. Ct. Rep. 828.

A motion to dismiss the writ is interposed, but the grounds of the motion are plainly untenable, and it is denied.

In the trial court and again in the court of civil appeals the railroad company contended that the injuries which caused the death of the deceased were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322); and that, if liable, it was liable only to his personal representative, and not to the plaintiffs or any of them. This contention was denied by both courts, and the correctness of that ruling is the matter now to be considered.

The cause of action sought to be enforced was not recognized at common law. Michigan C. R. Co. *v. Vreeland, 227 U. S. 59[158 67, ante, 417, 33 Sup. Ct. Rep. 192. It was essential, therefore, that it be based on some applicable statute. There was a Texas statute on the subject, and also the Federal one. Both could not occupy the same field, and they were unlike. The Texas statute gave the right of action to the "surviving husband, wife, children, and parents," and provided that it might be enforced by all of them or by one or more for the benefit of all; while the Federal statute vested the right of action in the deceased's "personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." There were other points of dissimilarity, but they need not be noticed. If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the national Constitution. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; Michigan C. R. Co. v. Vreeland, supra. And if the Federal statute was applicable, the right of recovery, if any, was in the personal representative of the deceased, and no one else could maintain the action. Briggs v. Walker, 171 U. S. 466, 471, 43 L. ed. 243, 245, 19 Sup. Ct. Rep. 1; American R. Co. v. Birch, 224 U. S. 547, 557, 56 L. ed. 879, 882, 32 Sup. Ct. Rep. 603; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, ante, 355, 363, 33 Sup. Ct. Rep. 135; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 443, ante, 586, 591, 33 Sup. Ct. Rep. 274. The real question, therefore, is, whether the Federal statute was applicable; and this turns upon whether the injuries which caused the death of the deceased were sustained while the company was engaged, and while he was employed by it, in interstate commerce. Second Employers' Liability Cases, supra; Pedersen v. Delaware, L. & W. R. Co. (decision announced with this). [229 U. S. 146, ante, 1125, 33 Sup. Ct. Rep. 648.]

The plaintiff's petition was altogether silent upon that subject, and the defendant, by appropriate special exceptions, called attention to the two statutes, insisted *that whether one or the other[159 applied depended upon facts not stated, and asked that the plaintiffs be required so to state the facts as to enable it to perceive which statute was relied upon. The exceptions were over-

ruled, and when that matter came before the court of civil appeals it said: "The action was brought under the state law, and the petition stated a good cause of action, and was not subject to the exceptions presented." By its answer the defendant put in issue the allegations of the petition, and the evidence adduced upon the trial established without dispute the following facts:

The defendant was a Texas corporation owning and operating a railroad extending from the boundary between Oklahoma and Texas southward through North Sherman. This railroad connected at the Oklahoma boundary with another one extending northward through Madill, and the two were so operated that trains were run through from North Sherman to Madill, and from Madill to North Sherman. The defendant was engaged in both intrastate and interstate commerce, much the larger part of the traffic handled in its North Sherman yard being interstate. The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductors' lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing, trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. The purpose with which he was going to the train 160 was that of taking the *numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck and fatally injured by a switch engine, which, it is claimed, was being negligently operated by other employees in the yard.

At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor on the ground that the undisputed evidence disclosed that the case was one in which the defendant's liability was controlled by the Federal statute, and that, if liable, it was liable only to the personal representative of the deceased, and not to the plaintiffs. The request was denied, and the jury returned a verdict for the plaintiffs, in which the damages were apportioned among them conformably to the state law.

In its original opinion the court of civil appeals took the view (a) that by not interposing a plea in abatement, the defendant waived any right it had to object that the plaintiffs were not personal representatives of the deceased, (b) that the plaintiffs were the real beneficiaries, and it was immaterial that they were not the deceased's personal representatives, and (c) that the state statute authorized a recovery by the plaintiffs on the case stated in the petition, and as the Federal statute was not pleaded as a defense, it could not be invoked to defeat a recovery, no matter what may have been its effect on the state statute. In its opinion on the motion for rehearing the court recognized the supremacy of the Federal statute, if applicable, and held that the evidence did not bring the case within that statute. While recognizing that the train which the deceased was proceeding to examine was an interstate train, having just come from Oklahoma, the court said: "The North Sherman yards were the terminal for that train; that is, that was the end of the run of that train. If any trains went south, they were made up in the yards, new trains, and sent south, or other *trains made up and sent north. The[161 evidence does not show that any of the cars in the train coming in were destined for other points."

In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight; and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line. McNeill v. Southern R. Co. 202 U. S. 543, 559, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722. See also Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158.

It comes, then, to this: The plaintiffs' petition, as ruled by the state court, stated a case under the state statute. The defendant, by its special exceptions, called attention to the Federal statute, and suggested that the state statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that

the defendant was called upon to make defense. A plea in abatement would have been unavailing, because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced it developed that the real case was not controlled by the state statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, 162] *that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it. Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited. So also Tiffany, Death by Wrongful Act, 2d ed. §§ 80, 109, 116.

The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion, but without prejudice to such rights as a personal representative of the deceased may have.

Reversed.

Mr. Justice Lamar dissents.

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W. W. DEGGE, the Wellington Association, the Wellington Development Company, and the Wellington Investment Company, Plffs. in Err.,

v.

FRANK H. HITCHCOCK, as Postmaster General of the United States. (No. 157.)

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MYTTON MAURY, Thomas E. Irvine, O. J. Watrous, John A. Webber, et al., Plffs. in Err.,

v.

FRANK H. HITCHCOCK, as Postmaster General of the United States. (No. 158.)

(See S. C. Reporter's ed. 162-172.)

**Certiorari — to review executive order.**

An order of the Postmaster General directing the nondelivery and the return to the senders of mail addressed to certain persons whom he found, conformably to U. S. Rev. Stat. §§ 3929, 4041, U. S. Comp. Stat. 1901, pp. 1995, 2749, after notice and hearing, and upon evidence satisfactory to him, were using the mails in furtherance of a fraudulent scheme, though quasi judicial, has enough administrative quality to prevent it from being subject to review by writ of certiorari.

[For other cases, see Certiorari, I. b, in Digest Sup. Ct. 1908.]

[Nos. 157 and 158.]

Argued January 31, 1913. Decided May 26, 1913.

TWO WRITS OF ERROR to the Court of Appeals of the District of Columbia to review judgments which affirmed judgments of the Supreme Court of the District, refusing to issue certiorari to review a fraud order made by the Postmaster-General. Affirmed.

See same case below in No. 157, 35 App. D. C. 218; No. 158, 35 App. D. C. 228.

Statement by Mr. Justice Lamar:

In 1909 complaint was made to the postal authorities that W. W. Degge and the Wellington corporations, of which he was president, were using the mails in furtherance of a fraudulent scheme. Notice was given to Degge and the corporations, and a hearing was had before the officer to whom, under the Postal Regulations, the disposition of this class of cases was committed. He found that the charges were true, and to his finding he attached a copy of all the evidence which had been taken. The report was confirmed by the Postmaster General, who issued an order directing the postmaster at Boulder, Colorado, not to deliver mail addressed to Degge or to these corporations, but to return all such letters to the sender with the word "Fraudulent" plainly stamped on the envelop. Rev. Stat. §§ 3929, 4041, U. S. Comp. Stat. 1901, pp. 1995, 2749.

Degge, the corporations, and some of the stockholders, thereafter filed petitions in the supreme court of the District of Columbia, alleging that the officer before whom the hearing had been had was without power to make report on which the Postmaster General had acted; that there was no testimony to show the existence of a fraudulent *scheme, and no evidence whatever to[164 support the finding. It was alleged that the order was arbitrary, in excess of the power of the Postmaster General, and void. The petitioners prayed that the court would issue writs of certiorari directing the Postmaster General to certify the record to the court, and that upon hearing and review thereof the court would set aside the order. A rule to show cause was granted. The Postmaster General demurred on the ground

NOTE.—As to certiorari in United States courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

that the court was without jurisdiction to issue the writ, and subject thereto answered, attaching the record and the evidence on the hearing before the officer of the Postoffice Department having charge of the Fraud Orders investigations.

The case was heard by the supreme court of the District of Columbia on petition, demurrer, and answer. After a hearing the court dismissed the case. The court of appeals of the District, without passing on the right to issue the writ, affirmed the judgment upon the ground that the evidence supported the order. The petitioners appealed, and on the argument in this court, the government renews the contention that the district court was without jurisdiction to issue the writ of certiorari to the Postmaster General.

Mr. O. A. Erdman argued the cause, and, with Mr. Walter B. Guy, filed a brief for plaintiffs in error:

The decisions of the Postmaster General in fraud order cases are by no means final and conclusive.

People's United States Bank v. Gilson, 88 C. C. A. 332, 161 Fed. 290; American School v. McAnnulty, 187 U. S. 94, 108–110, 47 L. ed. 90, 96, 97, 23 Sup. Ct. Rep. 33; Marbury v. Madison, 1 Cranch, 137, 171, 2 L. ed. 60, 71.

The writ of certiorari at common law is considered an extraordinary remedy, resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress, and yet unprovided for by the ordinary forms of proceedings.

Harris, Certiorari, §§ 17–21; 4 Enc. Pl. & Pr. 9, 10; Duggen v. McGruder, Walk. (Miss.) 112, 12 Am. Dec. 536.

In the Federal courts it is in the nature of a writ of error to bring up, after judgment, the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law.

Harris v. Barber, 129 U. S. 366, 32 L. ed. 697, 9 Sup. Ct. Rep. 314; District of Columbia v. Brooke, 29 App. D. C. 563; District of Columbia v. Burgdorf, 6 App. D. C. 465.

The test of the question whether a proceeding is reviewable upon certiorari is not, What are the usual functions exercised by the tribunal? but, What is the character of the proceedings sought to be reviewed?

Duggen v. McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527; Cunningham v. Squires, 2 W. Va. 422, 98 Am. Dec. 770; State ex rel. Rawlinson v. Ansel, 76 S. C. 412, 57 S. E. 185, 11 Ann. Cas. 613.

The proceeding before the Postmaster General in this case was quasi judicial in character. It involved a hearing and the ascertainment of facts upon evidence. It resulted in a decision based upon alleged satisfactory evidence. In such cases the Postmaster General exercises judicial or quasi judicial functions.

United States v. Burton, 131 Fed. 552; Western R. Co. v. Nolan, 48 N. Y. 513.

The writ should have been granted as of right.

Matthews v. Matthews, 26 N. C. (4 Ired. L.) 158; State v. Bill, 35 N. C. (13 Ired. L.) 373; Reg v. Surrey Justices, L. R. 5 Q. B. 473, 39 L. J. Mag. Cas. N. S. 145; Re Listowel's Fishery, Ir. Rep. 9 C. L. 46.

Assistant Attorney General Adkins argued the cause, and, with Mr. Louis G. Bissell, filed a brief for defendant in error:

Certiorari does not lie to review administrative action by cabinet officers.

Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 575; Decatur v. Paulding, 14 Pet. 497, 515, 10 L. ed. 559, 568; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; United States v. Young, 94 U. S. 258, 24 L. ed. 153.

At common law and in the District of Columbia a writ of certiorari runs to an inferior tribunal, only to ascertain whether that tribunal had jurisdiction and has observed due process of law.

Basnet v. Jacksonville, 18 Fla. 523; Bradshaw v. Earnshaw, 11 App. D. C. 495; District of Columbia v. Burgdorf, 6 App. D. C. 471; Harris v. Barber, 129 U. S. 366, 32 L. ed. 697, 9 Sup. Ct. Rep. 314; Hendley v. Clark, 8 App. D. C. 165; Re Schneider, 148 U. S. 162, 37 L. ed. 406, 13 Sup. Ct. Rep. 572; People ex rel. Maloney v. Lindblom, 182 Ill. 241, 55 N. E. 358; Phillips v. Welch, 12 Nev. 158; Reaves v. Ainsworth, 219 U. S. 297, 55 L. ed. 226, 31 Sup. Ct. Rep. 230; Rex v. Mahony [1910] 2 I. R. 727

In some jurisdictions the scope of the writ, without legislative action, has been enlarged to include questions of law arising on the record, and the question whether the finding is supported by any evidence.

People ex rel. Cook v. Metropolitan Police Dist. 39 N. Y. 506; Keenan v. Goodwin, 17 R. I. 649, 24 Atl. 148.

But it is practically universally agreed that the case is not reviewable on the merits, and that the writ of certiorari is not appropriate to settle disputed questions of fact, or to weigh conflicting evidence, if there was any evidence at all before the tribunal.

Farmington River Water Power Co. v. Berkshire County, 112 Mass. 206; Harris v. Barber, 129 U. S. 366, 32 L. ed. 697, 9 Sup. Ct. Rep. 314; Imperial Water Co. v. Imperial County, 162 Cal. 14, 120 Pac. 780; Rawson v. McElvaine, 49 Mich. 194, 13 N. W. 513; Reaves v. Ainsworth, 219 U. S. 297, 55 L. ed. 226, 31 Sup. Ct. Rep. 230; State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; State, Wilson, Prosecutor, v. Hudson, 32 N. J. L. 365.

And if the court has the power on certiorari to review questions of law, it will not interfere with the decision of the Postmaster General, unless clearly of the opinion that such decision was wrong.

Bates & G. Co. v. Payne, 194 U. S. 108, 48 L. ed. 894, 24 Sup. Ct. Rep. 595; Smith v. Hitchcock, 226 U. S. 53, ante, 119, 33 Sup. Ct. Rep. 6.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

This case is the first instance, so far as we can find, in which a Federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of 170] *United States government. That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers. For, since the adoption of the Constitution, there have been countless rulings by heads of Departments that directly affected personal and property rights, and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of quasi judicial orders under attack. The modern decisions cited to sustain the power of the court to act in the present case are based on state procedure and statutes that authorize the writ to issue not only to inferior tribunals, boards, assessors, and administrative officers, but even to the chief executive of a state in proceedings where a quasi judicial order has been made. But none of these decisions are in point in a Federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law.

In ancient times it was used to compel the production of a record for use as evidence; more often to supplement a defective record in an appellate court, and later, to remove, before judgment,—Harris v. Barber, 129 U. S. 369, 32 L. ed. 699, 9 Sup. Ct. Rep. 314,—a record from a court without jurisdiction, and with a view of preventing error rather than of correcting it. When, later still, its scope was enlarged so as to make it serve the office of a writ of error, certiorari was granted only in those instances in which the inferior tribunal had acted without jurisdiction, or in disregard of statutory provisions. But in those cases the writ ran to boards (Reaves v. Ainsworth, 219 U. S. 297, 55 L. ed. 226, 31 Sup. Ct. Rep. 230), officers, tribunals, and inferior judicatures, whose findings and decisions, even though erroneous, had the quality of a final judgment, and there being no right of appeal or other method of review, the extraordinary writ of certiorari was resorted to from necessity to afford a remedy where there would otherwise have been a denial of justice. But in all those cases it ran *from court to[171 court,—including boards, officers, or tribunals having a limited statutory jurisdiction, but whose judgments would be conclusive unless set aside.

The plaintiffs in error insist that under these common-law principles the writ should issue here because, having to act "upon evidence satisfactory to him" (Rev. Stat. § 3929), and notice and a hearing having been given, the Postmaster General acted in a judicial capacity in making the order, which was therefore subject to review on certiorari because he exceeded his jurisdiction, and, without any proof of fraud in the use of the mails, deprived plaintiffs in error of the valuable right to receive letters and money through the postoffice.

It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order, and that in making his ruling he may be said to have acted in a quasi judicial capacity. But the statute was passed primarily for the benefit of the public at large, and the order was for them and their protection. That fact gave an administrative quality to the hearing and to the order, and was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari. Not being a judgment, in the sense of a final adjudication, the plaintiffs in error were not concluded by his decision, for had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Philadelphia Co. v. Stimson, 223 U. S. 620, 56 L. ed. 576, 32 Sup. Ct. Rep. 340.

The fact that there was this remedy is itself sufficient to take the case out of the 172]principle on which, at common *law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice. Besides, if the common-law writ, with all of its incidents, could be construed to apply to administrative and quasi judicial rulings, it could, with a greater show of authority, issue to remove a record before decision, and so prevent a ruling in any case where it was claimed there was no jurisdiction to act. This would overturn the principle that, as long as the proceedings are *in fieri*, the courts will not interfere with the hearing and disposition of matters before the Departments. Plested v. Abbey, 228 U. S. 42, 51, ante, 724, 727, 33 Sup. Ct. Rep. 503. To hold that the writ could issue either before or after an administrative ruling would make the despatch of business in the Departments wait on the decisions of the courts, and not only lead to consequences of the most manifest inconvenience, but would be an invasion of the executive by the judicial branch of the government.

The writ of certiorari is one of the extraordinary remedies, and being such it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789. This cannot be done.

Affirmed.

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173] *JOHN C. MACKAY
v.
UINTA DEVELOPMENT COMPANY.

(See S. C. Reporter's ed. 173-177.)

**Removal of causes — irregularity — waiver.**

Any irregularity in docketing a cause removed to a Federal circuit court from a state court, or in the order of the pleadings, may be waived, and neither it nor the method of securing the attendance of the parties in the Federal court can operate to deprive that court of jurisdiction where there was presented to that court a controversy between citizens of different states, in which the amount claimed by one nonresident was more than $2,000, exclusive of interest and costs.

[For other cases, see Removal of Causes, IX., in Digest Sup. Ct. 1908.]

[No. 190.]

*Argued March 14 and 17, 1913. Decided May 26, 1913.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting the question whether the Circuit Court properly retained jurisdiction of a cause irregularly removed from a state court. Answered in the affirmative.

The facts are stated in the opinion.

Mr. Barnard J. Stewart argued the cause, and, with Messrs. Charles B. Stewart, Samuel W. Stewart, and Daniel Alexander, filed a brief for John C. Mackay.

Mr. John W. Lacey argued the cause and filed a brief for the Uinta Development Company.

Mr. Justice Lamar delivered the opinion of the court:

On December 8, 1908, the Uinta Development Company, a corporation of the state of Wyoming, brought an action in a Wyoming court against John C. Mackay, a resident and citizen of Utah, to recover $1,950 damages *for a trespass upon land of[174 the Development Company, situated in Wyoming.

On January 8, 1909, Mackay duly filed his answer. On March 2 the plaintiff, by leave of court, filed an amended petition, which Mackay answered. On May 3 he filed an amended answer, which, in addition to denying many of the allegations of the amended petition, set up a counterclaim for $3,000 damages.

The claims of the parties were so related that either could have been interposed as a counterclaim to the other; or they could have been determined in different suits,—subject to the provision that, under the Wyoming statute, defendant who failed to set up his counterclaim, and subsequently made it the subject of a separate action, could not recover costs if he prevailed therein. No Federal question was presented in the plaintiff's suit or defendant's original answer, but Mackay's amended answer and counterclaim were grounded upon certain statutes of the United States. This counterclaim for $3,000 was filed after the expiration of the time in which he was required to plead to the original petition.

But, notwithstanding the delay, Mackay, the nonresident, without objection on the part of the Development Company, filed in the state court a petition to remove the case to the United States circuit court for the district of Wyoming. An order removing the case was granted on the theory that the parties were citizens of different states; that the construction of the Federal statutes was necessarily involved, and that the amount in dispute, as disclosed by the counterclaim, exceeded $2,000. The trans-

cript was duly filed in the United States court. Both parties appeared. The plaintiff filed in the United States court a reply to Mackay's counterclaim, and the case, which was docketed as "Uinta Development Company v. John C. Mackay," was submitted to the court for determination with-175]out a jury. *Judgment was entered in favor of the Development Company, and thereupon Mackay took the case to the circuit court of appeals, assigning errors relating to rulings made in the course of the trial, but neither party raised any question as to its power to determine the cause. On these facts the circuit court of appeals certified to this court various questions as to whether Mackay could remove the case to the United States court; among them the following:

4. "Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that, as respects his claim against the Development Company, all the jurisdictional elements were present which were essential to enable the circuit court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counterclaim and thereby have entitled the court to take cognizance thereof, did the parties, by appearing in the circuit court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim, and through the interposition by the Development Company of its claim as a counterclaim in that action?"

This question must be answered in the affirmative; and that fact makes it unnecessary to consider the status of the parties in the state court, and who was technical plaintiff and who technical defendant, or whether Mackay, a nonresident defendant, sued in a state court for $1,950, could, by filing a counterclaim for $3,000, acquire the 176] *right to remove the case to the United States court. The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship ncessary to give the United States circuit court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularly removed, it could be lawfully tried and determined.

Removal proceedings are in the nature of process to bring the parties before the United States court. As in other forms of process, the litigant has the right to rely upon the statute, and to insist that, in compliance with its terms, the case shall be taken from the state to the Federal court in the proper district, on motion of the proper person, at the proper time, and on giving the proper bond. But these provisions are for the benefit of the defendant, and intended to secure his appearance. When that result is accomplished by his voluntary attendance, the court will not, of its own motion, inquire as to the regularity of the issue or service of the process, or, indeed, whether there was any process at all, since it could be waived, in whole or in part, either expressly or by failing seasonably to object. Powers v. Chesapeake & O. R. Co. 169 U. S. 98, 42 L. ed. 675, 18 Sup. Ct. Rep. 264.

What took place in the state court may therefore be disregarded by the court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the circuit court a controversy between citizens of different states in which the amount claimed by one nonresident was more than $2,000, exclusive of interest and costs. As the court had jurisdiction of the subject-matter, the parties could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper. But if there was any irregularity *in docketing the case or[177 in the order of the pleadings, such an irregularity was waivable, and neither it nor the method of getting the parties before the court, operated to deprive it of the power to determine the cause. The fourth question certified to us by the circuit court of appeals is answered in the affirmative.

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TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
C. C. PRATER.

(See S. C. Reporter's ed. 177, 178.)

Appeal — damages for delay.

The judgment of a circuit court of appeals, affirming a judgment of the trial court in a negligence action, on the ground that, though the evidence was conflicting, that for the plaintiff was sufficient to sustain the verdict in his favor, will be affirmed with 10 per cent damages where the Su-

preme Court concurs in this view, and there is no question of law involved.

[For other cases, see Appeal and Error, IX. h, in Digest Sup. Ct. 1908.]

[No. 211.]

Submitted April 15, 1913. Decided May 26, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Texas in favor of plaintiff in a negligence action. Affirmed.

See same case below, 106 C. C. A. 120, 183 Fed. 574.

Mr. W. L. Hall submitted the cause for plaintiff in error.

Mr. C. C. Prater, *in propria persona*, and Mr. A. W. Gregg, submitted the cause for defendant in error.

Memorandum opinion, by direction of the court, by Mr. Justice Lamar:

The plaintiff, a locomotive engineer, sued for personal injuries resulting from a col-178]lision with a freight train *which had been left standing, without danger signals, on the track in the defendant's railroad yard at Thurber Junction, Texas. The company contended that he had been guilty of contributory negligence in failing to keep a lookout, in running at a high rate of speed, and disregarding rules requiring the engineer to keep the locomotive under control in anticipation that cars might be on the tracks within yard limits. The evidence for the plaintiff tended to show that he was in the exercise of proper diligence; that from his position on the right of the locomotive he could look straight down the track, but, on account of the height of the boiler, could not see the freight train, which was standing on a curve, which there turned to the left; that it was about dark, and the freight train, having no danger signals, and being out of range of the headlight, was not seen by the fireman, on the left of the engine, until too late to avoid the collision, although the emergency brake was applied as soon as he saw the danger and gave warning to the engineer.

The defendant offered evidence tending to show that the speed exceeded that permitted in the yard limits, and that the freight train could have been seen in time to stop if proper lookout had been kept. From the physical condition proved, and the whole evidence, the company moved the court to *direct a verdict* in its favor. The motion was overruled and the jury found for the plaintiff. There was no exception to the charge, but the case was taken to the circuit court of appeals on the ground that, from the undisputed evidence, the plaintiff was shown to have been guilty of contributory negligence. That court held (106 C. C. A. 120, 183 Fed. 574) that though the evidence was conflicting, that for the plaintiff was sufficient to sustain the verdict. In that view we fully concur; and, as there is no question of law involved, the judgment is affirmed with 10 per cent damages.

Affirmed.

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*FIRST NATIONAL BANK OF[179 CLAREMORE, Plff. in Err.,

v.

C. M. KEYS and Hugh Mills, a Partnership under the Name of C. M. Keys & Company, Stock Yards Bank, and Wat Mayes, Defts. in Err. (No. 263.)

FIRST NATIONAL BANK OF VINITA, Plff. in Err.,

v.

C. M. KEYS and Hugh Mills, a Partnership under the Name of C. M. Keys & Company, Stock Yards Bank, and Wat Mayes, Defts. in Err. (No. 264.)

CITIZENS BANK OF PRYOR CREEK, Plff. in Err.,

v.

C. M. KEYS and Hugh Mills, a Partnership under the Name of C. M. Keys & Company, Stock Yards Bank, and Wat Mayes, Defts. in Err. (No. 302.)

J. C. HOGAN, Plff. in Err.,

v.

C. M. KEYS and Hugh Mills, a Partnership under the Name of C. M. Keys & Company, Stock Yards Bank, and Wat Mayes, Defts. in Err. (No. 303.)

(See S. C. Reporter's ed. 179–186.)

**Chattel mortgage — recording — new recording office.**

1. The lien of a chattel mortgage duly filed for record at Muskogee with the clerk of the United States court, *ex officio* recorder for the northern district of Indian territory, was not lost because it was not re-recorded at Vinita, and was not transferred to the indexes at Pryor Creek, under the acts of May 27, 1902 (32 Stat. at L. 276, chap. 888), and February 19, 1903 (32 Stat. at L. 842, chap. 707), successively creating new districts with recording offices at those two places, the first statute

NOTE.—On necessity of refiling or recording chattel mortgage in state to which property is removed after execution of mortgage —see note to Snider v. Yates—64 L.R.A 356.

not requiring re-recording, and the second one not affirmatively visiting such a penalty upon nonaction by the mortgagee.

[For other cases, see Chattel Mortgage, III., in Digest Sup. Ct. 1908.]

**Error to state court — effect of admission of territory as state — review of non-Federal question.**

2. Even if the decision of a non-Federal question by an Oklahoma court having jurisdiction of a cause transferred from the Federal court upon the admission of Oklahoma into the Union were subject to review in the Federal Supreme Court on writ of error to the Oklahoma supreme court, the discretion of the trial judge in permitting or refusing an amendment to the pleadings would not be interfered with except in case of manifest error.

[For other cases, see Appeal and Error, 1030–1035, in Digest Sup. Ct. 1908.]

[Nos. 263, 264, 302, and 303.]

Argued April 25, 28, 1913. Decided May 26, 1913.

FOUR WRITS OF ERROR to the Supreme Court of Oklahoma to review judgments of the District Court of Craig County, in that state, in a suit involving the respective rights of chattel mortgagees in the proceeds of the mortgaged property. Affirmed.

See same case below on first appeal, 22 Okla. 174, 104 Pac. 346, 18 Ann. Cas. 152; on second appeal, 27 Okla. 704, 113 Pac. 715.

Statement by Mr. Justice Lamar:

On July 20, 1906, the First National Bank of Claremore brought suit against Wat Mayes in the United States district court in the Indian territory, northern district, sitting at Vinita. An attachment issued and was levied on cattle belonging to Mayes and located on his ranch near Pryor Creek. It appeared that he had 180]given mortgages *on the herd to Vinita National Bank (1899), C. M. Keys & Company (1901), First National Bank of Vinita (1903), Citizens' Bank (July 24, 1905), J. C. Hogan (July 27, 1905), Mary D. Mayes (August 2, 1905).

These mortgagees intervened in the attachment suit and asked that the case be transferred to the equity docket, and that the cattle be sold and the proceeds applied to the payment of their debts.

It appeared that the Bank of Claremore and the First National Bank of Vinita also had mortgages on real estate, and it was contended that, having a lien on two funds, they should be required to seek payment out of this land before receiving anything under their mortgages against the cattle. A receiver was appointed, who took charge of the property, real and personal. He sold the herd for $11,234.47. The case was then referred to a master, where all the mortgages were proved, although an attack was made on that given by Mayes to Keys & Company. It appeared that being indebted to that firm $34,800.04, he, on October 28, 1901, gave them a note therefor, due one month after date. To secure that note and any renewals thereof he, on October 29, 1901, executed a mortgage on 2,835 head of mixed cattle and their increase. The cattle were described as being located on the "mortgagor's range, 3 miles south of Pryor Creek, I. T.," then in the northern judicial district of the Indian territory. The acknowledgment recited that "Mayes executed the same for the purposes and consideration therein named," omitting "and set forth," which it was claimed was required by the provisions of § 656, Mansfield's Digest, of force in the Indian territory. This mortgage, thus acknowledged, was filed for record October 31, 1901, with the clerk of the United States court, *ex officio* recorded for the northern district of Indian territory, at Muskogee, and was recorded November 22, 1901.

At the hearing Mayes contended that he had shipped *enough cattle to pay off[181 the mortgage debt. It appeared, however, that in January and March, 1905, he gave two notes aggregating $15,288.69. The master found that they were renewal notes, representing the balance due on the original debt of $34,800.04, and were secured by the mortgage of October 29, 1901. He held, however, that this mortgage, while oldest in date, and while good against Mayes, was inferior to the attachment and the other mortgages because of the failure of Keys & Company to re-record it at Vinita and transfer it to the index at Pryor Creek, in pursuance of acts of May 27, 1902 (32 Stat. at L. 276, chap. 888), and February 19, 1903 (32 Stat. at L. 842, chap. 707), successively creating recording offices at those two places. He therefore recommended that the money should be paid in the following order: First National Bank of Vinita, $3,778.19 (mortgage of January 16, 1903); First National Bank of Claremore, $4,869.10 (attachment issued July 20, 1905); Citizens' Bank of Pryor Creek, $1,824.68 (mortgage of July 24, 1905); J. C. Hogan, $6,187.00 (mortgage of July 27, 1905); Mary D. Mayes, $1,440 (mortgage of August 2, 1905); Vinita National Bank (one of the cases by subsequent stipulation); Keys & Company, $15,808.69 (mortgage of October 28, 1901).

Under this ruling nothing would have been paid on the mortgage to Keys & Company, which had been transferred to the Stock Yards Bank. They therefore filed

exceptions, which were overruled. The court, however, confirmed the report, and made the additional finding that "the mortgage of C. M. Keys & Company is an absolute fraud by reason of their failure to renew or to advise people in any way, shape, or form of the various payments that had been made and the transfers that had been made." The court directed that the real estate should be sold and the proceeds applied in the order of priority heretofore set out. Before this was done, Keys & Company took the case to the United States court of appeals in the Indian 182]territory, *and while the cause was there pending, Oklahoma was made a state, and, under the enabling act (34 Stat. at L. 276, chap. 3335, 34 Stat. at L. 1287, chap. 2911), the cause was transferred to the supreme court of Oklahoma, which (22 Okla. 174, 104 Pac. 346, 18 Ann. Cas. 152) held that the acts of Congress did not require mortgages recorded at Muskogee to be re-recorded at Vinita, nor was the holder required to have them transferred to the index at Pryor Creek. It thereupon directed that the money should be paid to (1) the Vinita National Bank; (2) to Keys & Company, "the other creditors taking their places after them in the order decreed by the court below. Let the judgment of the court below be modified to conform to this opinion."

A motion for a rehearing was granted, and the then defendants in error urged many grounds why the judgment should be affirmed. The court rendered an elaborate supplemental opinion in which it held that the Keys mortgage was properly acknowledged; that it had not been rendered void by failure to take possession of the cattle; that there was no exception to the finding by the master, that the debt of $15,808.69 was due and secured by the mortgage; that no issue of fraud had been raised by the pleadings, "and the charge of fraud upon the merits seems to be without foundation." The court refused to make a final order of distribution, but adhered to the judgment of reversal previously made. The mandate was returned to the district court of Craig county, Oklahoma.

Thereupon the Bank of Claremore, Citizens' Bank, First National Bank of Vinita, J. C. Morgan, and Mrs. Mayes called the court's attention to the fact that the supreme court had held that the issue of fraud had not been presented by the pleadings, and they asked leave to file amended answers to the intervention of Keys & Company, in which they denied the existence of any debt from Mayes to Keys & Company, averring that the mortgage was defectively *acknowledged, was fraudu-[183 lent in law and in fact, or, if originally good, had lost its validity against creditors of Mayes because he had been permitted to retain possession of the herd.

The motions to amend were disallowed and (the Vinita National Bank, by consent, having been paid) the court entered a decree in conformity with the opinion of the supreme court, under which the proceeds of the cattle were to be applied to the payment of the mortgage of Keys & Company, transferred to the Stock Yards Bank. No distribution was made of the proceeds of the real estate. The Claremore Bank and the other plaintiffs in error again took the case to the supreme court of Oklahoma, which held that the district court had merely followed its ruling, and dismissed the writ of error. The case was then brought here on the ground that the construction of Federal statutes and the validity of a Federal judgment were involved.

Mr. W. H. Kornegay argued the cause, and, with Mr. J. Howard Langley, filed a brief for plaintiffs in error.

Mr. Robert F. Blair argued the cause and filed a brief for defendants in error.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The Bank of Claremore levied an attachment upon cattle of Mayes, who had given several mortgages on the herd. The property did not sell for enough to pay all of the liens, and the various creditors united in an attack on the mortgage to Keys & Company, which, being the oldest in date, would, unless defeated, take all of the fund. This mortgage, however, was sustained by the supreme court of Oklahoma, and three of the contesting creditors brought their cases here. They were all argued together and were *submitted[184 on the briefs and record in No. 263, in which there are forty-four assignments of error. They need not, however, be separately considered, since the controlling question is whether the mortgage from Mayes to Keys & Company, duly recorded at Muskogee, on October 31, 1901, lost its lien because it was not re-recorded in 1902 at Vinita, and was not transferred in 1903 to the indexes at Pryor Creek, under the acts of 1902 (32 Stat. at L. 276, chap. 888), and 1903 (32 Stat. at L. 843, chap. 707), successively creating new districts with recording offices at those two places.

Registration laws are of statutory origin, and the statute must in each case be examined to determine what instruments are

to be recorded, where they are to be recorded, and the effect of a failure to record. Provision as to these matters was made by Congress when it declared that the registration laws of Arkansas should be of force in the Indian territory, and that the clerk of the court should be *ex officio* recorder, with his office at Muskogee. In compliance with that law, the mortgage from Mayes to Keys was duly recorded at Muskogee. Some months later Congress passed the act of May 27, 1902 (32 Stat. at L. 276, chap. 888), dividing the district, providing that the "clerk's office at Vinita shall also be the recorder's office for the northern district," in which Mayes's ranch was left. But as that statute did not require that recorded instruments should be re-recorded at Vinita, Keys & Company were under no obligation to do what the law did not demand, but could rely on the fact that their mortgage had been duly registered at Muskogee in accordance with the law of force when it was given and when the cattle were in that district.

Nor is the case different under the act of February 19, 1903 (32 Stat. at L. 841, chap. 707). It created twenty-five recording offices, named Pryor Creek as the place for the office in the fifth district, in which Mayes's ranch was located, made the clerk *ex officio* recorder, provided that he 185]should receive *the usual fees for registering deeds and mortgages, but that all sums collected in excess of $1,800 should be paid over to a school fund. It then declared that "such instruments heretofore recorded with the clerk of any United States court in Indian territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute."

This provision of the act, following as it does the clause on the subject of fees, was evidently addressed to the clerk, who was thereby required, without cost, to transfer to the indexes in his office all papers previously recorded at Muskogee or Vinita, relating to property in his district. There was no provision in the statute that the lien of a duly recorded mortgage should be lost against subsequent purchasers if not transferred to the index, and that silence cannot be construed into an affirmative declaration that such penalty should follow nonaction by the mortgagee. Congress could have made it the duty of grantees to have their recorded documents again registered in the new district on pain of holding their rights subject to those which might be acquired by bona fide purchasers. But it made no such provision, and we need not, therefore, inquire as to whether, had it done so, it would not have been necessary to give a reasonable time in which to have deeds and mortgages reindexed. The duty to transfer to the index was imposed on the clerk. No time was fixed within which it should be done. No penalty for its nonperformance was imposed on the holder of any instrument previously and duly recorded. Purchasers were charged with notice of territorial limits, and that Mayes's ranch had been in the old northern district at a time the registration office was located at Muskogee, and that there they must look to see whether, during that period, sales had been made or mortgages given on property then *located within the district. This is[186 in accord with the practice in the many instances in which counties have been subdivided. In none of which do we find that holders of mortgages on property falling in the new county lost their rights because of a failure to have them refiled, reindexed, or re-recorded at the new county seat.

This conclusion disposes of the case, because the other assignments of error relate to findings by the master to which the plaintiffs in error took no exception, but on which they were heard in the supreme court of Oklahoma, upon their application for a rehearing. In the rulings of that court, so far as they are subject to review on this writ, we find no error. As to those made when the mandate was returned to the district court, it is sufficient to say that they are all foreclosed by the refusal to permit plaintiffs in error to amend. For even if the decision of a state court having jurisdiction of a case transferred from a Federal court were subject to review here on a non-Federal question, we would not interfere with the discretion of the trial judge in permitting or refusing an amendment except in case of manifest error. Cf. Spencer v. Lapsley, 20 How. 267, 15 L. ed. 904. The judgment of the Supreme Court of Oklahoma is affirmed.

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*CHARLES H. SWIGART, E. McCul-[187
loch, and R. K. Tiffany, Appts.,

v.

D. P. BAKER.

(See S. C. Reporter's ed. 187-199.)

**Waters — irrigation — reclamation act — assessment for maintenance.**

The practical interpretation of the reclamation act of June 17, 1902 (32 Stat. at L. 389, chap. 1093), both by the Secretary of the Interior and by Congress in the acts

of March 6, 1906 (34 Stat. at L. 53, chap. 518), and March 1, 1907 (34 Stat. at L. 1037, chap. 2285), removes any doubt that the irrigable lands may be assessed with the annual cost of maintenance and operation under the authority conferred upon the Secretary by the former statute, to make the charges against the land within the irrigable limits, "with a view of returning to the reclamation fund the estimated cost of construction of the project."

[For other cases, see Waters, II. c; Statutes, II. e, in Digest Sup. Ct. 1908.]

[No. 944.]

Argued April 9 and 10, 1913. Decided May 26, 1913.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which, reversing a decree of the Circuit Court for the Eastern District of Washington, held that the Secretary of the Interior could not assess irrigable land under the reclamation act with the annual cost of maintenance and operation. Reversed, and decree of District Court affirmed.

See same case below, 199 Fed. 865.

The facts are stated in the opinion.

Assistant Attorney General Knaebel argued the cause, and, with Messrs. S. W. Williams and W. W. Dyar, filed a brief for appellants:

The right and duty of the Secretary to collect the cost of maintenance and operation are deducible from the reclamation act, or, to say the least, are not clearly precluded by its terms.

United States v. Cantrall, 176 Fed. 949.

The words which the legislature has employed are, in the first instance, to be taken in their common or literal sense, and that is the sense which preferably should be adopted by the courts; but it is entirely sound to say that it should never be adopted finally without first consulting the entire enactment, and comparing one part with another in the light of the conditions and circumstances out of which it was evolved, to the end that the dominating spirit and purpose may be revealed, and the whole statute read in harmony with them if possible.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 293, 52 L. ed. 208, 215, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; United States v. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728; People ex rel. Wood v. Lacombe, 99 N. Y. 49, 1 N. E. 599; Church of Holy Trinity v. United States, 143 U. S. 457, 459, 36 L. ed. 226, 228, 12 Sup. Ct. Rep. 511; Maxwell, Interpretation of Statutes, 5th ed. p. 30.

In testing the correctness of the court's conclusions, particular attention should be directed to the result of their acceptance,—the appropriation of millions of dollars of public moneys for the immediate benefit of private landowners and entrymen; and due weight should constantly be given to the rule of strict interpretation, which is always to be applied, in such cases, in favor of the government.

Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 400; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 740, 23 L. ed. 634, 637; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 562, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689; Slidell v. Grandjean, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; United States v. Michigan, 190 U. S. 379, 401, 47 L. ed. 1103, 1111, 23 Sup. Ct. Rep. 742.

The expression, "cost of construction of the project," may not unreasonably be extended so as to include the cost of maintenance and operation.

Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Atty. Gen. v. Boston, 142 Mass. 204, 7 N. E. 722; Pelham v. The B. F. Woolsey, 16 Fed. 418; Bell v. Maish, 137 Ind. 226, 36 N. E. 358, 1118; Atchison, T. & S. F. R. Co. v. McConnell, 25 Kan. 372.

Conceding, for the sake of the argument, that the cost referred to in the 4th section includes only what may be termed the original cost of irrigation works, it by no means follows that authority to collect the cost of maintenance and operation is *ipso facto* excluded.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 740, 23 L. ed. 637.

The explanations of the reclamation act, made to Congress at the time of its passage, the continuous and consistent construction of it by the Executive in enforcing it, and the subsequent legislation of Congress in amending and extending it, united in upholding the charges in question. The construction thus placed upon the enactment should be adopted by the court.

Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Robertson v. Downing, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; United States v. Freeman, 3 How. 556, 564, 11 L. ed. 724, 727; Alexander v. Alexandria, 5 Cranch, 1, 3 L. ed. 19; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Cope v. Cope, 137 U. S. 682, 687, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222.

If the power to make the charges in con-

troversy was withheld by the reclamation act, the subsequent legislation conferred it by amendment.

Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 331, 22 L. ed. 348, 351; Postmaster General v. Early, 12 Wheat. 136, 6 L. ed. 577; Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453.

Mr. W. T. Dovell argued the cause and filed a brief for appellee:

If there be no ambiguity in the act, there is no room for construction.

Hamilton v. Rathbone, 175 U. S. 421, 44 L. ed. 222, 20 Sup. Ct. Rep. 155; United States v. Goldenberg, 168 U. S. 102, 42 L. ed. 398, 18 Sup. Ct. Rep. 3; Lake County v. Rollins, 130 U. S. 670, 32 L. ed. 1063, 9 Sup. Ct. Rep. 651.

The Executive Department cannot create an ambiguity where none occurs, and upon this pretext insist that its misinterpretation shall define the law.

Cooley, Const. Lim. 7th ed. p. 105; Houghton v. Payne, 194 U. S. 99, 48 L. ed. 891, 24 Sup. Ct. Rep. 590; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; United States v. Alger, 152 U. S. 384, 38 L. ed. 488, 14 Sup. Ct. Rep. 635; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Fairbank v. United States, 181 U. S. 310, 45 L. ed. 873, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222.

Prior or subsequent legislation may be resorted to, to solve, but never to create, an ambiguity.

Hamilton v. Rathbone, 175 U. S. 419, 44 L. ed. 221, 20 Sup. Ct. Rep. 155; Koshkonong v. Burton, 104 U. S. 678, 26 L. ed. 890; Lewis's Sutherland Stat. Constr. 2d ed. § 447; Barnes v. Philadelphia & R. R. Co. 17 Wall. 307, 21 L. ed. 547; New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 662, 23 L. ed. 339.

Courts have uniformly refused to yield their functions, out of deference to the opinion of officers of other departments.

Deming v. McClaughry, 51 C. C. A. 349, 113 Fed. 639, affirmed in 186 U. S. 49, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786.

Reference to reports of committees is proper as an aid to construction, where there is any ambiguity.

Johnson v. Southern P. Co. 196 U. S. 20, 49 L. ed. 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. Fisher, 2 Cranch, 386, 2 L. ed. 313; Wadsworth v. Boysen, 78 C. C. A. 437, 148 Fed. 771; Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; Roberts v. Southern P. Co. 186 Fed. 938; Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240; United States v. Wilson, 58 Fed. 768; Ex parte Farley, 40 Fed. 66; Symonds v. St. Louis & S. E. R. Co. 192 Fed. 353.

Mr. Justice Lamar delivered the opinion of the court:

The Sunnyside Unit of the Yakima Irrigation Project was so far completed in 1909 that the Secretary of the Interior gave notice that water would be furnished for irrigation purposes, and that "the charges would be in *two parts: 1.[192 Building of the irrigation system, $52 per acre. . . . 2. For operation and maintenance, 95 cents per acre per annum." The appellee, Baker, applied for a water right and paid the assessed charges until 1911, when he refused to pay the 95 cents per acre for maintenance and operation, on the ground that the Secretary had no authority to make such an assessment. The reclamation officers thereupon threatened to cut off the supply of water, and Baker at once filed, in the United States circuit court for the eastern district of Washington, a bill against them, alleging that the charge for maintenance was illegal, that his crops would be destroyed if water was not furnished, and praying that the reclamation officers should be perpetually enjoined from cutting off the supply of water because of his failure to pay the illegal assessment.

The defendants in their answer set up that the charge of 95 cents per acre, per annum, for maintenance and operation, had been lawfully made by the Secretary of the Interior under the power conferred upon him by statute. The case was heard on bill and answer, and the bill dismissed. 196 Fed. 569. Baker took the case to the circuit court of appeals, where, one judge dissenting, the decree was reversed (199 Fed. 865) on the ground that the Secretary of the Interior could not assess irrigable land with the cost of maintenance and operation.

Since its adoption in 1902 the act has always been differently construed by the Secretary of the Interior, who, in granting water rights, has uniformly assessed the landowners with the cost of maintenance. The contrary construction by the circuit court of appeals raises a question of great importance to the owners of the land now irrigated. It is of equal importance to the government and to that part of the public interested in the reclamation of those portions of the arid region which can be irrigated as soon as funds are available. For, by so much as the fund is depleted in the

193]payment of *operating charges at one place, by so much is the reclamation of arid lands elsewhere postponed.

The statute provides that the cost of construction of the project shall be charged against the land within the irrigable limits. The phrase is not expressly defined, and being general in its terms, is not necessarily limited to building, but may include the preservation and maintenance of what has been built. For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes for its maintenance. Power to construct a dock imposed the duty of operating it. Permission to "construct internal improvements" warranted the purchase of a plant already built, and authority to construct a road conferred power to maintain it. Re Fowler, 53 N. Y. 60; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Atty. Gen. v. Boston, 142 Mass. 200, 7 N. E. 722; Pelham v. The B. F. Woolsey, 16 Fed. 418; Atchison, T. & S. F. R. Co. v. McConnell, 25 Kan. 372; Bell v. Maish, 137 Ind. 226, 36 N. E. 358, 1118; Weston v. Hancock County, 98 Miss. 800, 54 So. 307. So, in the present case the statute provides that the Secretary may assess "the cost of construction of the project" without defining the term, and it may assist in arriving at the legislative intent to refer briefly to the facts leading up to the passage of the reclamation act.

The official reports show that, in 1902, there were in sixteen states and territories 535,486,731 acres of public land still held by the government and subject to entry. A large part of this land was arid, and it was estimated that 35,000,000 acres could be profitably reclaimed by the construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise; or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was pro-194]posed *that the proceeds arising from the sale of all public lands in these sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works,—the cost of each project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the trust, it was again to be used for the construction of other works. Thus the fund, without diminution except for small and negligible *sums not properly* chargeable to any particular *project*, would be continually invested *and reinvested* in the reclamation of arid land. See H. R. Report No. 1463, 57th Congress, 1st session.

The general outline of this plan was approved by Congress, which, on June 17, 1902 (32 Stat. at L. 389, chap. 1093), passed "An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands." †

*The statute provided that the money[195 arising from the sales of the public lands

†The proceeds of the public land, less certain deductions, were, § 1, "reserved, set aside, and appropriated as a special fund in the Treasury, to be known as the 'Reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said states and territories, and for the payment of all other expenditures provided for in this act.

Sec. 5. The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the government the charges apportioned against such tract, as provided in section four. . . . The annual instalments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancelation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. . . .

Sec. 6. The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: Provided, That when the payments required by this act are made for the major portions of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the land irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress.

Sec. 10. The Secretary of the Interior is hereby authorized to perform any and all acts, and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

in these states and territories was to be known as the reclamation fund, and was to be used for the purpose of reclaiming arid lands. Provision was made for preliminary surveys, and when the Secretary determined that a project was practicable, he was authorized to make contracts for its construction, if there were funds available. The land capable of being irrigated was to be open only to homestead entry, and (§§ 4-6) the Secretary was then to give notice of the charges which should be made per acre and the number of instalments, not exceeding ten, in which the charges should be paid; these charges to be determined with a view of returning to the reclamation fund the estimated costs of the construction of the project, . . . and all moneys received from the above sources shall be paid into the reclamation fund. . . . The Secretary of the Interior is hereby authorized and directed to use the reclamation funds for the operation and maintenance of all reservoirs and irrigation works 196]constructed under the *provisions of this act; provided that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense; . . . Provided that the title to and management and operation of the reservoirs and works necessary for their protection and operation shall remain in the government until otherwise provided by Congress.

In pursuance of this act, various works, including that of the Sunnyside Unit of the Yakima Project, were constructed and notice was given of the charges that would be made. At first they were stated in a lump sum, cost of building, maintenance, and operation making up the total. After 1906, the charges were separately stated substantially thus: "1. For building, $— per acre; 2. For maintenance and operation, $— per acre per annum." †

1. The contention that this last item could not be assessed against the irrigated 197]land is based upon the fact *that § 4 authorizes the Secretary to make the estimated charges "with a view of repaying the cost of construction of the project." But an analysis of the act shows that the charges were not limited to the building of the dam or the digging of the canals, but included the purchase of land needed for reservoirs and everything chargeable to "the cost of construction of the project," which project was later to be turned over as a going concern to the landowners. The cost to the United States represented not only the expense of building, but of maintenance up to the time it was surrendered to the water users. And as the government collected no interest, the result would be that if the cost of maintenance was not returned, there would be a constant and heavy diminution of the reclamation fund. That fund was the proceeds of public land, and was not intended to be diminished for the benefit of any one project, but, without increase by interest, and undiminished by local expenses, was again to be used for constructing other works. The cost of surveying those projects which were not developed and the administrative expenses not chargeable to any particular project might not be repaid, but these sums were so small as to be negligible as against the fundamental idea of the bill, that the proceeds of public land as a trust fund should be kept intact, and again invested and reinvested for constructing new irrigation works. But if it should be taxed with cost of maintenance, it follows as a mere matter of mathematics that the reclamation fund would be greatly depleted, if not entirely consumed, and the proceeds of the public domain be thus diverted to the payment of local expenses.

2. If there could be any doubt as to the meaning of the statute, it disappears in the light of congressional construction which may properly be examined as an aid in its interpretation. Burridge v. Detroit, 117 Mich. 557, 42 L.R.A. 684, 72 Am. St. Rep. 582, 76 N. W. 84. The Secretary of the Interior annually made reports *to Con-[198 gress in which these charges of maintenance and operation were shown. No adverse action was taken as to these assessments by

†Examples of the form of notice showing such division of charges are to be found in "Report of Reclamation Service, 1908-1909," pp. 124, 130, 136, 163, 200. The notice for the Sunnyside Project recites that water "will be furnished from the Sunnyside Project under the provisions of the reclamation act . . . and the charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project are in two parts, as follows:

1. The building of the irrigation system, $52 per acre of irrigable land, payable in not more than 10 annual instalments. . . .

2. For operation and maintenance, which will as soon as the data are available be fixed in proportion to the amount of water used, with the minimum charge per acre of irrigable land whether water is used or not. The operation and maintenance charge for the irrigation season of 1909, and until further notice, will be 95 cents per acre of irrigable land, for which water is ready in the irrigation season of 1909, whether water is used thereon or not.

the Secretary. On the contrary, Congress in several instances showed that it construed the act in the same way. This distinctly appears in statutes providing a method by which irrigable lands in Indian reservations might be opened to entry and brought within the limits of an irrigation project. In these cases it was provided that the person taking up such land should pay the amount due to the Indians "*in addition to the charges for construction and maintenance of the irrigation system made payable into the reclamation fund by the provisions of the reclamation act.*" (Act March 6, 1906, 34 Stat. at L. 53, § 2, chap. 518.) A similar recital is found in the statute relating to the acquisition of irrigable land in the Blackfeet Reservation, where it was provided that if any such lands were "deemed practicable . . . [for an irrigation project under the provisions of the reclamation act] said lands shall be . . . disposed of under the provisions of said act, and settlers shall pay, *in addition to the cost of construction and maintenance provided therein*, the appraised value" of the Indian land. (March 1, 1907, 34 Stat. at L. 1037, chap. 2285.) See also 35 Stat. at L. 85, 558, 562, chaps. 153, 237; 36 Stat. at L. 835, chap. 407, U. S. Comp. Stat. Supp. 1911, p. 678.

3. It is argued that though these expressions show that Congress, in 1906 and 1907, thought that the cost of maintenance was chargeable under the reclamation act of 1902, yet no effect should be given to such legislative interpretation, since Congress is not authorized to exercise the judicial function, and has no power to construe existing statutes. But these acts of 1906 and 1907 were passed before the appellee, Baker, applied for his water rights in 1909, and there are cases (State v. Ohio Soldiers' & Sailors' Orphans' Home, 37 Ohio St. 279; Dequindre v. Williams, 31 Ind. 444) which would support a holding that this language, as to future transac-199]tions, was legislative in character *and incorporated these provisions into the original act. We refer to them, however, as we do to the notices given and charges made by the Secretary of the Interior, as showing the repeated and practical construction which has been given the statute from the beginning, and in the light of which many water rights have been granted and many hundred of thousands of dollars for maintenance paid to the government as a part of "the cost of construction of the project." This practical interpretation by Congress and the Secretary of the Interior accords with the provisions of the act, *taken in its entirety.*

*The decree of the* Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court.

Reversed.

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WILLIAM H. DILL, Plff. in Err.,
v.
WILLIAM H. EBEY, Receiver of the Citizens Bank & Trust Company of Stonewall.

(See S. C. Reporter's ed. 199–208.)

**Error to state court — frivolous Federal question.**

1. The provision of U. S. Rev. Stat. § 723, U. S. Comp. Stat. 1901, p. 583, that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law," is so plainly inapplicable to the practice in the United States court for the Indian territory, which, under the acts of March 1, 1889 (25 Stat. at L. 783, chap. 333), § 6, and May 2, 1890 (26 Stat. at L. 81, 95, chap. 182), § 31, is generally to conform to the Arkansas practice, that the assertion of a right thereunder, in a case brought in that court and later transferred to the Oklahoma courts, to have the case determined in equity, will not raise a substantial Federal question, such as, under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, will sustain a writ of error from the Federal Supreme Court to the Oklahoma supreme court.

[For other cases, see Appeal and Error, 1119-1137, in Digest Sup. Ct. 1908.]

**Error to state court — decision of Federal question — right to jury trial.**

2. No question of Federal right reviewable by the Federal Supreme Court by writ of error to the Oklahoma supreme court was raised by the act of the United States court for the Indian territory in overruling a demurrer by which defendant sought to assert a right under the Federal Constitution to a trial by jury, where, under the local practice, such an objection is not a ground for demurrer.

[For other cases, see Appeal and Error, 1351-1430, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — how raised.**

3. A judgment of the supreme court of Oklahoma in a case originally begun in

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NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

the United States court for the Indian territory is not reviewable in the Federal Supreme Court, under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, on the ground of a deprivation of the right to trial by jury, where such right was asserted in the territorial court by demurrer, in which, under the local practice, it had no proper place, and was first reiterated in a motion for new trial in the state court when there was no issue of fact to be tried.
[For other cases, see Appeal and Error, 1163-1243, in Digest Sup. Ct. 1908.]

[No. 191.]

Argued March 17, 1913. Decided May 26, 1913.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Okfuskee County, in that state, enforcing an unpaid subscription to the capital stock of a bank. Dismissed for want of jurisdiction.

See same case below, 27 Okla. 584, — L.R.A.(N.S.) —, 112 Pac. 973.

The facts are stated in the opinion.

Mr. Frank B. Burford argued the cause, and, with Mr. John H. Burford, filed a brief for plaintiff in error.

Mr. Fredric D. McKenney argued the cause, and, with Mr. Clinton A. Galbraith, filed a brief for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

This writ of error brings before us a judgment of the supreme court of the state of Oklahoma, affirming a judgment rendered by the district court of Okfuskee county, holding the plaintiff in error liable for the amount of an unpaid subscription made by him to the capital stock of a bank of which the defendant in error is the receiver.

The case is brought here under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227], and the jurisdictional question is raised.

The action was commenced in the United 201]States court *for the western district of the Indian territory on September 17, 1906, by Ebey, as receiver of the Citizens Bank & Trust Company, against Dill, the plaintiff in error, and four others, by the filing of a complaint in equity setting forth that the defendants had organized the bank and caused it to be incorporated for the purpose of transacting a general banking and trust business at Stonewall, in the Indian territory; that the articles of incorporation and certificate required by law were properly filed, setting forth the objects and purposes of the corporation, and reciting that the capital stock was $25,000, divided into shares of $25 each, and that $10,000 thereof had been actually paid in by the subscribers, who were the defendants, and that they had severally taken certain shares of stock, of which 80 shares, of the par value of $2,000 were issued to Dill; that he had not paid any part of this par value, or anything of value, for the stock subscribed for by and issued to him; that defendants organized the bank without any purpose or intent to pay for its capital stock, except $2,000 paid in by one of the other defendants, and that this latter sum was paid in with the distinct understanding that it should be returned, and it was returned, after the corporation became a going concern; that the bank was and is insolvent, and on the petition of one of its creditors the plaintiff was appointed by the United States court for the southern district of the Indian territory, receiver to take charge of all its property and effects, and administer them for the benefit of its creditors; that the liabilities, as shown by its books, were $15,179.02; that a great deal of its paper was worthless, and a very small sum could be realized from the same and the rest of its assets; that after six months' effort the plaintiff had only been able to collect on notes $60.50, and to realize on other property the sum of $100; that all of the capital stock represented as paid, namely, $10,000, and the assets in the hands of the plaintiff as *receiver, would not be sufficient to[202 pay the creditors; that on a partial presentation of these facts to the judge, an order was made, directing the plaintiff as receiver to institute proper proceedings against the defendants as subscribers to the capital stock, to recover the respective amounts remaining unpaid on said subscription, or for the stock issued to them, for the benefit of all the creditors of the bank, and that this suit was commenced in compliance with that order. "That the plaintiff has no adequate remedy at law, and unless this court takes jurisdiction of this suit in equity, he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions."

November 4, 1907, Dill filed a demurrer to the complaint, upon the following grounds: (a) That it did not state sufficient facts to authorize a court of equity to assume jurisdiction; (b) that it showed upon its face that plaintiff had a plain, adequate,

and complete remedy at law; and (c) that defendant was entitled to a trial by jury under the laws and Constitution of the United States, of which he would be deprived should the cause be tried in equity. The demurrer was overruled, and he took an exception.

Thereafter, and on November 16, 1907, by proclamation of the President (35 Stat. at L. 2160), the state of Oklahoma, including the former territory of Oklahoma and Indian territory, was admitted into the Union by virtue of the enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335). By § 20 of this act (34 Stat. at L. 277), as amended by act of March 4, 1907 (34 Stat. at L. 1287, chap. 2911), it was provided that all causes pending in the district courts of Oklahoma territory and in the United States courts in the Indian territory at the time said territories should become a state, not transferred to the United States 203] circuit or *district courts under previous sections, should be "proceeded with, held, and determined by the courts of said state, the successors of said district courts of the territory of Oklahoma, and the United States courts in the Indian territory; with the right to prosecute appeals or writs of error to the supreme or appellate court of said state, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such state to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a state to the Supreme Court of the United States."

Upon statehood, the present action was transferred to the district court of Okmulgee county, and the defendant Dill, now plaintiff in error, obtained its transfer from that court to the district court of Okfuskee county. There he answered upon the merits, admitting the organization and incorporation of the bank, and that he subscribed for 80 shares of its capital stock, but alleging that he paid the consideration therefor to the bank at the time, and denying any indebtedness to the plaintiff on the stock.

If any of the other defendants pleaded to the action, the transcript presented here does not show it. The cause, however, came on for trial before the court without a jury, the plaintiff, the defendant Dill, and another defendant named Malott, appearing respectively in person and by attorney. The issue as between the plaintiff and Malott was declared to be, whether the latter had in fact subscribed for 80 shares of the stock of the bank, for the par value of which the plaintiff sought to hold him liable. The trial court found in favor of the defendant Malott, and against the defendant Dill, and rendered a decree against the latter for $2,000, together with interest and costs.

*Dill moved for a new trial on sev-[204 eral grounds, the only one here significant being —"Error of the court in trying the said cause without submitting the same to a jury, when the parties thereto had not waived a jury trial."

This motion having been denied, he appealed to the supreme court of Oklahoma, renewing there the insistence that the cause of action alleged in the complaint was cognizable at law, and not in equity, and that under the Constitution and laws of the United States he was entitled to a trial by jury. The court overruled this contention, and on rehearing adhered to the same view, so that the judgment of the district court was affirmed (27 Okla. 584, — L.R.A. (N.S.) —, 112 Pac. 973), and the case comes here.

It is insisted that whatever rights or immunities under the laws of the United States had been asserted by defendant in the course of the litigation prior to statehood were preserved to him after statehood by the clause above quoted from § 20 of the enabling act, together with § 1, of the schedule to the state Constitution (Okla. Comp. Laws 1909, p. 137), the language of which is: "No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the changes in the forms of government, but all shall continue as if no change in the forms of government had taken place."

Without passing upon the soundness of this proposition, we may, for present purposes, assume it to be sound. Blanchard v. Ezell, 25 Okla. 434, 106 Pac. 960; Garnsey v. State, 4 Okla. Crim. Rep. 547, 38 L.R.A. (N.S.) 600, 112 Pac. 24; Pacific Mut. L. Ins. Co. v. Adams, 27 Okla. 496, 112 Pac. 1026; Choctaw Electric Co. v. Clark, 28 Okla. 399, 114 Pac. 730; St. Louis & S. F. R. Co. v. Cundlieff, 96 C. C. A. 211, 171 Fed. 319, 322.

Next, the insistence is that by his demurrer, filed before statehood, and specifying, as one of the grounds, that the plaintiff had "a plain, adequate, and complete remedy at law," the defendant clearly asserted a right or immunity under § 723, Rev. Stat. (U. S. Comp. Stat. 1901, p. 583), which declares that "suits in *equity shall not[205 be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This section, however, by its own terms, applies only to "courts of the United States;" and when afterwards a United

States court was established in the Indian territory by the act of March 1, 1889 (chap. 333, 25 Stat. at L. 783), it was by the 6th section enacted "that the provision of chapter eighteen, title thirteen, of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 680), shall govern such court, so far as applicable; Provided, That the practice, pleadings, and forms of proceedings in civil causes shall conform, as near as may be, to the practice, pleadings, and forms of proceeding existing at the time in like causes in the courts of record of the state of Arkansas, any rule of court to the contrary notwithstanding." Chapter 18 of title 13, Rev. Stat., includes some sections prescribing the forms of procedure, but not § 723. However, the proviso making the practice, pleadings, and forms of procedure conformable to those existing in the state of Arkansas must, of course, be given effect. Moreover, in the act of May 2, 1890, enlarging the jurisdiction of the court (chap. 182, 26 Stat. at L. 81, 95), it was in § 31 enacted that certain provisions of the Arkansas statutes, as contained in Mansfield's Digest of 1884, should be extended over and put in force in the Indian territory, among them being chapter 119, relating to pleadings and practice. That chapter (Mans. Dig. §§ 4914 etc.) abolishes forms of action; provides that there shall be but one form of civil action; enacts that the proceedings therein may be of two kinds, at law or in equity (§ 4925); that "an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket;" and (§ 4926) that such error may be corrected on motion. 206]Sec. 5028 provides that the *defendant may demur to the complaint for want of jurisdiction of the court over the person or the subject-matter, the plaintiff's want of legal capacity, the pendency of another action, a defect of parties, plaintiff or defendant, or "Fifth. That the complaint does not state facts sufficient to constitute a cause of action." Evidently, under this mode of pleading, the objection that the action is in equity, whereas it ought to be in law, is not a ground of demurrer. The liberality of the system is illustrated in Zufall v. United States, 1 Ind. Terr. 638, 643, 43 S. W. 760; Sparks v. Childers, 2 Ind. Terr. 187, 198, 47 S. W. 316; Hampton v. Mayes, 3 Ind. Terrr. 65, 72, 53 S. W. 483; Rogers v. Nidiffer, 5 Ind. Terr. 55, 58, 82 S. W. 673. In Indian Land & T. Co. v. Shoenfelt, 68 C. C. A. 196, 135 Fed. 484, the circuit court of appeals for the eighth circuit, in an action commenced by bill in equity in the United States court in the Indian territory, seems to have held that § 723, Rev. Stat., was applicable. But see a later decision by the same court in St. Louis & S. F. R. Co. v. Cundieff, 96 C. C. A. 211, 171 Fed. 319, 321.

Upon this question, we hold that if the demurrer may be deemed an assertion by the defendant of a right, under § 723, Rev. Stat., to have the case determined in equity, yet that section was so plainly inapplicable to the practice in the territorial court that no substantial Federal question is raised, such as would warrant a review here under § 709, Rev. Stat.

It is, however, next insisted that the demurrer amounted also to a demand for a trial by jury, and an assertion of a right thereto under the Federal Constitution (extended to the territory by chap. 182, § 31, 26 Stat. at L. 96); and that this right was denied by the subsequent decision of the state court, sustaining the judgment notwithstanding the demurrer.

We deem this untenable, for two reasons; *viz.*, (a) because the demurrer was not a proper demand for trial by jury; and (b) the right to such a trial, if it existed, and *was properly demanded prior to state-[207 hood, was subsequently waived.

(a) We have already pointed out that under the Code, as contained in Mansfield's Digest, the grounds of demurrer are limited, and the contention that defendant will be deprived of a jury trial is not one of them. Indeed, since a demurrer has the necessary effect of admitting the facts alleged in the complaint, a demand for a trial by jury is quite incongruous; for a jury has no function to perform where the facts are admitted. It is evident that, under the local practice, the court of the territory was warranted in overruling this ground of demurrer, and that no question of Federal right is raised by its action in doing so.

(b) As already pointed out, the defendant afterwards answered in the state court, denying the facts set up in the complaint. But he did not in his answer, nor at any other time, so far as the record discloses, demand a jury trial until after the court had found against him on the facts and rendered judgment accordingly. He did then move for a new trial upon the ground, among others, that there was error in trying the cause without submitting it to the jury, "when the parties thereto had not waived a jury trial."

While it is conceded that under Mansfield's Digest, § 5105, and also under § 5785 of the State Code (Okla. Comp. Laws 1909), a jury might be waived, it is insisted that since the case was tried after statehood, and pursuant to the procedure prescribed

by the state law, § 5808 (Okla. Comp. Laws 1909) applied, which prescribes the manner in which trial by jury may be waived; *viz.*, "By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal."

208] *The record shows no written consent, nor any entry upon the journal of oral consent. It does show that the action was in form an action in equity, normally triable without jury, and it further shows a trial of the issues before the court without a jury, in which trial the now plaintiff in error participated in person and by attorney, without taking any exception to the mode of trial.

The state courts did not pass upon the question whether, under the local practice, this amounted to a waiver of a demand for jury trial; both courts having entertained the view that the cause was properly brought in equity, in which case there was no right to trial by jury.

We deem it clear that in order to entitle himself to a review here under § 709, Rev. Stat., on the ground of a deprivation of the right to trial by jury, plaintiff in error should have "specially set up" his alleged right to trial by jury, plaintiff in error should not have relied upon a premature assertion of that right, contained in a demurrer, where it had no proper place, and not reiterated at any time when there was an issue of fact to be tried.

Writ of error dismissed.

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## JEROME E. MORSE, Appt.,
## v.
## UNITED STATES.

(See S. C. Reporter's ed. 208-212.)

**Navy — pay of retired officer — private relief act.**

The status of a naval officer retired for incapacity not originating in the line of duty was not changed to that of an officer retired for incapacity "incident to the service," so as to bring him within the provisions of the act of June 29, 1906 (34 Stat. at L. 554, chap. 3590, U. S. Comp. Stat. Supp. 1911, p. 383), for an increase in rank and pay, by the special act of June 10, 1902 (32 Stat. at L. 1444, chap. 1075), passed for the relief of such officer, authorizing and empowering the Secretary of the Navy to transfer such officer from the half-pay retired list to the three-quarters pay list, such transfer to take effect as of the passage of the act.

[For other cases, see Army and Navy, 72-82, in Digest Sup. Ct. 1908.]

[No. 274.]

Argued May 2, 1913. Decided May 26, 1913.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a retired naval officer for additional pay. Affirmed.

See same case below, 46 Ct. Cl. 361.

The facts are stated in the opinion.

Mr. George A. King argued the cause, and, with Mr. William B. King, filed a brief for appellant.

Mr. Frederick De Courcy Faust, Acting Assistant Attorney General, argued the cause and filed a brief for appellee.

Mr. Justice Pitney delivered the opinion of the court:

The question in this case is whether the appellant, an officer on the retired list of the Navy, is entitled to the difference between the retired pay of a lieutenant and that of a lieutenant commander, from the date of the passage of the act of June 29, 1906 (34 Stat. at L. 554, chap. 3590, U. S. Comp. Stat. Supp. 1911, p. 383). At the time of his retirement he held the rank of lieutenant. The act referred to provides that any officer not above the grade of captain, whose name is borne on the official register of the Navy, and having certain other qualifications that the appellant concededly possesses, "and who has heretofore been or may hereafter be retired on account of wounds or disability incident to the service . . . may, in the discretion of the President, by and with the *ad-[210 vice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement."

Appellant had served in the Navy during the Civil War, and thereafter until July 22, 1874, when he was retired on furlough pay upon approval by the President of the finding of a retiring board that he was incapacitated for performing the duties of his office, and that the incapacity did not originate in the line of duty. The retiring board acted under § 23 of the act of August 3, 1861 (12 Stat. at L. 291, chap. 42), now §§ 1448 to 1457 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1022-1024). Afterwards, and on July 17, 1878, under the provisions of § 1594, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1087); he was transferred by the President, with the consent

of the Senate, from the furlough to the retired-pay list, and thereafter received 50 per centum of the highest sea pay of his grade as lieutenant.

On June 26, 1902, he was transferred from the half-pay list to the three-quarters pay list, under the authority of a special act of Congress, approved June 10, 1902 (32 Stat. at L. 1444, chap. 1075), which reads as follows: "Be it enacted, etc., that the Secretary of the Navy be, and he is hereby, authorized and empowered to transfer Lieutenant Jerome E. Morse, of the retired list of the United States Navy, from the half-pay list to the seventy-five per centum pay list of retired officers, under section fifteen hundred and eighty-eight of the Revised Statutes of the United States; and the said transfer shall take effect as of the passage of this act."

The section of the Revised Statutes therein referred to is as follows: "Sec. 1588. The pay of all officers of the Navy who have been retired after fortyfive years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age 211] *of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement." U. S. Comp. Stat. 1901, p. 1086.

In January, 1907, appellant was nominated by the President for advancement to the grade of lieutenant commander on the retired list, in accordance with the provisions of the act of June 29, 1906, first above mentioned; the nomination was confirmed by the Senate, and the appellant was shortly afterwards advised in the usual mode by the Secretary of the Navy that he had been advanced from June 29, 1906, the date of the passage of the act.

The question is whether the appellant (having all other qualifications for advancement under the act referred to) is to be considered as having been retired for disability incident to the service; and this depends upon the question whether the special act of June 10, 1902, operated to change his status from that of an officer retired for incapacity not incident to the service, to that of an officer retired for incapacity incident to the service.

The court of claims resolved this question against the claimant (46 Ct. Cl. 361). This we think is correct. The case is in effect governed by Potts v. United States, 125 U. S. 173, 31 L. ed. 661, 8 Sup. Ct. Rep. 830, and United States v. Burchard, 125 U. S. 176, 31 L. ed. 662, 8 Sup. Ct. Rep. 832.

The argument to the contrary is based upon the act of June 10, 1902. Its title is —"An Act for the Relief of Lieutenant *Jerome E. Morse." This is invoked[212 as an aid in interpreting the meaning of the enactment. The query propounded is, "What was the relief that Congress intended to grant the claimant, unless it was relief from the consequences of the wrong and injustice that had been done him by the retiring board in 1874?" But this query begs the whole question. There is nothing in the record to show that any wrong or injustice was done by the action of the retiring board. The answer to the query is, we think, written in unmistakable terms in the act itself, and in § 1588, Rev. Stat., to which it refers. The intended relief consisted in an increase of pay, measured by the difference between half pay and three quarters pay, for the rank that he held at the time of his retirement; that is to say, for the rank of lieutenant.

The case differs widely from McLean v. United States, 226 U. S. 374, ante, 260, 33 Sup. Ct. Rep. 122, and is not controlled by it.

Judgment affirmed.

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CITIZENS NATIONAL BANK OF ROSWELL, NEW MEXICO, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, Appts.,

v.

GEORGE A. DAVISSON and Fay Etta Owens.

(See S. C. Reporter's ed. 212-225.)

**Vendor and purchaser— performance —vendee's default.**

1. The vendors in a contract for the sale of real property were absolved from any further performance of the conditions precedent on their part, where, before they were in default, the vendee repudiated and abandoned the contract without just cause, and gave up possession of the property and left the jurisdiction.

[For other cases, see Vendor and Purchaser, II., in Digest Sup. Ct. 1908.]

NOTE.—On statute of frauds as affecting parol variation of instrument—see note to Dolvin v. American Harrow Co. 28 L.R.A. (N.S.) 876.

**Contracts — parol modification.**

2. A verbal arrangement between the vendors and the vendee, made on or about the date fixed in the written contract of sale for final settlement, by which the vendors were allowed thirty or forty days' time in which to procure the judicial authorization of the sale which the vendee required, does not vary or modify the contract of sale, where such contract did not call for the passing of title on the date fixed unless the abstract showed good title, but provided that if it did not, and objections were pointed out by the purchaser, the vendors were to have at least ten days in which to cure his objections, and that if the title could not be made good "within such reasonable time," then it should be the duty of the vendors to perfect the title at their expense promptly, in accordance with the requirements of the vendee "within the time stated."

[For other cases, see Contracts, VI. b, in Digest Sup. Ct. 1908.]

**Escrow — duty of custodian — unauthorized delivery.**

3. A memorandum endorsed by the cashier of a bank upon an envelop containing a binding contract for the sale of land and the vendee's check, stating that the same were to be held "in escrow" until a specified date, pending the furnishing of an abstract of title, a favorable report thereon, and final settlement, is not the complete expression of the agreement of the parties, but must be read in connection with the contract of sale; and the bank, being a custodian or stakeholder for the benefit of both vendors and vendee, must answer to the vendors if it turns over the check or its equivalent to the vendee after the date fixed by the memorandum for final settlement, but while the vendors were doing all they were called upon under the contract to make a good title; and it is immaterial that no officer of the bank read the contract of sale or knew its terms.

[Matters as to escrow, see Escrow, in Digest Sup. Ct. 1908.]

[No. 551.]

Argued December 4, 1912. Decided May 26, 1913.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which, on a second appeal, affirmed the decree of the District Court of Chaves County in that territory, holding the custodian in an escrow agreement liable as a trustee for an unauthorized delivery of the deposited property. Affirmed.

See same case below, first appeal, 15 N. M. 680, 113 Pac. 598; second appeal, 16 N. M. 689, 120 Pac. 304.

*The facts* are stated in the opinion.

Mr. William C. Reid argued the cause, and, with Mr. James M. Hervey, filed a brief for appellants:

This case is practically before this court on the errors alleged to have been committed by the supreme court of New Mexico on the first appeal. The second trial and the second appeal were necessary in order to obtain a final judgment from which an appeal to this court might be taken. In such cases, the court will consider the errors committed on the first appeal.

United States v. Denver & R. G. R. Co. 191 U. S. 84, 48 L. ed. 106, 24 Sup. Ct. Rep 33; Zeckendorf v. Steinfeld, 225 U. S. 445, 56 L. ed. 1156, 32 Sup. Ct. Rep. 728.

The holder of an escrow can return the papers to one party to the escrow agreement, after default of the other party in meeting the conditions of the escrow agreement.

16 Cyc. 576, 584; 11 Am. & Eng. Enc. Law, 352; Humphreys v. Richmond & M. R. Co. 88 Va. 431, 13 S. E. 985; Burlington, C. R. & M. R. Co. v. Palmer, 42 Iowa, 222; Bodwell v. Webster, 13 Pick. 411; Hayden v. Meeks, — Ark. —, 14 S. W. 864; Equity Gaslight Co. v. McKeige, 139 N. Y. 237, 34 N. E. 898; Riggs v. Trees, 120 Ind. 402, 5 L.R.A. 696, 22 N. E. 254; Hoyt v. McLagan, 87 Iowa, 746, 55 N. W. 18.

The bank was a stranger to the alleged parol contract, but if, as assumed by the court, it is bound by it, it could only be so bound as a privy of Berryman, and the statute of frauds is available by parties to the contract, their representatives, and privies.

29 Am. & Eng. Enc. Law, 807.

The contract in question, being for the sale of land, is within the statute of frauds; and the district court on the second trial having found that a further conference was held in which it was orally agreed between Berryman and the estate that the latter should have thirty or forty days in which to secure an order of the court, this was a subsequent variation of the contract in writing by parol, which is not permissible.

Emerson v. Slater, 22 How. 42, 16 L. ed. 365; Swain v. Seamens, 9 Wall. 254–274, 19 L. ed. 554–560.

The effect of changing the time for performance of a written contract that was in escrow with the bank would be to make the entire contract a parol contract.

Kirchner v. Laughlin, 4 N. M. 394, 17 Pac. 132; Hasbrouck v. Tappen, 15 Johns. 200; Heisley v. Swanstrom, 40 Minn. 196, 41 N. W. 1029; Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110;

Abell v. Munson, 18 Mich. 306, 100 Am. Dec. 165; Cook v. Bell, 18 Mich. 389; 29 Am. & Eng. Enc. Law, 824, 825.

It is a general rule of law, with an exception only where the statute so provides, that part performance of a contract within the statute of frauds does not remove it from the operation of such statute.

20 Cyc. 289.

Oral promises to convey land gain no validity at law by reason of the taking possession of the land by the proposed purchaser.

20 Cyc. 296.

It is generally held that unless the contract expressly provides that a deed shall be made by a third person, it must be made by the vendor himself, even though the words of the contract are that the vendor shall execute the deed or cause it to be executed.

29 Am. & Eng. Enc. Law, 701; Warvelle, Vendors, § 419.

The rule "responsible over" can be applied only where the party against whom suit is brought is primarily liable.

Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427.

Mr. W. A. Dunn argued the cause, and, with Messrs. G. A. Richardson and Ed. S. Gibbany, filed a brief for appellees:

Even where time is declared to be of the essence of the contract, it may be waived by one for whose benefit the stipulation is made; as, for instance, where he recognizes the contract as still in force after the time for the performance has passed, or directs changes making a longer time necessary.

9 Cyc. 608; Brown v. Guarantee Trust & S. D. Co. 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127; Amoskeag Mfg. Co. v. United States, 17 Wall. 592, 21 L. ed. 715; McAlpine v. Reicheneker, 56 Kan. 100, 42 Pac. 339; Kent v. Church of St. Michael, 136 N. Y. 10, 18 L.R.A. 331, 32 Am. St. Rep. 693 32 N. E. 704; Welch v. Dutton, 79 Ill. 465.

The bank ought to be held to a knowledge of all the provisions of the "sales contract." That instrument was in its possession, in the same envelop from which it took a check to be cashed, and it had only to examine the paper to ascertain the contractual relations of the interested parties. If it wilfully shut its eyes to the means of knowledge when a controversy arose between the parties, it has no one to blame but itself. If a depository, bailee, or holder of an escrow negligently pays over or delivers a fund in its possession to the wrong person, it is guilty of conversion, and answerable therefor.

3 Am. & Eng. Enc. Law, 2d ed. 762; 9 Am. & Eng. Enc. Law, 2d ed. 291, 292; Southern R. Co. v. Atlanta Nat. Bank, 56 L.R.A. 546, 50 C. C. A. 558, 112 Fed. 861; Clarke v. Eureka County Bank, 123 Fed. 922; Kahaley v. Haley, 15 Wash. 678, 47 Pac. 23; Doty v. Hawkins, 6 N. H. 247, 25 Am. Dec. 459; Wells v. American Exp. Co. 55 Wis. 23, 42 Am. Rep. 695, 11 N. W. 537, 12 N. W. 441; McAnelly v. Chapman, 18 Tex. 198; Dusky v. Rudder, 80 Mo. 400; Bushnell v. Chautauqua County Nat. Bank, 74 N. Y. 290.

One who pays earnest money on a contract for the sale of lands cannot recover the same until he shows that he is willing to consummate the bargain made.

Brockhausen v. Bowes, 50 Ill. App. 98; Hausbrough v. Peck, 5 Wall. 497, 18 L. ed. 520; Glock v. Howard & W. Colony Co. 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; Johnson v. Puget Mill Co. 28 Wash. 515, 68 Pac. 867.

Where a person is responsible over, either by operation of law or express contract, to another, and has notice of a suit against the latter, and an opportunity to appear and defend, the judgment rendered in the action will be conclusive on him, whether he appear or not.

23 Cyc. 1270; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; American Bell Teleph. Co. v. National Improved Teleph. Co. 27 Fed. 663; Doty v. Hawkins, 6 N. H. 247, 25 Am. Dec. 459; Wells v. American Exp. Co. 55 Wis. 23, 42 Am. Rep. 695, 11 N. W. 537, 12 N. W. 441; McAnelly v. Chapman, 18 Tex. 198; Dusky v. Rudder, 80 Mo. 400; Bushnell v. Chautauqua County Nat. Bank, 74 N. Y. 290.

Mr. Justice Pitney delivered the opinion of the court:

This action was brought in the first instance in the district court of Chaves county, in the then territory of New Mexico, by Davisson, as plaintiff, against the Citizens National Bank of Roswell and Mrs. Owens, as defendants. He set up a claim to be paid $5,000 as commissions on a sale of real and personal property made by him as broker in her behalf to one C. C. Berryman, claiming a right to recover against the bank on the ground that Mrs. Owens had given to him a written order directed to the bank for payment of the $5,000 out of money of hers that was in the hands of the bank. Mrs. Owens answered for herself and others as executors of Solon B. Owens, deceased, denying liability to Davisson, on the ground that the sale in question had not been consummated; and, by a cross complaint against the bank, she set up that a contract of sale was made by her in behalf of the executors of Solon B. Owens

deceased, with Berryman, and, upon its execution, the sum of $9,173.32 was, by agreement of the parties, deposited in the bank, together with a copy of the agreement; that after examination of the title by Berryman, he required the executors to procure an order of court, authorizing them to sell and convey the land, whereupon it was agreed that the time for the conveyance of the title should be extended until such date as the executors should be able to obtain the order so required, and that in the meantime Berryman should enter into 216] *possession of the land, and he did go into possession thereof; that afterwards Berryman abandoned the possession of the land and removed to his former home in Arkansas, and because of his not being within the jurisdiction of the territory, the executors could not obtain service of process upon him, nor sue him for specific performance of the contract of sale; that under the provisions of the contract the executors had elected to declare said $9,173.32 forfeited by the failure and refusal of Berryman to carry out the contract; wherefore judgment was prayed against the bank as trustee for the executors with respect to the money in question. The bank answered both the complaint and the cross complaint, not denying the making of the contract between Mrs. Owens and Berryman, but denying that it was a party thereto or had any knowledge thereof or concern therewith, and asserting that the $9,173.32 was deposited with the bank by Berryman in escrow, and subject only to the terms of a written memorandum or agreement signed by the bank's cashier; and that because these terms had not been complied with by Mrs. Owens, the responsibility of the bank to her had been terminated, and therefore the bank had paid the whole of the sum of $9,173.32 to Berryman, in compliance with his demand.

Upon the issues thus joined, the parties proceeded to trial before the judge of the district court, without a jury, who rendered judgment in favor of the bank, dismissing both the complaint and the cross complaint.

Davisson and Mrs. Owens appealed to the supreme court of the territory, which court reversed the judgment and remanded the record to the district court with instructions to reinstate the action and proceed in accordance with the views expressed in the opinion. 15 N. M. 680, 113 Pac. 598. The grounds of decision, briefly, were that by the escrow agreement the bank became agent for both parties, that the memorandum did not 217]authorize it to pay over *the money to *either party, and* that in taking sides and *making payment* to Berryman it acted at its peril, and should be held responsible to Davisson and Mrs. Owens if, upon a retrial, they should sustain their right to the money as against Berryman.

The case was accordingly brought on again to trial before the district court, without a jury, with the result that judgment was rendered against the bank, in favor of Davisson, for $5,000 and interest (the amount of his commissions), and in favor of Mrs. Owens and the other executors of the estate of Solon B. Owens, deceased, for the residue of the $9,173.32. Upon appeal by the bank to the supreme court of the territory this judgment was affirmed (16 N. M. 689, 120 Pac. 304), and the bank appealed to this court.

Under the act of April 7, 1874, chap. 80, § 2 (18 Stat. at L. 27, 28), our review is confined to determining the question whether the facts found by the court below sustain the judgment. And these facts are to be certified to us by the territorial supreme court, either by adopting the findings of the trial court, or by making separate findings of its own. Stringfellow v. Cain, 99 U. S. 610, 613, 614, 25 L. ed. 421, 422; O'Reilly v. Campbell, 116 U. S. 418, 421, 29 L. ed. 669, 670, 6 Sup. Ct. Rep. 421; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 312, 40 L. ed. 436, 439, 16 Sup. Ct. Rep. 282; Gildersleeve v. New Mexico Min. Co. 161 U. S. 573, 577, 40 L. ed. 812, 813, 16 Sup. Ct. Rep. 663; Apache County v. Barth, 177 U. S. 538, 542, 547, 44 L. ed. 878, 879, 881, 20 Sup. Ct. Rep. 718; Crowe v. Trickey, 204 U. S. 228, 235, 51 L. ed. 454, 458, 27 Sup. Ct. Rep. 275; Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 54 L. ed. 1131, 31 Sup. Ct. Rep. 27; Zeckendorf v. Steinfeld, 225 U. S. 445, 448, 56 L. ed. 1156, 1160, 32 Sup. Ct. Rep. 728; Rosaly v. Graham y Frazer, 227 U. S. 584, 590, ante, 655, 33 Sup. Ct. Rep. 333.

The supreme court of the territory, in affirming the judgment of the district court, resulting from the second trial, adopted the findings of that court, and supplemented them with certain findings of its own. From these findings, and from the admissions of the pleadings, the essential facts of the case may be summarized as follows:

On August 21, 1908, Mrs. Owens, residing at Roswell, *Chaves county, New Mex-[218 ico, acting for herself and in behalf of others who were her coexecutors of the estate of her deceased husband, Solon B. Owens, made an agreement in writing with C. C. Berryman of Arkadelphia, Arkansas, for the sale to him of certain lands, belonging to the estate, situate in Chaves county, containing 360 acres, with the live stock and other personal property thereon. Davisson negotiated the sale as broker, and was entitled

to a commission of $5,000 for his services if the sale should be finally consummated.

The price agreed to be paid by the purchaser was $80,000, payable $10,000 in cash upon the making of the agreement (receipt whereof was acknowledged), $12,000 by assuming payment of a note for that amount held by an insurance company in Ohio, and not yet due, and the balance to be secured by five notes of $11,600 each, falling due September 10, 1909, and in the four successive years thereafter. The property was to be clear of all encumbrance excepting the $12,000 mortgage. By the terms of the agreement the party of the first part, within ten days from its date (that is, on or before August 31), was to furnish the party of the second part, at Roswell, a complete abstract of title showing a good merchantable title in the party of the first part; the purchaser was to have until September 10th to examine the abstract, and if it showed a good title, the transaction was to be closed at Roswell on or before September 10th, by the delivery of a warranty deed to the purchaser, he paying the consideration according to the terms of the agreement. There were the following additional clauses, which should be quoted in full:

"6th. If, upon examination of the said abstract of title, it is found that the title is not a good merchantable title, then any objections made to said title shall be pointed out by the party of the second part, and then the party of the first part shall have ten days in which to cure said objections. Should it prove, upon examination 219] *of said abstract, that the said title is not good, and same cannot be made good within such reasonable time, then it shall be the duty of the party of the first part to perfect said title at their expense, promptly, in accordance with the requirements of the party of the second part, within the time stated, and if the party of the first part fails, neglects, or refuses to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part, who shall repay at Roswell, New Mexico, such sum of money as is expended by the party of the second part in perfecting said title, and if, upon examination of said title, it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annulled, and the said $10,000 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part.

"7th. Now, if the party of the first part complies with this contract and furnishes the abstract as provided for, and the title is shown to be good or can be made good, and tenders to the party of the second part at Roswell, New Mexico, a warranty deed as provided for, and the party of the second part shall fail, neglect, or refuse to comply with this contract, shall fail to accept deed and execute the said notes as provided for, then, in such event, the party of the second part shall forfeit the said $10,000 paid, at the option of the party of the first part, or at his option, *and* the party of the first part shall have a cause of action against the party of the second part, enforceable in the courts of Chaves county, New Mexico, for a specific performance of contract.

"8th. Should the party of the second part, upon examination of said abstract, find the title to the said property good, and within the time stated stand willing and *able to consummate this deal, to pay[220 the balance of purchase money, and execute the notes as above provided for, and the party of the first part shall fail, neglect, or refuse to execute said warranty deed in accordance with this contract, then in such event, the party of the second part shall have a cause of action against the party of the first part, enforceable in the courts of Chaves county, New Mexico, for a specific performance of contract.

"9th. Possession of said property shall be given on or before the 10th day of September, 1908."

Upon the making of this written contract, it was folded and placed in an envelop, together with a check made by Berryman and payable to Mrs. Owens for the sum of $9,173.32, and the envelop and its contents were taken by Mrs. Owens, Davisson, and Berryman to the Citizens National Bank of Roswell, to be held by the bank "in escrow" until September 10th, pending the furnishing an abstract of title, a favorable report thereon, and final settlement. With the consent and approval of all the parties a memorandum was indorsed upon the envelop in the folowing terms: "Check inclosed to be held in escrow until September 10, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to Citizens Bank & Trust Company, Arkadelphia, Arkansas, for examination. No money to be paid over until abstract is approved by purchaser's attorneys. (Signed) J. J. Jaffa, Cashier."

Up to September 10th the Owens estate had not made good title to Berryman, and on or about that date it was orally agreed between them that the estate should have thirty or forty days' time in which to secure an order of court, and in consideration of this, Berryman, who was stopping on

expense at the hotel in Roswell, was put in possession of the property on September 10th, and he remained in possession thereof, exercising acts of ownership thereon until September 22d, on which date (the 221] *time agreed upon for securing an order of sale through the courts not having yet expired) Berryman, without just cause, repudiated and abandoned the contract and departed from the territory. Meanwhile, and in consideration of the verbal arrangement of September 10th, the estate took immediate steps at considerable expense to secure the required order of court, and did in fact secure it on October 5th. But at some time after September 10th (the precise date does not appear) Berryman demanded of the bank the return of his check. The bank had been notified by Davisson of the verbal agreement of September 10th, extending the time in which to perfect the title to the land, but had no other knowledge of this, and the granting of this extension was denied by Berryman. The bank complied with his demand and returned to him the check of $9,173.32, or its equivalent. It appears that no officer of the bank ever read the contract of sale or knew of its terms; and the bank, so far as appears, had no knowledge of what had taken place between Mrs. Owens and Berryman after the contract and check were left with it, except for Davisson's notification respecting the verbal arrangement made on September 10th. After the bank had turned over to Berryman the check or its equivalent, Mrs. Owens and Davisson demanded from the bank their respective shares of the money, and the demands not being complied with, the present action resulted. Berryman, being absent from the territory, was not joined as a party.

The fundamental proposition that underlies the whole argument for the appellants is that the bank had no concern with anything beyond the terms of the escrow, as manifested in the written memorandum indorsed upon the envelop. But this memorandum is evidently not a complete expression of the agreement between the parties, and indeed is unintelligible except by reference to the contract of sale. It does not 222]mention the names of the *parties or either of them; does not specify what "settlement" is to be made, nor where; does not state by whom "deed and abstract" are to be placed in escrow, nor when, nor for what purpose. Above all, and more important for the present purpose, it does not either state or intimate what is to be done with the check or money if settlement is not made on September 10th, or if abstract is not "approved by purchaser's attorney."

It is clear that the instrument of August 21st came into existence as a binding contract betwen the parties thereto at, if not before, the time it was lodged with the bank. We say this, notwithstanding the ambiguity of the findings in this regard; for the supreme court, after having stated that the parties "entered into" the contract, afterwards stated that "the contract itself was never delivered to either of the parties, other than being placed in escrow." Since the making of the contract was clearly averred in both the complaint and the cross complaint, and was not denied by the bank in its answer, it followed, under the local practice (Comp. Laws, N. M. 1897, § 2685, subsec. 67), that, for the purposes of this action, the averment must be taken as true.

And, on general principles, the findings are to be interpreted in the light of the issue. Reynolds v. Stockton, 140 U. S. 254, 268, 35 L. ed. 464, 468, 11 Sup. Ct. Rep. 773, and cases cited.

Therefore the deposit of the agreement and check with the bank was not technically an "escrow," in the sense that the agreement was not to take effect until performance of the condition. In the light of all the facts of the transaction, as shown by the findings, it is clear that the parties treated the agreement as in force between them. And the terms of the memorandum indorsed on the envelop are consistent with this.

The contract of August 21, 1908, being in force as a contract between the parties, it is plain that the memorandum indorsed upon the envelop was not intended to modify its provisions.

*Upon the whole case, we are clear[223 that the effect of the deposit of the contract and check with the bank was to constitute it a custodian or stakeholder for the benefit of both parties, holding the money without right or interest in it, bound above all things not to take sides between the parties, and answerable ultimately to the one or the other, according to their respective rights as between themselves.

The indorsement upon the envelop was a mere memorandum, not containing any clear expression respecting the agreement of the parties, and evidently unintelligible unless read in connection with the contract of sale. Quite as manifestly the deposit had no reason for existence except in aid of that contract, and as a protection to both contracting parties.

The fact that no officer of the bank read this contract or knew of its terms is of no avail to the bank. By the very circumstances of the deposit it was put upon notice that it was assuming a duty that could

not be fully understood or fairly performed without a knowledge of the contents of the contract; it had possession of that instrument, with full opportunity to examine it; except for its own negligence it would have known the terms thereof. To permit it now to set up its own ignorance as an excuse or justification of its conduct in violating the rights of one of the parties to the contract would be to permit it to take advantage of its own wrong.

Berryman's check to the order of Mrs. Owens for $9,173.32, having been deposited as a substitute for the cash payment of $10,000, called for by the agreement of August 21, was, of course, subject to be forfeited under the terms of the agreement as above recited, in the event that Berryman failed to comply with his contract.

The facts found show that while the vendors were doing what he had required them to do, and, so far as appears, all that they were called upon to do, to make a 224] *good title under the contract, be repudiated and abandoned it, without just cause, gave up possession of the property, and departed from the territory. On familiar principles, this absolved the Owens' estate from any further performance of conditions precedent on their part. Roehm v. Horst, 178 U. S. 1, 8, 16, 44 L. ed. 953, 956, 959, 20 Sup. Ct. Rep. 780, and cases cited; O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; Holt v. United Secur. L. Ins. & T. Co. 74 N. J. L. 795, 801, 11 L.R.A.(N.S.) 100, 67 Atl. 118, 12 Ann. Cas. 1105; 76 N. J. L. 585, 590, 21 L.R.A. (N.S.) 691, 72 Atl. 301.

It is contended that the verbal arrangement made between the Owens executors and Berryman on or about September 10th, for an allowance of time within which to procure the court order, was an attempt to vary the written contract, and that this could not be done without writing, because of the statute of frauds. Emerson v. Slater, 22 How. 28, 42, 16 L. ed. 360, 365; Swain v. Seamens, 9 Wall. 254, 272, 19 L. ed. 554, 559.

Without stopping to inquire as to the bearing of the statute, a sufficient answer to this point is that the verbal arrangement of September 10th was not variant from, and therefore did not have the effect of modifying, the written agreement of August 21st. That agreement did not call for the passing of title on or before September 10th, unless the abstract showed a good title; if it did not, and objections were pointed out by the purchaser, the vendors were to have at least ten days in which to cure his objections; and if the title could not be made good "within such reasonable time" (evidently referring to the ten days) "then it shall be the duty of the party of the first part to perfect said title at their expense, promptly, in accordance with the requirements of the party of the second part, within the time stated; and if the party of the first part fails, etc., to perfect said title in accordance with the requirements of the party of the second part, then the party of the second part shall have the right to perfect said title at the expense of the party of the first part, who shall repay," etc.

*The contract did not fix any speci-[225 fied time, upon the expiration of which Berryman was entitled to treat it as being at an end. It foresaw possible delays respecting the perfection of the title, and contemplated a verbal agreement allowing to the vendors a reasonable time for this purpose. The verbal arrangement, allowing to the executors "thirty or forty days' time in which to procure an order of court," was in effect a "stating of time" by Berryman, within which his "requirements" should be complied with, as provided by the sixth paragraph of the written agreement.

That instrument stated what should be deemed sufficient ground for an annulment of the sale, and a return to Berryman of the $10,000, paid on account of the purchase money, and did not set any time limit, the language being: "And if, upon examination of said title, it shall be shown that the title to the said property is not good and cannot be made good, then in such event this sale shall be annulled and the said $10,000 paid as purchase money hereinbefore provided for shall be returned by the party of the first part to the party of the second part." Berryman, having himself repudiated the contract before any default was made by the vendors, thereby dispensed with a tender or further performance on their part, and forfeited to them the money deposited.

The bank, with fair notice of this, and in violation of its duty of acting impartially between the parties, paid the money over to Berryman, and thereby became liable to respond to the executors, in whose behalf the contract was made by Mrs. Owens, and who were represented by her in this action.

It follows that the facts fairly sustain the judgment of the court below. Upon this appeal no controversy is raised as between Davisson and the executors.

Judgment affirmed.

226] *UNITED STATES, Plff. in Err.,
v.
BOB WRIGHT.

(See S. C. Reporter's ed. 226-238.)

**Indians — Federal regulation — intoxicating liquors — implied repeal.**

1. An intent to effect the complete repeal of the prohibitions of the act of March 1, 1895 (28 Stat. at L. 693, chap. 145), § 8, against the bringing of intoxicating liquors into the Indian territory, cannot be inferred from the provisions of the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), punishing sales of intoxicants to Indian allottees, or their introduction into the Indian country, the later act not mentioning the earlier one, although containing an express repealing clause.

[For other cases, see Indians, II.; Statutes, III. d, in Digest Sup. Ct. 1908.]

**Indians — Federal regulation — intoxicating liquors — implied repeal.**

2. The prohibition against the introduction and sale of intoxicating liquors in the Indian country, made by the act of July 23, 1892 (27 Stat. at L. 260, chap. 234), amendatory of U. S. Rev. Stat. § 2139, was not superseded, so far as the Indian territory was concerned, by the act of March 1, 1895, made specially applicable to such territory by name, and covering by its 8th section the general subject of the introduction and sale of intoxicating liquors therein, but declaring in its 13th section that laws theretofore put in force in the Indian territory shall remain in full force and effect unless in conflict therewith.

[For other cases, see Indians, II.; Statutes, III. d, in Digest Sup. Ct. 1908.]

**Indians — Federal regulation — intoxicating liquors — implied repeal — admission of state.**

3. The existing prohibitions against the introduction of intoxicating liquors into the Indian country, made by U. S. Rev. Stat. § 2139, as amended by the acts of July 23, 1892, and January 30, 1897, were not superseded as to transactions wholly within the state by the admission of Oklahoma into the Union under the enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), which, in addition to a requirement that the state Constitution should prohibit the manufacture and sale of intoxicants in that part of the proposed state known as the Indian territory, and their shipment from other parts of the state into such protected territory, contained a reservation to the government of the United States of authority to make laws and regulations in the future respecting the Indians, and declared that the laws of the United States not locally inapplicable shall have the same force and effect within the state as elsewhere within the United States.

[For other cases, see Indians, II.; State, XI.; Statutes, III. b, in Digest Sup. Ct. 1908.]

[No. 918.]

Argued April 11, 1913. Decided May 26, 1913.

IN ERROR to the District Court of the United States for the Eastern District of Oklahoma to review a judgment sustaining a demurrer to an indictment charging the introduction of intoxicating liquors into the Indian country. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Denison argued the cause and filed a brief for plaintiff in error:

The utmost effect which the Indian territory prohibition act could have had upon the other series of statutes constituting the general rule throughout the United States as to Indian country would have been merely to effect an exception from that general rule.

Chicago, M. & St. P. R. Co. v. United States, 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194; Frost v. Wenie, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. Rep. 532; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; South Carolina v. Stoll, 17 Wall. 425, 21 L. ed. 650.

The supposed exception was repealed by the Oklahoma enabling act (Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769), and the repeal wiped out the exception, and left the general acts free in their operation.

Chicago, M. & St. P. R. Co. v. United States, 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194; 1 Sutherland, Stat. Constr. 2d ed. §§ 275, 295.

Furthermore, the Indian territory prohibition act never created any such exception, but both acts were applicable to Oklahoma.

United States Exp. Co. v. Friedman, 112 C. C. A. 219, 191 Fed. 673; Mosier v. United States, 117 C. C. A. 162, 198 Fed. 54; Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 497, 50 L. ed. 281, 286, 26 Sup. Ct. Rep. 133; Chicago, M. & St. P. R. Co. v. United States 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194; The Industry, 1 Gall. 114, Fed. Cas. No. 7,028; The John C. Brooks, 3 Ware, 273, Fed. Cas. No. 7,336; Wood v. United States, 16 Pet. 342, 362, 10 L. ed. 987, 995; Great Northern R. Co. v. United States, 84 C. C. A. 93, 155 Fed. 945; Me-

NOTE.—On repeal of statute by implication—see note to United States v. 356 *Cadies of Tobacco*, 20 L. ed. U. S. 235.

Chord v. Louisville & N. R. Co. 183 U. S. 500, 46 L. ed. 297, 22 Sup. Ct. Rep. 165; Harford v. United States, 8 Cranch, 109, 3 L. ed. 504; Ex parte Yerger, 8 Wall. 85, 105, 19 L. ed. 332, 339; United States v. Buckles, 6 Ind. Terr. 319, 97 S. W. 1022; Bishop, Stat. Crimes, 3d ed. § 160.

It might well be that the Indian territory prohibition act operated to create an aggravated degree of the offense created by the general Indian intercourse acts, just as robbery, for instance, is an assault committed under peculiar circumstances of aggravation. If that were so, an offender might be convicted under either the simpler or the aggravated form, at the election of the prosecuting power; but a prosecution for either would presumably exempt from prosecution under the other.

Bishop, Statutory Crimes, §§ 171, 172; English Statutory Interpretations Act 52 & 53 Vict. chap. 63, § 33.

The enabling act did not except the state of Oklahoma from the operation of the general Indian intercourse acts concerning liquor, and those acts are applicable to that state just as they are to every other state in the Union.

Mosier v. United States, 117 C. C. A. 162, 198 Fed. 54; Ex parte Webb, 225 U. S. 663, 683, 56 L. ed. 1248, 1256, 32 Sup. Ct. Rep. 769; Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 497, 50 L. ed. 281, 286, 26 Sup. Ct. Rep. 133; Frost v. Wenie, 157 U. S. 46, 59, 39 L. ed. 614, 619, 15 Sup. Ct. Rep. 532; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93.

Mr. James C. Denton argued the cause and filed a brief for defendant in error:

The legislative meaning is to be extracted from the consideration of a statute as a whole.

Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 638, 23 L. ed. 995, 996, 13 Mor. Min. Rep. 204; Kohlsaat v. Murphy, 96 U. S. 153, 159, 24 L. ed. 844, 846.

In construing a statute, the existing law, the history of the times, and the circumstances existing at the time of its enactment, are to be considered.

Welch v. Cook, 97 U. S. 541, 543, 24 L. ed. 1112, 1113; The Delaware, 161 U. S. 459, 472, 40 L. ed. 771, 776, 16 Sup. Ct. Rep. 516; Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155; Dewey v. United States, 178 U. S. 510, 520, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981.

Also the history of a statute from the time it is introduced until it is finally passed may be referred to as an aid to its construction.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

Although the later act does not specifically refer to prior acts, but declares that all laws in conflict therewith are repealed, if it comprehend and be variant from the prior act, the legislature must be assumed to intend it as a substitute for and a repeal of the prior act.

Hess v. Reynolds, 113 U. S. 73, 79, 28 L. ed. 927, 929, 5 Sup. Ct. Rep. 377; United States v. Auffmordt, 122 U. S. 197, 208, 30 L. ed. 1182, 1184, 7 Sup. Ct. Rep. 1182; Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207; Tom Hong v. United States, 193 U. S. 517, 48 L. ed. 772, 24 Sup. Ct. Rep. 517; Gibson v. United States, 194 U. S. 182, 48 L. ed. 926, 24 Sup. Ct. Rep. 613; Lowe v. United States, 194 U. S. 193, 48 L. ed. 931, 24 Sup. Ct. Rep. 617; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 401, 25 L. ed. 231, 232.

While it is a rule of statutory construction that a statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute (Ex parte Crow Dog [Ex parte Kang-Gi-Shun-Ca] 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; United States v. Nix, 189 U. S. 199, 205, 47 L. ed. 775, 777, 23 Sup. Ct. Rep. 495); or, in other words, where there are two statutes, the earlier special and the later general, the terms of the general broad enough to include the matter provided for in the special,—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general (Rodgers v. United States, 185 U. S. 83, 87, 46 L. ed. 820, 818, 22 Sup. Ct. Rep. 582; Minnesota v. Hitchcock, 185 U. S. 373, 397, 46 L. ed. 954, 966, 22 Sup. Ct. Rep. 650); one as the general law of the land, the other as the law of the particular case (South Carolina v. Stoll, 17 Wall. 425, 21 L. ed. 650). Yet it is also a canon of statutory construction, that a prior special law which is merely temporary and provisional is repealed by a subsequent perpetual law intended as a complete system of government (Eckloff v. District of Columbia, 135 U. S. 240, 34 L. ed. 120, 10 Sup. Ct. Rep. 752; District of Columbia v. Hutton, 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369).

Since the 1897 act is a complete revision of the subject of the sale of intoxicating liquors to Indians and their introduction into Indian country, it might be said, unless a contrary intention appeared, to repeal all prior acts on that subject. (United States v. Ranlett, 172 U. S. 133, 140, 43 L. ed. 393, 395, 19 Sup. Ct. Rep. 114.) Con-

tainly no repealing clause was necessary in the 1897 act to repeal that part of the act of 1892 which was inconsistent therewith.

Henderson's Tobacco, 11 Wall. 652, 657, 20 L. ed. 235, 237; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 128, 43 L. ed. 637, 639, 19 Sup. Ct. Rep. 327.

Thus the repealing clause tends to show that it was the intention of Congress that the 1897 act, together with the special provisions of the 1892 act governing the venue of complaints in Indian territory, should constitute a general law dealing with the introduction and sale of intoxicating liquors in Indian country, and that it should apply in Indian territory. Therefore the 1895 act must have been repealed by the 1897 act, since the latter act in no way preserves the former act in force, and since the 1897 act is a complete revision of the subject of the sale to Indians, and of the introduction, in the Indian country, of intoxicating liquors.

Cook County Nat. Bank v. United States, 107 U. S. 445, 451, 27 L. ed. 537, 539, 2 Sup. Ct. Rep. 561; Murphy v. Utter, 186 U. S. 95, 105, 46 L. ed. 1070, 1076, 22 Sup. Ct. Rep. 776; The Habana, 175 U. S. 677, 685, 44 L. ed. 320, 323, 20 Sup. Ct. Rep. 290; United States v. Rider, 163 U. S. 132, 140, 41 L. ed. 101, 104, 16 Sup. Ct. Rep. 983; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. ed. 651, 23 Sup. Ct. Rep. 452.

Section 7 of the act of February 28, 1902, amounts practically to a legislative construction by Congress that the 1897 act, and not the act of 1895, was in force in Indian territory in 1902. And this construction should be considered in construing the act.

Cope v. Cope, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222; United States v. Freeman, 3 How. 556, 564, 11 L. ed. 724, 727; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 22 L. ed. 348; United States v. Pitman, 147 U. S. 669, 671, 37 L. ed. 324, 325, 13 Sup. Ct. Rep. 425.

When it is remembered that the 1895 act was a temporary territorial act designed to cover Indian territory during the period immediately preceding statehood, it would seem that it would require some express enactment of Congress to retain it in force after statehood.

De Lima v. Bidwell, 182 U. S. 1, 197, 45 L. ed. 1041, 1056, 21 Sup. Ct. Rep. 743; McNulty v. Batty, 10 How. 72, 13 L. ed. 333.

Under the allegations of the indictment, the introduction of the one quart of intoxicating liquor into Muskogee county and the eastern judicial district of the state of Oklahoma could have been made from Oklahoma city, which is located within the old Oklahoma territory part of the state. This would not be an offense under the 1895 act as repealed by the enabling act. Hence the indictment is bad and the demurrer should have been sustained.

22 Cyc. 335; United States v. Hess, 124 U. S. 483, 486, 31 L. ed. 516, 517, 8 Sup. Ct. Rep. 571; Pettibone v. United States, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; United States v. Mann, 95 U. S. 580, 583, 24 L. ed. 531, 532.

Indian country, within the meaning of the general statutes of the United States, and especially within the meaning of that term as used in those sections of the Revised Statutes which were originally a part of the act of June 30, 1834, is lands held by the Indians in common under the Indian title; and when the Indian title is extinguished, such lands *ipso facto* cease to be Indian country without an act of Congress.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 561, 27 L. ed. 1032, 3 Sup. Ct. Rep. 396; Clairmont v. United States, 225 U. S. 551, 56 L. ed. 1201, 32 Sup. Ct. Rep. 787.

Mr. Justice Pitney delivered the opinion of the court:

The defendant in error was indicted in the United States district court for the eastern district of Oklahoma, the charge being that—"on the 19th day of March, in the year 1912, in the county of Muskogee, in the said *district, and within the jurisdic-[227 tion of said court, the said county and district then and there being a portion of the Indian country of the said United States, (he) did at the time and place aforesaid, unlawfully, wilfully, knowingly, and feloniously introduce into said Indian country one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to wit, whisky. Contrary to the form of the statute in such case made and provided," etc.

The district court sustained his demurrer, and the case is brought here under the criminal appeals act.

The statutes involved are: § 2139 of the Revised Statutes, as amended by the act of July 23, 1892, (chap. 234, 27 Stat. at L. 260), and by the act of January 30, 1897 (chap. 109, 29 Stat. at L. 506); also § 8 of the act of March 1, 1895 (chap. 145, 28 Stat. at L. 693); and the Oklahoma enabling act of June 16, 1906 (chap. 3335, 34 Stat. at L. 267). Extracts from these are set forth in footnotes to the opinion in Ex parte Webb, 225 U. S. 663, 671, 677, 56 L. ed. 1248, 1251, 1254, 32 Sup. Ct. Rep. 769 Musko-

gee county is a part of what was the Indian territory.

The district court in effect construed the indictment as charging, not an interstate transaction, but an introduction of liquor from a point within the state of Oklahoma, but outside of what is now Indian country, into such Indian country. The decision of this court in the Webb Case, which had to do with § 8 of the act of March 1, 1895, and the effect of the enabling act upon it; and also the decision of the circuit court of appeals for the eighth circuit in United States Exp. Co. v. Friedman, 112 C. C. A. 219, 191 Fed. 673, and Mosier v. United States, 117 C. C. A. 162, 198 Fed. 54,—both of which turned upon the effect of the enabling act upon the act of January 30, 1897,—were reviewed by the district court, and the conclusion reached, principally because of the line of reasoning expressed in the opinion in the Webb Case, was "that the provisions of Rev. Stat. § 2139, as amended by the act of 1892 and the act of 1897, so far as they related, if at all, to 228] the introduction *of liquor into the Indian territory from points outside of that territory, but within what is now Oklahoma, must be considered as having been repealed by the enabling act."

And again: "This confines offenses of this character, of which the Federal court had jurisdiction, to those in which the liquor is introduced from a point without the state. It is a violation of the state law, as established by the constitutional provision above referred to, to introduce liquor into what was formerly Indian Territory from some other portion of Oklahoma, but such violation is an offense exclusively within the jurisdiction of the state court. In order to give the Federal court jurisdiction, it is necessary that the introduction of the liquor should have been from a point without the state. This is an essential element of the offense, so far as the Federal court is concerned, and should therefore be charged in the indictment. It follows that the demurrer must be sustained."

The criminal appeals act (chap. 2564, 34 Stat. at L. 1246) provides for a writ of error, to be taken by the United States from the district court direct to this court, from a decision or judgment sustaining a demurrer to an indictment, "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." The present case is clearly within this act, as previously interpreted and applied. United States v. Sutton, 215 U. S. 291, 294, 54 L. ed. 200, 201, 30 Sup. Ct. Rep. 116; United States v Keitel, 211 U. S. 370, 385, 53 L. ed. 230, 239, 29 Sup. Ct. Rep. 123; United States v. Biggs, 211 U. S. 507, 518, 53 L. ed. 305, 309, 29 Sup. Ct. Rep. 181; United States v. Stevenson, 215 U. S. 190, 195, 54 L. ed. 153, 155, 30 Sup. Ct. Rep. 35; United States v. Miller, 223 U. S. 599, 602, 56 L. ed. 568, 569, 32 Sup. Ct. Rep. 323; United States v. Patten, 226 U. S. 525, 535, ante, 333, 338, 33 Sup. Ct. Rep. 141; United States v. George, 228 U. S. 14, 17, ante, 712, 713, 33 Sup. Ct. Rep. 412; United States v. Anderson, 228 U. S. 52, ante, 727, 33 Sup. Ct. Rep. 500; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 100, ante, 742, 746, 33 Sup. Ct. Rep. 443.

Upon the merits, the principal question is whether the acts of 1892 and of 1897 were repealed, as to intrastate *transac-[229 tions, by the effect of the enabling act and the admission of the state, with the constitutional prohibition of the liquor traffic that was prescribed by that act. It is not contended that there was any express repeal. The insistence that there was a necessary repeal by implication is supported by arguments that may be outlined as follows:

(a) That since the act of 1895 was a special act, applicable by name to the Indian territory, it had the necessary effect of superseding as to that territory the existing general statute (§ 2139, Rev. Stat., as amended in 1892) against the introduction and sale of intoxicating liquors in the Indian country.

(b) That § 8 of the act of 1895 was in turn superseded or repealed *in toto* by the act of 1897 and the enabling act.

(c) Or else, that the act of 1897, because amendatory only of the general statute against the introduction and sale of intoxicating liquors in the Indian country, had no effect upon the act of 1895, and did not apply to the Indian territory because that territory was covered by the act of 1895.

(d) And that whether the acts of 1892 and 1897, or either of them, was in force in Indian territory prior to the admission of Oklahoma as a state, they were necessarily superseded as to intrastate transactions by the force and effect of that act, upon the same grounds on which this court said in the Webb Case that the act of 1895 was superseded.

Section 2139, Rev. Stat., providing for the punishment of persons introducing liquor into the Indian country, traces its origin to § 20 of the Indian intercourse act of June 30, 1834 (chap. 161, 4 Stat. at L. 732), as amended by act of March 15, 1864 (chap. 33, 13 Stat. at L. 29). The amendment of 1892 (set forth in 225 U. S. 671) extended the prohibition to include ale, beer, and intoxicating liquors of any

kind, as well as ardent spirits and wine, 230]and added a clause *fixing the venue for complaints, arrests, and trials, including a special provision that complaints for offenses committed in the Indian territory should be made before the United States court commissioner, or commissioner of the circuit court of the United States, residing nearest the place where the offense was committed. The penalty under this act, as under § 2139, Rev. Stat., is imprisonment for not more than two years and fine of not more than $300 for each offense.

Next in chronological order was the act of March 1, 1895 (chap. 145, 28 Stat. at L. 693), the title of which is—"An Act to Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory, and for Other Purposes." Section 8 (set forth 225 U. S. 672) provides *inter alia*, that any person carrying into the territory any vinous, malt, or fermented liquors or other intoxicating drinks, shall upon conviction be punished by fine not exceeding $500 and by imprisonment for not less than one month nor more than five years. Other sections have to do with the creation of judicial districts in the territory, the establishment of courts, the appointment of judges, attorneys, marshals, clerks, etc. Section 4 adopts the criminal law provisions of Mansfield's Digest of General Laws of Arkansas, with certain reservations. And § 13 declares "that none of the provisions of any other acts, or of any of the laws of the United States, or of the state of Arkansas, heretofore put in force in said Indian territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said territory."

The act of January 30, 1897 (chap. 109, 29 Stat. at L. 506), while having an independent title,—"An Act to Prohibit the sale of Intoxicating Drinks to Indians, providing Penalties Therefor, and for Other Purposes,"—was manifestly intended primarily as an amendment of the act of 1892. 231]*This appears from a comparison of the clauses defining the acts prohibited, from the circumstances that the act of 1897 contains no provisions of its own prescribing the venue for complaints, arrests, and trials, and especially from the provision of its 2d section, "that so much of the act of the twenty-third day of July, 1892, as is inconsistent with the provisions of this act, is hereby repealed." The prohibition is made to apply to sales of intoxicants "to *any Indian to* whom allotment of land has *been made while* the title to the same shall be held in trust by the government, or to any Indian, a ward of the government, under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship;" and the familiar prohibition of the introduction of intoxicants "into the Indian country" is repeated, with the addition of the following new clause: "Which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allotee without the consent of the United States." And the act provides that any person violating its provisions "shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense, and not less than two hundred dollars for each offense thereafter."

The act of 1895, although evidently *in pari materia*, is not mentioned in the act of 1897. This circumstance, coupled with the fact that the latter act contains an express repealing clause, is, we think, negatively significant upon the question of implied repeal. In our opinion the act of 1897 was not intended to take the place of § 8 of the act of 1895 after the manner of a revision, and there is no such complete repugnance as to render it clear that that section was intended to be repealed *in toto*.

It is contended that, while the act of 1892 covered the *subject of the intro-[232 duction and sale of intoxicating liquors in Indian country, and was applicable to the Indian territory because it was Indian country, the passage by Congress of the act of 1895,—a special act applicable to the territory by name, and covering, by its 8th section, the general subject of the introduction and sale of intoxicating liquors therein,—necessarily superseded the former act, so far as the territory was concerned.

To show the purpose that Congress had in mind in passing this act of 1895, the argument is that prior to the general allotment act of February 8, 1887 (24 Stat. at L. 388, chap. 119), all Indian lands were held in common by the Indian tribes; that soon thereafter it came to be questioned whether § 2139, Rev. Stat., as amended by the 1892 act, would apply to an Indian allottee and his allotment under the 1887 act, for the reason that upon allotment thereunder the individual Indian became a citizen of the United States, and his allotment ceased to be Indian country under the accepted definition (Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; Ex parte Crow Dog [Ex parte Kang-Gi-Shun-Ca] 109 U. S. 556, 27 L. ed. 1030, 3 Sup.

Ct. Rep. 396), because of the Indian title having been extinguished; that beginning with the act of March 3, 1893 (27 Stat. at L. 645, 646, chap. 209), Congress began to contemplate the allotment in severalty of all lands within the Indian territory, and to look forward to the ultimate creation of a new state out of that territory; that it was supposed that the effect of allotment would be the same as under the 1887 act, in that the lands allotted would cease to be Indian country; and that hence Congress passed § 8 of the 1895 act, in order that the people residing in Indian territory might not be left without protection against the introduction and sale of intoxicants when the 1892 act should become inoperative because of the extinguishment of the Indian titles. This argument is ingenious, and has much force; but it takes too litle account, we think, of § 13 of the act of 1895, above quoted.

233] *Assuming all that is claimed as to the general object that Congress had in view during these years when the Indian territory was in a transition state, it seems to us safer to rely upon the words of the several acts of 1892, 1895, and 1897 in order to determine the true intent and meaning of the lawmaker. If Congress, in enacting the 8th section of the act of 1895, had intended to totally supersede the act of 1892 as to the Indian territory, that purpose would naturally have been expressed in plain terms. And so would the act of 1897 presumably have expressed the purpose to supersede and repeal that section. if such purpose had existed. The very fact that Congress contemplated that the situation in Indian territory was but temporary,—that either because of statehood, or because of the allotment of the Indian lands in severalty, the necessity for retaining these prohibitory laws upon the statute book would not long continue,—tends to negative a desire on the part of Congress to presently repeal either of them; and therefore rebuts the presumption of an implied repeal of one act by the other.

It seems to us, upon the whole, that during this transition period preceding the admission of Oklahoma as a state, the several acts referred to were intended to and did stand together, excepting so far (if at all) as they were necessarily repugnant one to the other; that is to say, the act of 1892, as amended in 1897, on the one hand, making "Indian country" (a term defined in Bates v. Clark, supra; Clairmont v. United States, 225 U. S. 551, 558, 56 L. ed. 1201, 1204, 32 Sup. Ct. Rep. 787, and cases cited) the test of the prohibition respecting the introduction of intoxicants; and the act of 1895, on the other hand, employing the territorial test, irrespective of whether it was or continued to be Indian country.

We thus come to consider the effect of the enabling act of June 16, 1906 (chap. 3335, 34 Stat. at L. 267), and the admission of Oklahoma as a state thereunder, which occurred November 16, 1907.

*The pertinent clauses of the act may[234 be found in 225 U. S. 677, 56 L. ed. 1254, 32 Sup. Ct. Rep. 769, the clause respecting liquor prohibition being especially important. We should also note the proviso in the 1st section, that nothing in the state Constitution should "be construed to limit or impair the rights of person or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." And also this clause from the 21st section: "All laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United states."

It is suggested, rather than argued, that the reservation of "the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed," evidences a purpose *not* to preserve *prior* laws or regulations respecting the Indians. But this is sufficiently answered by what was said in Ex parte Webb, 225 U. S. 663, 682, 56 L. ed. 1248, 1256, 32 Sup. Ct. Rep. 769, where the view of the court was expressed as follows: "It is contended that this does not preserve the existing laws and regulations respecting the Indians, but rather excludes the inference of their continued force and existence by indicating a purpose on the part of Congress to thereafter enact regulations for the protection of the Indians in Oklahoma if necessity requires. This, we think, is an *inadmissible[235 construction. We deem it unreasonable to suppose that Congress, possessing the constitutional power and recognizing the moral duty to make laws and regulations respecting the Indians, and having already established laws and regulations of this character

ter applicable in the territory, including some that were established by treaties and agreements, should resolve to wipe them out, and thereby impose upon future Congress es the labor and difficulty of establishing other proper laws and regulations in their stead. In our opinion, the purpose expressed in the proviso to reserve to the government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject."

When it is recalled that the new state was made up by combining two territories theretofore separately existing under different systems of laws, one of them being largely inhabited by Indian tribes, with whom numerous treaties had previously been made, differing from each other in many respects, but each recognizing to some extent the propriety of restricting the liquor traffic, the importance of these clauses in the enabling act—read, as they of course must be read, in connection with the restriction of the manufacture and sale of liquors within those parts of the state known as the Indian territory and the Osage Indian Reservation for a period of twenty-one years, imposed upon the new state by § 3 of the act—is very evident.

In the Webb Case, as appears from the opinion, p. 676, the government conceded that the act of 1895 had been repealed by the enabling act and the admission of the state thereunder, saving so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory. The statement to the like effect in the 236] *opinion, p. 681, was made in view of this concession; but we see no reason for recalling it. The language used was: "No doubt the enabling act, followed by the adoption of the Constitution therein prescribed and the admission of the new state, had the effect of remitting to the state government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the state, and respecting commerce in such liquors conducted wholly within the state; and to the extent that the scheme of prohibition established by the enabling act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed." But this had reference only to the act of 1895, and not to the act of 1897, it having previously been stated *in the opinion* (p. 676) that since § 2139, *Rev. Stat.*, and the act of 1897, contained provisions respecting the sale of intoxicating liquors to Indians, and in this and perhaps in other important respects covered ground not covered by the act of 1895, we must not be understood as deciding that those prohibitions were no longer in force within what was the Indian territory.

But, because the act of 1895 was impliedly repealed with respect to intrastate manufacture and traffic, it does not necessarily follow that the act of 1892, as amended in 1897, was likewise repealed in respect of that traffic, by the enabling act and the admission of the state. The one was a territorial prohibition applicable to the Indian territory because made so by Congress, irrespective of other considerations; while the other act, applicable to Indian country throughout the states and territories generally, happened to be applicable to the Indian territory because that was Indian country. But, as already pointed out, in passing the enabling act, Congress knew that if, and when, and so far as, portions of the Indian territory ceased to be Indian country, the acts of 1892 and 1897 would cease to apply, irrespective *of[237 statehood; and on the other hand, must be deemed to have intended that the establishment of statehood should repeal the act of 1895 with respect to matters wholly intrastate, because that act (whatever reasons may have moved Congress to enact it) was, by its terms, applicable to the territory as a territory and as a whole, irrespective of whether it was Indian country; and this kind of internal prohibition of the liquor traffic would naturally cease with statehood, because inconsistent with local self-government and with equality between the states.

The terms of the act of January 30, 1897, show that it was especially designed to provide for the changes consequent upon the adoption of the policy of allotting the Indian lands in severalty. Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587. This policy was in progress in the Indian territory at the time of the passage of the Oklahoma enabling act. The history has been so recently rehearsed that it need not be here repeated. Tiger v. Western Invest. Co. 221 U. S. 286, 300, 302, 55 L. ed. 738, 743, 744, 31 Sup. Ct. Rep. 578; Heckman v. United States, 224 U. S. 413, 435, 56 L. ed. 820, 828, 32 Sup. Ct. Rep. 424; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Goat v. United States, 224 U. S. 458, 56 L. ed. 841, 32 Sup. Ct. Rep. 541; Deming Invest. Co. v. United States, 224 U. S. 471, 56 L. ed. 847, 32

Sup. Ct. Rep. 549. Every consideration arising out of the governmental guardianship over the Indians, and control over their lands, indicated that as to them the liquor prohibition should be maintained after statehood, so far as it was consistent with the control of the state over its internal police. The act of 1892, as amended in 1897, concededly remains in force in other states where there is Indian country or governmental trusteeship over Indian lands or guardianship over the Indians. United States v. Sutton, 215 U. S. 291, 295, 54 L. ed. 200, 202, 30 Sup. Ct. Rep. 116. Such legislation is of undoubted constitutionality. United States v. Kagama, 118 U. S. 375, 383, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109; Ex parte Webb, supra. The prohibition against introducing liquor into the Indian country has been consistently ad-[238]hered *to for many years, with beneficial results so far as the welfare of the Indians is concerned.

All of these considerations were presumably in the mind of Congress when it passed the enabling act, and they are inconsistent with any tacit purpose to repeal the acts of 1892 and 1897. The liquor prohibition, so far as it concerns the Indians, has always been deemed one of the peculiar responsibilities of the government at Washington, and it may easily be believed that Congress felt reluctant to delegate the subject-matter wholly to the state government that was about to be established in the Indian territory; especially as the same subject-matter in other states remained, as it still remains, under Federal control.

In United States Exp. Co. v. Friedman, 112 C. C. A. 219, 191 Fed. 673, the circuit court of appeals for the eighth circuit held that the enabling act did not repeal the act of 1897, at least, with respect to the introduction of liquor into the Indian country from points outside the state. In Mosier v. United States, 117 C. C. A. 162, 198 Fed. 54, the same court held the act of 1897 to be in force within the state so far as relates to the sale of liquors to Indians.

Upon the whole, while the matter is not free from difficulty, it seems to us the better argument is against the implied repeal. It follows that the District Court erred in holding the acts in question, *viz.*: § 2139, Rev. Stat., as amended by the acts of 1892 and 1897, to be no longer in force, and erred in sustaining the demurrer to the indictment. The judgment should be reversed and the cause remanded for further proceedings in accordance with the views above expressed.

Judgment reversed.

*UNITED STATES, Plff. in Err., [239
v.
ALFRED SHELLEY.

(See S. C. Reporter's ed. 239-243.)

**Internal revenue — manufacture of opium — prohibition.**

The reconversion of the residuum of opium remaining after smoking into a form fit for resmoking is not a manufacture of opium for smoking purposes within the meaning of the act of 1890, October 1 (26 Stat. at L. 567, chap. 1244, U. S. Comp. Stat. 1901, p. 2226), § 36, levying an internal revenue tax upon all opium manufactured in the United States for smoking purposes, and prohibiting any person from engaging in such manufacture who is not a citizen of the United States, and who has not given the bond required by the Commissioner of Internal Revenue.

[Federal taxation generally, see Internal Revenue, in Digest Sup. Ct. 1908.]

[No. 943.]

Argued April 11, 1913. Decided May 26, 1913.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to an indictment charging the unlawful manufacture of opium for smoking purposes. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Harr argued the cause and filed a brief for plaintiff in error.

Mr. Robert M. Moore argued the cause and filed a brief for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

We have here under review a judgment of the district court sustaining a demurrer to two counts of an indictment for a violation of § 36 of the act of Congress approved October 1, 1890 (chap. 1244, 26 Stat. at L. 567, 620, U. S. Comp. Stat. 1901, p. 2226).

This act is the so-called McKinley tariff law, and provided for the tariff duties to be paid upon articles imported from foreign countries, and also for the collection *of certain internal revenue taxes. [240 The tariff provisions are, of course, long since superseded. Section 36 reads as follows: "That an internal-revenue tax of ten dollars per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; and no person shall engage in such manufacture who is not a citizen of the United States,

and who has not given the bond required by the Commissioner of Internal Revenue."

The counts in question are the second and third counts of the indictment. The former of these avers (omitting formal matters) that, without having given bond, etc., the defendant "did engage in the manufacture of opium for smoking purposes, in and by employing and using the process by means of which yen shee, which is the product or ashes which remains after prepared, or smoking, opium has been used and smoked by the smoker, is dissolved in water after having been permitted to remain in solution in water in any receptacle or vessel for a period of time; furthermore, by means of which the said aqueous solution of yen shee is strained and purified so as to remove from the said solution all matter which is foreign to such opium as may be contained in the said yen shee, such matter consisting of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes, and by means of which the said aqueous solution of yen shee thus strained and purified is heated and cooked in any receptacle or vessel for a period of time and until a product is produced as the result, among other things, of the evaporation of a part of the aqueous content of the said solution in the course of such heating and cooking, which said product thus remaining is smoking, or prepared, opium of an inferior grade, and which said product resembles in appearance and consistency thick molasses, and is opium for 241]smoking *purposes, against the peace of the United States and their dignity, and contrary to the form of the statute," etc.

The third count charges that the defendant, without having given bond, etc., "did engage in the manufacture of opium for smoking purposes, in and by employing and using a process by means of which a high-grade smoking opium is dissolved in water in any receptacle or container; and yen shee, which is the product of the partial combustion of smoking, or prepared, opium, remaining when the smoker has used such smoking, or prepared, opium for smoking purposes, is in like manner dissolved in water, in any receptacle or container, and the said aqueous solution of yen shee is strained and purified so that all substances contained therein which are foreign to the opium content in the said solution, and to the water therein contained, are removed, and which said substances so removed consist of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes; and the said process is, further, that the said aqueous solution of yen shee thus strained and purified is mixed with the aforesaid solution of high-grade smoking, or prepared, opium, and the two solutions thus mixed and combined are heated and cooked in any receptacle or vessel over a slow fire until a product is produced by such heating and cooking and by the evaporation of a part of the aqueous content of the said combined solution, which has the consistency and appearance of thick molasses, and which said product is known as smoking, or prepared, opium, and which said product is opium prepared for smoking purposes; against," etc.

This indictment seems to have been framed with the object of indirectly reviewing Shelley v. United States, 117 C. C. A. 294, 198 Fed. 88, where the circuit court of appeals for the second circuit reversed a conviction that had been had in the district court under a previous indictment, upon *grounds succinctly expressed in[242 the opinion, as follows: "It appears that when smoking opium has been produced, it may be smoked more than once. That is to say, the residuum left after a first smoking may be simply heated and smoked again. If to this residuum (known as yen shee) some additional smoking opium is added, each time it is reheated, the process of resmoking may be continued longer. We are of the opinion that the mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same, is not a 'manufacture of opium for smoking purposes' within the meaning of the statute. The manufacture which the statute contemplates is complete when from the crude opium there has been produced the smoking opium, with which alone, as defendant contended, he operated, in its unsmoked and smoked condition. . . . We think there was error in the refusal to charge that, if the jury found that defendant only mixed smoking opium with the residue which remains after smoking, his act was not a manufacture of opium for smoking purposes within the meaning of the statute."

It appears that the primary manufacture of opium for smoking purposes is done by treating crude opium in such manner as to convert it into a different form, thus rendering it fit for smoking. It is conceded that this manufacture is subject to the tax prescribed by § 36 of the act of 1890. And see Marks v. United States, 116 C. C. A. 250, 196 Fed. 476. The counts now under consideration describe two processes by which the residuum of opium remaining

after smoking (yen shee) may be reconverted into a form fit for smoking, in the one case by dissolving it in water, straining and purifying the solution so as to remove foreign matter, and then heating and cooking the refined solution, and thereby producing an inferior grade of smoking opium; the other process differs in that an admixture of smoking opium of a high grade is employed together with the yen shee.

242] *In the argument counsel discussed the proper definition of the term "manufacturing," citing Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; and United States v. E. C. Knight Co. 156 U. S. 1, 14, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; to which may be added Anheuser-Busch Brewing Asso. v. United States, 207 U. S. 556, 559, 52 L. ed. 336, 337, 28 Sup. Ct. Rep. 204, which had to do with the drawback provision of the McKinley law (26 Stat. at L. 567, 617, chap. 1244, § 25).

But, aside from the general principle that criminal statutes ought not to be extended by construction, we have here the additional consideration that this statute was primarily designed as a taxing act. Section 36 must be read in connection with the accompanying administrative provisions, which render it clear that the tax was designed to yield substantial revenue, and not merely or primarily to prohibit the manufacture of smoking opium. It may easily be believed that if (irrespective of constitutional limitations upon its power) Congress were undertaking to stamp out the practice of opium smoking, it might prohibit such processes of reclaiming as were charged against the defendant in the second and third counts of this indictment. But it is not so easy to believe, in the absence of clear language requiring such a construction, that in prescribing a revenue tax upon the manufacture of opium for smoking purposes, it intended to subject the same substance more than once to the tax, or to require surveillance over opium-smoking resorts,—in which, it would seem, such treatment of the residuum might most readily be conducted, —the same as over a factory or other establishment where the primary conversion of crude opium into smoking opium is conducted.

Of course the prohibition is not more extensive than the taxing clause; and so we are satisfied that the offenses charged in the second and third counts of this indictment are not within the denunciation of § 36 of the act.

*Judgment affirmed.*

*UNITED STATES, Plff. in Err., [244
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 244-254.)

**Judgment — res judicata.**

A decree in a suit brought by the United States, through the procurement of the Secretary of War, subsequent to the enactment of the river and harbor act of March 3, 1899 (30 Stat. at L. 1121, chap. 425), upon which the bill relied, refusing to enjoin the replacement of a bridge constructed over the Ohio river, conformably to the act of July 14, 1862 (12 Stat. at L. 569, chap. 167), which contained no reservation of the right to repeal or amend, is a conclusive determination as against the Secretary of War, when attempting, under the supposed authority of § 18 of such river and harbor act, to compel alterations in the bridge in the interest of navigation, that, in the absence of changed conditions, the structure is not subject to that act.

[For other cases, see Judgment, III. 1, in Digest Sup. Ct. 1908.]

[No. 118.]

Argued October 19 and 20, 1911. Decided June 10, 1912.

IN ERROR to the Circuit Court of the United States for the Northern District of West Virginia to review a judgment directing a verdict of not guilty in a criminal prosecution for refusing to alter a bridge over the Ohio river, as directed by the Secretary of War. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Harr argued the cause and filed a brief for plaintiff in error.

Mr. B. M. Ambler argued the cause, and, with Messrs. W. W. Van Winkle and Mason G. Ambler, filed a brief for defendant in error:

The circuit court had full jurisdiction of the suit in equity, or information in chancery.

1 Street, Fed. Eq. Pr. §§ 136-138; Oklahoma ex rel. West v. Gulf, C. & S. F. R. Co. 220 U. S. 290, 55 L. ed. 469, 31 Sup. Ct. Rep. 437, Ann. Cas. 1912 C, 524; Oklahoma v. Atchison, T. & S. F. R. Co. 220

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bolleng v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

U. S. 277, 55 L. ed. 465, 31 Sup. Ct. Rep. 434; Ex parte Young, 209 U. S. 162, 52 L. ed. 730, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Dobbins v. Los Angeles, 195 U. S. 223-241, 49 L. ed 169-177, 25 Sup. Ct. Rep. 18; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 566, 567, 14 L. ed. 269, 270; Atty. Gen. v. Cleaver, 18 Ves. Jr. 211; Crowder v. Tinkler, 19 Ves. Jr. 617, 13 Revised Rep. 267; Georgetown v. Alexandria Canal Co. 12 Pet. 98, 9 L. ed. 1015.

When the United States invokes the jurisdiction of a court and submits a controversy, the decision is as binding on the government as it would be on a natural person.

United States v. California & O. Land Co. 192 U. S. 355, 358, 48 L. ed. 476, 478, 24 Sup. Ct. Rep. 266; United States v. O'Grady, 22 Wall. 641, 22 L. ed. 772; Buchanan v. Knoxville & O. R. Co. 18 C. C. A. 129, 37 U. S. App. 499, 71 Fed. 324; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 292, 50 L. ed. 477, 487, 26 Sup. Ct. Rep. 252.

*Res judicata* may render straight that which is crooked, and black that which is white.

Taxing District v. Loague, 129 U. S. 493, 32 L. ed. 780, 9 Sup. Ct. Rep. 327.

Matters which have once been fully investigated between the parties, and determined by the court, shall not be again contested.

Baker v. Cummings, 181 U. S. 117, 124, 45 L. ed. 776, 779, 21 Sup. Ct. Rep. 578; United States v. Dalcour, 203 U. S. 408, 51 L. ed. 248, 27 Sup. Ct. Rep. 58; United States v. California & O. Land Co. 192 U. S. 355, 358, 48 L. ed. 476, 478, 24 Sup. Ct. Rep. 266.

A decision upon the merits deciding issues in equity, under full pleading, is an estoppel upon the parties to the record, and is conclusive upon the matters adjudged, as to the points decided. If the judgment is admissible, it is conclusive of all the matters determined by it, although it is not pleaded.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

An issue determined by a decree in equity cannot be retried in a collateral action, although the evidence upon which the case was heard is in the record.

Franklin County v. German Sav. Bank, 142 U. S. 93, 35 L. ed. 948, 12 Sup. Ct. Rep. 147.

All the authorities agree on the reasons which, in most instances, exclude the record in a criminal case as a bar in a civil proceeding, at common law.

Stone v. United States, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778; United States v. Zucker, 161 U. S. 475, 479, 40 L. ed. 777, 16 Sup. Ct. Rep. 641; Chantangeo v. Abaroa, 218 U. S. 476, 54 L. ed 1116, 31 Sup. Ct. Rep. 34; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Herman, Estoppel, § 413; 1 Freeman, Judgm. § 319; Mitchell v. State, 140 Ala. 118, 103 Am. St. Rep. 19, 37 So. 76.

A judgment in a civil case must generally be excluded from the evidence in a criminal prosecution, because the parties are not the same; and, were they the same, it would be improper to receive a judgment in a civil case as evidence of the commission of a crime of which the defendant is accused, for the reason that such judgment may be founded on the mere preponderance of evidence, not sufficient to satisfy the jury beyond a reasonable doubt.

Freeman, Judgm. § 319a; Mitchell v. State, 103 Am. St. Rep. 23, note.

There are cases in which a party charged with larceny has sought to put in evidence a decision made in a civil suit between private persons, to the effect that he was the owner of the property; and in those cases the record in the civil suit has been excluded for the reason that the parties were not the same.

Mitchell v. State, 103 Am. St. Rep. 27, note.

The rule excluding a judgment rendered in a criminal proceeding from evidence in a civil proceeding, and *vice versa*, certainly loses force as applied to this case.

1. There is the identity of parties.

2. The defendant is offering the judgment in the civil case as a matter of defense on this indictment; hence, it cannot be said that the government is being prejudiced, because in the criminal case, guilt must be proved beyond a reasonable doubt; and if the government is required to establish its case on this prosecution only by a preponderance of the evidence, then the rule of evidence would be the same in both cases.

3. Many of the authorities state that one of the reasons operating at common law was, that in a criminal proceeding, an individual might testify in favor of the state, while the defendant was precluded from testifying at all; or that the prosecuting witness in a criminal proceeding might testify for the state, but could not testify in a civil case to which he was a party. But to-day every person can testify in any case, except where death has sealed the lips of the other party.

245] *Mr. Chief Justice White delivered the opinion of the court:

This writ of error seeks the reversal of a judgment discharging the defendant in error here from further prosecution under an indictment which alleged a violation of the act of March 3, 1899 [30 Stat. at L. 1121, chap. 425], in refusing to alter, as directed by the Secretary of War, a bridge across the Ohio river, connecting Parkersburg, West Virginia, and Belpre, Ohio. The case was tried to a jury, and at the close of the evidence, by direction of the court, a verdict of not guilty was returned, whereupon the judgment was entered which is under review.

The facts established by the evidence, so far as material to be stated, may thus be summarized.

The bridge in question was completed in the year 1871, in full compliance with an act of Congress approved July 14, 1862 (12 Stat. at L. chap. 167, p. 569), which prescribed the height, width of span, and other requirements for bridges erected above the Kentucky line (mouth of Big Sandy river), and in § 5 it was provided that "any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post routes . . . and the officers and crews of all vessels, boats, or rafts navigating the said Ohio river are required to regulate the use of the said vessels and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provisions of this act." The act contained no express reservation of right to alter or amend it in any respect.

On October 29, 1904, the United States attorney for the northern district of West Virginia, by direction of the attorney general, filed in the circuit court of the United States for the northern district of West Virginia a bill of complaint on behalf of 246]the United States against the *Parkersburg Branch Railroad Company, a West Virginia corporation, John W. Davis, its receiver, and the Baltimore & Ohio Railroad Company. The bill in effect charged that the bridge in question was owned, operated, and controlled by the defendants, that the bridge had been constructed under the act of 1862, and averments were made as to the provisions of various statutes subsequently passed by Congress concerning the construction of bridges across the Ohio river, *viz.*, § 7 of the act of December 17, 1872 (17 Stat. at L. 398, chap. 4), and §§ 2 and 4 of the act of February 14, 1883 (22 Stat. at L. 414, chap. 44), and the provisions of other statutes conferring additional powers upon the Secretary of War in regard to the control and regulation of the navigable waters of the United States, *viz.*, §§ 4 and 7 of the act of September 19, 1890 (26 Stat. at L. 426, chap. 907), and § 9 of the act of March 3, 1899 (30 Stat. at L. 1121, chap. 425). In substance it was charged that the spans of the bridge in question—the present main span being 349 feet in width and the adjacent span of the same width—were wholly inadequate to accommodate the present commerce of the Ohio river at the point where built, and constituted a serious and dangerous obstruction to the navigation of the Ohio river at such point, and it was averred that the Secretary of War, under the supervisory power conferred upon him by the statutes referred to, "in recent years has required that all bridges over the Ohio river shall have channel spans ranging from 600 to 800 feet in length." It was further averred that the railroad company, under the pretense of renewing the old bridge, was erecting a new structure on the site of the old, despite the fact that the government, "through its proper officers," had refused to grant authority so to do, except "on condition of removing the pier between spans 38 and 39 of the said bridge, and uniting spans 38 and 39 in one span, thus making the channel span to the said bridge approximately 698 feet. It was also alleged "that the construction of *this proposed new[247 bridge, without the consent or approval of the United States, to which is intrusted by the Constitution the protection of this great water way of commerce among the several states, will be in violation of law, and to the great and irreparable injury of the United States and the commercial interests intrusted to its care." The prayer of the bill was as follows:

"Your orator avers that there is no adequate remedy at law in the premises, and therefore prays that a temporary restraining order enjoining the defendants, their agents, servants, employees, workmen, contractors, and others whomsoever, from constructing or proceeding to construct the contemplated bridge or any bridge across the Ohio river from Parkersburg to Belpre, with a channel span of not less than 698 feet, and without the consent of Congress and the approval of the Secretary of War and the Chief of Engineers, until the final hearing of this cause, when your orator prays that such temporary injunction may be made perpetual; and that the existing bridge operated by the said railroad company between Parkersburg, West Virginia, and Belpre, Ohio, be declared and decreed to be an unreasonable obstruction to the navige-

Two attorneys general have delivered opinions that this act was not applicable to the bridge here in question. 22 Ops. Atty. Gen. 346; 25 Ops. Atty. Gen. 194.

Unlike the statutes thereafter enacted, nowhere in the act of 1862, by which the authority to build the bridge was conferred and under which it was built, was there an 253] *express reservation of a right to alter or amend the act in any respect. So, also, it is not questioned that the bridge was constructed in exact conformity to the requirements of the statute, and that it has been so maintained ever since. No statute has been passed expressly condemning the structure as an obstruction to navigation, or ordering its removal or alteration. Indeed, when the equity cause was commenced, the act of March 3, 1899, was operative, and under its provisions prior to the commencement of that suit the Secretary of War had been seeking to compel the railroad company to alter the bridge precisely in the mode directed in the notice upon which the indictment at bar is based. It is not contended that the institution of the equity cause was directed by Congress, and it manifestly was brought directly or indirectly through the procurement of the Secretary of War, in order to carry into effect his conception of his duty to compel the radical alterations deemed essential to be made in the width of the channel spans. An issue plainly presented in the equity cause was whether the bridge in question was subject to the act of 1899, and was within the jurisdiction of the Secretary of War under that act, and whether the government had the right to enforce the decision of the Secretary, that pier 38 should be removed and one span made from pier 37 to pier 39; and among other things, the defendant denied that the act of 1899 had application, or that the Secretary possessed jurisdiction in the premises. The final adjudication of the circuit court of appeals necessarily decided this issue adversely to the government, and conclusively determined as between the parties that the Secretary had no power over the bridge, and that the structure in its present condition was not subject to the act of 1899. We are of the opinion, therefore, that, as against action by the Secretary of War, the decree in the equity cause was properly held to be *res judicata* as to the facts averred in the indictment, and as decisive of the question 254] *that, in the absence of changed conditions, the bridge in question was not subject to the act of 1899. How far, if at all, the *grant* of the right to build the bridge under *the terms specified* in the act of 1862, with *no reservation of* the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and therefore express no opinion upon it. And of course, we also express no opinion as to how far the decree in the equity cause would be applicable in case of such direct action by Congress.

Judgment affirmed.

Mr. Justice Pitney, not being a member of the court when this case was argued, took no part in its consideration.

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FRED. ROBERTSON and W. J. Ratcliff, Plffs. in Err.,
v.
C. F. HOWARD and Fred. Howard.

(See S. C. Reporter's ed. 254-264.)

**Bankruptcy — jurisdiction — ordering sale of property in another state.**

1. A court of bankruptcy has jurisdiction in original proceedings pending in that court to order the trustee to sell certificates of purchase of school lands owned by the bankrupt, or the interest in the land evidenced by them, although such land is situated beyond its territorial jurisdiction in another state.

[Jurisdiction of bankruptcy court, see Bankruptcy, II., in Digest Sup. Ct. 1908.]

**Bankruptcy — sale of bankrupt's real estate — procedure.**

2. A court of bankruptcy, when proceeding to sell the bankrupt's equitable interest in land in another state, represented by certificates of purchase of school land, is not governed by the provisions of the act of March 3, 1893 (27 Stat. at L. 751, chap. 225, U. S. Comp. Stat. 1901, p. 710) regulating generally the sale of real estate by Federal courts.

[For other cases, see Bankruptcy, IX., in Digest Sup. Ct. 1908.]

**Judicial sale — confirmation — collateral attack.**

3. An order of the referee in bankruptcy, made under the discretionary power conferred by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 70b, confirming a trustee's sale of the bankrupt's interest in real estate, is sufficient to validate the sale as against collateral attack because of such irregularities as the alleged lack of appraisement, and error in the description of the property in the published notice.

[For other cases, see Judicial Sale, VI., in Digest Sup. Ct. 1908.]

[No. 320.]

Submitted May

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which, on a rehearing, reversed a judgment of the District Court of Rawlins County, in that state, in favor of plaintiffs in an action of ejectment, with directions to render judgment for defendants. Reversed and remanded for further proceedings.

See same case below, 82 Kan. 588, 109 Pac. 696; on rehearing, 83 Kan. 453, 112 Pac. 162.

The facts are stated in the opinion.

Mr. Charles Blood Smith submitted the cause for plaintiffs in error. Mr. Samuel Barnum was on the brief:

The United States district court for the southern district of Illinois, sitting in bankruptcy, had jurisdiction to order a sale within the state of Illinois, of land situate in Kansas.

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818; Re Dempster, 97 C. C. A. 51, 172 Fed. 353; Re Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046, 28 Sup. Ct. Rep. 621; United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 217, 56 L. ed. 1055, 1062, 32 Sup. Ct. Rep. 620.

The bankruptcy act is manifestly sufficient in and of itself, and by its terms, to confer jurisdiction upon the bankruptcy court fully to administer the estate in accordance with the provisions therein contained, without being hampered or bound by the terms of a former enactment having reference only to ordinary judicial sales.

1 Sutherland, Stat. Constr. § 254; Re Edes, 135 Fed. 595; Re National Min. Exploration Co. 193 Fed. 235.

The claimed want of appraisement and the apparent misdescription in the notice of sale cannot avail the defendants in error in this action.

Fitzwilliams v. Davie, 18 Tex. Civ. App. 81, 43 S. W. 841; Connor v. McCoy, 83 S. C. 165, 65 S. E. 257; 24 Cyc. 36; Rorer, Judicial Sales, 2d ed. §§ 109, 113; Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381, 2 Rose's Notes, 319 et seq; Trowbridge v. Cunningham, 63 Kan. 847, 66 Pac. 1015; Buckler v. Rodgers, 21 Ky. L. Rep. 1265, 54 S. W. 848; Emery v. Vroman, 19 Wis. 724, 88 Am. Dec. 726; Paine v. Spratley, 5 Kan. 525.

Mr. T. F. Garver submitted the cause for defendants in error. Mr. R. D. Garver was on the brief:

District courts within their districts have plenary powers in bankruptcy cases; but, so far as real estate having a situs in another district and state is concerned, they have no more power than did the district court have over real estate in another district through a receiver whom it may have appointed to take charge of the property of an insolvent debtor.

Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969; Staunton v. Wooden, 102 C. C. A. 355, 179 Fed. 61; Kirkpatrick v. Gallup, 200 Fed. 108; Re Benedict, 140 Fed. 55.

In principle, the same limitations of jurisdiction apply to the Federal courts, in their respective districts, as apply to the courts of a state attempting to exercise jurisdiction over property in another state.

Williams v. Nichol, 47 Ark. 262, 1 S. W. 243; Thompkins v. Adams, 41 Kan. 38, 20 Pac. 530; Watson v. Holden, 58 Kan. 657, 50 Pac. 883; Bullock v. Bullock, 52 N. J. Eq. 561, 27 L.R.A. 213, 46 Am. St. Rep. 528, 30 Atl. 676; Short v. Hepburn, 21 C. C. A. 252, 41 U. S. App. 520, 75 Fed. 113; Casseday v. Norris, 49 Tex. 613; 24 Cyc. 72.

Being made without appraisement, the sale was void.

Collier v. Stanbrough, 6 How. 14, 12 L. ed. 324; Smith v. Cockrill, 6 Wall. 756, 18 L. 973; Capital Bank v. Huntoon, 35 Kan. 577, 11 Pac. 369.

A valid sale cannot be based on such a notice as was given.

Hobart v. Upton, 2 Sawy. 302, Fed. Cas. No. 6,548; Hughes v. Watt, 26 Ark. 228; Thomas v. La Baron, 8 Met. 355; Den ex dem. Todd v. Philhower, 24 N. J. L. 796.

Mr. Chief Justice White delivered the opinion of the court:

John H. Hagener was adjudicated a bankrupt by the district court of the United States for the southern district of Illinois, and a trustee for his estate was qualified. At the time of the adjudication the bankrupt was the owner, by assignment executed to him on October 28, 1901, of two certificates, each reciting the purchase from the state of Kansas of a particular quarter section of school lands situated in Rawlins county, Kansas, of the making of a partial payment therefor, and the right to receive from the state a deed of the land upon the payment of the balance due. The certificates were placed on the bankruptcy schedule as real estate. Upon the petition of the trustee the referee ordered the sale at public auction, after ten days' notice by publication in a newspaper of general circulation, published in Cass county, Illinois, *and by distribution of handbills, of [256 the interest of the bankrupt in certain described real estate, including the certificates in question. The published notice, however, mistakenly stated the lands to be situated in range 1 instead of in range 34. The certificates realized only the sum of $1

each. The sale, on the report of the trustee, was confirmed by the referee. The record does not affirmatively show that any appraisement was made either of the certificates or of the interest of the bankrupt in the land which they embraced.

By virtue of the sale and its confirmation, the trustee executed an assignment to Henry Fraumann, the purchaser at the sale, of each certificate and of "all the right, title, and interest" of the bankrupt "of and to the land therein described." Fraumann transferred the certificates and his interest in the land, as well as all his right to rents and profits which had accrued, to Fred. Robertson, one of the plaintiffs in error, and Robertson executed a like assignment of an undivided half of each certificate, with an undivided half of the interest in the real estate and in the rents which had accrued, to W. J. Ratcliff, the other plaintiff in error.

It appears that in September, 1901, just prior to the time when Hagener, the bankrupt, had acquired the certificates, the taxes on the land not having been paid, a sale for delinquent taxes took place, at which the county of Rawlins became the purchaser. The county, on September 28, 1903, issued a certificate to each of the defendants in error, reciting the tax sale, the purchase by the county, the payment by the defendants in error of the delinquent taxes and costs, and assigned the interest of the county in the property to the purchasers. Subsequently, evidently treating the certificates which had been previously issued for the land by the state, and which were surrendered in the bankruptcy, under the circumstances we have recited, as being the 257]land itself, and therefore *as passing to the purchaser at the sale for delinquent taxes, assignments were drawn by the county officials, making recitals of the facts, and virtually substituting the two Howards to the ownership of the right, title, and interest acquired under the original certificates, with the right on their part to acquire patents for the land from the state on paying the balance due to the state on the terms fixed in the original certificates issued by the state. Thereafter the two Howards, as owners each of a quarter section, under these proceedings, went into possession of the land.

Subsequently, as the result of mandamus proceedings, Robertson and Ratcliff, as the owners of the lands by virtue of the original certificates issued by the state, surrendered by the bankrupt, and acquired by the sale in bankruptcy, paid the full amount of principal and interest due to the state upon the certificates, as also a sum sufficient to reimburse each of the Howards for the moneys disbursed by them in acquiring from the county of Rawlins supposed rights under the tax sale to which we have referred, it not being disputed that the tax sales were void. In the year 1899 patents of the state for the land were duly issued to Robertson and Ratcliff.

Prior to the issue of the state patents, as above mentioned, and while the bankruptcy proceedings were undetermined, the bankrupt and his wife executed to Robertson and Ratcliff a quitclaim deed of all their right, title, and interest to the land.

Soon after the execution by Hagener and wife of this quitclaim deed, Robertson and Ratcliff commenced two actions in ejectment in the district court of Rawlins county, Kansas, to recover possession of the two quarter sections, and damages for detention. The defendant in one action was C. F. Howard, and the defendant in the other action was Fred. Howard. The plaintiffs recovered *in the trial court. On appeal to the[258 supreme court of the state, the actions were consolidated and the court decided that the sale in the bankruptcy proceedings was void, and that the purchaser did not acquire either the title to the certificates or the right to the possession of the quarter sections in controversy. The judgment of the trial court was nevertheless affirmed upon the ground that the interest of the bankrupt in the land passed by the quitclaim deed executed by the bankrupt and his wife. 82 Kan. 588, 109 Pac. 696. Upon a rehearing the judgment of affirmance was vacated and set aside and the judgment of the trial court was reversed, with directions to render judgment for the Howards, the claimants under the tax sale. 83 Kan. 453, 112 Pac. 162. This was based upon the ruling that not only was the sale in the bankruptcy proceedings of the certificates of purchase invalid, but that a right to possession was not derived from the quitclaim deed, since when it was executed and when the actions in ejectment were commenced, the bankruptcy proceedings were pending and the property and right of possession to the land was in the trustee in bankruptcy. In consequence it was held that the plaintiffs in ejectment were not entitled "to recover the possession of the property even against one who had simply the naked possession thereof." This writ of error was then prosecuted.

But one ground for reversal is relied on, *viz.*, that the supreme court of Kansas erred in deciding that the sale of land in Kansas by a trustee, in pursuance of an order of the court of bankruptcy for the southern district of Illinois, made in original pro-

ceedings pending in that court, was void and did not convey to the purchaser any interest to such land.

The state court held that the contracts between the bankrupt and the state of Kansas, evidenced by the certificates of purchase in question, conveyed to the purchaser an equitable title to the land and was real 259]estate. *We follow this construction of the local law; hence the only question with which we are concerned was thus stated by the court below: "Whether the sale of the certificate by the trustee in bankruptcy conveyed any interest in the land, or whether it was necessary, in order to devest the certificate holder of his title in the land, to appraise and advertise the land itself for sale, and sell it in the method provided by the laws of the United States." [82 Kan. 594, 109 Pac. 696.] The court, while conceding that the adjudication in bankruptcy "conveyed this land and all the property of Hagener to the trustee," yet decided that "the court had no jurisdiction over the land. Its jurisdiction was *in personam*." And apparently having in mind the provisions of the act of Congress approved March 3, 1893, chap. 225, 27 Stat. at L. 751, U. S. Comp. Stat. 1901, p. 710, regulating sales of real estate by courts of the United States, it was declared that the attempted sale of the land by the trustee was not simply irregular and erroneous, but was void. The views of the court on the subject were thus stated:

"The United States district court for the southern district of Illinois has no jurisdiction in Kansas in bankruptcy, and a trustee appointed by it can only sell real estate in this state under orders procured from some court having jurisdiction therein. U. S. Rev. Stat. § 563, sub. div. 18, U. S. Comp. Stat. 1901, p. 455. So far as conveying any interest in the land in question, the sale of the certificate by the trustee is void." [82 Kan. 595.]

It is to be observed that no question was raised concerning the validity under the state law of the certificates, and their efficacy to transfer the title, if the court of bankruptcy had power in the premises, and the sale was otherwise valid under the laws of the United States. It is certain, therefore, that the refusal to recognize the assignments as having validity was based solely upon the opinion that the court of bankruptcy was without power to order the sale because the land covered by the certificate 260] *was not located within its territorial jurisdiction, and that a sale could only have been made under orders of a court of the United States within whose territorial jurisdiction the land was situated, and in the mode pointed out by the act of 1893. This, however, but amounts to holding that a court of bankruptcy is confined in the administration of the property of a bankrupt to state or district boundaries, and that whenever the bankrupt has property within two or more states, it is necessary to commence independent or ancillary proceedings in all such states in order to subject the property therein to administration and sale. But we think it is clear that this view is incompatible with the bankrupt act of 1898. [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418.] No analysis of the text of the act, we think, is necessary to demonstrate this result, since it is elementary and has been decided over and over again that the effect of the adjudication in bankruptcy is to transfer the title of the property of the bankrupt and vest the same in the trustee, who has the right, under the control and authority of the court, to administer the same.

No limitation on this general principle arises from the mere fact of the particular situation of the property, as the principle is general and embraces all the property of the bankrupt estate, wherever situated. Indeed, this view was accepted by the court below and made the basis of its ruling, since, in considering whether the quitclaim deed was valid, it held it to be void because the title to the property which it embraced remained in the trustee in bankruptcy,—a view which necessarily demonstrates that the ruling as to the invalidity of the sale made in the bankruptcy proceedings rested upon the conception that although the property passed to the trustee and was subject to administration, nevertheless the court was without power to direct the sale of the property, because it was located in another state. But, in discussing the jurisdiction vested in a court of bankruptcy, in United *States Fidelity &[261 G. Co. v. Bray, 225 U. S. 205, 217, 56 L. ed. 1055, 1062, 32 Sup. Ct. Rep. 620, it was said:

"We think it is a necessary conclusion from these and other provisions of the act, that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustee

and others who are employed to assist them."

The court of bankruptcy in Illinois therefore acquired full jurisdiction over the land in question upon the filing of the petition in bankruptcy. Having such jurisdiction, it possessed the power to order a sale of the certificates or of the interest in the land evidenced by them. The legal title to the certificates being in the trustee, and he being within the jurisdiction of the court, and subject to its orders, that tribunal could lawfully exert its powers over him, without regard to where the land was situated. Even if the enlarged powers of a court of bankruptcy over the estate under its control to put out of view, and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one state in a proper case could compel a defendant before it to convey property situated in another state. Fall v. Eastin, 215 U. S. 1, 8, et seq., 54 L. ed. 65, 69, 23 L.R.A. (N.S.) 924; 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853, and cases cited. There being thus ample power in the court, it follows, of course, that resort to ancillary proceedings was unnecessary. The decision in Babbitt v. Dutcher, 216 U. S. 103, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969, to the effect that district courts other than the court in which original proceedings in bankruptcy are instituted possess power in proper cases to exert ancillary 262]jurisdiction in aid *of the court in which the bankruptcy proceedings are pending lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court.

We come, then, to consider whether the courts of bankruptcy in Illinois, in the proceedings to sell the certificates and the interest in the land evidenced by them, was required to conform to the provisions of the act of Congress of March 3, 1893, chap. 225, 27 Stat. at L. 751, U. S. Comp. Stat. 1901, p. 710, heretofore referred to, reading as follows:

Section 1. "That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such orders or decree of sale may direct.

Sec. 2. "That all personal property sold under any order or decree of any court of the United States shall be sold as provided *in the first* section of this act, unless, in *the opinion of the* court rendering such order or decree, it would be best to sell it in some other manner.

Sec. 3. "That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued, and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided *for[263 to be made in such other papers as may seem proper."

We think this question must be answered in the negative. It is not to be doubted that the subject of bankruptcy was special in its nature, and that in enacting the bankrupt act it was proposed comprehensively to deal with the subjects coming within the scope of bankruptcy legislation, which included, of course, the authority of courts of bankruptcy to deal with the sale of the real and personal estate of a bankrupt. Section 70b of the bankruptcy act provides that:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court, for less than 75 per centum of its appraised value."

This provision makes it manifest that it was the purpose of Congress to give bankruptcy courts full and complete equitable power in matters of the administration and sale of the bankrupt estate, wholly irrespective of the mere situs of the property, the controlling factor being, not where the property is situated, but did it pass to the trustee, and is it a part of the estate subject to administration under the direction of the court. In view of the fact that the bankrupt law was enacted long after the passage of the statute of 1893, and of the complete right of administration which the bankrupt act confers over the property, real and personal, of the bankrupt estate, we think it follows that the authority to realize, by way of sale, on the property of

the bankrupt estate, cannot be held to be limited by the provisions of the act of 1893. Indeed, this conclusion is additionally demonstrated by the fact that, as recognized by No. 18 of the general orders in 264] *bankruptcy, in disposing by sale of the property of the bankrupt, a bankruptcy court, as to both real and personal property, may, if reason for so doing exists, direct a private sale to be made. We do not stop to refer to the many cases in the lower Federal courts which have applied and enforced the view which we here maintain, as we think it unnecessary to do so.

As regards the alleged lack of an appraisement and error in the description of the property covered by the certificate, contained in the published notice, we think they must in this collateral proceeding be deemed as mere irregularities, and that the order of confirmation, made by the referee, was sufficient to validate the sale under the discretionary power given to the referee by § 70b of the bankruptcy act. Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381.

The Supreme Court of Kansas erred in deciding that the plaintiffs in error acquired no right or interest to the land in controversy under the sale made by the Court of Bankruptcy for the Southern District of Illinois; and its judgment must therefore be reversed and the case be remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

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265] *ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

MRS. CORDIE McWHIRTER, Administratrix of the Estate of Etwal McWhirter, Deceased.

(See S. C. Reporter's ed. 265-287.)

**Error to state court — decision of Federal question — suit based on Federal statute.**

1. A decision of the highest court of a state, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service act of March 4, 1907 (34 Stat. at L. 1416, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321), and the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and in which, at the close of the evidence, defendant had requested the court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, i. e., defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the state court.

[For other cases, see Appeal and Error, 1436-1445, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — decision on non-Federal ground.**

2. A mere ruling by the highest state court in a suit based solely upon the hours of service act of March 4, 1907, and the employers' liability act of April 22, 1908, that there was testimony tending to show negligence, affords no basis for the contention that the judgment which affirmed a judgment below in favor of plaintiff, was rested upon that ground, so as to deprive the Federal Supreme Court of jurisdiction of a writ of error to the state court, on the theory that the case was decided on an independent non-Federal ground.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question — evidence of liability under Federal statute.**

3. A contention in a state court in an action based solely upon a Federal statute, that there was no evidence tending to show liability under that statute, presents a Federal question which, when denied, will support a writ of error from the Federal Supreme Court to the highest state court.

[For other cases, see Appeal and Error, 1596-1600, 2175-2208, in Digest Sup. Ct. 1908.]

**Master and servant — hours of service law — effect of violation.**

4. A violation of the prohibition of the hours of service act of March 4, 1907, against requiring more than sixteen hours' consecutive service from railway employees, does not create an unconditional liability on the part of the carrier for all accidents to such employees happening during the period of service beyond the statutory limit, irrespective of proof showing a connection between the accident and the working overtime.

[No. 541.]

Argued December 4, 1912. Decided June 10, 1913.

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 62 L.R.A. 33.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Hickman County, in that state, in favor of plaintiff in an action based on the Federal hours of service and employers' liability acts. Reversed and remanded for further proceedings.

See same case below, 145 Ky. 427, 140 S. W. 672.

The facts are stated in the opinion.

Mr. Robert T. Railey argued the cause, and, with Messrs. E. T. Bullock and M. L. Clardy, filed a brief for plaintiff in error:

No common-law cause of action was either alleged or shown, and the case was tried under the hours of service act.

Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 305, 306, 56 L. ed. 212, 213, 32 Sup. Ct. Rep. 96; Broom's Legal Maxims, 4th London ed. p. 667; Fulgham v. Midland Valley R. Co. 167 Fed. 663; Gilkeson v. Missouri P. R. Co. 222 Mo. 173, 24 L.R.A.(N.S.) 844, 121 S. W. 138, 17 Ann. Cas. 763; Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580.

The petition states no cause of action either at common law or otherwise.

Clark v. Dillon, 97 N. Y. 370; Gibson v. Chicago G. W. R. Co. 225 Mo. 483, 125 S. W. 453; Louisville & P. Canal Co. v. Murphy, 9 Bush, 522; Mallinckrodt Chemical Works v. Nemnich, 169 Mo. 395, 69 S. W. 355; Pagames v. Chicago, 111 Ill. App. 590; Pier v. Heinrichoffen, 52 Mo. 336; Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044; Sidway v. Missouri Land & Live Stock Co. 163 Mo. 375, 63 S. W. 705; Southern R. Co. v. King, 217 U. S. 536, 537, 54 L. ed. 872, 873, 30 Sup. Ct. Rep. 594; Stivers v. Baker, 87 Ky. 508, 9 S. W. 492; Willard v. Zehr, 215 Ill. 148, 74 N. E. 107.

Deceased and the engineer were fellow servants at common law, and hence no right of action at common law could exist in behalf of decedent's widow as against the principal.

Beutler v. Grand Trunk Junction R. Co. 224 U. S. 85, 56 L. ed. 679, 32 Sup. Ct. Rep. 402.

The ground assigned by defendant in error for the dismissal of the writ of error, that contributory negligence and assumption of risk were defenses not open to defendant, and that this court is without jurisdiction to consider the negligence of the engineer as the proximate cause of the death of plaintiff's intestate, for the reason that the lower court decided that the negligence of the engineer and the violation of the sixteen-hour law concurred in causing the accident and injury complained of, is untenable and cannot be sustained.

Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 305, 306, 56 L. ed. 212, 213, 32 Sup. Ct. Rep. 96; Chaney v. Louisville & M. River R. Co. 176 Mo. 598, 75 S. W. 595; Hudson v. Wabash Western R. Co. 101 Mo. 30, 14 S. W. 15.

The petition fails to state a cause of action under the hours of service act.

Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Kerlin v. Chicago & N. W. R. Co. 149 Iowa, 440, 128 N. W. 548; Lloyd v. North Carolina R. Co. 151 N. C. 536, 45 L.R.A.(N.S.) 378, 66 S. E. 604; Smith v. Atchison, T. & S. F. R. Co. 39 Tex. Civ. App. 468, 87 S. W. 1052.

The court of appeals erred in holding that there was any evidence tending to prove negligence upon the part of the conductor or engineer.

1 Bailey, Personal Injuries Relating to Mast. & S. 1st ed. 1121; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 534; Hirsch v. Freund Bros. Bread Co. 150 Mo. App. 174, 129 S. W. 1060; Moore v. Kansas City, Ft. S. & M. R. Co. 146 Mo. 572, 48 S. W. 487; Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Smith v. Forrester-Nace Box Co. 193 Mo. 737, 92 S. W. 394; 1 White, Personal Injuries on Railroads, § 140.

The court of appeals erred in holding that contributory negligence and assumption of risk were not available as defenses, if a right of action existed under the sixteen-hour law.

Kerlin v. Chicago & N. W. R. Co. 149 Iowa, 440, 128 N. W. 548; Lloyd v. North Carolina R. Co. 151 N. C. 536, 66 S. E. 604; Smith v. Atchison, T. & S. F. R. Co. 39 Tex. Civ. App. 468, 87 S. W. 1052.

The court of appeals erred in holding that plaintiff was entitled to recover under the hours of service act, and especially erred in holding that defendant was an insurer of the deceased under said act.

Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156, 1 N. C. C. A. 517; Baltimore & O. S. W. R. Co. v. Abegglen, 41 Ind. App. 603, 84 N. E. 566; Hutchinson v. Missouri P. R. Co. 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852; Illinois C. R. Co. v. Willis, 123 Ky. 636, 97 S. W. 21; Murray v. St. Louis Transit Co. 176 Mo. 189, 75 S. W. 611; Pakalinsky v. New York C. & H. R. R. Co. 82 N. Y. 424.

The jury were permitted to speculate and conjecture as to whether the deceased had performed sixteen hours of consecutive service, and without any evidence whatever on which to base their finding. This was clearly in violation of legal principles.

Louisville Gas Co. v. Kaufman, S. & Co. 105 Ky. 156, 48 S. W. 434; Louisville & N. R. Co. v. Guest, 32 Ky. L. Rep. 670, 106 S. W.

817; Warner v. St. Louis & M. River R. Co. 178 Mo. 134, 77 S. W. 67.

The Kentucky court of appeals erred in holding that the provisos in § 3 of the hours of service act do not apply to the case at bar because the answer of defendant did not plead same.

Baggaley v. Pittsburg & L. S. Iron Co. 33 C. C. A. 202, 62 U. S. App. 683, 90 Fed. 636; Carter, W. & Co. v. United States, 74 C. C. A. 397, 143 Fed. 256; Re Day, 181 Ill. 73, 50 L.R.A. 521, 54 N. E. 646; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Hudson v. Wabash Western R. Co. 101 Mo. 13, 14 S. W. 15.

The alleged violation of the sixteen-hour law was not the proximate cause of the death of plaintiff's husband.

Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Atkinson v. Pacific R. Co. 90 Mo. App. 489; Beach, Contrib. Neg., 2d ed. § 31; Broom, Legal Maxims, § 215; Cincinnati, N. O. & T. P. R. Co. v. Mealer, 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. 725; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676; Cooley, Torts, pp. 68–71; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205; 3 Elliott, Railroads, 1st ed. § 1310; Fowlkes v. Southern R. Co. 96 Va. 742, 32 S. E. 465; Georgetown Teleph. Co. v. McCullough, 118 Ky. 182, 111 Am. St. Rep. 294, 80 S. W. 782; Gwyn v. Cincinnati, N. O. & T. P. R. Co. 83 C. C. A. 648, 155 Fed. 88; Henry v. St. Louis, K. C. & N. R. Co. 76 Mo. 288, 43 Am. Rep. 762; Holman v. Chicago, R. I. & P. R. Co. 62 Mo. 564; Jarnagin v. Travelers' Protective Asso. 68 L.R.A. 499, 66 C. C. A. 622, 133 Fed. 892; Lauterer v. Manhattan R. Co. 63 C. C. A. 38, 128 Fed. 540; Logan v. Cincinnati, N. O. & T. P. R. Co. 139 Ky. 202, 129 S. W. 577; Logan v. Wabash R. Co. 96 Mo. App. 461, 70 S. W. 734; Louisville & N. R. Co. v. Long, 139 Ky. 299, 117 S. W 361; McClary v. Sioux City & P. R. Co. 3 Neb. 44, 19 Am. Rep. 631; Mella v. Northern S. S. Co. 162 Fed. 499; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Minneapolis St. R. Co. v. Odegaard, 104 C. C. A. 496, 182 Fed. 56; Ray, Negligence of Imposed Duties, pp. 133, 134; Renner v. Canfield, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; Rockford v. Tripp, 83 Ill. 247, 25 Am. Rep. 381; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 602; Setter v. Maysville, 114 Ky. 60, 69 S. W. 1074; Shearm. & Redf. Neg. 5th ed. §§ 25 et seq.; Sira v. Wabash R. Co. 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; Swearingen v. Wabash R. Co. 221 Mo. 644, 120 S. W. 773; Teis v. Smuggler Min. Co. 15 L.R.A.(N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; 1 Thomp. Neg. 2d ed. § 45; United States Fidelity & G. Co. v. Des Moines Nat. Bank, 74 C. C. A. 553, 145 Fed. 273; Watson, Damages for Personal Injuries, §§ 33, 35; Webb's Pollock, Torts, Enlarged Am. ed. pp. 29, et seq.; 1 White, Personal Injuries on Railroads, §§ 20, 39.

Mr. William V. Eaton argued the cause, and, with Messrs. Aubrey Everett Boyd and James Denis Mocquot, filed a brief for defendant in error:

The plaintiff below having stated a cause of action both at common law and under the Federal statutes, and there being evidence to support both causes, this court is without jurisdiction to entertain this writ of error and appeal.

Eustis v. Bolles, 150 U. S. 362, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 640, 641, 40 L. ed. 284, 289, 290, 16 Sup. Ct. Rep. 113; Giles v. Teasley, 193 U. S. 147, 160, 48 L. ed. 656, 658, 24 Sup. Ct. Rep. 359.

The fact of continuing the employee in his service in violation of the prohibitions of the statute in itself constitutes sufficient negligence on which to base a cause of action.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Platt v. Southern Photo Material Co. 4 Ga. App. 159, 60 S. E. 1068; National Casket Co. v. Powar, 137 Ky. 156, 125 S. W. 279; Nashville, C. & St. L. R. Co. v. Higgins, 29 Ky. L. Rep. 89, 92 S. W. 549; Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 31 L.R.A.(N.S.) 1137, 131 S. W. 1049; Vanderveer v. Moran, 79 Neb. 431, 112 N. W. 581; Louisville & N. R. & Lighting Co. v. Hynes, 47 Ind. App. 507, 91 N. E. 962; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Delk v. St. Louis & F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Schlemmer v. Buffalo, R. & P. R. Co. 220 U.

S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 942.

The cause of action for the death of McWhirter survived.

Midland Valley R. Co. v. Fulgham, — L.R.A.(N.S.) —, 104 C. C. A. 151, 181 Fed. 91.

There being no issue in the pleading as to "contributory negligence" or "unavoidable casualty," the court was not required to submit these questions to the jury.

Frankfort v. Chinn, 28 Ky. L. Rep. 257, 89 S. W. 188; Newport, L. & A. Turnp. Co. v. Pirmann, 26 Ky. L. Rep. 933, 82 S. W. 976; Paducah & M. R. Co. v. Hoehl, 12 Bush, 41; Washington & G. R. Co. v. Gladmon, 15 Wall. 401, 21 L. ed. 114; Western Real Estate Trustees v. Hughes, 96 C. C. A. 658, 172 Fed. 206.

When the measure of duty is defined by the law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court.

29 Cyc. 635; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65.

Mr. Chief Justice White delivered the opinion of the court:

The record in this case is confusedly arranged, and numerous matters are pressed in argument which we deem to be irrelevant. Not following the various steps by which the petition as originally filed and the answer were both frequently amended, the case as finally put at issue was as follows: The defendant in error as administratrix of the estate of her husband, Etwal McWhirter, sued the plaintiff in error, for the benefit of herself and her four infant children, to recover damages alleged to have been suffered by the death of McWhirter. It was alleged that the deceased was employed as a flagman by the defendant company, and that he was doing that work on an interstate commerce freight train when he was run over and killed by the train on which he was serving. The death was alleged in general terms to have resulted from the wrongful and negligent acts of the conductor and engineer in charge of the train, and by the negligent and wrongful acts of the train despatcher and higher officers of the defendant company. It was moreover alleged that the deceased "had been permitted and required by the officers and agents of the defendant to be and remain on duty for a longer period than sixteen consecutive hours, next before the aforesaid accident, and in violation of chapter 2939, § 2, 34 Stat. at L. 1416, U. S. Comp. Stat. Supp. 1911, p. 1321, of the acts of Congress of the *United States* relating to interstate commerce, and being a part of an act entitled 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon,' which became a law on the 4th day of March, 1907, and also an act entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Em-[267 ployees in Certain Cases,' which became a law on the 22d day of April, 1908 [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322], and that the aforesaid negligent and wrongful acts of the officers and agents of the said defendant, and the said violation of the laws of the United States relating to interstate commerce, were the proximate and sole causes of the death of her said husband, and she relies on the laws of the United States made and provided in such cases."

The answer of the defendant company denied the charges of negligence of its officers and other employees, admitted the death of McWhirter at a date and hour which was specified, while employed as alleged in the petition, and stated facts which it was charged established that the death was an unavoidable accident for which the company was not responsible. It, besides, averred there was no right to recover because of an alleged written contract of assumption of risk, entered into by the deceased and the company at the time he entered its service, several years before the happening of the accident.

The case was tried to a jury. During the course of the trial both sides made various objections to evidence and exceptions were taken to testimony offered. All the evidence upon which the case was tried is in the record. Leaving aside trivial matters having no tendency to affect the result, the entire case, as to negligence, was this: The defendant operates a line of railroad through the states of Missouri and Illinois, and Illmo is a station on the main line in Missouri, and Bush a station on a branch line in Illinois, the branch diverging from the main line at a station in Illinois called Gorham. On the afternoon of February 22, 1910, at 3:30, a train of empty coal or freight cars was started from Illmo, destined for Bush, for the purpose of being loaded with coal and returning. The train reached Bush about 11:30 that night. It there either loaded some of the empties with coal, or exchanged some for loaded cars.[268 Exactly how long a time the operations at Bush consumed is not precisely fixed, one witness saying an hour, and another an hour and a half, and the same divergence exists as to the hour of departure on the return journey, one witness saying 12:30 and the other 1 o'clock. Gorham, where the branch line connects with the main line, is

about 20 miles from Bush. When the train reached that point on the return trip is not shown. Certain it is, however, that, judging by the average speed of the train, somewhere about 6:15 the train passed a station called Howertown, where there was a siding, and found itself at either 7:35 or 7:37 drawing into a station called Wolf Lake, which is 15 miles from Gorham and 35 miles from Bush. The proof as to what then took place is contained in the testimony of three witnesses. Guess, the engineer of the train, Roberson, the telegraph operator who was stationed at Wolf Lake, and Loper, the conductor of the train.

Omitting as a general rule questions and answers except where it may be thought important to reproduce them, we state in narrative form the entire testimony of the first two of these witnesses, and make such reference to the third (Loper) as has any bearing upon the happening of the accident.

The engineer testified, as a witness for the plaintiff, as follows:

I have been employed as an engineer three years by the St. Louis, Iron Mountain, & Southern Railway Company; for a longer period than that was a fireman. At Illmo, Missouri, I was called out on the afternoon of February 22, 1910, at 3:30 o'clock, as near as I can remember. The crew of the train was as follows: Loper, conductor, flagman, Mansker, brakeman, McWhirter, and fireman, Edmiston. The train was going to Bush in Illinois. Bush is on a branch line which runs from Gorham to Bush. I do not recollect what hour we arrived at 269] *Gorham, but we changed from the main to the branch line. The train going up to Bush consisted of nine empties, a freight train. We stayed about an hour at Bush. We set out the train of empties, and turned the engine. It took about an hour to make the transfer at Bush. We came back to Gorham, going south towards Illmo. McWhirter was killed, returning, at Wolf Lake, on the morning of February 23, at 7:35, as near as I can remember. It was in that neighborhood. He was killed performing his duty, going out to set a switch.

Question. Just detail the manner as it occurred, as you know it?

Answer. As I came into Wolf Lake, when I whistled for town, brakeman McWhirter asked me if I were going to head in at Wolf Lake. I told him yes, that we had to get in on account of the sixteen-hour law. He got up, went out at the front window on the left side of the engine along the footboard, and the next thing I seen was the operator at Wolf Lake very much excited in giving a stop signal. I stepped off of engine, asked him what was the matter. He said, "My goodness, you have run over the brakeman." I went looking for him, found him under the left tank wheel, cut in two.

Q. Did you know this brakeman was in front of the engine?

A. No, sir.

Q. Did you see him go out of the cab window?

A. I seen him go out of the cab window. That is all.

Q. What did you suppose he went out of the cab window for?

A. He is supposed to get out there to open the switch. I supposed that is what he went out there for.

Q. Was it his duty to throw the switch in front of the window or not?

A. No, sir, it wasn't his place to throw it in front of the window. He wasn't supposed to go out on that pilot.

*Q. What I mean is, was the switch[270 that the brakeman was required to throw in front of the engine or behind of the engine?

A. It was in front of the engine. I have no record that would show the minute that the train arrived at Wolf Lake on the morning of the 23d. I testified before the coroner's jury. As near as I can remember I stated at the coroner's inquest that the train arrived at Wolf Lake at 7:35. That would make five minutes over the sixteen-hour law.

Q. You stated before the coroner's inquest "at 7:30 the sixteen-hour law was up. We were seven minutes over time." Was that correct?

A. I suppose so. As near as I can remember it was five minutes. It was 7:35. If I said 7:37 that was correct. Then I knew it. It has been over a year ago now. Neither cylinder of my engine was bad, more than ordinarily. It wouldn't make any difference in this case. Neither was leaking steam. I was not working steam when he was killed. The engine was drifting. Understand, shut off, there would be no leak there. Neither cylinder had been leaking steam that morning. There had not been anything the matter with the engine on this return trip. Nothing at all.

Q. Who saw this man run over?

A. Mr. Roberson was the only man I can say. Mr. Fred Roberson. He was standing on the platform. The train was going out to Wolf Lake. Destination was Illmo.

The crew of my train did not go any further than Wolf Lake. There was another crew that came to relieve us there.

On cross-examination the witness testified:

McWhirter knew of our purpose to head in at Wolf Lake, for I told him that we were going to head in on account of the sixteen-hour law. Wolf Lake was the first 271] *switch or place which we could enter at the expiration of the sixteen-hour law. It was McWhirter's duty as brakeman to throw the switch.

Q. When was the first time that you knew of the unfortunate accident?

A. When Mr. Roberson told me what had happened.

Q. Whom do you mean by Mr. Roberson, who was he?

A. The telegraph operator at Wolf Lake.

On re-direct examination the witness said:

It is about in the neighborhood of 15 miles from Wolf Lake to Gorham, and about 6 miles from Wolf Lake to Howardtown. There is a switch at Howardtown. There was no defect in the pilot step and I know nothing about how this accident happened except from the fact that the telegraph operator told me that something was wrong.

F. A. Roberson, a witness for the plaintiff, testified as follows:

I am employed as a telegraph operator by the St. Louis, Iron Mountain, & Southern Railway Company, and have been so employed since July, 1904. I was stationed, as operator, at Wolf Lake, on February 22, 1910. I was at the station on the morning of the 23d of February when extra train No. 503 came into Wolf Lake from the north. I saw the train when it pulled in. It was about 7:37 as well as I recollect, by the time it got to the depot.

Q. Just tell what you know about the accident that happened at Wolf Lake on that morning?

A. As I was sweeping out the office, I heard an engine coming. I looked out of the window and saw it was an extra south —saw it was a train coming south—didn't know it was an extra. I seen they were stopping and I wondered what they were stopping for and went ahead sweeping. When they came in closer to the office I went out and was standing on the platform. I saw a man leave the cab window and come 272]down the left running board *and came down to the pilot, and as it was nearing the switch he left the pilot and struck the ground running and the next I saw he fell face downward between the rails. I next saw him on his hands and knees. After that I turned my eyes to the engineer and did not see him any more, giving the engineer a stop signal. When he came to a stop I told the engineer something, but I do not remember what I told him, but that was the last I saw of the brakeman until he was taken from under the tender of the engine.

He was dead when he was taken out from under the engine. The weather was pretty cold—weather chilly, cold. As near as I can remember, the ground was frozen. I do not remember that there was any ice and sleet on the ground.

Q. Do you know how this man came to fall?

A. I do not.

There were cinders between the rails where he was, ashes between the rails, a little higher than the other ground about the place he was killed. I believe they were frozen. I do not recollect whether it had been raining on the night of the 22d—not that I remember of it raining. I do not think anyone else saw McWhirter at the time he was killed—not at the office. At that time there was no one else around there except the train crew on this freight train.

The remainder of the testimony of the witness is as follows:

Q. When you saw McWhirter's perilous condition you say you turned your head. Why did you do that?

A. I don't remember saying I turned my head. I turned my eyes from the brakeman to the engineer.

Q. Did you know that he was in a condition to be hurt?

A. I didn't positively know so, but I thought he was in a dangerous condition down there.

*Q. How far did the train run be-[273 fore the engineer stopped it after you notified him of this trouble?

A. I suppose about the length of an engine. Maybe not quite so far, maybe a little further. I don't remember.

Q. Do I understand you to say that Mr. McWhirter left the engine, passed down over the pilot, and was out on the ground when you saw him?

A. He was on the ground when I saw him.

Q. How far was he from in front of that engine when he fell?

A. That is pretty hard for me to judge because he was in line of the engine and myself.

Q. How far was it from where he fell to the switch which he was called on to turn?

A. Perhaps three or four car lengths, maybe not so far.

Q. How far is a car length—how many feet?

A. That is pretty hard for me to say.

Q. How long is a car?

A. Well, they ordinary run 36 feet, some of them 30, some of them 40.

Q. Now, when you saw him fall, how far was he from this switch?

A. About three car lengths. About three car lengths.

Re-direct examination by Mr. E. Boyd, counsel for plaintiff:

Q. You say that at the time McWhirter fell he was in line with you and the engine. Explain what you mean by that?

A. In direct with me—between where I stood and where he got off, putting me in direct line with him and where he got off. I can't tell whether he was 10, 20, or how far he was from the engine.

Q. You mean, if I understand you, that the train was coming towards you, and he stepped off between you and the engine; is that correct?

A. That is correct.

274] *Q. Do you know whether or not the cylinder heads of this engine were leaking?

A. I couldn't say whether it was the cylinder heads or not. I recollect there was some steam or other from the engine.

Q. Steam was escaping?

A. Steam was escaping from the engine, as well as I recollect.

Cross-examination by Judge E. T. Bullock, counsel for defendant:

Q. Do you know what caused that?

A. I do not.

As to the testimony of conductor Loper, it suffices to say that he swore he was in the caboose and saw nothing of the accident, although he knew it occurred as the train was entering the station at Wolf Lake at 7:37 in the morning. When examined as a witness for the plaintiff he testified on cross-examination that at the time of the accident the train could not have been going more than 2 miles an hour because they stopped at an "engine's length," while, when called to the stand as a witness for the railroad company, he testified on cross-examination that at the time of the accident the train was going "about 3 or 4 miles an hour." Loper also testified that the night of the 22d of February, 1910, was a cold night, freezing, and the ground was frozen; that at the expiration of the sixteen-hour limit the train was probably 2 miles from Wolf Lake, which was the first switch on the expiration of that limit.

At the close of all the evidence the defendant requested the court to instruct the jury to find in its favor. The court refused to do so, and an exception was noted. There were many other requests to charge asked by the respective parties, some of which were given and some of which were refused and exceptions taken.

There was a verdict and judgment for the plaintiff. The *court of appeals af-[275 firmed the judgment. 145 Ky. 427, 140 S. W. 672. Among other things, the court held that there was testimony tending to show negligence, and therefore the binding instruction to the contrary asked by the defendant was rightly refused, and that an instruction as to the operation and effect of the hours of service act was also correct.

We must first dispose of a motion to dismiss which was made and postponed to the hearing on the merits. It rests upon the ground that the case as made by the pleadings presented two distinct causes of action,—one at common law, irrespective of the statutes of the United States, and the other under those statutes; and that the former cause of action was sustained and affords a basis broad enough to support the judgment irrespective of what may have been decided concerning the statutes of the United States. The contention wants foundation in fact. As we have seen, the pleadings in express terms exclusively based the right to relief upon the statutes of the United States, and no non-Federal ground was either presented below or passed upon. It is true that although the case was exclusively rested upon Federal statutes, as it comes here from a state court, our power to review is controlled by Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result. Seaboard Air Line R. Co. v. Duvall, 225 U. S. 447, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616. And of course, as the cause of action alleged was exclusively placed on the Fed-

eral statute, and the defense therefore alone 276]involved determining *whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783. If, as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer, for the purpose of establishing that even if a Federal question was passed upon, the case was also decided on an independent non-Federal ground, broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in Neilson v. Lagow, 12 How. 98, 13 L. ed. 909, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion "that the court below may have rested its judgment" on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this: that the power to review a Federal question which has been expressly decided by a state court does not obtain where such court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony, upon the assumption that there was 277]nothing adequate to *go to the jury to show liability under the Federal law. While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat. § 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly *excepted to, is reviewable*, because inherently involving the operation and effect of the Federal law. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822.

The plaintiff in error assigns twenty-two alleged errors. We deem it necessary only to refer to those which concern the following subjects: First, the refusal to give the binding instruction asked by the defendant: and, second, an instruction given over the objection and exception of the defendant, concerning the act of Congress commonly known as the hours of service act, and in connection therewith a special charge on the same subject, given by the court of its own motion, which was excepted to by both parties.

Let us first consider the interpretation and effect given to the hours of service act as a result of the instructions of the trial court and the action of the court below in approving the same. The instructions given by the trial court was as follows:

"The court further instructs the jury that if you shall believe from the evidence that the said Etwal McWhirter had been permitted or required to be or remain on duty continuously for more than sixteen consecutive hours next before the accident which caused his death, then the defendant was negligent and liable in damages for said injury and death of Etwal McWhirter, if you shall believe from the evidence that the permitting or requiring the said Etwal McWhirter to be or remain on duty continuously for more than sixteen consecutive hours next before his death in any way contributed to the said accident and *death, you will find for the plaintiff[278 such damages as you may believe from the evidence she has sustained, by reason of his death, not exceeding the sum of $25,000.

"The court instructs the jury that unless they believe from the evidence that Etwal McWhirter came to his death on account of the carelessness and negligence of the officers, agents, and servants of the defendant, or that the said Etwal McWhirter was permitted or required by the defendant to be on duty more than sixteen consecutive hours next before his death, and that his being permitted or required to be on duty more than sixteen hours next before his death contributed to his death, the law is for the defendant, and the jury should so find."

The court of appeals, after reviewing the evidence as to the happening of the accident, and stating that it was patent "that it occurred after more than sixteen con-

secutive hours of continuous service by the intestate on the train," said:

"In thus requiring of the intestate more than sixteen consecutive hours of service, albeit the excess of service over the sixteen hours was but five or seven minutes, appellant violated the statute, supra; and as the death of the intestate, from the act of its engineer complained of, occurred while he was engaged in the required continuous service, and after the expiration of the sixteen consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence *per se*, to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned."

Further declaring that if the right to recover depended alone upon the ability to show that the death of McWhirter was caused by the negligence of the engineer, there was evidence tending to prove such negligence, the court said:

"Recurring to the appellant's violation of 279]the provisions *of the statute prohibiting it from requiring its employees to remain on duty longer than sixteen consecutive hours, we find that the language of the provision in question is mandatory and that the duty it imposes is a definite, absolute duty. Its nonperformance may not, therefore, be excused by a showing on the part of the railroad company that it used ordinary care or reasonable diligence to perform it, but was unable to do so. The violation of such a statutory duty is therefore negligence *per se*."

And these positive conclusions were deemed to be further reinforced by a citation of decisions of this court enforcing the imperative duty of carriers to maintain in good order all appliances required by the safety-appliance act, the court saying:

"The requirements of the statute with respect to the safety appliances to be used on appellant's trains are no more imperative or mandatory than is the statutory restriction here involved upon its right to suffer its employees to engage in its service more than sixteen consecutive hours. The violation of the statute in either case invites the penalty prescribed, and the offender will not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements."

Giving to the views, these expressions by the court, their natural significance, there would seem to be little doubt that it was intended to hold that the effect of the violation of the hours of service act was to create an unconditional liability for all accidents happening during the period beyond the statutory time, irrespective of proof showing a connection between the accident and the working overtime. In other words, the ruling was that by operation of law the carrier is an insurer of the safety of all his employees while working beyond the statutory time. And it is true also to say that although the instructions given by the trial court may not have as explicitly stated the doctrine as did the court of appeals, nevertheless such *instructions rested upon[280 the same interpretation of the statute for the following reasons (a) because beyond the proof of working overtime there was no offer of proof connecting the accident with the working overtime; and, (b) because it is apparent that the court of appeals interpreted the charge upon which it was passing as having that significance, and affirmed it for that reason.

In giving to the statute the construction above stated, we think error was committed. The hours of service act was approved March 4, 1907, and is entitled, "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon." Chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1911, p. 1321. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this because, although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion *of negligence, but also the[281

inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employee to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of.

It is to be observed, however, that even if, for the sake of argument, the broad expressions of the court below and those of the trial court be so limited as to justify the conception that it was only intended to decide that permitting the working beyond the statutory time was negligence *per se*, giving rise to liability only where the proof showed a causal connection between the injury complained of and such *per se* negligence, the concession would not avoid the Federal question or remove the error. We say this, because indulging in the assumption stated would render it necessary to determine, as previously pointed out, the Federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident; that is, whether the plaintiff had offered any proof tending to show the existence of the Federal right which was asserted; or, conversely speaking, whether there was any proof tending to establish that the defendant was liable within the terms of the statute,—considerations as the right, on the one part, of the plaintiff, or the immunity, on the other part, of the defendant, depending exclusively upon the statute, were, in the nature of things, both necessarily Federal, since they were, from the point of view of the statute, correlative. Assuming then that, as the result of the hypothesis we have indulged in, the case is reducible to the Federal question last stated, we are clearly of the opinion that, as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, 282] *and the happening of the accident, reversible error was committed. Of course, the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of.

Our conclusion that there was no reasonable tendency in the evidence connecting the permitting of the working overtime with the accident may be briefly thus summarized: *First*, because we think there is nothing in the proof concerning the action of the deceased from which an inference could be drawn, that his jumping from the pilot of the slowly moving engine was in any way caused by the fact that he had been working overtime; second, because we think there was no proof tending to show negligence on the part of the engineer, and therefore obviously no room to conclude that the fact that he had worked overtime negligently contributed to the accident, for the following reasons: (a) because of the uncontradicted testimony of the engineer and of the telegraph operator whose signal was immediately seen and caused the engineer to stop the train within a car length; (b) because of the testimony of the operator as to the position of the brakeman when he leaped from the pilot to run towards the switch, of his statement as to the line of vision from where he stood and the brakeman and engineer, the short interval which elapsed, the place where the brakeman, in rising after falling, was struck by the locomotive, as shown by the distance the engine traveled before it came to a stop and the place where the body was found. Indeed, irrespective of the testimony of the telegraph operator, we think, when the natural position of the engineer on the right side of the cab is considered, of the position in which it is unquestionably shown the deceased was, of the short distance which the train moved before it was stopped after *the signal from the operator, it is[283 demonstrated with mathematical certainty that the deceased was not within the possible vision of the engineer as he leaped or stepped from the pilot for the purpose of running along the track to the switch.

The judgment of the Court of Appeals of Kentucky must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Pitney, dissenting:

It seems to me that the rulings of the state court, held to be erroneous, are not within the scope of our review under the act (Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575; Jud. Code, § 237 [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]) that alone confers jurisdiction upon this court to review the judgment of a state court.

The action was based upon the hours of service act of March 4, 1907 (34 Stat. at L. 1416, chap. 2939, § 2, U. S. Comp. Stat. Supp. 1911, p. 1321), and upon the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and the verdict and judgment rest upon the theory that plaintiff's

intestate, Etwal McWhirter, a flagman or brakeman upon one of defendant's interstate trains, had been kept continuously at work far more than sixteen consecutive hours, in violation of the former act, and that his death was directly due to the negligence of the locomotive engineer upon the same train, either alone or in conjunction with McWhirter's excessive fatigue, due to his having been worked overtime. The negligence of the engineer was, of course, attributable to the defendant under the act of 1908, and under that act the negligence of the deceased, if shown, would not bar the action.

As I read the record, the trial judge instructed the jury to the effect that the violation of the hours of service act created no liability unless there was a causal rela-[284]tion *between the working overtime of the deceased and the catastrophe that resulted in his death. And so, I think, the court of appeals of Kentucky interpreted the instructions (145 Ky. 427, 441, 140 S. W. 672; Instructions 4 and 5).

However, let it be conceded, for present purposes, that the trial court erroneously instructed the jury that the effect of the violation of the hours of service act was to create an unconditional liability for an accident happening after the expiration of the sixteen-hour limit, and to render the carrier an insurer of the safety of the employee while working beyond the statutory time. And let it be further conceded that the trial court held, and erred in holding, that there was enough in the evidence to warrant a finding that the locomotive engineer was negligent, so as to make the carrier liable under the employers' liability act; or held, erroneously, that there was enough to show a causal relation between the working overtime of McWhirter and the disaster, so as to create a liability under the hours of service act.

It still does not seem to me that the state courts, in overruling defendant's objections to the instructions referred to, or in denying the motion (and sustaining such denial) for direction of a verdict in defendant's favor, decided *against* any "title, right, privilege, or immunity specially set up or claimed" by the defendant under the Constitution or laws of the United States, within the meaning of § 709, Revised Statutes; Judicial Code, § 237. It was the plaintiff in the trial court (now defendant in error) who alone claimed under the laws of the United States. The attitude of the defendant was that of merely denying the validity of her claims. And the rulings of the state court (as is conceded, for argument's sake) erroneously imposed upon the defendant a greater responsibility than those laws warranted; in other words, gave too great force to the Federal statutes. The questions thus raised were undoubtedly Federal questions in *the general[285 sense; that is to say, they arose under the laws of the United States. And I concede that the judgment cannot be sustained upon any independent non-Federal ground. But according to all previous decisions, so far as I am aware, the mere existence of a Federal question in the record is not sufficient to give to this court jurisdiction to review the judgment of a state court; it is necessary that the Federal question shall have been decided in a particular way.

There is a clear distinction between the existence of a Federal question such as would give original jurisdiction to a Federal court because "arising under the Constitution or laws of the United States," etc. (Judicial Code, § 24, [36 Stat. at L. 1091, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 135]), or such as would give a right of appeal to this court from those courts (§§ 238, 241), and the *denial* by a state court of a Federal right or immunity, under such circumstances as to give jurisdiction to this court to review the state court's decision.

Section 237, Judicial Code, formerly § 709, Rev. Stat., authorizes a review by this court of the final judgment of the court of last resort of a state only "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is *against* their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is *in favor of* their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority."

Unless the emphatic words—"*against* their validity"—*"*in favor of* their[286 authority"—"*against* the title . . . or immunity *especially set up*," etc.,—are to be eliminated from the section, it must be construed as giving, not a mutual or reciprocal right of review of Federal questions decided in the state courts, but an unilateral right of review, dependent upon the way in which the question was decided in the state court.

The distinction has been recognized by this court in cases without number. See

Whitten v. Tomlinson, 160 U. S. 231, 238, 40 L. ed. 406, 410, 16 Sup. Ct. Rep. 297; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; Holder v. Aultman, M. & Co. 169 U. S. 81, 88, 42 L. ed. 669, 671, 18 Sup. Ct. Rep. 269; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 620, 48 L. ed. 1142, 1152, 24 Sup. Ct. Rep. 784.

The terms of § 237, Judicial Code, are not new. Except for using the word "*especially*" instead of "*specially*," the jurisdictional clause is identical with the corresponding clause in § 709, Rev. Stat., under which it has been uniformly held that this court has no general power to review or correct the decisions of the state courts, and is authorized only to protect against alleged violations in state court decisions of rights arising under the Federal authority; that it was not the purpose of Congress to authorize a review by this court whenever a Federal question is decided in a litigation in a state court, but was to prevent the state jurisdictions from impairing or frittering away the authority of the Federal government by failing to give full force to the statutes, etc., established by that government; and that therefore the writ of error will lie only when the decision is adverse to the Federal right asserted in the state court by the plaintiff in error; and that a decision in the state jurisdiction upon a Federal question, however erroneous the decision may be, is not to be corrected in this court if the decision be in favor of the right or immunity that is set up under the Federal authority. Montgomery v. Hernandez (1827) 12 Wheat. 129, 132, 6 L. ed. 575, 576; Hale v. Gaines (1859) 22 How. 144, 160, 16 L. ed. 264, 269; Murdock v. Memphis (1874) 20 Wall. 590, 626, 22 L. ed. 429, 441; Missouri ex rel. Carey 287] *v. Andriano, 138 U. S. 496, 499, 34 L. ed. 1012, 1013, 11 Sup. Ct. Rep. 385; Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 292, 40 L. ed. 430, 431, 16 Sup. Ct. Rep. 276; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 528, 44 L. ed. 872, 874, 20 Sup. Ct. Rep. 715.

In all these cases the word "immunity," as used in § 709, Rev. Stat., like the associated words "title, right, privilege," has been given its normal affirmative force; the clause meaning not that the plaintiff in error may have merely denied a Federal right asserted against him by his adversary, but that he must have claimed exemption from a liability or obligation asserted *against* him on grounds of state or of Fed*eral law, by specially setting up* an im*munity because of some statute*, or treaty, or constitutional provision of the United States.

The more recent decisions that are sometimes supposed to have given a different construction to § 709 do not, upon critical examination, bear out this view. Nutt v. Knut, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216, and cases cited; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 434, etc., 51 L. ed. 553, 556, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Kansas City Southern R. Co. v. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. St. Rep. 822; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790. An apparent exception is St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 291, 52 L. ed. 1061, 1066, 28 Sup. Ct. Rep. 616, etc. But in that case the plaintiff in error did at least assert a special construction of the Federal act upon which its adversary's suit was based, and upon that special construction claimed an exemption from liability.

I am unable to find in § 709, or in previous decisions of this court, any authority for a review by this court of a decision by a state court, sustaining a defendant's liability in an action founded upon a Federal law, although such decision be excepted to; or for reviewing a state court decision that, instead of impairing or limiting the effect of an act of Congress, is alleged to enlarge its scope and effect and the consequent responsibility of a defendant thereunder.

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*LEWIS PUBLISHING COMPANY, [288
Appt.,
v.
EDWARD M. MORGAN, as Postmaster of the United States of America in and for New York City, Borough of Manhattan. (No. 819.)

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JOURNAL OF COMMERCE & COMMERCIAL BULLETIN, Appt.,
v.
ALBERT S. BURLESON,† as Postmaster General of the United States; James C. McReynolds, as Attorney General of the United States, et al. (No. 818.)

(See S. C. Reporter's ed. 288-316.)

Postoffice — second-class matter — newspaper publicity law — construction.

1. Both the text and the legislative his-

†Retirement of Frank H. Hitchcock as Postmaster General, and George W. Wickersham as Attorney General suggested, and Albert S. Burleson and James C. McReynolds, their successors in office, substituted March 11, 1913, as parties appellees herein.

tory of that part of the postoffice appropriation act of August 24, 1912 (37 Stat. at L. 553, chap. 389), § 2, which requires newspapers and periodical publications to file with the Postmaster General and the postmaster at the place where "entered," and to publish in the second issue thereafter, a sworn statement of average circulation, and of the names of editor, publisher, owners, stockholders, principal creditors, etc., under penalty, in case of failure, of denial of the "privileges" of the mail, and to mark all paid reading matter "Advertisement," under penalty of criminal prosecution for noncompliance,—show that these provisions were intended simply to supplement existing legislation relative to second-class mail matter, and to impose additional conditions for admission to the privileged class of mail, and that they were not enacted as an exercise of legislative power to regulate the press or curtail its freedom.

**Postoffice — classification of mail matter — power of Congress.**

2. Congress, in the interest of the dissemination of current intelligence, may so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even though the legislation on that subject, when considered intrinsically, discriminates against the public, and in favor of such publications and their publishers.

**Postoffice — conditions of enjoying second-class privileges — validity of newspaper publicity law.**

3. The additional conditions upon the right to enjoy second-class mail privileges, imposed by the postoffice appropriation act of August 24, 1912, § 2, which requires newspapers and periodical publications to file with the Postoffice Department, and to publish in the second issue thereafter, a sworn statement of average circulation, and of the names of editor, publisher, owners, stockholders, principal creditors, etc., and to mark all paid reading matter "Advertisement," are incidental to the purpose to be secured by the second-class classification, and are therefore not repugnant to the Federal Constitution as infringing the freedom of the press, or taking property without due process of law.

[Freedom of the press, see Constitutional Law, 906–910, in Digest Sup. Ct. 1908.]

[Nos. 819 and 818.]

Argued December 2 and 3, 1912. Decided June 10, 1913.

TWO APPEALS from the District Court of the United States for the Southern District of New York to review decrees dismissing suits to enjoin the enforcement of the newspaper publicity law. Affirmed.

The facts are stated in the opinion.

Mr. Robert C. Morris argued the cause, and, with Mr. Guthrie B. Plante, filed a brief for appellant, The Journal of Commerce & Commercial Bulletin:

In using the terms "liberty and property," we do so in the broad sense in which the words are construed to have been used in the Constitution of the United States, and in a strictly legitimate sense in law, that interference with the profitable and free use of property by its owner arbitrarily deprives him of his property and of some portion of his personal liberty.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Smyth v. Ames, 169 U. S. 466, 523, 42 L. ed. 810, 840, 18 Sup. Ct. Rep. 418; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 52.

The question presents itself, is this act "necessary and proper" in connection with the power to establish, maintain, and regulate postoffices and post roads? Such a question is properly the subject of judicial inquiry (M'Culloch v. Maryland, 4 Wheat. 316, 420, 4 L. ed. 579, 580), and any such judicial inquiry must look to whether there is an advantage to be derived to the benefit of the people, and whether Congress has adopted a legitimate means of obtaining such object.

This legislation not being a means to accomplish the legitimate purpose of the maintenance of the postal establishment, or the regulation of the mail service, or the exclusion of harmful matter, or matter which it is impracticable to handle, is an attempted exercise by Congress of powers neither expressly nor incidentally granted, and impliedly condemned by the Constitution.

United States v. Fox, 95 U. S. 670, 24 L. ed. 538; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366.

There being no justification by express or implied power to Congress for the legislation in question, with no public service to be subserved, it is an unwarranted, arbitrary, and unreasonable interference with lawful private rights, invading personal freedom, and confiscating and destroying private property.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273.

The word "liberty," as employed in the Constitution of the United States, is not

mere freedom from arrest and restraint, but embraces the broader conception of freedom of action, freedom in the selection of a business calling or vocation, freedom of the citizen in the use and control of his property, so long as he does not violate the rights of others, freedom in exercising the rights, privileges, and immunities that belong to the citizen generally, and freedom in the conduct and pursuit of a lawful business.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Ex parte Virginia, 100 U. S. 339, 344, 25 L. ed. 676, 678; Munn v. Illinois, 94 U. S. 113, 142, 24 L. ed. 77, 90; Lansburgh v. District of Columbia, 11 App. D. C. 521; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652.

The word "liberty" embraces the right to keep secret one's books and papers, his business methods, and his knowledge of his own affairs. The right of society only extends to the point of sacrifice in the liberty of its individual members when such sacrifice is the result of due process of law. There must be, and is, reasonable protection against the danger of abuse, and no general inquiry into private affairs should be permitted. Vested rights must not thus arbitrarily be interfered with.

Re Davies, 168 N. Y. 105, 56 L.R.A. 855, 61 N. E. 118; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 38 L. ed. 1047, 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words "by the law of the land," in Magna Charta.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 276, 15 L. ed. 372, 374; Davidson v. New Orleans, 96 U. S. 97, 101, 24 L. ed. 616, 618.

Due process of law is not confined to judicial process, and cannot be thus restricted. It extends to every case which may deprive a citizen of life, liberty, or property, whether the process be judicial, or administrative, or executive in its nature.

Stuart v. Palmer, 74 N. Y. 190, 30 Am. Rep. 289.

If it is absolutely necessary to the public morals, the public health, or the public safety that a newspaper shall file a statement of its private affairs with the government, and thereafter publish such statement to the world at large, the provisions of the act in question may be termed a valid exercise of the police power: but unless such absolute necessity exists, the police power cannot be invoked to compel the filing and publication.

Colon v. Lisk, 153 N. Y. 196, 69 Am. St. Rep. 609, 47 N. E. 302.

The police power cannot encroach upon vested constitutional rights, and the courts should not be concerned with the probable purpose for which it is attempted to be exercised, or uncertain evils which it attempts to correct. The first requirement to the just exercise of the police power is that it must be reasonable, must be moderate, and have proportion in its means to the end to be attained.

Plessy v. Ferguson, 163 U. S. 537, 550, 41 L. ed. 256, 260, 16 Sup. Ct. Rep. 1138; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Frank L. Fisher Co. v. Woods, 187 N. Y. 94, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Wright v. Hart, 182 N. Y. 344, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Freund, Pol. Power, p. 61.

The act discriminates against appellant and other publishers siimlarly situated, and denies to it and them the equal protection of the laws.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

The first ten Amendments to the Constitution were intended as limitations upon the Federal powers previously granted, and this court has always held them so to be.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 12 L. ed. 213; Mechanics' & T. Bank v. Thomas, 18 How. 384, 15 L. ed. 460; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580.

For a true understanding of the meaning of the phrase "freedom of the press," we must look to what it imported in England and in America at and just prior to the time of the adoption of the 1st Amendment; for it was the liberty of the press as it was

then understood which is safeguarded. In this view, freedom of the press meant the right of free discussion by the press, and the right of publishing and circulating a newspaper by any of the usual means or channels, without restraint, except the restraint which then existed under the law of libel.

4 Bl. Com. *152; People v. Croswell, 3 Johns. Cas. 360.

There can be no doubt but that Congress, in the exercise of the police power, has the right to exclude by appropriate legislation all articles or matter from the mails which are contrary to public morals, and such exclusion is not an abridgment of the freedom of the press.

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; Re Rapier, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

The act is illegal and void and beyond the power of Congress to enact, being an usurpation by Congress of powers expressly reserved to the states of the United States, in that it is legislation affecting matters with which the several states alone have the right to treat by legislation or otherwise.

2 Rives, "The Life and Times of James Madison," pp. 38, 46; Barron v. Baltimore, 7 Pet. 243, 247, 8 L. ed. 672, 674; United States v. Fox, 95 U. S. 670, 24 L. ed. 538; Prigg v. Pennsylvania, 16 Pet. 539, 625, 10 L. ed. 1060, 1092; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; United States v. Press Pub. Co. 219 U. S. 1, 55 L. ed. 65, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Stone v. Mississippi, 101 U. S. 814, 819, 25 L. ed. 1079, 1080.

The word "mail" embraces the entire postal system, the instrumentalities of conveyance and delivery, and the entire body of matter thus conveyed. It applies equally to the sending of matter "first," "second," "third," or "fourth" class. The use of the term imports no limitation and permits of no restriction. It is all-embracing in its scope, and cannot be confined without the use of words of express limitation, such as "first-class" mail, "second-class" mail, etc.

Standard Dict. "Mail;" Bouvier's Law Dict.; United States v. Wilson, Baldw. 78, Fed. Cas. No. 16,730; United States v. Marselis, 2 Blatchf. 108, Fed. Cas. No. 15,724; Wynen v. Schappert, 6 Daly, 560.

In order to give the effect contended for by the Solicitor General this court is asked to prefix to the paragraphs in question a suitable phrase, such as, "before any newspaper, periodical, etc., shall be entitled to be admitted to the second-class mail," and to insert the words "second-class" in the expression "privileges of the mail," and to insert the words "and mailing" after the word "printing," in the paragraph relating to advertising matter, and to provide the other necessary changes to make the statute uniform and workable. In other words, judicial legislation is asked,—something that this court has always refused.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; Holden v. Stratton, 198 U. S. 202, 210, 49 L. ed. 1018, 1021, 25 Sup. Ct. Rep. 676.

The construction given the act by the Attorney General has been adopted by the Postmaster General, and as such should not be disturbed unless clearly wrong.

United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532.

Mr. James M. Beck argued the cause and filed a brief for appellant, the Lewis Publishing Company:

While resort may not be had to the dedates in Congress to determine the interpretation of a statute, yet they can be examined when the object of a statute is a pertinent matter.

United States v. Press Pub. Co. 219 U. S. 1, 55 L. ed. 65, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942.

An alleged implied power, as in the case at bar, must justify itself by showing that it is "necessary and proper" and "plainly adapted" to carrying out some express power.

M'Culloch v. Maryland, 4 Wheat. 423, 4 L. ed. 605; Federalist, No. 33; Hepburn v. Griswold, 8 Wall. 603, 614, 19 L. ed. 513, 523; United States v. Harris, 106 U. S. 636, 27 L. ed. 292, 1 Sup. Ct. Rep. 601; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The number of Federal enactments that have been adjudged unconstitutional is sometimes underestimated. Without pretending to have made an exhaustive search of the authorities, I have found twenty cases in which Federal enactments were thus adjudged unconstitutional by this court. In one of these (the Legal Tender Cases) the decision was subsequently reversed. Of the remaining nineteen, twelve

were adjudged void for want of power, and seven because they contravened some express constitutional limitation. The cases are:

Marbury v. Madison, 1 Cranch, 138, 2 L. ed. 60; Scott v. Sandford, 19 How. 393, 15 L. ed. 691; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; The Alicia (The Alicia v. United States) 7 Wall. 571, 19 L. ed. 84; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Supreme Justices v. Murray (Supreme Justices v. United States) 9 Wall. 274, 19 L. ed. 658; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Klein, 13 Wall. 128, 20 L. ed. 519; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

What cannot be done directly, because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result.

Fairbank v. United States, 181 U. S. 283, 294, 45 L. ed. 862, 867, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

If the means employed have no real substantial relation to public objects which the government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26* Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Union Bridge Co. v. United States, 204 U. S. 364, 397, 51 L. ed. 523, 538, 27 Sup. Ct. Rep. 367.

Nor can it matter that the law now under consideration may incidentally and to some extent relate to the due administration of the Post Office Department, for even a regulation of interstate commerce may be invalid if its enforcement involves a direct interference with intrastate commerce.

Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550.

Even where the power asserted is the power to tax,—the most sweeping, unlimited, and fundamental of governmental powers,—this court has found no insuperable difficulty in determining the difference between a tax and a reasonable fee covering expenses to protect the government against fraud (Pace v. Burgess, 92 U. S. 372, 23 L. ed. 657); between a tax on exports and a mere stamp duty on a document (Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135); between a tax and a penalty (Helwig v. United States, 188 U. S. 605, 47 L. ed. 614, 23 Sup. Ct. Rep. 427); between a tax and an improper burden on interstate commerce (Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817); between a legitimate regulation of rates and a confiscation of private property (Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418).

Congress cannot so use its conceded powers as to reach objects beyond its scope.

Adair v. United States, 208 U. S. 161, 178, 52 L. ed 436, 444, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; United States v. Fox, 95 U. S. 670, 24 L. ed. 538; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356.

Of all the rights of the citizens, few are of greater importance or more essential to his peace and happiness than the right of personal security; and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.

Re Pacific Railway Commission, 32 Fed. 250.

This right of privacy and the sanctity of one's books and papers were never better emphasized than in the case of Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, where Mr. Justice Bradley, in one of the ablest defenses of personal liberty to which this court ever gave utterance, defended the right of privacy against oppressive Federal regulations, even though they were enacted in execution of the most drastic of all governmental powers,—the power of taxation.

As in interpreting the Constitution recourse must be had to the standards of thought and conduct of its framers, in order to determine its meaning and scope (South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737), it should be remembered that no abridgment of the freedom of the press would have excited more opposition among those who framed the Constitution than the compulsory disclosure of authorship. They would have felt that an invaluable weapon against error had been taken from their hands.

The requirement that a certain class of newspapers shall disclose the most intimate details of their business, and use their own capital, labor facilities, and valuable space for such disclosure, is a taking of "liberty" and "property" without due process of law, and a like taking of valuable property rights for an assumed public use, without just compensation.

Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Munn v. Illinois, 94 U. S. 141, 24 L. ed. 89.

Solicitor General **Bullitt** argued the cause and filed a brief for appellees:

The general subject of the statute is the use of the mails by newspapers, etc.; and that idea should be borne in mind in construing the language of particular sentences.

Pollard v. Bailey, 20 Wall. 520, 525, 22 L. ed. 376, 377; Blair v. Chicago, 201 U. S. 400, 463, 50 L. ed. 801, 827, 26 Sup. Ct. Rep. 427.

The power of Congress over the postal system is plenary, and it may, in its own uncontrolled discretion, say what shall be carried and what shall not be carried; and it may classify not only the recipients of mail matter, but also (1) the senders and (2) the mail sent, according to such rules as to it seem best.

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; Re Rapier, 143 U. S. 110, 133, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789.

In the exercise of an admitted power, Congress may indirectly accomplish results which it would have no power to accomplish directly.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

The statute is not a law "abridging the freedom of the press."

Francis v. United States, 188 U. S. 375, 47 L. ed. 508, 23 Sup. Ct. Rep. 334, 13 Am. Crim. Rep. 595; France v. United States, 164 U. S. 676, 41 L. ed. 595, 17 Sup. Ct. Rep. 219; Re Rapier, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374; Patterson v. Colorado, 205 U. S. 454, 462, 51 L. ed. 879, 881, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689.

A court of equity will not, by injunction, restrain the prosecution of criminal proceedings.

Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482; Harkrader v. Wadley, 172 U. S. 148, 170, 43 L. ed. 399, 406, 19 Sup. Ct. Rep. 119; Fitts v. McGhee, 172 U S. 516–531, 43 L. ed. 535–542, 19 Sup. Ct. Rep. 269; Hemsley v. Myers, 45 Fed. 283; Wagner v. Drake, 31 Fed. 849; Logan v. Postal Teleg. & Cable Co. 157 Fed. 570; 2 Story, Eq. Jur. § 893; High, Inj. 4th ed. § 68; Joyce, Inj. §§ 58–60a.

If the "advertisement" paragraph should be held void, it should not affect the validity of the balance of the statute.

Bank of Hamilton v. Dudley, 2 Pet. 492, 526, 7 L. ed. 496, 508; Marshall Field & Co. v. Clark, 143 U. S. 649, 695–697, 36 L. ed. 294, 311, 312, 12 Sup. Ct. Rep. 495; Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 158 U. S. 601, 635, 636, 39 L. ed. 1108, 1126, 15 Sup. Ct. Rep. 912; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; Baldwin v. Franks, 120 U. S. 678, 686, 687, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763; Poindexter v. Greenhow, 114 U. S. 270, 304, 305, 29 L. ed. 185, 197, 198, 5 Sup. Ct. Rep. 903, 962; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 501, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 89, 24 L. ed. 377, 381; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580.

Mr. Chief Justice **White** delivered the opinion of the court:

The postoffice appropriation act of August 24, 1912 (37 Stat. at L. 553, 554, chap. 389), in § 2, contains the following:

"Sec. 2. . . . That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication, to

file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Postoffice Department, a sworn statement setting forth the names and postoffice addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided, further, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication 297]printed *next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall, upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

The two appellants, publishers of newspapers in the city of New York, complaining that this legislation abridged the freedom of the press protected by the 1st, and constituted a denial of the due process of law guaranteed by the 5th, Amendment to the Constitution, filed their bills against designated officials of the United States to prevent the enforcement of the provision in question. The bills were dismissed for want of equity, and this appeal was taken directly to this court, because of the rights asserted under the Constitution. Coming to *define the controversy* in order to appreciate and restrict the issues, to the end that we may pass on none but the questions which are necessary to be decided, it is to be observed that there are some differences in the mode in which the cases are stated in the pleadings and in the argument. But after all, these divergences give rise to no real distinction between the two cases, and we hence treat them as one. At the outset, in order to state in the most direct way the grievances which the publishers deem they have suffered, we reproduce, retaining the italics, the statement made on that subject in the opening passages of the argument of the counsel for the Lewis Publishing Company:

*"The newspaper law, whose consti-[298 tutionality is in this suit called into question, is neither in form nor substance a law to regulate the carriage of the mails, but *to regulate journalism.*

"In this respect it has the merit of sincerity. It does not pretend to be in aid of the Postoffice Department. That Department did not seek its enactment, but protested against it.

"The law in question makes no reference to the mails, except that it uses exclusion therefrom *as a means of enforcing this censorship of the press.*

"Even this remote connection is wanting in the latter section of the law, which requires paid reading matter to be formally branded as an advertisement. Its enforcement is left to a criminal action for a penalty.

"The law has two plainly avowed objects.

"The first is to compel a disclosure to the government, under oath, of the names and addresses of the editors, publishers, business managers, and owners, stockholders, security creditors, and the daily circulation of such newspapers for the preceding six months.

*"This will be hereafter referred to as the inquisitorial provision.*

"The second object is to compel a disclosure to the public, through newspaper publication, of these facts, and also whether any editorial or reading matter in such publication has been inserted for a valuable consideration.

*"This will be hereafter referred to as the publicity provision.*

"The publicity provision cannot be referred to any proper function of the Postoffice Department. Its function is to carry the mails, and in such carriage it cannot matter whether *the public* are advised as to the ownership, editorial direction, and circulation of a newspaper or not, or whether the matter which it publishes is published for a consideration."

And thus interpreting the assailed pro-

299]vision not as a *mere exertion of legislative power to additionally prescribe the conditions by which publishers might continue to enjoy the right to participate in the large pecuniary advantages and other privileges created in their favor through the classification of mail matter, but, on the contrary, treating the provision as a substantive exercise of a legislative authority not possessed, and which unduly restricted the freedom of the press, thinly disguised as a regulation of the mails, and enforceable by an absolute exclusion from the right to all mail service, the legal propositions advanced are as follows:

"1. The Constitution has not, either under the post-roads clause or elsewhere, delegated to the Federal government the power (1) to compel these disclosures, and (2) to direct their publication, or (3) to compel paid reading matter to be marked as an advertisement.

"2. The Constitution not only failed to give such power, but it expressly forbade it, by the 1st Amendment, prohibiting any law 'abridging the freedom of the press.'

"3. The requirement that a certain class of newspapers shall disclose to the public by publication the most intimate details of their business, and use their own capital, labor facilities, and valuable space for such disclosure, is a taking of 'liberty' and 'property' without due process of law, and a like taking of valuable property rights for an assumed public use without just compensation."

On the other hand, putting aside what we deem to be minor subdivisions, broadly stated, all the contentions of the government are reducible to the following: (a) That the assailed provision in no sense can be considered as an attempted exertion of power to regulate the freedom of the press, or even as the exercise of the legislative authority to regulate the mails in the larger or general sense of that term, since, when rightly construed, the provision only deals with what is known as second-class mail matter, and imposes conditions necessary 300]to be complied with to *enable publishers to participate in the great and exclusive privileges and advantages which arise from the right to use the second-class mail. (b) That the precedent conditions thus imposed are relevant to the purpose which was intended to be accomplished by Congress in creating the second-class mail privilege, and are either directly or incidentally embraced in the power to regulate the mails, and, in doing so, to confer the second-class privilege. (c) That even if these propositions be not well founded, and the provision be given the significance attributed to it by the publishers, nevertheless it is valid as an exertion by Congress of its power to establish postoffices and post roads,—a power which conveys an absolute right of legislative selection as to what shall be carried in the mails, and which therefore is not in any wise subject to judicial control, even although in a given case it may be manifest that a particular exclusion is but arbitrary, because resting on no discernible distinction, nor coming within any discoverable principle of justice or public policy.

From this statement of the opposing contentions it is apparent that the first and fundamental cause of difference arises from the widely conflicting views entertained concerning the meaning of the assailed provision, and that hence it becomes primarily necessary to settle such differences; that is, to determine the true meaning of the provision. Moreover, as the controversy concerning the meaning of the provision involves its relation to the law concerning the carriage of newspapers in the mails, in force at the time of the passage of the provision, and an appreciation of its letter and spirit, it also becomes necessary to consider that law, its origin and development.

An abstract of the laws relating to the postal service from early Colonial times (1639), and under the Constitution down to and including the year 1888, will be found in the report of the Postmaster General for the year 1888. A condensed yet comprehensive statement of the general *results of the legislation from the[301 first statute on the subject, February 20, 1792 (1 Stat. at L. 235, chap. 7), to the act of May 12, 1910 (36 Stat. at L. 366, chap. 230), is contained in the report of the Commission on Second-class Mail Matter, communicated by the President to Congress on February 22, 1912, pp. 13-18.

A consideration of the abstract made by the Postmaster General, above referred to, and of the synopsis contained in the report of the commission, leaves no doubt that from the beginning Congress, in exerting the power to establish postoffices and post roads, has acted upon the assumption that it was not bound by any hard and fast rule of uniformity; that is to say, that in exerting its power on the subject of the mails it has always considered that the right to classify in the broadest sense was enjoyed, and, consequently, depending upon conceptions of public good to be accomplished irrespective of the mere cost of carriage, the rates of mail have varied and the privileges accorded have changed from time to time. All the power which has been exerted is derived from the grant to Congress, in

article 1, § 8 of the Constitution, to establish postoffices and post roads. And the wise combination of limitation with flexible and fecund adaptability of the simple yet comprehensive provisions of the Constitution are so aptly illustrated by a statement in the argument of the government as to the development of the postal system, that we insert it as follows:

"Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 postoffices, with hundreds of thousands of employees, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billion of pounds, the incorporation of railroads, the establishment of the rural free delivery system, the money-order system, by which more than 302]half *a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcels post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of fraudulent and criminal schemes, impossible to be reached in any other way."

Only particularly concerned, as we are, with the legislation relating to the carriage of newspapers in the mails, we need not stop to generally demonstrate the accuracy of the statements we have made. An abstract from and reference to the statutes chronologically arranged, relating particularly to discriminations in favor of the carriage of newspapers in the mail, will be found in a statement made by W. A. Glasgow, Jr., Esq., before the Postal Commission of 1906-07, forming part of House Document, vol. 98, beginning at page 541. And a consideration of the statutes referred to in this abstract will demonstrate the legislative inauguration of and persistent adhesion to what is aptly described in the report of the Commission on Second-class Mail Matter as "the historic policy of encouraging by low postal rates the dissemination of current intelligence." Indeed, we think also that it is not open to controversy that a review of these statutes will demonstrate that it was always conceived not only that Congress might so exert its power as to favor the circulation of newspapers, by giving special mail advantages, but that it also possessed the authority to fix a general standard to which publishers seeking to obtain the proffered privileges must conform in order to obtain them. Nothing affords a more *apt illustration* of the assumed existence *of the power in Congress* to discriminate *on the subject* than was shown as early as 1845 by the act of March 3 of that year (5 Stat. at L. 735, § 9, chap. 43), by which, although there was secured to the government a virtual monopoly in the transportation "of any letters, packets, or packages of letters," by forbidding the establishment of "any private express or expresses" for their conveyance on mail routes, it was declared that the *restrictions should[303 not apply to the transportation of newspapers, pamphlets, magazines, and periodicals.

But it is useless to pursue the subject in detail, since, as the result of legislation, beginning with the act of March 3, 1863, chap. 71, 12 Stat. at L. pp. 704 et seq., and embracing statutes which are noted in the margin,† it had come to pass on August 24, 1912, when the provision here assailed was enacted, that mail matter, disregarding mere subordinate subdivisions, was divided into four general classes,—the first class embracing letters and printed matter, the second class covering newspapers and periodicals, the third, books and pamphlets, and the fourth merchandise. And it is obvious and is not disputed, that the classification thus adopted was based not upon merely inherent distinctions or differences in the nature and character of the articles as mailable matter and the cost of their carriage, but rested upon broad principles of public policy; in other words, upon the conceptions of Congress as to how far it was wise for the general welfare to give advantages to one class not enjoyed by another. It is not necessary to stop to enumerate the exceptional privileges and great advantages which were offered to publishers of newspapers by the classification thus adopted, since it is not questioned that, as a result of giving them the benefits of the second-class rates, pecuniary advantages of great consequence to them resulted which, when conjoined with the exceptional administrative and other privileges which were accorded under that classification, undoubtedly operated a very great dis-

†Act of June 8, 1872, chap. 335, §§ 99 et seq., 17 Stat. at L. 296; June 23, 1874, chap. 456, §§ 5 et seq., 18 Stat. at L. 232, U. S. Comp. Stat. 1901, p. 2667; July 12, 1876, chap. 179, § 15, 19 Stat. at L. 82, U. S. Comp. Stat. 1901, p. 2679; March 3, 1879, chap. 180, §§ 7 et seq., 20 Stat. at L. 358; U. S. Comp. Stat. 1901, p. 2646; June 9, 1884, chap. 73, 23 Stat. at L. 40; U. S. Comp. Stat. 1901, p. 2668; March 3, 1885, chap. 342, 23 Stat. at L. 387; July 16, 1894, chap. 137, 28 Stat. at L. 105, U. S. Comp. Stat. 1901, p. 2653; June 6, 1900, chap. 801, 31 Stat. at L. 660, U. S. Comp. Stat. 1901, p. 2654; May 12, 1910, chap. 230, 36 Stat. at L. 366. See also act of August 24, 1912, chap. 389, 37 Stat. at L. p. 551.

304]crimination in *their favor. It was obviously this result of the legislation which caused the Postmaster General, at page 6 of his report to Congress for the year 1907, to say that "by acts of Congress passed in 1874, 1879, 1885, and 1894, a privileged class has been created." And without going into detail or intending by citing them to treat the figures as being other than illustrative, the subject is illumined by a statement made in the brief for the government, that the rate for first-class or letter mail is of such a character as to produce a profit of seventy millions a year to the government, while for the second or newspaper class the rates are such as to entail upon the government a loss of seventy millions of dollars each year,—a result which it is moreover stated is brought about by the fact that letter mail under the classification is subjected to a rate eighty times higher than that given newspapers under the second class, and that while not so large, a very great discrimination also exists against the other classes and in favor of the second class.

But the mere distinction between the classes is not the only measure of the exceptional privileges accorded to publishers, for within the second class under which they are placed, advantages are given them not possessed by others in that class. For instance, the postage on a newspaper coming under the second-class rate when mailed by an individual is higher than is the rate of postage exacted for the mailing of the same newspaper by publishers or news agents. While it cannot be questioned that the conferring of the special privileges above stated was, at least in form, a discrimination against the public generally, beyond doubt, however, in the legislative mind they were deemed not to be of that character because the purpose of their bestowal was to secure to the public the benefits to result from "the wide dissemination of intelligence as to current events." Certain, however, as is this view, it is equally also certain that for the purpose of securing 305]the *public benefits which it was conceived would result from the giving of the privilege, it was deemed that the power and duty existed to fix a standard which should be complied with by those who wished to enjoy the privilege,—a result manifested by the following provisions of § 14 of the act of March 3, 1879, chap. 180, 20 Stat. at L. 359, U. S. Comp. Stat. 1901, p. 2647:

"Sec. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguished printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And the long-settled administrative practice in enforcing these conditions serves to show what was deemed to be their importance and the necessity for applying them to the end that the results intended to be accomplished by Congress might be realized. Prior to 1887 the enforcement of the conditions exacted as a prerequisite to the enjoyment of second-class mail privileges depended upon the action of postmasters throughout the United States, and although in the discharge of their duty they were governed by regulations and instructions promulgated by the Postoffice Department, there was certainly laxity *and pos-[306 sible confusion. In 1887, to remedy this condition, under the authority conferred upon him by Rev. Stat. § 396 (U. S. Comp. Stat. 1901, p. 224), the Postmaster General promulgated new rules and regulations. It suffices briefly to point out the means by which uniformity in administration was secured. Those desiring to obtain the second-class privileges were compelled to make written application for entry of their publications at the local postoffice, to file copies of the publications, to make affidavit to the essential facts, and to make written answers to questions propounded which were deemed to be essential to show the existence of the conditions precedent imposed by the statute. A copy of the questions required to be answered are in the margin.† *One con-[307

† From Postal Laws and Regulations—1902 ed., p. 198.

V.—Applications for Entry of Publications as Second-class Matter.

Sec. 438. When a publication, not included in §§ 429 and 430 (see §§ 427 and 428), is offered for mailing for the first time at the second-class rates of postage, the postmaster shall require the proprietor or his duly au-

trolling authority for passing upon all applications for entry was provided by vesting the Third Assistant Postmaster General with power to that end, that officer being authorized in case of approval of the application to empower the postmaster at the proper office to issue a certificate of entry. Upon the issue of the certificate it was made the duty of the publisher to print upon each copy of the publication, so entered, the 308]following: *"Entered—at the postoffice at—as second-class matter under the act of—."

It is true to say that these regulations promulgated in 1887, modified in some respects not material here to be considered, were continuously in force from their adoption up to the time the statutory provisions here in question were enacted, and had therefore been in operation for about twenty-five years.

In the light of this statement concerning the evolution of the law as to mail matter and its classification, as it existed at the time the provision here involved was enacted, we come to dispose of the controversy as to the meaning of that provision, the question which we are called upon to solve being this:

Was the provision intended simply to supplement the existing legislation relative to second-class mail matter, or was it enacted as an exertion of legislative power to regulate the press, to curtail its freedom, and under the assumption that there was a right to compel obedience to the command of legislation having that object in view, to deprive one who refused to obey of all right to use the mail service? When the question is thus defined its solution is free from difficulty, since by its terms the provision only regulates second-class mail, and the exclusion from the mails for which it provides is not an exclusion from the mails generally, but only from the right to participate in and enjoy the privileges accorded by the second-class classification.

The reasons which cause us to think this to be the case are these: (a) Because the provision is part of a postoffice appropriation act, and naturally, therefore, gives rise to the inference that it concerns the general subject of the mails, there being an entire absence of anything justifying even a surmise, if such a point of view could be indulged in under any circumstances, that Congress was intentionally exerting power not delegated to it, and consciously

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thorized representative to make and present to him, with two copies of the publication, sworn answers in writing (on Form 3501) to the following interrogatories:

(1) How often is the publication issued?

(2) Where is the "known office of publication?" (If in a city, give street and number.)

(3) Where is it printed?

(4) Who are the proprietors?

(5) Are they in any way interested pecuniarily in any business or trade represented by the publication, either in the reading matter or in the advertisements? If so, what is the interest?

(6) Who are the editors of the publication, and how is their compensation determined?

(7) Have the editors any pecuniary interest in any business or trade represented by the publication, either in the reading matter or in the advertisements? If so, what is the interest?

(8) Can any house in good standing advertise in your publication at the regular published rates?

(9) Are advertisements of competitors accepted at the usual rates?

(10) Have any of the business houses which advertise in your publication any interest (either by past connection or special contract) therein respecting advertisements or subscriptions? If so, what is the interest?

(11) What is the greatest number of copies furnished to any person or firm advertising in your publication?

(12) On what terms are these papers furnished?

(13) What number of copies do you print of each issue?

(14) What number of bona fide subscribers have you for the next issue of your paper, made up as follows:

a. Direct individual subscriptions to publisher without premium?

b. Direct individual subscriptions to publisher with premium?

c. Direct individual subscriptions in clubs or through clubbing arrangements?

d. Copies regularly sold over publishers' counter to purchasers of individual copies?

e. Copies regularly sold by newsboys?

f. Regular sales of consecutive issues by news agencies?

g. Bulk purchases of consecutive issues by news agencies for sale without the return privilege?

h. Copies to advertisers, one to each to prove advertisement?

i. Bona fide exchanges, one copy for another, with existing second-class publications?

(15) What is the subscription price of your publication per annum?

(16) How many pounds weight will cover the papers furnished to regular subscribers?

(17) What average number of specimen copies with each issue do you desire to send through the mails at the pound rate?

(18) How are the names of the persons to whom sample copies are to be sent obtained?

(19) What disposition is made of the excess, if any, of copies printed over those furnished to subscribers, news agents, including newsboys, and as sample copies?

309] *violating an express prohibition of the Constitution, and for that reason clothed its exertion of power in the disguise of postal legislation; (b) because the text makes clear the fact that the legislation was exclusively addressed to the regulation of second-class mail, and was shaped in contemplation of the long-established law and regulations governing that class. This result becomes apparent when it is observed that the provision makes it the duty of the publisher to "enter" his publication, since by practice and regulation prevailing during a long period of time, it had come to pass that the word "to enter" had exclusive relation to a duty to be performed in order to obtain the benefits of the second-class classification. In the absence, therefore, of some express indication to the contrary, no other conclusion is possible than that the word was used with reference to its received official and administrative significance. In fact, in view of the history which we have given of the development of the second-class classification, and the reasons which led to the system of entry, unless the settled significance of the word be given to it, it would have no meaning whatever.

Further, we think that because, as finally enacted, the provision which was in one paragraph as it passed the House of Representatives, in the Senate was divided into two paragraphs, affords no ground for contending that the requirement as to advertisements, contained in the second printed paragraph, is not embraced within and controlled by the conclusion we have stated. We say this because the second printed paragraph by reference clearly manifests that its provision applied to "such" newspapers, periodicals, etc., that is, the newspapers or periodicals covered by the first paragraph, and which by its terms are submitted to the duty of entry in order to enjoy the privileges conferred. Nor do we think there is in reason ground to support the proposition that because the provision sanctioned the duty to make entry 310]by an exclusion from *the mails, it hence is a general regulation, and not simply conferring the right of availing of the second-class privileges. The proposition assumes that the command is that for failure to comply with the conditions imposed there shall be a denial of the use of the mails, while in fact the provision is there shall be a denial of the "privileges" of the mail,—a qualification which, in view of the great advantages given by the second-class mail classification, and of the fact that in the reports made to Congress concerning that classification, attention was directed to the circumstance that a privileged class was thereby created, goes to show the conscious purpose to provide only for the exceptional privileges with which the provision was dealing.

Equally wanting in force is the further contention that because the regulation in the second paragraph to the effect that paid matter shall be marked as advertisement is sanctioned by a penalty, therefore, at least, as to such provision, an independent regulation of the press was intended, divorced from the requirements as to entry contained in the first paragraph. We reach this conclusion because when the paragraph referred to is accurately considered it makes more cogent the view we have taken, and additionally demonstrates that the legislative mind, in enacting it, was sensitively alive to the fact that the provision alone concerned the privileges of second-class mail, and the administrative rule which for so many years prevailed on the subject. In other words, that as, under existing administrative regulations, the exactions as to entry contemplated conditions existing at the time of the application for entry, and the condition as to advertisements concerned conduct of a publisher after entry, which could not therefore be a condition precedent to entry, a penalty for the latter was devised in order to harmonize with the requirements as to admission to the second-class mail.

*But even if we were to omit the[311 word "privilege" which qualifies the exclusion from the mails as provided in the first paragraph, so as to cause the provision to read "shall be denied the (privileges of the) mails," there would be nevertheless no room for doubt. As we have seen, coeval with the establishment of the system of entry, as the means of securing the privileges of the second-class mail, and presumably because of the overshadowing advantages and benefits which were conferred by that system upon those entitled to participate in them, the right to such admission came to be indifferently described as "the entry to the mails of newspapers," etc., the "publications admitted to the mails," etc., and the duty which was cast upon the Third Assistant Postmaster General, in passing upon such subjects, as "the responsibility of finally admitting such matters to the mail," etc. See the report of the Third Assistant Postmaster General, contained in the report of the Department for the year 1887, at page 699, where, after referring to the regulations concerning entry, the quoted expressions are employed. Moreover, when it is considered that the provision was dealing only with the second-class privilege, it cannot in reason be an-

sumed that conditions were imposed dealing with a subject with which the statute was not concerned, in order thereby to afford ground for asserting it to be unconstitutional, when the elementary rule is that every reasonable intendment to avoid such a result must be indulged in. United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527. Without stopping, however, to review the subjects in detail, we content ourselves with saying that we think neither the reference to expressions in debate, upon the concession for the sake of argument that they are competent to be looked at, nor an opinion of the Attorney General upon which reliance is placed, are adequate to control or modify the conclusion we have reached as to the meaning of the provision.

312] *But granting that room for doubt remains after the analysis of the text, which has preceded, we are of opinion that the legislative history of the adoption of the provision makes that conclusion indisputable for the following reasons: 1. Since the bill as introduced in the House of Representatives contained but one paragraph, and obviously related to the privileges of the second-class mail alone; 2d, because although the bill as reported to the Senate by the committee to which it was there referred was somewhat modified as to the conditions exacted, and was divided into two paragraphs, the report of the committee leaves no doubt that there was no purpose to disintegrate the provision as it passed the House of Representatives, by making two enactments, or to do anything more than to exact additional conditions for the right to enjoy the second-class mail privileges, the latter result being clearly shown by the following excerpt from the report of the committee. (Report No. 955, p. 24):

"The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequaled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter, and since these publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who *own or control them.*"

*As therefore* the assailed provision when rightly construed only affixes additional conditions for admission to a privileged class of mail, and it was merely designed to provide for the continuance on compliance with designated conditions of a system under which vast sums of public *money were expended, to the end[313 that the power and influence of the press might be expanded, it results that there was no foundation for the meaning attributed to the provision in question by the complainants, and on which the grievances upon which they relied rested.

We come, then, to determine whether the provision as thus construed is valid. That Congress, in exerting its power concerning the mails, has the comprehensive right to classify which it has exerted from the beginning, and therefore may exercise its discretion for the purpose of furthering the public welfare as it understands it, we think it too clear for anything but statement; the exertion of the power, of course, at all times and under all conditions, being subject to the express or necessarily implied limitations of the Constitution. From this it results that it was and is in the power of Congress, in "the interest of the dissemination of current intelligence," to so legislate as to the mails by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers. Although in the form in which the contentions here made by the publishers which we have at the outset reproduced, as literally stated, seem to challenge this proposition by suggesting that the power of Congress to classify is controlled and limited by conditions intrinsically inhering in the carriage of the mails, we assume that such apparent contention was merely the result of an unguarded form of statement, since we cannot bring our minds to the conclusion that it was intended on behalf of the publishers to generally assail as an infringement of the constitutional prohibition against the invasion of the freedom of the press the legislation which, for a long series of years, has favored the press by discriminating so as to secure to it great pecuniary and other concessions, *and a wider[314 circulation and consequently a greater sphere of influence. If, however, we are mistaken in this view, then, we think, it suffices to say that the contention is obviously without merit. This being true, the attack on the provision in question as a violation of the Constitution because infringing the freedom

of the press, and depriving of property without due process of law, rests only upon the illegality of the conditions which the provision exacts in return for the right to enjoy the privileges and advantages of the second-class mail classification. The question, therefore, is only this: Are the conditions which were exacted incidental to the power exerted of conferring on the publishers of newspapers, periodicals, etc., the privileges of the second-class classification, or are they so beyond the scope of the exercise of that power as to cause the conditions to be repugnant to the Constitution? We say this is the question, since necessarily if the power exists to legislate by discriminating in favor of publishers, the right to exercise that power carries with it the authority to do those things which are incidental to the power itself, or which are plainly necessary to make effective the principal authority when exerted. In other words, from this point of view, the illuminating rule announced in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, and Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, governs here as it does in every other case where an exertion of power under the Constitution comes under consideration. The ultimate and narrow question, therefore, is, Are the requirements of the provision in question incidental to the purpose intended to be secured by the second-class classification?

Let us consider the matter from the historical and from the inherent standpoint. Under the statute, as we have seen, for a long series of years a publication primarily devoted to advertisements was not entitled to the benefit of the second-class classification, and by a long administrative construction, embodied in the regulations, the disclosure of the names of the proprietors as 315] well as of the *editors of a publication which has sought to be entered as second-class matter was required. The new conditions imposed are first, that where there is matter the publication of which is paid for, the fact of such payment shall be disclosed by marking the matter as an advertisement; and second, the disclosure as to ownership, etc., previously exacted, is enlarged by making it necessary in the case of a corporation to furnish the names of the stockholders, and also requiring that the names of the principal creditors, etc., be given. As the right to consider the character of the publication as an advertising medium was previously deemed to be incidental to the exercise of the power to classify for the purpose of the second-class mail, it is impossible in reason to perceive why the new condition as to marking matter which is paid for as an advertisement is not equally incidental to the right to classify. And the additional exactions as to disclosure of stockholders, principal creditors, etc., also are as clearly incidental to the power to classify as are the requirements as to disclosure of ownership, editors, etc., which for so many years formed the basis of the right of admission to the classification. We say this because of the intimate relation which exists between ownership and debt; since debt, in its ultimate conception, is a dismemberment of ownership, and the power which it confers over an owner is, by the common knowledge of mankind, often the equivalent of the control which would result from ownership itself. Considered intrinsically, no completer statement of the relation which the newly exacted conditions bear to the great public purpose which induced Congress to continue in favor of the publishers of newspapers at vast public expense the low postal rate as well as other privileges accorded by the second-class mail classification can be made than was expressed in the report of the Senate committee, stating the intent of the legislation which we have already excerpted; that is, to secure to the public in *"the dissemination of knowledge of [316 current events," by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be, or was in substance a paid advertisement. We repeat that in considering this subject we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but we are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense,—a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded.

It may be deemed from what we have said in considering the asserted repugnancy of the conditions imposed by the provision under examination that we have assumed that if the attack made upon such conditions was well founded and they therefore would disappear, nevertheless the right to continue to enjoy the second-class mail privileges would remain; but we have not considered that subject and intimate no opinion upon it.

Finally, because there has developed no necessity of passing on the question, we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition, embodied in the proposition of the government which we have previously stated.

Decrees affirmed.

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317] *CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

THOMAS W. BROWN.

(See S. C. Reporter's ed. 317-322.)

**Master and servant — contributory negligence — railroad case.**

A switchman reaching in between slowly moving cars to remove a coupling pin after repeated unsuccessful attempts to operate the automatic coupler is not, as a matter of law, guilty of such contributory negligence as defeats his right to recover for the resulting injuries, because he did not anticipate that his foot might slip and catch as it did in an unblocked guard rail of which he had, or could be charged with, knowledge.

[For other cases, see Master and Servant, II. c, 2, in Digest Sup. Ct. 1908.]

[No. 230.]

Argued and submitted April 18, 1913. Decided June 10, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois in favor of plaintiff in an action brought by an employee against a carrier to recover damages for personal injuries. Affirmed.

See same case below, 107 C. C. A. 300, 185 Fed. 80.

The facts are stated in the opinion.

Mr. M. L. Bell argued the cause, and, with Mr. F. C. Dillard, filed a brief for plaintiff in error:

The court erred in refusing to direct a verdict for the defendant, on the ground that plaintiff was guilty of contributory negligence as a matter of law.

Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; Kilpatrick v. Choctaw, O. & G. R. Co. 57 C. C. A. 255, 121 Fed. 11, 195 U. S. 624, 49 L. ed. 349, 25 Sup. Ct. Rep. 789; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529; Suttle v. Choctaw, O. & G. R. Co. 75 C. C. A. 470, 144 Fed. 668; Union P. R. Co. v. Brady, 88 C. C. A. 579, 161 Fed. 719; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561.

Mr. James C. McShane submitted the cause for defendant in error:

Plaintiff cannot be held guilty of contributory negligence, as a matter of law.

Highland Ave. & Belt R. Co. v. Walters, 91 Ala. 435, 8 So. 360; 7 Thomp. Neg. § 5374, p. 814; Taylor v. Felsings, 164 Ill. 331, 45 N. E. 161; Taggart v. Republic Iron & Steel Co. 73 C. C. A. 144, 141 Fed. 910; Herrick v. Quigley, 41 C. C. A. 299, 101 Fed. 187; Lake Erie & W. R. Co. v. Craig, 19 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 642; 5 Thomp. Neg. 2d ed. p. 148, § 5593; Illinois C. R. Co. v. Heath, 228 Ill. 314, 81 N. E. 1022; St. Louis, I. M. & S. R. Co. v. York, 92 Ark. 554, 123 S. W. 376; Sprague v. Wisconsin C. R. Co. 104 Minn. 58, 116 N. W. 104; Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Turrittin v. Chicago, St. P. M. & O. R. Co. 95 Minn. 408, 104 N. W. 225, 18 Am. Neg. Rep. 506; Mobile, J. & K. C. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Brady v. Kansas City, St. L. & C. R. Co. 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195; Illinois C. R. Co. v. Cozby, 174 Ill. 109, 50 N. E. 1011; Ashman v. Flint & P. M. R. Co. 90 Mich. 567, 51 N. W. 645; Eastman v. Lake Shore & M. S. R. Co. 101 Mich. 597, 60 N. W. 309; O'Neill v. Chicago, R. I. & P. R. Co. 62 Neb. 358, 60 L.R.A. 443, 86 N. W. 1098; Bird v. Long Island R. Co. 11 App. Div. 134, 42 N. Y. Supp. 888; Curtis v. Chicago & N. W. R. Co. 95 Wis. 460, 70 N. W. 665, 2 Am. Neg. Rep. 275; United States v. El Paso & S. W. R. Co. Ariz. Dist. Ct. Jan. 30, 1907; Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 165 Fed. 869.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment of the circuit court of appeals, affirming a judgment of the circuit court for the northern district of Illinois for $8,000, in an action brought by Brown, defendant in error, against the railway company, for injuries received by

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NOTE.—On contributory negligence of employee of railroad in stepping between moving cars—see note to Korab v. Chicago, R. I. & P. R. Co. 41 L.R.A. (N.S.) 32.

*On servant's contributory negligence, generally—see note to* Quebec S. S. Co. v. Merchant, *33 L. ed. U. S. 656.*

him while working as a switchman in the railway company's yards at Chicago.

The action was brought in the state court, and removed on the petition of the railway company to the Federal court.

The first count of the declaration is based upon a violation of the safety appliance act, and it also contains allegations based upon the employers' liability act. The company was engaged and Brown was employed in interstate commerce. The fourth count charges negligence in failing to fill up the space between a running rail and a guard rail, in which space Brown's foot caught, where it was run over and his leg cut off.

The case was tried to a jury, resulting in a verdict for $8,000 for Brown upon two counts: (a) for a violation of the safety-appliance law, (b) common-law negligence in not blocking the switches. Judgment was entered upon the verdict, which was subsequently affirmed by the circuit court of appeals. 107 C. C. A. 300, 183 Fed. 80.

For the purpose of the contentions which are made here, the following facts must be accepted to be established, as summarized in the opinion of the circuit court of appeals:

"The defendant in error, a switchman in a large switch yard, was called upon, at 319]night, to uncouple some cars. *Not being in touch by signal with the engineer, he conveyed his signals to another switchman in advance of him, who conveyed them to the engineer. The cars were in motion on a car track at the time. The uncoupling was to be done by means of shoving the cars in motion. Had the safety appliance been in order, this could have been accomplished by defendant in error while walking at the side of the train. But the safety appliance on the side of the car on which he was working at the time would not operate. He gave three or four jerks to it, which failed to open the coupler. He then reached in between the cars and attempted to lift the coupler pin with his fingers, which he was unable to do. He then attempted to reach the pin on the adjacent coupler, in order to lift that with his fingers. During all this time he was walking beside the cars, which were moving slowly. The pin-lifting rod on the other car projected not towards him, but away from him; and as he was reaching for the coupler pin on this adjacent coupler, his foot slipped, and a low brake beam striking his foot, shoved it into an unblocked guard rail, where it was run over and his leg cut off. Had he, under these circumstances, abandoned the uncoupling altogether until the car had come to a standstill, he would have been saved the accident."

These being the facts, the railway company asserts error in the trial court in not directing a verdict for the company, on the ground (1) that Brown, in leaning between the cars while they were in motion, was guilty of contributory negligence as a matter of law, and (2) in instructing the jury, in effect, that Brown was not chargeable with contributory negligence by the mere fact of going between the cars.

The contentions are resolvable into one, and may be said to be covered by the charge to the jury which the railway company attacks. The court, after stating that the first count of the declaration is based on the failure *of the company to equip[320 the car with such a coupling device as that it could be operated without the switchman going between the ends of the car, said:

"This first count charging the failure I have just referred to is based upon the act of Congress imposing certain requirements upon common carriers engaged in interstate commerce, and this statute provides that a carrier so engaged shall not move or permit to be moved on its rails a car that is used in interstate commerce unless so equipped. This act also provides that if an employee engaged in the service of such a carrier sustains an injury by reason of the carrier's failure to obey that law, the employee shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still this first count, that if the employee goes between the cars to effect an uncoupling, he is not chargeable with contributory negligence, that is, a failure to exercise ordinary care for his own safety, by the mere fact of going in between the cars to effect the uncoupling, but he is required, before he can recover, to exercise ordinary care for his own safety after he goes between the cars, and while he is there, endeavoring to effect an uncoupling; that is, the separation of the cars."

The counsel for the company at the outset expressed their realization that this case is one of those characterized in Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79, as of the class which it was the purpose of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488] to submit to the final jurisdiction of the circuit court of appeals, and that this court under such circumstances will "go no farther than to inquire whether plain error is made out." Texas & P. R. Co. v. Howell, 224 U. S. 577, 56 L. ed. 892, 32 Sup. Ct. Rep. 601. And the

concession is made that in the Taylor Case, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, and in Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, this court settled 321]that the failure *of a coupler to work at any time sustains a charge of negligence in this respect, no matter how slight the pull on the coupling lever. And, further, "The mere fact that the pin would not lift when plaintiff [Brown] endeavored to lift it makes a case of negligence under the first count. Contributory negligence is asserted because Brown knew, as it is contended, that he would have to pass over an unblocked guard rail; that, besides, he controlled the situation, it is contended, through signals to the engineer; and that he had two safe methods in which to make the cut of the cars, but voluntarily and for his own purpose chose the most dangerous method.

But all these facts and how far they should have affected his conduct were submitted to the jury. The evidence detailed the situation to them and whether the judgment of Brown was prudently formed and exercised.

The trial court and the circuit court of appeals, considering the evidence, confirmed the finding of the jury, expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed, but such as must be pronounced to be without foundation as a matter of law.

The railway company starts its contentions with a concession of its own culpability in sending Brown to his duty to encounter defective appliances, and then seeks to relieve itself from liability by a charge against him of a careless judgment in its execution. But some judgment was necessary, and whether he should have selected one of the ways which counsel point out admits of debate. It is one thing to judge of a situation in cold abstraction; another thing to form a judgment on the spot. The Germanic (Oceanic Steam Nav. Co. v. Aitken), 196 U. S. 589, 595, 596, 49 L. ed. 610, 613, 614, 25 Sup. Ct. Rep. 317. The movement of trains requires prompt action, and we cannot hold that, as a matter of law, Brown, in leaning forward to remove a pin which would have yielded to his effort, was guilty of negligence because he did not 322]anticipate that his foot *might slip and be caught in an open frog rail of which he had or could be charged with knowledge. The case is within the ruling in the Texas & P. R. Co. v. Harvey, 228 U. S. 319, ante, 518, 33 Sup. Ct. Rep. 518.

*Judgment affirmed.*

CITIZENS' TELEPHONE COMPANY, Appt.,
v.
ORAMEL B. FULLER, Auditor General of the State of Michigan.

( See S. C. Reporter's ed. 322-334.)

**Constitutional law — equal protection of the laws — taxation of telephone company.**

1. Exempting the property of telephone companies whose gross receipts for the year do not exceed $500 from the ad valorem tax imposed by Mich. Acts 1909, act No. 49, does not render the statute invalid under U. S. Const., 14th Amend., as denying the equal protection of the laws, where, under the classification made by the statute, the companies taxed are mainly those organized for profit, while the untaxed enterprises are mainly not profit making, but mutual or co-operative.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

**Statutes — expression of subject in title.**

2. The purpose of Mich. Acts 1909, act No. 49, to extend to telegraph and telephone companies the provisions of Acts 1905, act No. 282, for the assessment of the property of certain classes of corporations and the levying of taxes thereon by the state board of assessors, and the method of collecting such taxes, is sufficiently expressed in the title to satisfy the state constitutional provision that no law shall embrace more than one object, which shall be expressed in its title, where such title explicitly states that the act is one to amend the title and certain enumerated sections of the earlier act, and in its first section the particular sections of the earlier act which consummate the purpose are referred to and declared to be amended.

[For other cases, see Statutes, I. e, in Digest Sup. Ct. 1908.]

[No. 284.]

Argued and submitted May 2, 1913. Decided June 10, 1913.

APPEAL from the Cirruit Court of the United States for the Western District of Michigan to review a decree dismissing the bill in a suit to enjoin the collection of a tax on the property of a telephone company. Affirmed.

See same case below, 185 Fed. 634.

The facts are stated in the opinion.

NOTE.—On equal privileges and immunities as to taxation, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 583.

On constitutional equality in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

Mr. Thomas P. Bradfield submitted the cause for appellant. Mr. Jacob Kleinhans was on the brief:

Judicial construction cannot enlarge or restrict the obvious meaning of the act.

Atty. Gen. v. State Assessors, 143 Mich. 73, 106 N. W. 698; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 37, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Denn ex dem. Scott v. Reid, 10 Pet. 527, 9 L. ed. 520; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Leoni Twp. v. Taylor, 20 Mich. 148; People v. Plumsted, 2 Mich. 465; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 18; People ex rel. Whipple v. Saginaw Circuit Judge, 26 Mich. 342; Wilt v. Cutler, 38 Mich. 189.

A law must operate equally and uniformly, and classification must be based upon some reasonable ground.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 112, 46 L. ed. 92, 110, 22 Sup. Ct. Rep. 30; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 621, 622, 48 L. ed. 1142, 1153, 1154, 24 Sup. Ct. Rep. 784; Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 160–166, 41 L. ed. 666, 670–672, 17 Sup. Ct. Rep. 255; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340.

The legislature has the right to make exemptions.

Chippewa County v. Auditor General, 65 Mich. 408, 32 N. W. 651; National Loan & Invest. Co. v. Detroit, 136 Mich. 451, 99 N. W. 380; People ex rel. St. Mary's Falls Ship Canal Co. v. Auditor General, 7 Mich. 85.

But this power is not absolute and without limitation.

1 Cooley, Taxn. 3d ed. 382; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; Yick Wo v. Hopkins, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

The object of the act is not expressed in the title, and is in conflict with the Michigan Constitution.

Atty. Gen. ex rel. Maybury v. Bolger, 128 Mich. 355, 87 N. W. 366; Bresler v. Delray Real Estate & Invest. Asso. 156 Mich. 3, 132 Am. St. Rep. 516, 120 N. W. 21; Callaghan v. Chipman, 59 Mich. 614, 26 N. W. 806; Cooley, Const. Lim. 143; Fort-Street Union Depot Co. v. Railroad Comrs. 118 Mich. 340, 76 N. W. 631; Detroit v. Wayne Circuit Judge, 112 Mich. 317, 70 N. W. 894, 2 Am. Neg. Rep. 376; Fish v. Stockdale, 111 Mich. 46, 69 N. W. 92; Re Hauck, 70 Mich. 396, 38 N. W. 269; Pratt Food Co. v. Bird, 148 Mich. 634, 118 Am. St. Rep. 601, 112 N. W. 701; Wilcox v. Paddock, 65 Mich. 24, 31 N. W. 609.

Mr. Roger I. Wykes argued the cause, and, with Mr. Grant Fellows, filed a brief for appellee:

In cases closely related to this, classifications have been sustained which indicate without question the propriety of that here made.

Pacific Exp. Co. v. Seibert, 142 U. S. 353, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 326, 328, 46 L. ed. 932, 933, 22 Sup. Ct. Rep. 662; Michigan R. Tax Cases, 138 Fed. 240, 201 U. S. 245, 302, 50 L. ed. 744, 765, 26 Sup. Ct. Rep. 459; Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S. W. 979; W. C. Peacock & Co. v. Pratt, 58 C. C. A. 48, 121 Fed. 776; King v. Mullins, 171 U. S. 435, 43 L. ed. 226, 18 Sup. Ct. Rep. 925; Cobb v. Durham County, 122 N. C. 311, 30 S. E. 338; Nicol v. Ames, 173 U. S. 521, 43 L. ed. 793, 19 Sup. Ct. Rep. 522; Cox v. Texas, 202 U. S. 450, 451, 50 L. ed. 1101, 26 Sup. Ct. Rep. 671; Armour Packing Co. v. Lacy, 200 U. S. 236, 50 L. ed. 457, 26 Sup. Ct. Rep. 232; New York ex rel. Hatch v. Reardon, 204 U. S. 158, 51 L. ed. 421, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Ex parte Brown, 28 Fed. 653; Savannah, T. I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; New York ex rel. Metropolitan Street R. Co. v. New York, 190 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; Board of Education v. Illinois, 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; Southern R. Co. v. Greene, 216 U. S. 406, 54 L. ed. 539, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Iowa Mut. Tornado Ins. Asso. v. Gilberson, 129 Iowa, 658, 106 N. W. 153; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 196,

28 Sup. Ct. Rep. 89; Erb v. Morasch, 177 U. S. 586, 44 L. ed. 898, 20 Sup. Ct. Rep. 819; W. W. Cargill Co. v. Minnesota, 180 U. S. 469, 45 L. ed. 627, 21 Sup. Ct. Rep. 423; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Quong Wing v. Kirkendall, 223 U. S. 60, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; Minnesota Iron Co. v. Kline, 199 U. S. 597, 50 L. ed. 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Keeney v. New York, 222 U. S. 537, 56 L. ed. 306, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Home Ins. Co. v. New York, 134 U. S. 593, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. Rep. 1385; Maine v. Grand Trunk R. Co. 142 U. S. 225, 35 L. ed. 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 394, 35 L. ed. 1051, 1054, 12 Sup. Ct. Rep. 255; Clark v. Titusville, 184 U. S. 331, 46 L. ed. 572, 22 Sup. Ct. Rep. 382; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Billings v. Illinois, 188 U. S. 102, 47 L. ed. 403, 23 Sup. Ct. Rep. 272; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Postal Teleg. Cable Co. v. Adams, 155 U. S. 698, 39 L. ed. 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 163, 24 L. ed. 95; Wellman v. Chicago & G. T. R. Co. 83 Mich. 592, 47 N. W. 489, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Marchant v. Pennsylvania R. Co. 153 U. S. 389, 38 L. ed. 756, 14 Sup. Ct. Rep. 894; St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909; Hammond Packing Co. v. Arkansas, 212 U. S. 344, 349, 53 L. ed. 542, 544, 29 Sup. Ct. Rep. 370; Consolidated Rendering Co. v. Vermont, 207 U. S. 555, 2 L. ed. 336, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; Cook v. Marshall County, 196 U. S. 274, 49 L. ed. 476, 25 Sup. Ct. Rep. 233; Field v. *Barber Asphalt Paving* Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 236, 33 L. ed. 894, 10 Sup. Ct. Rep. 533; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 689, 23 Sup. Ct. Rep. 401; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Standard Oil Co. v. Tennessee, 217 U. S. 420, 54 L. ed. 820, 30 Sup. Ct. Rep. 543; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Lindsley v. Natural Carbonic Gas. Co. 220 U. S. 79, 55 L. ed. 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160; Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661; Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913 B, 1349; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243; Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437.

Classification need not proceed along lines which are scientifically accurate or mathematically correct, and in the inclusion or the exclusion of subjects of taxation it is not essential that the rule of equality be absolute, but substantial and reasonable accuracy is all that can be expected.

Henderson Bridge Co. v. Henderson, 173 U. S. 592, 614, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553; King v. Mullins, 171 U. S 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 464, 42 L. ed. 237, 17 Sup. Ct. Rep. 829; Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 296, 42 L. ed. 1043, 18 Sup.

Ct. Rep. 594; District of Columbia v. Brooke, 214 U. S. 150, 53 L. ed. 945, 29 Sup. Ct. Rep. 560; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 256, 52 L. ed. 197, 28 Sup. Ct. Rep. 89; Mercantile Nat. Bank v. New York, 121 U. S. 161, 30 L. ed. 903, 7 Sup. Ct. Rep. 826; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 86, 52 L. ed. 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Martin v. District of Columbia, 205 U. S. 139, 51 L. ed. 744, 27 Sup. Ct. Rep. 440; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 78, 55 L. ed. 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160; Louisville & N. R. Co. v. Melton, 218 U. S. 54, 54 L. ed. 928, 30 Sup. Ct. Rep. 676; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Travelers' Ins. Co. v. Connecticut, 185 U. S. 372, 46 L. ed. 954, 22 Sup. Ct. Rep. 673.

In the consideration of questions of discrimination the courts have given attention to the relative amounts of property from whose exemption or different treatment discrimination was claimed to result.

Boyer v. Boyer, 113 U. S. 693, 28 L. ed. 1090, 5 Sup. Ct. Rep. 706; First Nat. Bank v. Ayers, 160 U. S. 667, 40 L. ed. 575, 16 Sup. Ct. Rep. 412; Mercantile Nat. Bank v. New York, 121 U. S. 161, 30 L. ed. 903, 7 Sup. Ct. Rep. 826; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 256, 52 L. ed. 197, 28 Sup. Ct. Rep. 89; Central Lumber Co. v. South Dakota, 226 U. S. 157, ante, 164, 33 Sup. Ct. Rep. 67.

The public service character or non-public service character is a proper basis of classification.

Munn v. Illinois, 94 U. S. 113, 125, 24 L. ed. 77, 84; Budd v. New York, 143 U. S. 535, 544, 36 L. ed. 252, 255, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 404, 38 L. ed. 761, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 179, 32 L. ed. 380, 9 Sup. Ct. Rep. 47; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 393, 35 L. ed. 1054, 12 Sup. Ct. Rep. 255; Louisville Tobacco Warehouse Co. v. Com. 106 Ky. 165, 57 L.R.A. 33, 49 S. W. 1069; Adams Exp. Co. v. Kentucky, 166 U. S. 179, 180, 41 L. ed. 963, 964, 17 Sup. Ct. Rep. 527; Schmidinger v. Chicago, 226 U. S. 578, ante, 364, 33 Sup. Ct. Rep. 183; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 75, 52 L. ed. 109, 28 Sup. Ct. Rep. 28.

Those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who cannot legally be taxed are not taxed.

Cahen v. Brewster, 203 U. S. 543, 552, 553, 51 L. ed. 310, 314, 27 Sup. Ct. Rep. 174, 8 Ann. Cas. 215.

The exemption of the smaller properties of a particular class has always been permitted.

King v. Mullins, 171 U. S. 435, 43 L. ed. 226, 18 Sup. Ct. Rep. 925; Cobb v. Durham County, 122 N. C. 311, 30 S. E. 338; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 835, 17 Sup. Ct. Rep. 418; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Quong Wing v. Kirdendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192.

If the classification rested upon the sole basis of a difference in earning power of the companies or property taxed, it would be equally valid.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Brown-Forman Co. v. Kentucky, 217 U. S. 571, 54 L. ed. 886, 30 Sup. Ct. Rep. 578; Foster v. Hart Consol. Min. Co. — Colo. —, 122 Pac. 50; People ex rel. Iron Silver Min. Co. v. Henderson, 12 Colo. 369, 21 Pac. 144; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; East Tennessee, V. & G. R. Co. v. Hamblen County, 102 U. S. 273, 26 L. ed. 152; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Raleigh & G. R. Co. v. Reid, 13 Wall. 269, 20 L. ed. 570; State v. Norwich & W. R. Co. 30 Conn. 290; State, Norris & E. R. Co. Prosecutor, v. Minton, 23 N. J. L. 529; Cook v. State, 33 N. J. L. 474; State Assessors v. Morris & E. R. Co. 49 N. J. L. 193, 7 Atl. 826; Mobile & O. R. Co. v. Moseley, 52 Miss. 127; Natchez, J. & C. R. Co. v. Lambert, 70 Miss. 779, 13 So. 33; Richmond & D. R. Co. v. Orange County, 74 N. C. 506; North Carolina R. Co. v. Alamance, 77 N. C. 4; Belo v. Forsyth County, 82 N. C. 418, 33 Am. Rep. 120.

688; Richmond & D. R. Co. v. Alamance Comrs. 84 N. C. 504; Raleigh & G. R. Co. v. Wake, 87 N. C. 414; Knoxville & O. R. Co. v. Hicks, 9 Baxt. 442; Baltimore & O. R. Co. v. Marshall County, 3 W. Va. 319; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. Rep. 1385; Maine v. Grand Trunk R. Co. 142 U. S. 225, 35 L. ed. 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 163; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 394, 35 L. ed. 1051, 1054, 12 Sup. Ct. Rep. 255; Billings v. Illinois, 188 U. S. 102, 47 L. ed. 403, 23 Sup. Ct. Rep. 272; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Postal Teleg. Cable Co. v. Adams, 155 U. S. 698, 39 L. ed. 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 163, 24 L. ed. 95; Wellman v. Chicago & G. T. R. Co. 83 Mich. 592, 47 N. W. 489, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

The distinctions between those discriminations which are the result of a well-ordered effort to equitably produce the needed revenue, and discriminations which violate the amendment, are well recognized.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 477, 480, 46 L. ed. 286, 287, 22 Sup. Ct. Rep. 176; Judson, Taxn. §§ 438, 454; Travellers' Ins. Co. v. Connecticut, 185 U. S. 365, 370, 46 L. ed. 950, 953, 22 Sup. Ct. Rep. 473; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; District of Columbia v. Brooke, 214 U. S. 150, 151, 53 L. ed. 945, 946, 29 Sup. Ct. Rep. 560; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Guthrie, 14th Amendment, p. 135; Darnell v. Indiana, 226 U. S. 390, ante, 267, 33 Sup. Ct. Rep. 120.

It has not been considered as an objection to exemptions that they have been treated as personal to the then owners of the property, and ceased upon its transfer to others.

Morgan v. Louisiana, 93 U. S. 219, 23 L. ed. 860; Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; Chesapeake & O. R. Co. v. Miller, *114 U. S. 185, 29* L. ed. 124, 5 Sup. Ct. *Rep. 813; Picard* v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640.

The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title.

Montclair Twp. v. Ramsdell, 107 U. S. 147, 155, 27 L. ed. 431, 433, 2 Sup. Ct. Rep. 391; Ross v. Aguirre, 191 U. S. 60, 64, 48 L. ed. 94, 95, 24 Sup. Ct. Rep. 22.

The purpose of the constitutional provision has been fully subserved by the title in question.

People ex rel. Drake v. Mahaney, 13 Mich. 494; Re Hauck, 70 Mich. 403, 38 N. W. 269; Kurtz v. People, 33 Mich. 281; Bissell v. Durfee, 58 Mich. 238, 24 N. W. 886; People v. Howard, 73 Mich. 14, 40 N. W. 789.

The courts have uniformly given to this provision a construction which would sustain the acts, if possible, and have not applied hypercritical or narrow rules of construction, but, where the general purposes of the constitutional provision are fulfilled in the title, have invariably declared the statute sufficiently to conform to it.

People ex rel. Secretary of State v. State Ins. Co. 19 Mich. 398; Inkster v. Carver, 16 Mich. 488; Hall v. Burlingame, 88 Mich. 440, 50 N. W. 289; Cooley, Const. Lim. 7th ed. 209; Ryerson v. Utley, 16 Mich. 277; Re Hauck, 70 Mich. 402, 38 N. W. 269.

When the object indicated by the title is to amend the title of the prior law, all interested are put upon inquiry,—they are notified that there is an amended title following which they must investigate to ascertain the nature of the amendment proposed.

People v. Parvin, 2 Cal. Unrep. 788, 14 Pac. 783.

Several cases are directly in point upon the sufficiency of this title.

Beatrice v. Edminson, 54 C. C. A. 601, 117 Fed. 427; Dyker Meadow Land & Improv. Co. v. Cook, 3 App. Div. 164, 38 N. Y. Supp. 222.

It is true that the title in declaring its intent to extend the operation of the act by stating its purpose to "amend the title" was general, but it is settled that the generality of a title is no objection.

Cooley, Const. Lim. 7th ed. p. 206; People ex rel. Secretary of State v. State Ins. Co. 19 Mich. 398; Chippewa County v. Auditor General, 65 Mich. 412, 32 N. W. 651; People v. Howard, 73 Mich. 13, 40 N. W. 789; Grand Rapids v. Burlingame, 93 Mich. 472, 53 N. W. 620; Canal Street Gravel Road Co. v. Paas, 95 Mich. 379, 54 N. W. 907;

Soukup v. Van Dyke, 109 Mich. 681, 67 N. W. 911; Detroit v. Schmidt, 128 Mich. 400, 92 Am. St. Rep. 468, 87 N. W. 383.

Where the title expresses the intent to amend a certain-named section, it has always been held that it gives notice that something germane to that section is to be inserted, and the intention of the citizen is directed to that particular subject. In this case the title gave notice of an intent to amend the title of a previous act, and upon like principle this gave notice that the scope of the statute was to be enlarged or diminished.

Atty. Gen. ex rel. Crane v. Amos, 60 Mich. 375, 27 N. W. 571; Grimm v. State, 137 Mich. 138, 100 N. W. 269.

The practice of amending a named act, under titles not describing either the purport of the act or amendment, has been repeatedly sustained, where the amendment was of a character coming within the title to the original act.

Detroit v. Schmidt, 128 Mich. 402, 92 Am. St. Rep. 468, 87 N. W. 383; People v. Howard, 73 Mich. 14, 40 N. W. 789.

As has also the practice of amending sections of the Compiled Laws by a reference to the section number.

People ex rel. Comstock v. Superior Ct. Judge, 39 Mich. 196; Callaghan v. Chipman, 59 Mich. 616, 26 N. W. 806.

The legislature has in many instances used this identical form, and has never in any instance, so far as we can discover, used any other in the amendment of titles to permit the addition of new matter not comprehended under previous titles. If the case were one of doubt, the legislative practice would establish it in favor of the validity of the statute in question.

Detroit v. Chapin, 108 Mich. 142, 37 L.R.A. 391, 66 N. W. 587; Cooley, Const. Lim. 6th ed. pp. 83, 84–86, and notes; Atty. Gen. ex rel. Scott v. Glaser, 102 Mich. 409, 61 N. W. 648, 64 N. W. 828; People ex rel. Hart v. McElroy, 72 Mich. 453, 2 L.R.A. 609, 40 N. W. 750; People v. Maynard, 15 Mich. 470; Hovey v. State, 119 Ind. 386, 21 N. E. 890; Biggs v. McBride, 17 Or. 640, 5 L.R.A. 115, 21 Pac. 878; Castro v. DeUriarte, 16 Fed. 93; Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Board of Education v. State Assessors, 133 Mich. 120, 94 N. W. 668.

Mr. Justice McKenna delivered the opinion of the court:

Appellant is a telephone company, located in the city of Grand Rapids, in the state of Michigan, where it has 10,000 telephones in use, and by its own and other lines is engaged in the telephone business all over the southern peninsula. It brought this suit to restrain the collection of a tax levied on its property under a certain act of the state of Michigan, on the ground (1) that the act violates *the[325 14th Amendment of the Constitution of the United States and (2) violates the Constitution of the state because the purpose of the act is not expressed in its title.

A demurrer was filed to the bill, which was overruled. An answer was then filed, and, after hearing, a decree was entered dismissing the bill. 185 Fed. 634. This appeal was then taken directly to this court, the case presenting questions under the Constitution of the United States.

Prior to 1909, telephone companies were taxed under act No. 179 of the Public Acts of Michigan for the year 1899 at the rate of 3 per cent on their gross receipts for the year in which the tax was laid. This act also embraced express and telegraph companies. The companies were required to make a report of their gross receipts for the year ending December 1st next preceding such report. The taxes paid were to be in lieu of all other taxes.

Act No. 282 of the Public Acts of 1905 provided for the assessment of the property of railroads and certain other companies, and for the levying of taxes thereon by a state board of assessors. The act did not include either telephone or telegraph companies.

In 1909 the legislature passed act No. 49, which amended the title and certain sections of the act No. 282, and provided for the assessment by the state board of assessors of the property of telephone companies on an ad valorem basis instead of a tax on their gross earnings, as provided by the act of 1899. The act contained this proviso: "Provided, That the property of telegraph and telephone companies whose gross receipts within this state, for the year ending June 30, did not exceed $500, shall be exempt from taxation."

The contention of appellant that the act offends the *equal protection clause of[326 the Constitution is based on that proviso. It is urged that the proviso makes an unjust discrimination between companies doing the same business by the same means, and imposes a tax on their property because the business of one is large and the other small. "The business is not taxed," it is contended, "under act 49. It is the property used in the business, and it is all of like kind and used for like purposes, and each dollar's worth should be treated alike." And it is urged that "it must be remembered that the tax in question is a tax *on property* according to its value, and not a tax on doing the business." This being

the insistence of appellant, that is, that the tax is on property simply, appellant makes the property, dollar for dollar, the only basis of comparison between the taxed companies and the exempt companies, and asserts illegal discrimination. In other words, treating the tax as one on property, and this being the purpose of the statute, "each dollar's worth should be treated alike;" and it is contended, if each dollar's worth is not treated alike, there is an arbitrary classification and hence an illegal classification, because it has no proper relation to the legislative purpose.

The district court, however, took a broader view and considered the inducement of the legislation and its administrative possibilities as giving character to its classification. The court also considered the character of the taxed and nontaxed lines, their number and comparative value, and the amount of taxes which would be assessed against them. The court said:

"For the year ending June 30, 1909, 659 corporations, individuals, or associations made the required report. Of these 224 showed receipts of more than $500 each, reported property said to have cost $35,000,000 and reported gross receipts of $7,600,000. The board assessed this property at $21,000,000, and levied thereon a total tax of $433,000, in place of the former 327]specific *tax, which would have been $228,000. Four hundred and thirty-five of the reports showed receipts of less than $500 each. Property belonging to the persons and companies so reporting was not assessed. The cost of this nonassessed property, at the average reported cost per telephone of all reporting companies, would be about $145,000; complainants' proof tends to show such cost to be about $250,000; $200,000 may fairly be assumed as such cost; and upon the comparative basis used with the larger corporations, this exempted property would have been assessed at $120,000. If we add an ample allowance for nonreporting, nontaxable property, it still appears that the property which escaped taxation, and which forms the basis of the complaint, is not more than 1 per cent of the total."

The lines may be divided into two classes: (1) lines owned by appellant and conducted for profit, and (2) lines connected with those of the first class, and called sublicensed companies, rural and roadway. There are 17 to 20 of the sublicensed companies which operate for a profit. Their lines are connected with the main lines and may extend over a whole county or more. It is testified that the sublicensed companies run their own business, no control being in the main line. Their lines, it is further testified, were constructed by themselves, and the instruments either leased from the main company or owned by themselves. The contracts with the subcompanies are not all alike. The main line may or may not have investment in the sublicensed line.

The "rural" usually belongs to an association of farmers who live along the line. It comprises a switch board leased by the main or profit-making company to a rural manager, the main company owning the telephones on the line, and receiving the entire charge for toll messages, less the manager's commissions for collection. The roadways connected with a "rural" are constructed and owned *by[328 the farmers in the same way as other roadways. The larger portion of "rurals" are contracts with individuals. The percentage of corporations in the roadway and sublicensed lines is very small.

The "roadway" is a line owned and constructed by farmers, connected with a receiving service from an existing exchange of a main line or profit-making company, or of rural exchange manager.

The profit that is derived from the rural and roadway lines is in the reduced rate for the telephones. The manager gets the difference between what he pays the main company and what he gets from those to whom he rents.

The difference, therefore, between the taxpaying and nontaxpaying companies or individuals is that the former, as said by the district court, belong to commercial corporations or enterprises, organized and conducted for the purpose of earning and paying profits as or in the nature of dividends; the latter, the untaxed, are cooperative or farmers' mutual associations, usually unincorporated, conducted at estimated costs, and organized primarily to get for the association cheap telephone service.

It is manifest, therefore, that there are marked differences between the taxed and nontaxed companies, and the differences might be pronounced arbitrary if the rule urged by appellant should be applied; that is, that in the taxation of property no circumstance should be considered but its value; or, to use appellant's words, "each dollar's worth should be treated alike." But such rigid equality has not been enforced. In Michigan the legislature has the power of prescribing the subjects of taxation and exemption, notwithstanding the Constitution of the state requires the legislature to provide a uniform rule of taxation, except on property paying specific taxes. People ex rel. St. Mary's Falls Ship Canal Co. v. Auditor General, 7 Mich. 84;

Chippewa County v. Auditor General, 65 Mich. 408, 32 N. W. 651; National Loan 329]& Invest. *Co. v. Detroit, 136 Mich. 451, 99 N. W. 380. The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature. We said in American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43, that from time out of mind it has been the policy of this government to classify for the purpose of taxation, and a discrimination was supported between taxation of producers and manufacturers of products; and yet in Billings v. Illinois, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272, we compared the rule with that in Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, where a distinction between buyers of products and the producers of them was held an illegal discrimination.

It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation. There is certainly as great a power, and the rule appellant urges cannot be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise.

In Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533, it was decided that under the power of classification there might be exemption of property, dependent upon its species, and the rates of excise might be varied upon different trades and products. And it was said that it was safe to say "that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation." It was pointed out that to give it that effect would destroy the constitutional provision and laws of some of the states which, while enjoining uniformity of taxation, permitted exceptions which were deemed material, and that "it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intem- 330] perance and *vice; and which every state, in one form or another, deems it expedient to adopt."

In Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, a distinction, for taxing purposes, between express companies which owned their own means of transportation and those who engaged for hire a railroad or steamship company to transport their merchandise, was supported. The range of classification for taxing purposes which was expressed in Bell's Gap R. Co. v. Pennsylvania and Home Ins. Co. v. New York, 134 U. S. 594, 606, 607, 33 L. ed. 1025, 1031, 1032, 10 Sup. Ct. Rep. 593, was approved. These cases and others were cited in Michigan C. R. Co. v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459, for the same principle of classification and its application to taxation. It was said: "There is no general supervision on the part of the nation over state taxation, and in respect to the latter, the state has, speaking generally, the freedom of a sovereign both as to objects and methods." And, further, quoting from the opinion of the lower court, it was said: "It is enough that there is no discrimination in favor of one against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."

In Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673, a law of the state was sustained which imposed a tax on the stock of nonresidents in corporations and exempted the stock of residents.

In King v. Mullins, 171 U. S. 404, 435, 43 L. ed. 214, 226, 18 Sup. Ct. Rep. 925, a distinction was made in the taxing system of the state between tracts of 1,000 acres or less and tracts of more than 1,000 acres. It was sustained.

In Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616, a law providing for the inspection of mines was held not unconstitutional by reason of its limitation to mines where more than five men were employed at any one time. See also McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

In New York, N. H. & H. R. Co. v. New York, 165 *U. S. 628, 41 L. ed. 853, 17[331 Sup. Ct. Rep. 418, a law requiring railroads to heat their passenger coaches, but exempting roads of less than 50 miles in length, was declared not unconstitutional and discriminatory. To like effect is Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028, where a classification of railroads by their length in fixing the rate of passengers' fare was sustained.

In Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360, a tax was graduated according to the amount and value of the property, measured by miles, and was in lieu of taxes levied directly on the property. Held valid. In Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, 1217

legacies less than a certain amount were held legally exempt from taxation.

To these cases may be added others. They illustrate the power of the legislature of the state over the subjects of taxation, and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. Cook v. Marshall County, 196 U. S. 274, 49 L. ed. 474, 25 Sup. Ct. Rep. 233; Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53. The cases decided subsequent to the decision in Bell's Gap R. Co. v. Pennsylvania have applied its principle to many varying instances. Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney v. New York, 222 U. S. 536, 56 L. ed. 305, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105. The state is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in "clear and hostile discriminations between particular persons and classes." See Quong v. Kirkendall, 223 U. S. 59, 62, 63, 56 L. ed. 350–352, 32 Sup. Ct. Rep. 192. Thus defined and thus limited, it is a vital principle, giving to government freedom to meet its exigencies, not binding its action by rigid formulas, but apportioning its burdens, and permitting it to make those "discriminations which the best interests of society require."

We think the statute under review is 332]within the rule. *It is not arbitrary. It has a reasonable basis, resting on a real distinction. It is not a distinction based on mere size only, as contended by appellant, nor upon the mere amount of business done. There is a difference in the doing of the business and its results; a difference in the relation to the public. Indeed, the nontaxed companies are subsidiary to the taxed companies,—patrons, in a sense, of the taxed companies. The use of the untaxed property, as pointed out by the district court, is "predominately private, while the use of the taxed property is correspondingly public; the exempt property is used for the personal convenience of the owners, while the taxed property represents commercial investment for profit-making purposes." To these differences the court added others: "(1) That the property exempted is only a trifling portion of the whole; (2) that the cost of assessing and collecting in this class would be disproportionate to the amount which would be realized; (3) that this property is in the incipient or development stage, while the taxed property is in the fully developed form." All were differences which could appeal to the legislature and determine a difference of treatment. To accomplish it they had to be united in a class, and, as happily said by Judge Denison in the circuit court, the companies were described "in terms of earnings instead of in terms of method and use." It seems, however, that by the selection of earnings as a basis of classification all of the differences we have enumerated are not exactly accommodated. Some small portion of the co-operative companies will be taxed and some small portion of the profit-making companies will be exempt. This result is not, we think, an impeachment of the basis of classification, as the cases we have cited illustrate. Besides, the appellant is not affected by the inexactitude.

The second question in the case is whether the purpose of act No. 49, of 1909, under which the appellant was *assessed, is[333 sufficiently expressed in its title. Prior to the passage of that act certain specified classes of corporations, such as railroad, express companies, etc., were taxed under the provisions of act No. 282 of the acts of 1905, supra.

The title of act No. 49 is: "An Act to Amend the Title and Certain Sections of Act No. 173 of 1901, Relating to the Taxation of Railroad and Express Companies." Section 1 reads as follows: "The title and §§ 1, 4, 5, 6, 8, 9, 10, 13, 14, 18, and 21 of act No. 282 of the Public Acts of 1905, entitled. 'An Act to Provide for the Assessment of the Property of Railroad Companies, Union Station and Depot Companies, Sleeping Car Companies, Express Companies, Car Loaning Companies, Stock Car Companies, Refrigerator Car Companies, and Fast Freight Line Companies, and for the Levy of Taxes Thereon by a State Board of Assessors, and for the Collection of Such Taxes, and to Repeal All Acts or Parts of Acts Contravening Any of the Provisions of This Act,' are hereby amended to read as follows:

" 'Title.—An Act to Provide for the Assessment of the Property, by Whomsoever Owned, Operated, or Conducted, of Railroad Companies, Union Station and Depot Companies, Telegraph Companies, Telephone Companies, Sleeping Car Companies, Express Companies, Car Loaning Companies, Stock Car Companies, Refrigerator Car Companies, and Fast Freight Companies, and All Other Companies Owning, Leasing, Running, or Operating Any Freight, Stock, Refrigerator, or Any Other Cars, Not Being Exclusively the Property of Any Railroad Company Paying Taxes upon Its Rolling Stock under the Provisions of This Act, over or upon the Line or Lines of Any Railroad or Railroads in This State, and for the Levy of Taxes

Thereon by a State Board of Assessors, and for the Collection of Such Taxes, and to Repeal All Acts or Parts of Acts Contravening Any of the Provisions of This Act.'"

334] *The contention is that there is nothing in the title to indicate the intention of adding to the act of 1905 "new classes of business to those already taxed by the ad valorem method, so as to include telephone companies." It is hence further contended that the act is invalid, the Constitution of the state providing that "no law shall embrace more than one object, which shall be expressed in its title."

There can be no doubt that the purpose of the act was to extend to telegraph and telephone companies the provisions of the act of 1905, which provided for the assessment of the property of certain companies, and the levying of taxes thereon by the state board of assessors, and the method of collecting such taxes. Its title explicitly states that its purpose is to amend the *title* and the *act* relating to the taxation of railroads and express companies, and the particular sections which consummate the purpose are referred to and in § 1 declared to be amended. The title therefore is a substantial compliance with the Constitution of the state, and the brief of appellee shows thirty-eight examples of like kind in the laws of the state. This legislative and executive construction is entitled to weight, and when considered in connection with the consequence of making those laws invalid, as well as declaring the law under review invalid, would determine against the construction urged by appellant, even if we had doubt of the sufficiency of the title to give notice of the purpose of the legislation. See Atty. Gen. ex rel. Crane v. Amos, 60 Mich. 372, 27 N. W. 571; Grimm v. Secretary of State, 137 Mich. 134, 100 N. W. 269; Detroit v. Schmid, 128 Mich. 379, 92 Am. St. Rep. 468, 87 N. W. 383; People v. Howard, 73 Mich. 10, 40 N. W. 789; Detroit v. Chapin, 108 Mich. 136, 37 L.R.A. 391, 66 N. W. 587.

Decree affirmed.

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335] *CITIZENS TELEPHONE COMPANY OF JACKSON, Appt.,

v.

ORAMEL B. FULLER, Auditor General of the State of Michigan.

(See S. C. Reporter's ed. 335.)

This case is governed by the decision in Citizens' Telephone Company v. Fuller, ante, 1206.

[No. 285.]

Argued and submitted May 2, 1913. Decided June 10, 1913.

APPEAL from the Circuit Court of the United States for the Western District of Michigan to review a decree dismissing the bill in a suit to enjoin the collection of a tax on the property of a telephone company. Affirmed.

See same case below, 185 Fed. 634.

The facts are stated in the opinion.

Mr. Thomas P. Bradford submitted the cause for appellant. Mr. Jacob Kleinhans was on the brief.

Mr. Roger I. Wykes argued the cause, and, with Mr. Grant Fellows, filed a brief for appellee.

For contentions of counsel, see their briefs as reported in Citizens' Teleph. Co. v. Fuller, ante, 1206.

Mr. Justice McKenna delivered the opinion of the court:

Appellant is a telephone company, located at the city of Jackson, state of Michigan, doing an extensive business. It brought this bill in equity to restrain the collection of a tax levied under the laws considered in No. 284. [229 U. S. 322, ante, 1206, 33 Sup. Ct. Rep. 833.] It is substantially like the bill in the latter case.

A demurrer was filed to the bill, and, being overruled, an answer was filed. After hearing, a decree was entered dismissing the bill. This appeal was then taken.

The questions presented are the same as those presented in No. 284, and were submitted at the same time and on the same argument. On the authority of the opinion in that case the decree is affirmed.

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*RAILROAD COMMISSION OF LOU-[336
ISIANA and Walter Guion, Attorney General of Louisiana, Appts.,

v.

TEXAS & PACIFIC RAILWAY COMPANY, St. Louis, Iron Mountain, & Southern Railway Company, and Kansas City Southern Railway Company.

(See S. C. Reporter's ed. 336-342.)

**Commerce — local or foreign — state regulation.**

Shipments of freight under local bills of lading calling for transportation from interior points in Louisiana to New Orleans, there to be delivered to the shipper's or con-

NOTE.—On local transportation of goods as part of interstate or foreign commerce—see notes to Gulf, C. & S. F. R. Co. v. Texas, 51 L. ed. U. S. 540; and Campbell v. Chicago, M. & St. P. R. Co. 17 L.R.A. 443.

signee's order, but intended by the shippers to be exported to foreign countries, and treated accordingly by both shippers and carriers, constitute foreign commerce, and as such are governed as to the intrastate transportation by the tariffs on file with the Interstate Commerce Commission, to the exclusion of the rates established by the state railroad commission.

[For other cases, see Commerce, I. b; III. c, in Digest Sup. Ct. 1908.]

[No. 336.]

Submitted May 8, 1913. Decided June 10, 1913.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Louisiana, enjoining the enforcement of certain orders of the Louisiana Railroad Commission. Affirmed.

See same case below, 106 C. C. A. 666, 184 Fed. 989.

The facts are stated in the opinion.

Mr. Ruffin G. Pleasant, Attorney General for Louisiana, and Mr. E. Howard McCaleb submitted the cause for appellants. Mr. Wylie M. Barrow, Assistant Attorney General, was on the brief:

Wherever a separation in fact exists between transportation service wholly within the state, and that between the states, a like separation may be recognized between the control of the state and that of the nation.

New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494.

The service rendered by the railway companies is wholly within the state. It has no contractual or necessary relation to foreign transportation. It is manifestly preliminary thereto, independently contracted for, not necessarily connected therewith. Locality therefore determines the jurisdiction, unless it is shown that though the local movement is actually within, it is legally outside the state.

New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Inasmuch as the rates, rules, and regulations for the inland carriage, whether established by either the state or Interstate Commission, obviously have no necessary relation to or direct connection with the ocean carriage, and could not have because the ocean carriage is admittedly beyond the control of both commissions (Cosmopolitan Shipping Co. v. Hamburg American Packet Co. 13 Inters. Com. Rep. 266; Kemble v. Boston & A. R. Co. 8 Inters. Com. Rep. 110; Re Jurisdiction Over Water Carriers, 15 Inters. Com. Rep. 205), the most that could be said is that these rates, rules, and regulations have an indirect bearing on the ocean transportation,—that is to say, foreign commerce,—because the local transportation is prior thereto.

While a state may not directly regulate foreign and interstate commerce, yet where Congress has not acted, state authority is not excluded, since, in many ways, state action indirectly affects foreign and interstate commerce without constituting a regulation of it within the meaning of the commerce clause of the Constitution.

Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; Gibbons v. Ogden, 9 Wheat, 1, 6 L. ed. 23; Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 592, 39 L. ed. 544, 545, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Hopkins v. United States, 171 U. S. 578, 594, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 621-623, 53 L. ed. 352, 360, 361, 29 Sup. Ct. Rep. 214.

All state regulations intended for the public good, indirectly or incidentally affecting foreign and interstate commerce, among which are the establishment of railroad rates between points within the state, come under the reserved power of the states.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Sturges v. Crowninshield, 4 Wheat, 193, 4 L. ed. 548; Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Willson v. Black Bird Creek Marsh Co. 2 Pet. 251, 7 L. ed. 414; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

If this were not so, then every regulation of a local character would be void, and the states rendered powerless in matters of internal policy and administration because such local regulations incidentally or remotely affect foreign and interstate commerce. Among the Federal laws and regulations of a character incidentally affecting interstate and foreign commerce may be mentioned the safety appliance act, accident report act, arbitration act, hours of service act. Prior to these enactments there

was no prohibition on the states from exercising the same power within their respective boundaries, for all the cases admit that the existence of the same power resided in the several states, subject to congressional action.

Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

Congress has studiously abstained from passing any regulation touching the facts of this case.

Leonard v. Kansas City Southern R. Co. 13 Inters. Com. Rep. 573; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 27, 48 L. ed. 327, 24 Sup. Ct. Rep. 202.

Unless it be found that there exists a common control, management, or arrangement between the ocean carriers and the railroad appellees, the state's jurisdiction over the inland transportation ought not to be ousted. That the shippers or consignees intended to have the staves transported to foreign countries either before, upon, or after, delivery to them, is immaterial. An arrangement between the water and rail carriers must exist in fact or by a conclusive presumption, and is independent of any intention or declaration of the shipper or consignee. The intention is not controlling, but the fact of statutory arrangement.

Coe v. Errol, 116 U. S. 525, 527, 29 L. ed. 718, 719, 6 Sup. Ct. Rep. 475; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 96, 47 L. ed. 394, 399, 23 Sup. Ct. Rep. 266; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 412, 51 L. ed. 546, 27 Sup. Ct. Rep. 360; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

Messrs. Charles Payne Fenner and Walker B. Spencer submitted the cause for appellees. Messrs. Philip S. Gidiere, Esmonds Phelps, Henry Bernstein, John Totts, and F. G. Hudson were on the brief:

The shipments involved were interstate shipments, and the rate fixed by the Railroad Commission of Louisiana was therefore inapplicable thereto.

Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, ante, 442, 33 Sup. Ct. Rep. 229; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279.

*Mr. Justice McKenna delivered[337 the opinion of the court:

Suit in equity to declare void certain orders of the railroad commission of the state of Louisiana, and to restrain the enforcement of penalties for the alleged violation thereof. The ground of the suit is that the orders and the penalties constitute a regulation of interstate commerce, and therefore are in violation of the commerce clause of the Constitution of the United States.

An amended and supplemental bill was filed by leave of the court, making the appellant Walter Guion, attorney general of the state, a party on the ground that he had asserted a right and intention to bring suits in the state courts to collect the fines and penalties imposed by the state railroad commission.

A demurrer was filed to the bill, stating as grounds thereof—(1) That neither the original nor the supplemental bill stated any cause for the relief prayed. (2) That the suit was one against the state, being one brought to restrain the state in her sovereign character and capacity from instituting suits to recover and enforce the collection of penalties imposed under and by virtue of the provisions of her Constitution of a penal nature. (3) That the amount involved is not sufficient to give the court jurisdiction, not being over $2,000.

The demurrer was overruled. An answer was then filed. The case was referred to a master, who reported his conclusions of fact and of law, and recommended that the bill be dismissed, basing his recommendation on Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

The circuit court, however, drew a different conclusion from the facts, and entered a decree perpetually enjoining the fines imposed. The decree was affirmed by the circuit court of appeals, expressing, without discussion, its concurrence with the court below that on *the facts found by the[338 master, the commerce involved in the case was interstate.

The facts as found by the master may be summarized as follows:

The appellee railroad companies are corporations engaged in interstate and intrastate commerce from points within and without the state of Louisiana to the city of New Orleans, and the freight transported by them is subsequently loaded on board ships and transported to foreign ports and countries. The railroad commission of Louisiana, on May 25, 1905, promulgated and put in effect an order which fixed the freight rates that the railroads should be entitled to charge on all intrastate traffic, and the rates were effective and in force at

the date of the shipment in controversy. In the months of July, August, and September, 1905, certain persons (their names are unimportant) delivered to the St. Louis, Iron Mountain & Southern Railway Company at certain stations on the line of its road, within the state, eighteen carloads of logs and staves. The logs and staves were transported by the railway from said stations and delivered to Alexandria, and there delivered to the Texas & Pacific Railway Company, which transported them to New Orleans, where they were unloaded from the cars, put on board ship, and exported to foreign countries.

When the shipments were made, the local tariff filed with and approved by the state railroad commission was 10 cents per hundred pounds; the local tariff filed with and approved by the Interstate Commerce Commission on such shipments, at that time, was 12 cents per hundred pounds.

The consignees were notified of the arrival of the cars at New Orleans, and the Texas & Pacific Railway Company was ordered by them to deliver the freight to certain steamships plying between New Orleans and European ports. The freight was delivered 339]in accordance with the *orders and exported from Louisiana. A freight rate of 12 cents per hundred pounds was charged on the shipments and collected by the railway company.

In March, 1905, a shipper delivered to the Kansas City Southern Railway Company at Leesville, Louisiana, on its line of road, three carloads of tank staves, which were loaded in cars of the Texas & Pacific Railway Company to be transported to a named consignee at New Orleans. The rate established by the state railroad commission was 10 cents per hundred pounds; the interstate rate filed with the Interstate Commerce Commission was 15 cents per hundred pounds. The staves were hauled to Shreveport, Louisiana, and there delivered to the Texas & Pacific Railway Company, which hauled them to New Orleans. The customary notice of their arrival was given to the consignee, and they were directed by him to be delivered to a particular steamship, to which they were delivered, being switched to the lines of two other carriers and transported to Hamburg. The Texas & Pacific Railway Company collected freight charges thereon from the consignee at 15 cents per hundred pounds. The consignee at the date of the shipment of the freight resided at New Orleans and was engaged in the business of shipping broker in negotiating for cargo space, routes, and attending to shipments for consignors in the *United States.* The consignees of the *eighteen carloads of* logs and staves were engaged at New Orleans in the business of exporting staves to foreign countries; the staves they deal in are not treated, manufactured, or changed from the original shape in which they are received at New Orleans for export, and 98 per cent of the shipments by them at New Orleans are exported to foreign countries.

At the time of the shipment the rules of the state railroad commission allowed four days' free time for unloading cars at New Orleans, except where the consignment *was for export, then twenty days[340 were allowed. No demurrage was tendered by the shipper or consignee or received by the carrier on account of delays in handling beyond the four days allowed by the rules. Every one of the shipments paid to the carrier ¾ of a cent per hundred pounds for handling charges, this being the amount paid on all export shipments. The shipments were in the physical custody of the railroad company until arrival at New Orleans, and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo.

The bills of lading in each instance provided for the delivery of freight from the initial point to New Orleans, there to be delivered to the shipper or consignee's order. But, notwithstanding this, the staves and logs were intended by the shippers to be exported to foreign countries, and were treated by both the shippers and the carriers accordingly, the shippers always holding the cars on the railroad track until they could accumulate cargo to fill their export orders and arrange for transportation. The railroad company allowed the shippers the usual twenty days' time for delivery, as in the case of export shipments, without charging demurrage, which the company would have had the right to charge, after the expiration of four days, if the shipments had been considered and treated as purely intrastate.

The sole question in the case is whether the shipments were foreign or intrastate commerce; or, speaking more accurately, whether they were within Federal or state jurisdiction. The circuit court and the circuit court of appeals both decided, as we have seen, that they were within Federal jurisdiction.

Appellants attack the conclusion and rely on, as the master relied on, the case of Gulf, C. & S. F. R. Co. v. Texas, supra. The argument is that the service rendered by the railroad companies was wholly *within the state and had "no con-[341 tractual or necessary relation to foreign transportation." It was, it is argued, "manifestly preliminary thereto, independently contracted for, and not necessarily

connected therewith." And the principle is urged that "locality, therefore, determines the jurisdiction [separation between Federal power and state power] unless it is shown that though the local movement is actually within, it is legally outside the state." To make the movement within legally outside of the state, appellants insist there must be bills of lading and other means of connection between the railroads and the ocean carriers. To make application of this principle, it is contended that "not a single fact appears or exists, physical or other, which connects the railroads with the ocean carrier," and that the intention of the shippers or consignees is made absolutely controlling.

To the principle urged, so far as its applicability to the case at bar is concerned, we may oppose Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1001, 32 Sup. Ct. Rep. 657, and Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, ante, 442, 33 Sup. Ct. Rep. 229.

In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases were that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country. The facts of the case at bar bring it within the ruling. The staves 342]and logs were *intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans.

Decree affirmed.

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CLARA A. WHEELER and Frank S. Lusk, Appts.,
v.
CITY AND COUNTY OF DENVER, Albion K. Vickery, Auditor; Lewis C. Greenlee, Treasurer, et al.

(See S. C. Reporter's ed. 342-352.)

**Federal courts — jurisdiction — diverse citizenship — collusive joinder.**

A suit by nonresident taxpayers on behalf of themselves and all other taxpayers, to restrain a municipal public utilities commission from proceeding to acquire, by purchase or otherwise, a waterworks system, on the ground that it was an unconstitutional body and its expenditures illegal, should not be dismissed on the theory that complainants were collusively made parties in order to create a case justiciable in the Federal courts, because they were solicited to bring the suit, and were indemnified by the existing waterworks company against liability for costs or counsel fees.

[For other cases, see Courts, 676-711, in Digest Sup. Ct. 1908.]

[No. 473.]

Argued January 7, 1913. Decided June 10, 1913.

APPEAL from the Circuit Court of the United States for the District of Colorado to review a decree dismissing, on the ground of collusive joinder, a suit by nonresident taxpayers to restrain the municipal acquisition of a waterworks system. Reversed.

Statement by Mr. Justice McKenna:

The case is here on a question of jurisdiction.

The appellants filed a bill in equity in the circuit court for the eighth circuit, district of Colorado, against the city and county of Denver and the other appellees, who constitute the public utilities commission, to restrain them from paying out any moneys authorized by the provisions of an amendment to the charter of the city, and likewise to restrain them and each of them from issuing or attempting to issue $8,000,000 of bonds authorized at an election directed by the amendment to the charter of *the city. The bill also prayed an[343 accounting of money already expended by reason of their supposed election and authority as members of the public utilities commission, and that they be required to reimburse the city therefor, that § 264A of the charter be declared unconstitutional and void, and all further action thereunder be forever restrained and enjoined, and all acts heretofore done and steps taken thereunder be declared wholly illegal, improper, and without authority of law.

The bill alleges the requisite citizenship of the parties and the jurisdictional amount. It further alleges the following:

Appellants Wheeler and Lusk were respectively owners of real estate in the city and county of Denver of the assessed valuation of $35,000 and $42,000, respectively. For the year preceding the filing of the suit the assessed valuation of all property within the city and county was $135,467,050. At a general city election held in May, 1910, it

was claimed by the appellees that an amendment to the charter of the city was adopted, which amendment provided for the acquisition, by purchase or otherwise, by the city, of a waterworks system, provided a public utilities commission to have charge and control of such works, named the persons who were to constitute the commission, their terms of office, salaries, and duties, and authorized them to issue bonds to the extent of $8,000,000 for the construction or purchase of such waterworks system and other duties.

The bill attacks the amendment on various grounds, among which are—that it was not properly submitted to the voters of the city; that the amendment was void because it submitted to the electors divers questions in one, which, under the submission, could only be voted for as a whole; that the amendment established the office of utilities commission, and by the same act filled such office, and that the amend-[344]ment violated the state and *Federal Constitutions; that another suit was pending in the Federal court in which the circuit court of appeals for the eighth circuit had sustained a temporary injunction theretofore granted by the circuit court for the district of Colorado, and the court's order declared that the amendment violated the contractual rights of the Denver Union Water Company under a contract then existing between that company and the city, and that nevertheless the city was proceeding under the amendment, to spend the money of the taxpayers of the city. Appellants filed the bill as taxpayers of the city in behalf of themselves and all other taxpayers.

Appellees made a motion to dismiss the bill on the ground that the court had no jurisdiction of the cause, in that it did not involve a dispute or controversy properly within the jurisdiction of the court, and that the parties had been improperly and collusively made or joined for the purpose of attempting to create a case cognizable under the laws of the United States.

An affidavit of Edwin Van Cise, one of the public utilities commission, was submitted with the motion. It averred that appellants (complainants in the bill) were respectively residents of Montana and Nevada; that appellant Lusk was formerly a resident of California and a personal friend of Mr. F. G. Moffat, of the city of Denver, a gentleman who was interested as a stockholder or bondholder, or both, or in some other capacity, in the Denver Union Water Company, and that Wheeler is a client of *Edwin H. Park*, solicitor for her and Lusk *in this cause. On the* 19th or 20th of June, 1911, Moffat, by the authority or consent of the water company, sent Lusk a telegram as follows:

"Would you be willing, as a nonresident taxpayer, to bring suit in Federal court to stop illegal expenditure of public moneys by utilities commission if protected by water company on expenses and all liabilities? If so, *wire me authority in[345] your name to engage attorney and bring suit."

Lusk replied as follows:

"Please engage necessary counsel and take proper steps to protect against illegal expenditures by utility commission. Am owner of four lots corner Ninth and Sherman, and I object to the proposed expenditures."

It is averred on information and belief, that upon the latter telegram Moffat, or someone acting for the water company, retained Park in the name of Lusk, but really for the water company, to prepare and file the bill in this cause. It being found upon consultation, that the amount in controversy with Lusk as sole complainant was insufficient to give the court jurisdiction, it became necessary to procure another nonresident owning property in the city. Park was thereupon authorized to confer with his client Wheeler, with a view to securing her co-operation, she to be guaranteed against all expenses. Thereupon the following telegram was sent by Park to her:

"Will you permit use of your name in suit here to restrain misuse of taxes by city officials? If so, wire me to bring such suit. I advise the bringing of the suit and will protect you against expenses." To the telegram the reply was sent, "Yes, use your judgment in the matter." The next day after the receipt of this telegram Park wrote Wheeler as follows:

"My dear Mrs. Wheeler: On yesterday I wired you for permission to bring a suit in your name against some of the city officials for misuse of taxes, and received your reply authorizing me to go ahead. I brought the suit and filed it on yesterday. The suit is to restrain the water commissioners of Denver from further expenditures looking toward the purchase of a water plant by the city of Denver. The city is already enjoined in another proceeding in which the water company was a party. Since that time the water commission has spent $31,000 to hold an *election, and about $25,000 for other[346] purposes; and are seeking to compel the city to pay out on warrants about $20,000 more.

"The courts have already held that the amendment to the charter establishing a

water commission for the purpose of purchasing or building a water plant is unconstitutional and void, and it is our purpose to stop the spending of any more of the people's money in that direction.

"I desire to bring suit in the Federal court, and therefore had to get permission of a nonresident taxpayer to bring suit, which accounts for my telegraphing you for permission.

"You will not be charged with any expense or costs in the matter, either for court costs or attorneys' fees; and I will see that you are absolutely protected in every way from any liability whatever. Thanking you for permission to bring the suit in your name, I remain."

The affidavit expressed the conclusion that the parties to the bill were improperly and collusively joined for the purpose of creating a cause cognizable in the United States circuit court, in the interest and at the cost of the Denver Union Water Company, neither of the parties having knowledge of the joinder with the other, or of any connection of the other with the cause, and having no interest which was so imperiled as to cause them to proceed on their own motion and at their own expense.

The affidavits of Park and Moffat were filed in opposition to the motion to dismiss. Park's affidavit states the following: He is solicitor for complainants (appellants here). On June 11, 1911, the question of bringing a taxpayers' suit against the public utilities commission was brought to his attention by Mr. Gerald Hughes, and he was asked if he would be willing to bring such suit for Lusk; that Moffat had received a telegram from Lusk, authorizing him (Moffat) to retain counsel for him for the purpose of bringing suit in the Federal court.

347] *Wheeler then owned property within the city and county, subject to taxation for the expenditure of the commission. Park had been her legal adviser for some time, and he suggested to Hughes the advisability of joining her in the suit so that she might receive the same protection and benefit as Lusk, provided she could be protected against costs and counsel fees. Park believing it to be for her interest to be so joined. He thereupon sent her the telegram and received the reply set out in the affidavit of Van Cise, and brought the suit for her and Lusk and all other taxpayers.

The affidavit set out the property owned by her and Lusk, and that she is neither a stockholder nor a bondholder nor otherwise financially interested in the water company. It averred further as follows: It is not true that the suit was brought at the solicitation or request of the water company, but, on the contrary, Park suggested the joinder of Wheeler because in his opinion, as her attorney, it was to her interest to be joined, provided she could be protected against costs and attorneys' fees; he so advised her, and she accepted his advice and authorized the suit. It is not true that the suit is one brought solely in the interest or for the benefit of the water company, but it is brought not only for the benefit of Wheeler and Lusk, but of all other property owners, including the water company, which is a large property owner, its property being assessed for taxation at about $2,500,000, being approximately 2 per cent of the total assessed valuation of all property within the city and county, and that, as Park was informed and believed, the water company, by reason of its large interest as a property owner and taxpayer, was willing to protect Wheeler and Lusk against costs and attorneys' fees. Park denied the suits were collusive.

Moffat's affidavit is to the following effect: On June 19, 1911, he was treasurer of the water company. In May, 1911, the circuit court of appeals for the eighth circuit, *in the case of Denver v. New[348 York Trust Co. [110 C. C. A. 24, 187 Fed. 890], had rendered an opinion that the amendment to the charter of Denver was unconstitutional and void. The water company was a party to that suit, and in a cross bill had alleged its property holdings in the city, and that it paid approximately one fiftieth of all the taxes assessed and collected in the city. Notwithstanding the opinion and decision of the court, the utilities commission and its members openly and publicly declared their purpose of ignoring the decision and continuing to disburse the public funds of the city; announced their intention of instituting other and independent litigation in the state courts for the purpose of raising the identical questions decided by the circuit court of appeals. Many taxpayers citizens of Colorado and of other states complained to the officers of the water company of such illegal attempts, and requested the officers of the company to take some proper and legal steps to stop such unwarranted action. These conditions were discussed between Moffat and Gerald Hughes, counsel for the company, and it being advisable that the litigation should remain in the Federal courts, free from local prejudice or influence or the attacks of local newspapers, Moffat suggested that Lusk, who had been a resident of Denver, and knew the conditions surrounding the litigation, might have a sufficient interest and be willing to institute such other suits in the

Federal court as might be necessary and proper to prevent further illegal expenditure of public funds affecting not only Lusk, but other taxpayers. Thereupon Moffat, with the consent and advice of Hughes, sent the telegrams set out in Van Cise's affidavit. Moffat, through Hughes, employed Park to institute the suit. Moffat informed Park that the water company would protect him in regard to expenses, but did not at that time inform him of the exchange of telegrams with Lusk. The latter's desire as a taxpayer to institute and maintain the suit 349]is *averred, and it is denied that he is a stockholder and bondholder of the water company, or that he has further or other interest than that of a taxpayer. It is averred that the water company is interested in the litigation, and has a right not only to maintain its rights as a taxpayer, but, if it sees fit, to join in this suit as a nominal party.

An affidavit of the members of the commission was filed, in reply in which they aver that they have not, nor has either of them, at any time, declared the purpose as charged against them in Moffat's affidavit, nor have they done anything which might be construed as a violation of the injunction of the circuit court. The cause referred to by Moffat, as they have been advised and believe, involves the same questions as the present controversy, and in the event that they shall be compelled to answer they will so set up and aver. After the decision of the circuit court of appeals was announced, they consulted with their counsel as to whether drawing warrants for their salaries and the expenses of the litigation could be construed as a violation of the injunction of the circuit court in any particular, and only issued warrants upon the assurance of counsel that they were not prohibited from doing so. They also readily acquiesced in the action of the auditor and treasurer of the city in requesting an opinion of the city attorney as to their official status, after which they issued three certificates with a view of testing their right and authority so to do in the state courts, and in so doing were advised that they were not in any manner transgressing the mandate of the court. They aver their intention of bringing suits in the discharge of their duties with a view of recovering certain money believed to be due from certain collectors of water rent, and such kindred matters as may arise from time to time, but not for the purpose of raising any question already raised or decided.

Mr. Edwin H. Park argued the cause *and filed a brief for* appellants:

*When a Federal* court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 40, 53 L. ed. 382, 394, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 58, 56 L. ed. 327, 349, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169.

This court has repeatedly declared that it will not concern itself about the motives which actuated a litigant in bringing the suit, so long as the litigant was, at the time of bringing the suit, vested with a justifiable controversy within the jurisdiction of a Federal court.

Blair v. Chicago, 201 U. S. 400, 448, 50 L. ed. 801, 821, 26 Sup. Ct. Rep. 427; Chicago v. Mills, 204 U. S. 321, 325, 51 L. ed. 504, 507, 27 Sup. Ct. Rep. 286; Re Metropolitan R. Receivership (Re Reisenberg) 208 U. S. 90, 107, 110, 52 L. ed. 403, 411, 412, 28 Sup. Ct. Rep. 219; Re Cleland, 218 U. S. 120, 123, 54 L. ed. 962, 964, 30 Sup. Ct. Rep. 647; Lanier v. Nash, 121 U. S. 404, 30 L. ed. 947, 7 Sup. Ct. Rep. 919; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 42 Sup. Ct. Rep. 67; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311.

The question of contribution has frequently arisen in the circuit courts and in the circuit courts of appeals of the various circuits.

Champagne Lumber Co. v. Jahn, 93 C. C. A. 532, 168 Fed. 510; Consumers' Gas Trust Co. v. Quinby, 70 C. C. A. 220, 137 Fed. 882; Woodside v. Ciceroni, 35 C. C. A. 177, 93 Fed. 1; New Albany Waterworks v. Louisville Bkg. Co. 58 C. C. A. 576, 122 Fed. 776; McEwen v. Harriman Land Co. 71 C. C. A. 163, 138 Fed. 797; Bowdoin College v. Merritt, 63 Fed. 213; Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 Fed. 217.

The payment of solicitor's fees and costs in this case by the water company, under the authorities, did not constitute maintenance or champerty.

Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388; Burnes v. Scott, 117 U. S. 582, 589, 29 L. ed. 991, 993, 6 Sup. Ct. Rep. 865; Seaton Mountain Electric Light, H. & P. Co. v. Idaho Springs Invest. Co. 49 Colo. 131, 33 L.R.A.(N.S.) 1078, 111 Pac. 834; O'Driscoll v. Doyle, 31 Colo. 198, 73 Pac. 27; Currency Min. Co. v. Bentley, 10 Colo. App. 274, 50 Pac. 920; Duke v. Harper, 2 Mo. App. 1; Rucker v. Bolles, 67 C. C. A. 30, 133 Fed. 862; Jahn v. Champagne Lumber Co. 157 Fed. 407; Ross v. Ft. Wayne, 12 C. C. A. 627, 24 U. S. App. 506, 64 Fed. 1006; Mexi-

can Nat. Coal, Timber & Iron Co. v. Frank, 154 Fed. 224.

Collusion means something more than assistance of a litigant with funds, by a person who is directly interested in the result of the litigation.

Dickerman v. Northern Trust Co. 176 U. S. 181, 190, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311.

Mr. W. H. Bryant argued the cause, and, with Messrs. William P. Malburn and Thomas R. Woodrow, filed a brief for appellees:

Collusion is an agreement for wrongful purposes.

Belz v. Belz, 33 Ill. App. 105.

A case exactly in point is that of Cashman v. Amador & S. Canal Co. 118 U. S. 58, 30 L. ed. 72, 6 Sup. Ct. Rep. 926.

In the matter of the jurisdiction of Federal courts, the discrimination between suits between citizens of the same state and suits between citizens of different states is established by the Constitution and laws of the United States. And it has been the constant effort of Congress, and of this court, to prevent this discrimination from being evaded by bringing into the Federal court controversies between citizens of the same state.

Bernards Twp. v. Stebbins, 109 U. S. 353, 27 L. ed. 960, 3 Sup. Ct. Rep. 252.

An agreement to obtain an object forbidden by law fills the definition of collusion.

Industrial & Min. Guaranty Co. v. Electrical Supply Co. 7 C. C. A. 471, 16 U. S. App. 196, 58 Fed. 743.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The merits of the controversy are not involved. The sole question is whether there was collusion to give the court jurisdiction of the cause; and, of course, the existence of collusion implies the existence of fraud. Is fraud shown? Between the parties there is the requisite diversity of citizenship, requisite amount, and the complainants (appellants here) had such relation to the matters charged as to give them a standing to litigate their legality. They were solicited to bring the suit, however, and they were indemnified against liability for cost and counsel fees. Was this enough to make their proceeding collusive? To answer the question we must keep in mind the situation. The utilities commission was alleged to be an unconstitutional body and its expenditures illegal. Indeed, this had been decided; but injury from its action still impended, or was believed to impend. Litigation was threatened or believed to be threatened in the state courts; in other words, there was a purpose to change the forum of the litigation and possibly its results. The belief may have been unfounded; it cannot be said that it was not honestly entertained. Against these circumstances what is opposed? It is said that the water company was the party who desired the suit to be brought, and that the suit was brought for its benefit, and at its instance and request, and upon an express contract to pay the costs of litigation and counsel fees which might be incurred. A great deal of this is assumption; the water company admits *its interest, but the appellants[351 also have interest; but mere unity of interest or difference in its degrees is not enough; there must be an illegal purpose. If the interest was real and the peril which threatened was real or thought to be real, unity of interest or contribution of expenses cannot be regarded as necessarily proof of collusion. Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286. And the cases are numerous in which it has been decided that the motives of litigants in seeking Federal jurisdiction are immaterial. Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427, and cases cited.

Cashman v. Amador & S. Canal Co. 118 U. S. 58, 30 L. ed. 72, 6 Sup. Ct. Rep. 926, is relied on. The case is distinguishable from the case at bar. Cashman was an alien and brought suit against the canal company, claiming that his land was injured by the *débris* thrown on it by the working of certain mines by hydraulic process. The suit was instituted at the instance of the county of Sacramento, the county not being able to bring suit in the Federal court. There was a cause of action in Cashman; there was a disability on the part of the county to sue in the Federal court in its own name. So far there is resemblance to the case at bar, but there are material differences between the agreement in that case and the agreement between the parties in this. The county was to pay the expenses, engage counsel, and indemnify Cashman against all charges and expenses, and he stipulated "not to compromise, dismiss, or settle the said suit without the consent of the county of Sacramento, and to allow said county and the attorneys aforesaid in its behalf to manage and conduct the said suit to the same extent and in the same manner as if such suit had been commenced by and was prosecuted in the name of the said county of Sacramento." It is manifest, as this court said, from the very beginning, the suit was in reality the suit of the county, with a party plaintiff "colluisively made"

for the purpose of creating a case cognizable "by the circuit court of the United 252] *States." In other words, as was said, the "dispute and controversy" which was "involved" was nominally between Cashman, an alien, and the defendants, citizens of California, but was "really and substantially" between one of the counties of California and citizens of that state, and thus not "properly within the jurisdiction" of the circuit court.

The case at bar has no such features. It is not under the control of the water company. It was brought by appellants, they having a justiciable controversy, well or ill-founded, and which it was desired to be determined in a Federal court, they being nonresidents of Colorado and citizens of other states.

It is true, by the decision of this court in Denver v. New York Trust Co. 229 U. S. 123, ante, 1101, 33 Sup. Ct. Rep. 657, the merits of the controversy have been decided against them, but they must be judged as of the time their suit was begun; and, so judged, we think the suit was not collusively brought, and should not have been dismissed for want of jurisdiction. The decree dismissing it is therefore reversed.

Mr. Justice Day dissents.

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253] *JOHN A. ADAMS, Plff. in err.,
v.
JAMES RUSSELL, Warden of State House of Correction and Branch of the State Prison at Marquette, Michigan, and the Advisory Board in the Matter of Pardons, Defts., in Err.

(See S. C. Reporter's ed. 353-362.)

**Error to state court — Federal question — decision on non-Federal ground.**

The denial by the highest court of a state of relief by habeas corpus, sought by a convict whose parole had been annulled without notice, cannot be reviewed by the Federal Supreme Court, where it can only be conjectured whether the state court entertained views adverse to those of the petitioner on the Federal questions presented, or whether it considered that its former decision on a prior petition presenting the same questions determined his rights, or whether the court thought that, as a matter of procedure, a rehearing was his remedy, or that the new claim of "good time" allowance was untenable.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

[No. 1048.]

Submitted May 12, 1913. Decided June 10, 1913.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment denying relief by habeas corpus to a convict whose parole had been annulled without notice. Dismissed for want of jurisdiction.

See same case below, 169 Mich. 606, 135 N. W. 658.

The facts are stated in the opinion.

Mr. Fred A. Baker submitted the cause for plaintiff in error.

Mr. Grant Fellows, Attorney General of Michigan, submitted the cause for defendants in error. Mr. Thomas A. Lawler, Assistant Attorney General, was on the brief:

The question involved is a construction of the language of a state statute, not subject to review in this court.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; Phœnix Ins. Co. v. The Treasurer, (Phœnix Ins. Co. v. Gardiner) 11 Wall. 204, 20 L. ed. 112; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Lambert v. Barrett, 159 U. S. 660, 40 L. ed. 296, 16 Sup. Ct. Rep. 135; Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; Patterson v. Colorado, 205 U. S. 454, 460, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U S. 557, 571, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445.

Mr. Justice McKenna delivered the opinion of the court:

Error to review the action of the supreme court of Michigan, denying plaintiff in error a writ of habeas corpus.

*The facts, as alleged in the peti-[254 tion, are these: Plaintiff in error was con-

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

victed in the recorder's court of the city of Detroit of the crime of seduction, and sentenced to imprisonment for not less than two and one-half years, and for not more than five years. The case was reviewed by the supreme court of the state on a bill of exceptions and a writ of error, and the sentence and judgment of the court below affirmed. Pending the writ of error, he was released from imprisonment, but after his sentence was affirmed he was recommitted to prison, and ever since has remained there. He duly made application to the advisory board of pardons for a parole under act No. 184 of the Public Acts of 1905, as amended. On December 5, 1911, the board granted and delivered to the warden of the prison a certificate or warrant of parole by which he was paroled "for two months from and after January 29, 1912."

On December 11, 1911, the action of the board paroling plaintiff in error was vacated, for the reason, as the records show, that it was at that date "in possession of facts not known at the time of such action." The warden was notified of the action of the board.

This action of the board was without notice to plaintiff in error, and gave him no opportunity to be heard or to disprove the charge or facts alleged against him.

Having served his minimum sentence, and having been granted a parole, he is not now imprisoned on any process, judgment, decree, or execution specified in the 8th section of the habeas corpus act of the state.

On March 5, 1912, he presented a petition for a writ of habeas corpus to the supreme court of the state, in which he set up the facts of his case as above stated, and alleged the illegality of his imprisonment as follows: (1) The advisory board has no jurisdiction or authority to vacate the parole granted to him, the power and authority to retake and return any paroled convict to 355]the prison being *within the exclusive jurisdiction and discretion of the warden or superintendent of the prison. (2) If the indeterminate sentence act is construed to confer such power upon the board without notice to the convict, then said act is in conflict with the provision of the Constitution of the state, which prohibits cruel and unusual punishment or the taking of life, liberty, or property without due process of law, and against the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. (3) If so construed, the convict would be twice punished for the same offense. (4) The indeterminate sentence act and the rules and regulations promulgated thereunder contemplate that a convict's parol will not be annulled except when he violates the terms and conditions of his parol or the rules and regulations. (5) His term of imprisonment has expired.

The supreme court, instead of granting a writ of habeas corpus as prayed, granted a writ of certiorari to inquire into the cause of detention, under the authority of § 9889 of the Michigan Compiled Laws of 1897. The court also granted a common-law writ of certiorari to bring the record of the advisory board before it, and both writs were made returnable April 2, 1912.

Returns were made to the writs, which plaintiff in error traversed so far as they set forth facts which were alleged in a communication to the board, attached to the returns.

The case so made up was argued and submitted to the court on the 2d of April, 1912.

The attorney general made no attempt to sustain the power or jurisdiction of the advisory board to annul a parole without notice to the convict, but contended that as the supreme court, in affirming the conviction of plaintiff in error, had held that the time he was out on bail should not be included in determining the length of his *imprisonment, he was "subject to[356 imprisonment under the sentence for the unexpired part thereof remaining at the time of his release" (on bail), his minimum sentence not expiring until January 29, 1912, and his parole was void because his application was made and acted upon before the expiration of his minimum sentence.

The court held that his parole was void on the ground taken by the attorney-general, and the petition was denied. 169 Mich. 606, 135 N. W. 658.

Plaintiff in error and his counsel inadvertently overlooked the fact that he was entitled under the laws of Michigan to a deduction from his minimum sentence for the "good time" accorded to convicts in the prisons of the state. Under the laws of the state he had earned and was entitled during the first and second years of his sentence, to five days "good time" for each month, and, during the third year, to six days each month, making a total of one hundred and thirty-eight days, so that his minimum sentence of two years had expired before his application for parole.

The prison parole law of the state has been in existence since 1905, and down to the decision of the supreme court in his case, it was the constant practice of the advisory board to receive and act upon applications of convicts before and in anticipa-

tion of the expiration of their minimum sentences, and to grant paroles from a designated date, at or after the expiration of the convict's minimum sentence. At the time of the decision there were a large number of paroles outstanding, and these have been recognized as legal and valid, and, notwithstanding the decision, no paroled convict or prisoner other than plaintiff in error has been kept in or returned to prison on the ground that his parole was prematurely granted and void. Discrimination is alleged to result against him and a violation of the 14th Amendment to the Constitution of the United States.

357] *Twenty-eight cases are enumerated, and it is alleged that the board, since the decision, has continued the practice.

Plaintiff in error alleged the illegality of his imprisonment as follows: (1) His minimum sentence had expired at the time the board received and acted upon his application for parole, and the order of release was a valid warrant or instrument for his discharge. (2) The board had no power to vacate it, or, if it had such power, it was only upon notice. (3) The parole law, as enforced, discriminates against him, and denies him the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States. (6) The vacating of his parole was a violation of the due process clause of that amendment. (7) He was not guilty of any violation of his parole. (8) The reasons given in his former petition were repeated and relied on.

It is not necessary to set forth the exhibits to the petition. They are sufficiently indicated in the petition. The board's action in vacating the parole was induced by a communication made to it by the prosecuting officer of the county, stating the circumstances of the crime for which Adams was convicted. They are not important, however, to the legal propositions involved, and even to a consideration of the latter a question of jurisdiction is interposed.

It will be observed that the questions in the second petition (that under consideration) are the same as those presented in the first. In both, local and Federal questions appear. We say Federal questions, for at least there are claims in words under the Constitution of the United States. They depend upon two propositions—(1) If the indeterminate sentence act be construed as giving the advisory board power to annul the parole without notice, it violates the due process clause of the Constitution of the United States. (2) The parole as enforced denies plaintiff in error the equal protection of the law.

358] *Granting for the time being that these propositions are not merely dependencies of the local questions, that is, are not dependent upon the statute, may we review them? We have seen that the supreme court decided that the parole was void, the advisory board having no power under the statute to grant it. The ground of the ruling was that plaintiff in error's minimum sentence had not expired. In his second petition he alleges that his term had expired on account of credit due him for "good time" accorded convicts in the prisons of the state, that his counsel had inadvertently overlooked the fact that he was entitled to such credit, which amounted to a total of one hundred and thirty-eight days, and that therefore his sentence had actually expired before his application for parole. The petition was denied without opinion, and it is left indefinite upon what ground, —whether the court entertained views adverse to plaintiff in error's on the Federal questions, or whether it considered that its former decision determined his rights; whether, as a matter of procedure, a rehearing was his remedy, or whether the new claim of "good time" allowance was untenable under the statute. In such situation may we conjecture upon which ground the court decided, and by conjecture acquire jurisdiction to review the judgment of the court?

In Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131, it is decided that when there is a Federal and state question in the case, and the latter is sufficient to sustain the judgment, this court will not review the judgment, and the logical course is to dismiss the writ of error. But we may be put to infer what points may have been raised and what was decided; in other words, whether the state court rested its decision upon a Federal ground or upon an independent ground. If the latter be contended, then it must appear that such ground was a good and valid one, sufficient to sustain the judgment. Klinger v. Missouri, 13 Wall. 257, 263, 20 L. ed. 635, 637.

Otherwise, *as was said in Neilson[359 v. Lagow, 12 How. 98, 110, 13 L. ed. 909, 914, "counsel might raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon;" and therefore, if the independent ground be not good and valid, it will not be presumed that the judgment was based upon it. See also Maguire v. Tyler, 8 Wall. 650, 19 L. ed. 320. If, however, the state question have that quality, and there be uncertainty as to the ground of decision, this court will not assume jurisdiction. Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 69, 41 L. ed. 72, 74, 16 Sup. Ct. Rep. 939; Allen v. Arguimbau,

198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622.

In Commercial Bank v. Rochester, 15 Wall. 639, 21 L. ed. 117, a suit was brought to recover a tax charged to have been illegally levied and collected upon the capital stock of the bank alleged to have been invested in United States bonds. The case was dismissed for want of jurisdiction. We said, by Mr. Justice Miller: "It has been so often held by this court, that the question on which the plaintiff in error relies to give it jurisdiction must appear to have been decided by the state court, that it has become one of the settled principles on that subject." And further: "It is said in this case that the court [state court] *must* have decided in favor of the validity of the tax, which it is conceded would have given this court jurisdiction. But this does not appear, either affirmatively or by necessary intendment. For the case may have been decided on the form of the remedy which the practice in the state courts required the plaintiff to adopt, or on the technical insufficiency of the pleading. In this uncertainty of the record as an indication, we might, without going further, dismiss the case on that ground." It was objected that the state decision precluded the view that the case was decided on the local rules of pleading, to which it was replied that the state court was the proper tribunal to decide the question, and that we were not authorized to say that the court did not decide it correctly, or that it made any 360]decision *adverse to the exemption of the securities of the United States from state taxation.

In Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381, and Phœnix Ins. Co. v. The Treasurer (Phœnix Ins. Co. v. Gardiner) 11 Wall. 204, 20 L. ed. 112, there was a possibility of two grounds of decision, Federal and local, and this court declined to review the judgments. See also Todd v. Daniel, 16 Pet. 521, 10 L. ed. 1054.

In Bachtel v. Wilson, 204 U. S. 36, 41, 42, 51 L. ed. 357, 359, 360, 27 Sup. Ct. Rep. 243, we said, by Mr. Justice Brewer, that before we can pronounce a judgment of a state court to be "in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was." The case involved the consideration of a state statute which presented two questions, one of which, at least, presented no matter of a Federal nature, and in respect to each of which something might be said one way and the other, and until it was shown what the supreme court did in fact decide, it was impossible to hold that the section as construed by it was in conflict with the Federal Constitution. Under these circumstances it was held that this court had no jurisdiction, and the writ of error was dismissed. Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111, was cited. No opinion was given by the state court in Bachtel v. Wilson, nor in the cited case. In neither case, therefore, did the record disclose the specific ground upon which the court proceeded. In such case, we said in Johnson v. Risk, by Mr. Chief Justice Fuller, that when the application of a state statute in a matter purely local was involved, if a plaintiff in error wished to claim that the cause was disposed of by the decision of a Federal question, he should obtain the certificate of the supreme court to that effect, or the assertion in the judgment that such was the fact. DeSaussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053, was adduced as deciding that to give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal *question was presented for[361 decision, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been rendered without deciding it.

The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plentitude of their powers. It permits no evasion by the state court of the responsibility of determining the Federal question if necessary to be determined; it permits no assumption by this court of jurisdiction to review the decision of local questions. The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the Federal question necessarily we have to consider, but, as was said in Johnson v. Risk: "Where a defense is distinctly made, resting on local statutes, we should not, in order to reach a Federal question, resort to critical conjecture as to the action of the court in the disposition of such defense." And, of course, the principle is applicable whether the question is presented as a ground of defense or a ground of action.

It certainly cannot be said that in the case at bar, the supreme court had not grounds of decision based on the local law, whether considered substantively or administratively. The "good time" law and the indeterminate sentence law were enacted at different times. Whether the former is part of the latter is a state question, and whether the supreme court has decided in

the present case contrary to its ruling in a prior case may or may not be true. And, again, it is a state question whether the "good time" law applies to the minimum sentence imposed, which, it is contended by defendant in error, is fixed and certain, not subject to diminution, § 5 of the indeterminate sentence act providing that "prisoners under the provisions of this act shall be eligible to parol after the expiration of their minimum term of imprisonment, and prisoners who have been twice previously 362] convicted "of a felony shall not be eligible to a parole." In other words it is contended that the reduction for "good time" should be only from the maximum term, that being the sentence referred to in the "good time" law, which provides: "Every convict who shall have no infraction of the rules of the prison or the laws of the state recorded against him shall be entitled to a reduction from his sentence," etc. It has been determined in other jurisdictions that the maximum term constitutes the sentence. See Re Spencer, 228 U. S. 652, ante, 1010, 33 Sup. Ct. Rep. 709; Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843. In support of the contention that the indeterminate sentence law and its provision for parole did not in any way repeal or modify the good time law, plaintiff in error cites the last clause of § 6, which reads as follows:

"The convict so paroled while at large shall be deemed to be still serving the sentence imposed upon him, and shall be entitled to good time the same as if confined in prison."

On the assumption made, the query yet remains, To what sentence is the good time to apply? We have seen, the supreme court has decided that a convict cannot be paroled until his minimum sentence has expired; and that good time does not apply to the minimum sentence receives support from the fact that neither the counsel for the parties, nor the court, upon the first petition, thought of the construction plaintiff in error now urges for the "good time" law and its operation to reduce his minimum sentence. We are not required to resolve the dispute. We have stated the respective contentions of the parties to show that there were substantial local questions in the case upon which the supreme court may have decided it.

It follows, therefore, upon the authority of the cases which we have cited, that the *writ of error* must be dismissed.

*Dismissed.*

*JAMES P. McGOVERN, Plff. in Err., [363
v.
CITY OF NEW YORK.

(See S. C. Reporter's ed. 363-373.)

**Constitutional law — due process of law — award in eminent domain proceedings.**

An award to the owner of one of many parcels of land taken by eminent domain for a site for a reservoir for a municipal water supply cannot be said to deny due process of law, where made without prejudice, in due form, and after full hearing, because the commissioners and courts refuse to take into consideration the value of the land as part of a natural reservoir site.

[For other cases, see Constitutional Law, IV. d, 4, in Digest Sup. Ct. 1908.]

[No. 15.]

Argued and submitted November 8, 1912. Decided June 9, 1913.

IN ERROR to the Supreme Court of the State of New York in and for the County of Ulster, in that state, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division, Supreme Court, Third Department, which had in turn affirmed a final order of the Supreme Court, confirming a report of commissioners of appraisal in eminent domain proceedings. Affirmed.

See same case below in appellate division, 130 App. Div. 350, 114 N. Y. Supp. 571; in court of appeals, 195 N. Y. 573, 88 N. E. 1132.

The facts are stated in the opinion.

Mr. Edward A. Alexander argued the cause, and, with Messrs. George Gordon Battle, J. J. Darlington, and Jerome H. Buck, filed a brief for plaintiff in error:

The commissioners of appraisal, and the courts of the state of New York, confiscated the claimant's property in entirely excluding from consideration, as an element of value, its adaptability for use as part of a reservoir site.

Missouri & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; 6 Sedgw. Damages, § 1075; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173; Seattle & M. R. Co. v. Murphine, 4 Wash. 456, 30 Pac. 720; Re Staten Island R. Co. 10 N. Y. S. R. 393; Russell v. St. Paul, M. & M. R. Co. 33 Minn. 210, 22 N. W. 379; Sanitary Dist. v. Loughran, 160 Ill. 365, 43 N. E. 359; McGroarty v. Lehigh Valley Coal Co. 213 Pa. 53, 61, Atl. 570; Payne v. Kansas & A. Valley R. Co. 46 Fed. 546; Amoskeag Mfg. Co. v. Worcester, 60 N. H. 522; Harwood v. West Randolph, 64 Vt. 41, 24 Atl. 97; Gard-

ner v. Brookline, 127 Mass. 358; Conness v. Com. 184 Mass. 541, 69 N. E. 341; Gage v. Judson, 111 Fed. 358; Hooker v. Montpelier & W. River R. Co. 62 Vt. 48, 19 Atl. 775; Re Gilroy, 85 Hun, 424, 32 N. Y. Supp. 891; Great Falls Mfg. Co. v. United States, 16 Ct. Cl. 160, affirmed in 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Cripp, Compensation, 4th ed. p. 108.

The New York state courts hold that an award must be so inadequate that it is shocking to the sense of justice, before they will set it aside.

Re Forty-Eighth Street, 19 App. Div. 602, 46 N. Y. Supp. 311; Long Island R. Co. v. Reilly, 89 App. Div. 166, 85 N. Y. Supp. 875.

This rule has been adopted by the New York state courts, in the face of the express language of both the state and the United States Constitutions, that wherever a man is deprived of his property by the public he must receive "just compensation" therefor.

Everything which the plaintiff in error offered to prove before the commissioners of appraisal must be regarded as having been proved.

Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287; Place v. New York C. & H. R. R. Co. 167 N. Y. 347, 60 N. E. 632; Waldron v. Fargo, 170 N. Y. 130, 62 N. E. 1077; Sundheimer v. New York, 176 N. Y. 495, 68 N. E. 867, 15 Am. Neg. Rep. 137.

The owner is entitled to have the value of his property considered with reference to its adaptability for any and all uses to which it may be devoted, and if, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is practically adapted to some particular use, all the circumstances which make up its adaptability may be shown, and the fact of such adaptability may be taken into consideration in estimating the compensation.

Lewis, Em. Dom. § 479.

In ascertaining the value of property taken for a public use, all the capabilities of the property, and the uses to which it may be applied, or for which it is adapted, are to be considered, and not merely the condition which it is in at the time and the use to which it is then applied by the owner.

Syracuse v. Stacey, 45 App. Div. 254, 61 N. Y. Supp. 165; Re Furman Street, 17 Wend. 649; College Point v. Dennett, 5 Thomp. & C. 217; Re State Reservation, 37 Hunt, 555; Re Union Elev. R. Co. 55 Hun, 163, 7 N. Y. Supp. 853; Re Daly, 72 App. Div. 396, 76 N. Y. Supp. 28.

The proposed testimony offered and rejected by the state courts is not speculative.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Re Gilroy, 85 Hun, 426, 32 N. Y. Supp. 891; Blake v. Griswold, 103 N. Y. 436, 9 N. E. 434, 12 Am. & Eng. Enc. Law, 2d ed. 484; Chandler v. Jamaica Pond Aqueduct Corp. 125 Mass. 544; Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co. 100 Ill. 33; Read v. Barker, 30 N. J. L. 378, 32 N. J. L. 477; Lowell v. Middlesex County, 146 Mass. 403, 16 N. E. 8; Warren v. Spencer Water Co. 143 Mass. 155, 9 N. E. 527.

The savings accruing to the condemning party by taking the particular land in question, in preference to other land of a similar character, which savings would accrue to any person using the land for the same purposes, must be taken into consideration, as competent evidence of the market value of the property.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Great Falls Mfg. Co. v. United States, 16 Ct. Cl. 160, affirmed in 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Re Brookfield, 176 N. Y. 138, 68 N. E. 138; Currie v. Waverly & N. Y. Bay R. Co. 52 N. J. L. 394, 19 Am. St. Rep. 452, 20 Atl. 56; Re Gough [1904] 1 K. B. 417, 73 L. J. K. B. N. S. 228, 68 J. P. 229, 52 Week. Rep. 552, 90 L. T. N. S. 43, 20 Times L. R. 179; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720.

It is the potentialities of a given piece of property, both developed and undeveloped, which constitute its chief element of value.

Langdon v. New York, 133 N. Y. 628, 31 N. E. 98.

Not only is the property in the case at bar available and adaptable, but it has a present intrinsic value, inherent in the property itself, and capable of proof.

Gearhart v. Clear Spring Water Co. 202 Pa. 292, 51 Atl. 891.

While a difference in the number of the owners may make a difference in the value of the property, because it would cost a purchaser more money to obtain the property from a larger number of owners, surely there can be no difference in principle whether there are two owners, ten owners, or two thousand owners. If there is such a difference in principle, where will the courts draw the line? If a large part of the bed of Lake Gilead had been owned by five thousand owners, instead of by five owners, would the case, as a matter of law, have been different? This question answers itself. Such a distinction has been termed by the highest court of California to be ridiculous.

San Diego Land & Town Co. v. Neale, 78 Cal. 63, 8 L.R.A. 83, 20 Pac. 372. See also Rankin v. Harrisonburg, 104 Va. 624, 3

L.R.A.(N.S.) 919, 113 Am. St. Rep. 1050, 52 S. E. 555.

Market value is not always the true measure of just compensation.

Sargent v. Merrimac, 196 Mass. 171, 11 L.R.A.(N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970; Sloan v. Baird, 162 N. Y. 330, 56 N. E. 752; Re New York, L. & W. R. Co. 27 Hunt, 116; Re Furman Street, 17 Wend. 648; Daly v. Smith, 18 App. Div. 197, 45 N. Y. Supp. 785.

The adaptability of land for use as a reservoir or for water purposes has been taken into consideration as an element of value of such land in a number of well-decided and carefully considered cases, both in Great Britain and in the United States.

Cripp, Compensation, 4th ed. p. 108; Re Gilroy, 85 Hun, 424, 32 N. Y. Supp. 891, Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Re Daly, 72 App. Div. 396, 76 N. Y. Supp. 28; Re Gough [1904] 1 K. B. 417, 73 L. J. K. B. N. S. 228, 68 J. P. 229, 52 Week. Rep. 552, 90 L. T. N. S. 43, 20 Times L. R. 179; College Point v. Dennett, 5 Thomp. & C. 217; Gearhart v. Clear Spring Water Co. supra; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

The fact that the plaintiff in error did not or could not alone use his property as a reservoir site does not deprive that property of its value as a reservoir site, or a portion of a reservoir site.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Great Falls Mfg. Co. v. United States, 16 Ct. Cl. 160; Chicago, N. W. R. Co. v. Chicago & E. R. Co. 112 Ill. 609; Hooker v. Montpelier & W. River R. Co. 62 Vt. 49, 19 Atl. 775; Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792; Mississippi River Bridge Co. v. Ring, 58 Mo. 491.

The fact that the plaintiff in error was the owner of only a part of the reservoir site does not prevent that element of value being considered. It only goes to the weight that should be given to the evidence, and the amount that should be allowed for this element of value.

Re Gilroy, 85 Hun, 424, 32 N. Y. Supp. 891; Re Tynemouth, 67 J. P. 425, 19 Times L. R. 630, 89 L. T. N. S. 559; San Diego Land & Town Co. v. Neale, 78 Cal. 63, 3 L.R.A. 83, 20 Pac. 372.

The use to which property can be put, and the value of such use, constitute property; and condemning property, without considering as a part of the compensation to be awarded therefor such use, or the value of such use, or permitting the owner to give evidence thereof, is depriving the owner thereof of his property without due process of law.

Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; People ex rel. Witherbee v. Essex County, 70 N. Y. 234.

It is not due process of law, where the courts apply a rule of law in absolute disregard of the right to just compensation.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 565, 42 L. ed 853, 857, 18 Sup. Ct. Rep. 445.

Eminent domain statutes are construed most strictly against the condemning party.

Appleby v. Buffalo, 221 U. S. 524, 531, 55 L. ed. 838, 841, 31 Sup. Ct. Rep. 699; Twining v. New Jersey, 211 U. S. 78, 91, 53 L. ed. 97, 102, 29 Sup. Ct. Rep. 14; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 35, 36, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Londoner v. Denver, 210 U. S. 373, 386, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 20, 26, 51 L. ed. 933, 942, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Old Wayne Mut. L. Asso. v. McDonough, 204 U. S. 8, 22, 51 L. ed. 345, 351, 27 Sup. Ct. Rep. 236; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; Madisonville Traction Co. v. Bernard Min. Co. 196 U. S. 239, 252, 49 L. ed. 462, 467, 25 Sup. Ct. Rep. 251; Tindal v. Wesley, 167 U. S. 204, 222, 42 L. ed. 137, 143, 17 Sup. Ct. Rep. 770; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372.

The capabilities of the property of the plaintiff in error, its adaptability and availability for use as part of a reservoir site, constitute commercial value and property. The term "property" means the right to use, exercise dominion over, and dispose of, some particular thing or object. Property means ownership, the exclusive right of a person to freely use, enjoy, and dispose of any object, whether real or personal.

Hamilton v. Rathbone, 175 U. S. 421, 44 L. ed. 222, 20 Sup. Ct. Rep. 155; Babcock v. Buffalo, 56 N. Y. 268; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; affirming 33 Hun, 374.

Mr. Louis C. White submitted the cause for defendant in error. Messrs. William McM. Speer and Archibald R. Watson were on the brief:

The New York courts decided correctly.

Re Simmons, 130 App. Div. 350, 114 N. Y. Supp. 571; Black River & M. R. Co. v. Barnard, 9 Hun, 104.

Just compensation to the owner whose property has been taken for public purposes is to be measured by what the owner lost, and not by what the taker has gained. Imaginary uses or speculative values are to be excluded.

Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459; Monongahela Nav. Co. v. United States, 148 U. S. 312, 343, 37 L. ed. 463, 474, 13 Sup. Ct. Rep. 459; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 250, 41 L. ed. 979, 989, 17 Sup. Ct. Rep. 581; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Five Tracts of Land v. United States, 41 C. C. A. 580, 101 Fed. 661; United States v. Seufert Bros. Co. 78 Fed. 520.

This court will regard as conclusive the construction placed upon the state statute by the courts of the state of New York.

Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459; Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

**Mr. Justice Holmes** delivered the opinion of the court:

This is a proceeding for the taking of land to be used for a reservoir to secure an additional supply of water for the city of New York. Commissioners were appointed, as provided by the Constitution of the state, to ascertain the compensation to be paid. Land belonging to the plaintiff in error, McGovern, was among the many parcels taken, and the question brought here arises on the refusal of the commissioners to admit certain evidence as to the exceptional value of the land for a reservoir site, the exclusion of which, it was alleged, had the effect of depriving McGovern of his property without due process of law, contrary to the 14th Amendment of the Constitution of the United States. The offer of proof as first made embraced many facts and covers six octavo pages of the record. This was rejected, the commissioners, as we understand their ruling, considering it only as a unit, and as containing inadmissible ele-[370]ments, which probably it *did. The offer then was made "to prove the fair and reasonable market value of this piece of property, taking into consideration that element of value which gives it an enhanced value because it is part of a natural reservoir site;" also "to prove the fair and reasonable value of the Ashokan reservoir site which the city of New York is now condemning," and that the Ashokan reservoir site (as a whole) was the best and most available site for the purpose of obtaining an additional water supply. These offers were enough to raise the question discussed, although the last one was only a reiteration of what was alleged in the original petition for the taking of the land, and stood admitted on the record. The action of the commissioners was affirmed by the courts of New York. 130 App. Div. 350, 356, 114 N. Y. Supp. 571, 575, 195 N. Y. 573, 88 N. E. 1132.

The statute requires the commissioners to determine "the just and equitable compensation which ought to be made." If there has been any wrong done it is due not to the statute, but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought, and in that sense is deprived of his property, can come to this court. The result of a judgment in trover, at least, if satisfied (Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Miller v. Hyde, 161 Mass. 472, 25 L.R.A. 42, 42 Am. St. Rep. 424, 37 N. E. 760), is to pass property as effectually as condemnation proceedings; yet no one would contend that a plaintiff could come here under the Constitution simply because of an honest mistake to his disadvantage in laying down the rule of damages for conversion. If the plaintiff could bring such a case to this court, one might ask why not the defendant for a mistake in the opposite direction that will deprive him of money that he is entitled to keep?

When property is taken by eminent domain, it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for *compensation before a party can[371] make out that the state has deprived him of his property unconstitutionally. A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 575, 576, 42 L. ed. 853, 861, 18 Sup. Ct. Rep. 445. As it is put in the case most frequently cited in favor of the right to a writ of error, "we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation." And again, the final judgment of a state court "ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation." Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 246, 247, 41 L. ed. 979, 988, 17 Sup. Ct. Rep. 581; Appleby v. Buffalo, 221 U. S. 524, 531, 532, 55 L. ed. 838, 841, 842, 31 Sup. Ct. Rep. 699.

The present case, of course, does not show disregard of McGovern's rights, or that he was prevented from obtaining substantially any compensation. Even if the plaintiff in error is right, it shows only that the commissioners and courts of New York adopted too narrow a view upon a doubtful point in the measure of damages. It hardly even is so strong as that; for the ruling of the commissioners is not to be taken as an abstract universal proposition, but the judgment concerning this particular case, found by men presumably, as the plaintiff in error says, men of experience, who had or were free to acquire outside information concerning the general conditions of the taking and the selected site. The plaintiff in error quotes authority that, probably for this reason, the New York courts will not set aside an award of such commissioners unless so palpably wrong as to shock the sense of justice. It is conceded 'that the owner is not permitted to take advantage of the necessities of the condemning party,' and it would seem that it well might be that the commissioners regarded it as too plain to be shaken by evidence, on the public facts, that the 372]value of the land for a reservoir *site could not come into consideration except upon the hypothesis that the city of New York could not get along without it, and that its only means of acquisition was voluntary sale by owners aware of the necessity, and intending to make from it the most they could. It is just this advantage that a taking by eminent domain excludes.

But if the rulings complained of be taken as universal propositions, they present no element of the arbitrary, even if they should be thought to be wrong. The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 249, 41 L. ed. 979, 989, 17 Sup. Ct. Rep. 581. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195, 54 L. ed. 725, 727, 30 Sup. Ct. Rep. 459. In estimating that probability, the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's river in United States v. Chandler-Dunbar Water Power Co. [229 U. S. 53, ante, 1063, 33 Sup. Ct. Rep. 667], decided last month.

The plaintiff in error relies upon cases like Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, to sustain his position that while the valuation cannot be increased by the fact that his land has been taken for a water supply, still it can be by the fact that the land is valuable for that purpose. The difficulties in the way of such evidence and *the[373 wide discretion allowed to the trial court are well brought out in Sargent v. Merrimac, 196 Mass. 171, 11 L.R.A.(N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970. Much depends on the circumstances of the particular case. We are satisfied on all the authorities that whether we should have agreed or disagreed with the commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice, in due form, and after full hearing, as a denial by the state of due process of law.

Judgment affirmed.

Mr. Justice Day dissents.

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EDMUND S. NASH, Spencer P. Shotter, et al., Petitioners,
v.
UNITED STATES.

(See S. C. Reporter's ed. 373-380.)

**Criminal law — vagueness in penal statute — anti-trust act.**

1. There is no such vagueness in the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), as to render it inoperative on its criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade.

[For other cases, see Criminal Law, I. a, in Digest Sup. Ct. 1908.]

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Note.—As to illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to monopolies, generally—see notes to Fowle v. Park, 33 L. ed. U. S. 67; and United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008.

**Indictment — conspiracy in restraint of trade — overt act.**

2. No overt act need be alleged in an indictment charging a conspiracy to restrain or monopolize interstate trade or commerce, under the anti-trust act of July 2, 1890, since that statute does not make the doing of any act other than the act of conspiring a condition of liability.

[For other cases, see Indictment, II. e, 3, b, in Digest Sup. Ct. 1908.]

**Monopoly — under anti-trust act — intent.**

3. An unlawful intent may be sufficient to convert what, on their face, might be no more than ordinary acts of competition, or the small dishonesties of trade, into a conspiracy forbidden by the anti-trust act of July 2, 1890, enacted to prevent combinations in restraint of interstate or foreign commerce, or the monopolization or intent to monopolize any part thereof.

[For other cases, see Monopolies, II. a, in Digest Sup. Ct. 1908.]

**Monopoly — under anti-trust act — traders.**

4. The alleged conspirators need not all be traders in order to bring their conspiracy within the condemnation of the anti-trust act of July 2, 1890, of combinations in restraint of interstate or foreign commerce, or the monopolization or attempt to monopolize any part thereof.

[For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.]

**Appeal — instructions — conspiracy.**

5. Instructing the jury to consider all the means charged in an indictment for conspiring, contrary to the act of July 2, 1890, to restrain or monopolize interstate or foreign commerce, and to find a verdict of guilty on any one of them, without calling the jury's attention in this connection to the fact that some of the charges had been abandoned, is reversible error,—especially where one of the means alleged, taken by itself, shows only cheating, and could not warrant a finding of the conspiracy with which the defendants were charged.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

[No. 197.]

Argued March 18 and 19, 1913. Decided June 9, 1913.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a conviction in the Circuit Court for the Southern District of Georgia of a criminal violation of the Sherman anti-trust act. Reversed.

See same case below, 108 C. C. A. 467, 186 Fed. 489.

The facts are stated in the opinion.

Mr. Samuel B. Adams argued the cause and filed a brief for petitioners:

The law is bad as a penal statute, because it is not sufficiently definite and explicit to advise parties what they may and may not do under the law.

United States v. Reese, 92 U. S. 219, 23 L. ed. 565; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 875; The Enterprise, 1 Low. Dec. 455, Fed. Cas. No. 4,498; United States v. Sharp, Pet. C. C. 118, Fed. Cas. No. 16,264; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; United States v. Brewer, 139 U. S. 288, 35 L. ed. 193, 11 Sup. Ct. Rep. 538; McChord v. Louisville & N. R. Co. 183 U. S. 498, 499, 46 L. ed. 296, 297, 22 Sup. Ct. Rep. 165; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; Cook v. State, 26 Ind. App. 489, 59 N. E. 489; United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42; Czarra v. Medical Supers. 25 App. D. C. 443; 2 Sutherland, Stat. Constr. § 520; 2 Tucker, Const. p. 448; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 185, 50 L. ed. 428, 432, 433, 26 Sup. Ct. Rep. 208; Shawnee Compress Co. v. Anderson, 209 U. S. 434, 435, 52 L. ed. 875, 876, 28 Sup. Ct. Rep. 572; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 409, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553.

The application of the statute seems to rest largely in the discretion of the executive and judicial departments of the government.

Standard Oil Co. v. United States, 221 U. S. 1, 34 L.R.A.(N.S.) 834, 55 L. ed. 619, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; 2 Cook, Corp. 6th ed. 351, 352; United States v. Joint Traffic Asso. 171 U. S. 566, 568, 43 L. ed. 286–287, 19 Sup. Ct. Rep. 25; State v. Central R. Co. 109 Ga. 724, 48 L.R.A. 351, 35 S. E. 37; Hopkins v. United States, 171 U. S. 592, 43 L. ed. 296, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed 300, 19 Sup. Ct. Rep. 50; E. Bement & Sons v. National Harrow Co. 186 U. S. 92, 46 L. ed. 1069, 22 Sup. Ct. Rep. 747; Addyston Pipe & Steel Co. v. United States, 175 U. S. 244, 44 L. ed. 148, 20 Sup. Ct. Rep. 96; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 228, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Spelling, Trusts & Monopolies, 221–224; 2 Eddy, Combinations, pp. 886–889, 993.

The indictment is bad because: 1. No overt act of any kind is alleged.

Bannon v. United States, 156 U. S. 469, 39 L. ed. 496, 15 Sup. Ct. Rep. 467; United States v. Reichert, 32 Fed. 145.

2. It does not charge that the trader mentioned had any combination, alliance, or agreement of any kind with any other trader.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 460; United States v. E. C. Knight Co. 156 U. S. 16, 17, 39 L. ed. 330, 331, 15 Sup. Ct. Rep. 249; Re Greene, 52 Fed. 104; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; United States v. Britton, 107 U. S. 655, 27 L. ed. 520, 2 Sup. Ct. Rep. 512; United States v. Trumbull, 46 Fed. 755.

3. No conspiracy is stated, or can be, in view of the facts.

Pettibone v. United States, 148 U. S. 203, 37 L. ed. 422, 13 Sup. Ct. Rep. 542.

4. It is not alleged or shown that the individual defendants were traders.

5. It is too vague and indefinite.

Joyce, Indictments, § 287; State v. Van Pelt, 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 Ann. Cas. 495; United States v. Adams Exp. Co. 119 Fed. 240; United States v. Hess, 124 U. S. 486, 31 L. ed. 517, 8 Sup. Ct. Rep. 571; Re Greene, 52 Fed. 114; United States v. Patterson, 4 Inters. Com. Rep. 775, 55 Fed. 641; American Banana Co. v. United Fruit Co. 160 Fed. 184; United States v. Cruikshank, 92 U. S. 555, 23 L. ed. 592; Rice v. Standard Oil Co. 134 Fed. 469; United States v. Carll, 105 U. S. 612, 613, 26 L. ed. 1135, 1136, 4 Am. Crim. Rep. 246; Armour Packing Co. v. United States, 14 L.R.A.(N.S.) 400, 82 C. C. A. 135, 153 Fed. 17; United States v. Green, 136 Fed. 643.

Mr. John C. Spooner also argued the cause, and, with Mr. George Rublee, filed a brief for petitioners.

Assistant to the Attorney General Fowler argued the cause, and, with Mr. Alexander Ackerman, United States attorney, filed a brief for respondent:

The Sherman anti-trust law of July 2, 1890, is valid as a penal statute.

Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 875; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; United States v. American Tobacco Co. 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; United States v. Patterson, 205 Fed. 292; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 108, 53 L. ed. 417, 429, 29 Sup. Ct. Rep. 220.

*The indictment is not defective because it fails to allege an overt act.*

Com. v. Fuller, 132 Mass. 566; Com. v. Judd, 2 Mass. 336, 3 Am. Dec. 54; Com. v. Shedd, 7 Cush. 514; People v. Dyer, 79 Mich. 481, 44 N. W. 937; People v. Richards, 1 Mich. 224, 51 Am. Dec. 75; State v. Keach, 40 Vt. 118; State v. Straw, 42 N. H. 394; Archbold, Crim. Pl. Ev. & Pr. 24th ed. 1212; 2 Bishop, Crim. Proc. 4th ed. § 205.

The indictment is not defective because it fails to charge that the trader mentioned had any combination, alliance, or agreement of any kind with any other trader, or because no conspiracy is stated therein, or because it does not allege that the individual defendants were traders.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Kissel, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124; United States v. Patterson, 205 Fed. 292; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; 8 Cyc. 657.

The indictment is not fatally defective because too vague and indefinite.

Aikens v. Wisconsin, 195 U. S. 206, 49 L. ed. 160, 25 Sup. Ct. Rep. 3; Armour Packing Co. v. United States 209 U. S. 56, 83, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Archbold, Crim. Pl. Ev. & Pr. 24th ed. 1416.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment in two counts,—the first for a conspiracy in restraint of trade, the second for a conspiracy to monopolize trade, contrary to the act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, commonly known as the Sherman act. Originally there was a third count for monopolizing, but it was held bad on demurrer and was struck out.

The allegations of fact in the two counts are alike. Summed up in narrative form they are as follows: The American Naval Stores Company, a West Virginia corporation having its principal office in Savannah and branch offices in New York, Philadelphia, Chicago, etc., was engaged in buying, selling, shipping, and exporting spirits of turpentine in and from Southern states to other states and abroad. Nash was the president; Shotter, chairman *of the board[375 of directors; Myers, vice president; Boardman, treasurer; DeLoach, secretary; and Moller, manager of the Jacksonville, Florida, branch. The National Transportation & Terminal Company, a New Jersey corporation, had warehouses and terminals for handling spirits of turpentine and naval

stores at Fernandina, and other places named, in Florida, Alabama, Mississippi, etc., was engaged in storing such turpentine and rosin and issuing warehouse receipts for the same. Myers was the president, DeLoach the secretary, and Moller manager of the Jacksonville branch. On May 1, 1907, it is alleged, these corporations and individuals conspired to restrain commerce in the articles named, among the states and with foreign nations,—the restraint to be effected in the following ways, among others: (1) by bidding down turpentine and rosin so that competitors could sell them only at ruinous prices; (2) by causing naval stores receipts that naturally would go to one port, to go to another; (3) by purchasing thereafter a large part of "its" supplies at ports known as closed ports, and, with intent to depress the market, refraining from purchasing any appreciable part at Savannah, the primary market in the United States for naval stores, where purchases would tend to strengthen prices, the defendants taking the receipts at the closed ports named on a basis of the market at Savannah; (4) by coercing factors and brokers into contracts with the defendants for the storage and purchase of their receipts, and refusing to purchase from such factors and brokers unless such contracts were entered into; (5) by circulating false statments as to naval stores production and stocks on hand; (6) by issuing fraudulent warehouse receipts; (7) by fraudulently grading, regrading, and raising grades of rosins, and falsely gauging spirits of turpentine; (8) by attempting to bribe employees of competitors so as to obtain information concerning their business and stocks; (9) by inducing consumers, by payments and 376] *threats of boycotts, to postpone dates of delivery of contract supplies, and thus enabling defendants to postpone purchasing when to purchase would tend to strengthen the market; (10) by making tentative offers of large amounts of naval stores to depress the market, accepting contracts only for small amounts, and purchasing when the market had been depressed by the offers; (11) by selling far below cost in order to compel competitors to meet prices ruinous to everybody; (12) by fixing the price of turpentine below the cost of production,—all the foregoing being for the purpose of driving competitors out of business and restraining foreign trade, or, in the second count, of doing the same and monopolizing the trade.

The two counts before us were demurred to on the grounds that the statute was so vague as to be inoperative on its criminal side; that neither of the counts alleged any overt act; that the contemplated acts and things would not have constituted an offense if they had been done, and that the same acts, etc., were too vaguely charged. The demurrer was overruled and this action of the court raises the important questions of the case. We will deal with them before passing to matters of detail.

The objection to the criminal operation of the statute is thought to be warranted by Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734, and United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632. Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. *The kindred proposition[377 that "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty," is cited from the late Mr. Justice Brewer, sitting in the circuit court. Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919.

But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw." Com. v. Pierce, 138 Mass. 165, 178, 52 Am. Crim. Rep. 264, 5 Am. Crim. Rep. 391; Com. v. Chance, 174 Mass. 245, 252, 75 Am. St. Rep. 306, 54 N. E. 551. "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." 1 East, P. C. 262. If a man should kill another by driving an automobile furiously

into a crowd, he might be convicted of murder, however little he expected the result. See Reg. v. Desmond, and other illustrations in Stephen's Dig. Crim. Law, art. 223, 1st ed. p. 146. If he did no more than drive negligently through a street, he might get off with manslaughter or less. Reg. v. Swindall, 2 Carr. & K. 230, 2 Cox, C. C. 141; Rex v. Burton, 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See the Germanic Oceanic Steam Nav. Co. v. Aitken, 196 U. S. 589, 596, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317. But without further argument, the case is very nearly disposed of by Waters-Pierce 378]Oil Co. v. *Texas, 212 U. S. 86, 109, 53 L. ed. 417, 429, 29 Sup. Ct. Rep. 220, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.

Coming next to the objection that no overt act is laid, the answer is that the Sherman act punishes the conspiracies at which it is aimed on the common-law footing,—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, in Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793, and Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136, 32 Sup. Ct. Rep. 812, have no bearing upon a statute that does not contain the requirement found in that section. As we can see no reason for reading into the Sherman act more than we find there, we think it unnecessary to offer arguments against doing so.

As to the suggestion that the matters alleged to have been contemplated would not have constituted an offense if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once. Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Loewe v. Lawler, 208 U. S. 274, 299, 52 L. ed. 488, 500, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815. Of course, this fact calls for conscience and circumspection in prosecuting officers, lest by the unfounded charge of a wider purpose than the acts necessarily import they convert what at most would be small local offenses into crimes under the statutes of the United States. But we cannot say, as was the case in United States v. Winslow, 227 U. S. 202, 218, ante, 481, 485, 33 Sup. Ct. Rep. 253, that no intent could convert the proposed conduct into such a crime.

Finally, we cannot pronounce the counts before us bad for uncertainty. On demand of the defendants a bill of *particulars[379 was furnished, and there is no reason to fear that injustice was done in that respect. There was no need to allege or prove that the conspirators themselves were all traders. Loewe v. Lawlor, 208 U. S. 274, 301, 52 L. ed. 488, 502, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815. The first count, at least, was well enough.

After the demurrer was overruled the defendants pleaded not guilty, and there was a trial and a verdict finding that Nash, Shotter, Myers, Moller, and Boardman were guilty and DeLoach not guilty, but saying nothing as to the corporations. Numerous exceptions were taken, but as writs of certiorari are not granted to bring up the ordinary incidents of a criminal trial, we shall say little more than is necessary to dispose of the case. It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy, they proved that the corporations, more clearly than anyone else, were parties to it, and therefore that a verdict that was silent as to them ought to be set aside. We need not consider the effect of Rev. Stat. § 1036, U. S. Comp. Stat. 1901, p. 723, on whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reversed for another reason.

The reason is this. The court in its instructions told the jury to "consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy," and said: "You will consider carefully all the means which the indictment charges;" and "it is sufficient if it be shown beyond a reasonable doubt that some of these means charged were a part of the common scheme, design, or understanding or conspiracy by two or more of the defendants, and that these same means were of themselves *sufficient to cause an es-[380 sential obstruction and restraint of the free and untrammeled flow of trade and commerce between the states and foreign

nations." Thus, while it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all, and permitted a verdict upon any one of them. The fifth, sixth, and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important. Furthermore, one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic, it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions, it showed only cheating, and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance, the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point.

Judgment reversed.

Mr. Justice Pitney dissents.

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381] *UNITED STATES OF AMERICA, Plff. in Err.,
v.
ADAMS EXPRESS COMPANY.

(See S. C. Reporter's ed. 381–390.)

**Appeal — review by government in criminal case — decision setting aside indictment.**

1. A judgment of a Federal district court in a criminal prosecution of an express company under the act to regulate commerce, sustaining a motion to quash service, which the court treated as a demurrer to the indictment, and dismissing the case because the express company is not a corporation, but is a joint stock association, is reviewable in the Federal Supreme Court under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), as a decision setting aside the indictment, based upon the construction of the statute upon which the indictment is founded.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

**Carriers — Federal regulation — criminal liability — express company.**

2. A joint stock association organized under the New York laws to do an express business is subject to criminal prosecution under the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), § 10, as amended by the act of June 18, 1910 (36 Stat. at L. 539, chap. 309), § 10, making any common carrier subject to the provisions of the act criminally liable for wilful violations of its requirements, since, under the 1st section of the original act, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), the term "carrier" is defined as including express companies.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

[No. 652.]

Argued April 7, 1913. Decided June 9, 1913.

IN ERROR to the District Court of the United States for the Southern District of Ohio to review a judgment setting aside the indictment of an express company for violation of the act to regulate commerce. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Denison argued the cause, and, with Mr. Loring C. Christie, filed a brief for plaintiff in error:

The duties which are cast on "express companies" are undoubtedly cast on all express companies, and are cast on them as "companies," and not on their members as individuals.

American Exp. Co. v. United States, 212 U. S. 522, 531, 53 L. ed. 635, 639, 29 Sup. Ct. Rep. 315.

Several of the states treat joint stock companies generally as entities, precisely like foreign corporations.

Adams Exp. Co. v. State, 161 Ind. 705, 706, 67 N. E. 1092; Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033; State ex rel. Railroad & W. Commission v. Adams Exp. Co. 66 Minn. 271, 38 L.R.A. 225, 68 N. W. 1085; Adams Exp. Co. v. Schofield, 111 Ky. 832, 64 S. W. 903; Adams Exp. Co. v. State, 55 Ohio St. 69, 44 N. E. 506; Com. v. Adams Exp. Co. 123 Ky. 720, 97 S. W. 386; American Exp. Co. v. People, 133 Ill. 649, 9 L.R.A. 138, 23 Am. St. Rep. 641, 24 N. E. 758; United States Exp. Co. v. State, 164 Ind. 196, 73 N. E. 101; State ex rel. Railroad Commission v. Adams Exp. Co. 171 Ind. 138, 19 L.R.A.(N.S.) 93, 85 N. E. 337, 966; Southern Exp. Co. v. Com. 92 Va. 59, 41 L.R.A. 436, 22 S. E. 809, affirmed in 168 U. S. 705, 42 L. ed. 1212, 18 Sup. Ct. Rep. 947.

And in many other cases actions against these companies as such were entertained with apparently no thought that there was anything anomalous in such a course

NOTE.—On review by government in criminal case—see note to United States v. Stevenson, 54 L. ed. U. S. 159.

(Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 194, 17 Sup. Ct. Rep. 305; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604). If the states can secure remedies against these associations themselves, surely there is warrant enough to suppose that Congress would not overlook the chance of securing a like remedy in enforcing the provisions of the interstate commerce act.

There are a number of useful analogies on this question. Joint stock associations may be held liable for contempt of court (Coats v. Chadwick [1894] 1 Ch. 347, 63 L. J. Ch. N. S. 328, 70 L. T. N. S. 228, 42 Week. Rep. 328). They may be held liable for torts, including fraud and libel (1 Lindley, Companies, 6th ed. pp. 267, 268; and Van Aernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537; Whitney v. Backus, 149 Pa. 29, 24 Atl. 51).

The English joint stock company, though frequently spoken of there as a corporation, is essentially the same as the joint stock association of this country. And there is no doubt of the attitude of the English courts toward the question whether such a company has such a separate existence that it may be subjected to penal action.

Pharmaceutical Soc. v. London & P. Supply Asso. L. R. 5 App. Cas. 857, 49 L. J. Q. B. N. S. 736, 43 L. T. N. S. 389, 28 Week. Rep. 957, 45 J. P. 20; Reg. v. Tyler [1891] 2 Q. B. 588; Pearks v. Ward [1902] 2 K. B. 1, 71 L. J. K. B. N. S. 656, 66 J. P. 774, 87 L. T. N. S. 51, 18 Times L. R. 538, 20 Cox, C. C. 279; Lawler v. Egan [1901] 2 I. R. 589.

So far as formation goes, no real difference is apparent between a corporation and a joint stock association, that has any bearing on the present question.

Eliot v. Freeman, 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360.

The association may sue and be sued as an entity. That in New York suit must be brought by or against a designated officer of the company is a mere matter of procedure, for the judgment when obtained binds the joint property of the association, and not the individual property of the officer designated.

National Bank v. Van Derwerker, 74 N. Y. 234.

The company may be sued by one of its own shareholders.

Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

The death or withdrawal of a shareholder does not work dissolution.

Re Jones, 172 N. Y. 575, 60 L.R.A. 476, 65 N. E. 570.

*Clearly, the result of these considerations is that the association is a thing with a separate existence, capable of acts and responsibilities distinct from those which are to be ascribed to its members as members of the association.*

Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 574, 19 L. ed. 1029, 1031.

And the New York courts have in other cases consistently treated these associations as having an existence separate from that of its individual members.

Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108; People ex rel. Winchester v. Coleman, 133 N. Y. 279, 16 L.R.A. 183, 31 N. E. 96; People ex rel. Platt v. Wemple, 117 N. Y. 136, 6 L.R.A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046; Van Aernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537; Waterbury v. Merchants' Union Exp. Co. 50 Barb. 158.

The characteristic of individual liability explains a line of cases in the Federal courts on which the defendant puts much reliance. These cases have established the rule that joint stock associations, unlike corporations, are not regarded as citizens for the purpose of determining the jurisdiction of Federal courts as based on diversity of citizenship.

Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; Thomas v. Ohio State University, 195 U. S. 207, 49 L. ed. 160, 25 Sup. Ct. Rep. 24.

Under the rule of individual liability of the members it might well result that a judgment secured by an outside party against the association would have to be satisfied against persons who were all citizens of the same state as the judgment creditor. For this purpose, therefore, it is proper not to treat the association as a citizen. But it does not at all follow that such an association is not a juridical person for other purposes, and that Congress could not have intended to treat it as such.

See Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oilver) 10 Wall. 575, 19 L. ed. 1032.

Mr. Joseph S. Graydon argued the cause, and, with Mr. Lawrence Maxwell, filed a brief for defendant in error:

The court has no jurisdiction to review the decision and judgment of the court below.

United States v. Stevenson, 215 U. S. 190, 195, 54 L. ed. 153, 155, 30 Sup. Ct. Rep. 35; State v. Clipper, 142 Mo. 474, 44 S. W. 264; People v. Richter, 113 Cal. 473, 45 Pac. 811; State v. Evansville, & T. H. R. Co. 107 Ind. 581, 8 N. E. 619; People v. Snyder, 44 Hun,

193; State v. Moore, 84 N. C. 724; State v. Simmons, 49 Ohio St. 305, 31 N. E. 34; Mick v. State, 72 Ohio St. 388, 74 N. E. 284; State v. Kemp, 5 Wash. 212, 31 Pac. 711; State v. Finstad, 16 S. D. 422, 93 N. W. 640; People v. Dundon, 113 App. Div. 369, 98 N. Y. Supp. 1048.

The Adams Express Company is not a corporation, but a joint stock association, or copartnership.

Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 454, 456, 44 L. ed. 842, 844, 845, 20 Sup. Ct. Rep. 690; Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735; Boston & A. R. Co. v. Pearson, 128 Mass. 446; Gregg v. Sanford, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151; Lindley, Companies, 1891, 5th ed. p. 1; Feiner v. Reiss, 98 App. Div. 45, 90 N. Y. Supp. 568.

The members of a joint stock association may be sued or indicted, but not in the company name, unless a statute so provides.

Taylor v. Weir, 96 C. C. A. 438, 171 Fed. 636; 23 Cyc. 469, 477; Van Aernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537; Moore v. Brink, 4 Hun, 402; St. Paul Typothetæ v. St. Paul Bookbinders' Union, 94 Minn. 352, 102 N. W. 725, 3 Ann. Cas. 699; Romana Oölitic Stone Co. v. Bolger, 179 Fed. 979; Pearson v. Anderburg, 28 Utah, 495, 80 Pac. 307; Standard Oil Co. v. Com. 122 Ky. 440, 91 S. W. 1128; Peterson v. State, 32 Tex. 477.

The rules of pleading and practice in criminal cases in the United States courts, except as modified by statute, are the rules of the common law as of the year 1789.

United States v Reid, 12 How. 361, 13 L. ed. 1023; United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750; United States v. Nye, 4 Fed. 888; Erwin v. United States, 2 L.R.A. 229, 37 Fed. 488; Withaup v. United States, 62 C. C. A. 328, 127 Fed. 530.

It is inconceivable that the definition of an indictable juridical person under the laws of the United States should be prescribed and governed by state law, common or statutory, and vary with the laws of the several states. If this were the rule, then a state, by requiring suits against the members of a joint stock association to be prosecuted in the name of the association, could prevent the United States from prosecuting the individual members for violation of the criminal laws of the United States.

Logan v. United States, 144 U. S. 263, 283, 36 L. ed. 429, 435, 12 Sup. Ct. Rep. 617.

This court need not consider itself bound as to a question of jurisdiction because it may have exercised jurisdiction in a case where the question might have been raised but passed *sub silentio*.

United States v. More, 3 Cranch, 159, 172, 2 L. ed. 397, 401; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 574, 39 L. ed. 759, 816, 15 Sup. Ct. Rep. 673.

If there be any fair doubt of the application of a criminal statute, it must be resolved in favor of the accused.

United States v. Clayton, 2 Dill. 219, Fed. Cas. No. 14,814; United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. ed. 37, 42; Smith v. Townsend, 148 U. S. 490, 497, 37 L. ed. 533, 535, 13 Sup. Ct. Rep. 634; France v. United States, 164 U. S. 676, 41 L. ed. 595, 17 Sup. Ct. Rep. 219; United States v. Biggs, 157 Fed. 264; Com. v. Adams Exp. Co. 123 Ky. 720, 97 S. W. 386.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment, under the act to regulate commerce, of the Adams Express Company, by that name, alleging it to be "a joint stock association, organized and existing under and by virtue of the common law of the state of New York." A summons to the Adams Express Company was issued and returned served on Charles F. Barrett, general agent for said company. Thereupon Barrett moved to quash the service and return "on the ground that [388] the same are not authorized by law." The entry with regard to the action upon this motion is that the court, "treating said motion as a demurrer to the indictment, finds that the indictment cannot be maintained against the Adams Express Company for the reason that it appears on the face of said indictment that the said Adams Express Company is not a corporation, but is a joint stock association. . . and for this reason the motion to quash service, treated as a demurrer to the indictment, is sustained and the defendant discharged, and the cause dismissed; to all of which the United States of America, by its counsel, excepts."

It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say

that in our opinion, if we are to go behind the entry, the decision entered was one setting aside the indictment, and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907.

We turn to the merits. The indictment alleges that the Adams Express Company had filed with the Interstate Commerce Commission its schedules of rates and charges, specifies what those charges were in certain cases, and sets forth in different counts instances in which the company demanded and received sums in excess of its scheduled rates for the parcels carried; in short, disobeyed the act of February 4, 1887, chap. 104, § 6, 24 Stat. at L. 379, 380. U. S. Comp. Stat. Supp. 1911, pp. 1284, 1289. By § 10 (amended by act of June 18, 1910, chap. 309, § 10, 36 Stat. at L. 539, 549) any common carrier subject to the provisions of the act, wilfully doing this, is guilty of a misdemeanor and liable to a fine.

389] *The objection to applying § 10 to the defendant has been indicated. It is confirmed in argument by the citation of many cases in which such companies are treated as simple partnerships, including those in which this court has declined to extend the legal fiction applied in determining jurisdiction over corporations so as to cover them. Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 454, 456, 44 L. ed. 842, 844, 845, 20 Sup. Ct. Rep. 690; Thomas v. Ohio State University, 195 U. S. 207, 49 L. ed. 160, 25 Sup. Ct. Rep. 24. But the argument is met by the plain words of the statute as it now stands. For by § 1 of the original act of 1887, as amended by the act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288, "the term 'common carrier,' as used in this act, shall include express companies and sleeping car companies." And thus the liability of common carriers, created by § 10, stands as if it read that express companies violating § 6 should be guilty of a misdemeanor and liable to fine.

It has been notorious for many years that some of the great express companies are organized as joint stock associations, and the reason for the amendment hardly could be seen unless it was intended to bring those associations under the act. As suggested in the argument for the government, no one, certainly not the defendant, seems to have doubted that the statute now imposes upon them the duty to file schedules of rates. American Exp. Co. v. United States, 212 U. S. 522, 531, 53 L. ed. 635, 639, 29 Sup. Ct. Rep. 315. (The American Express Company is a joint stock association.) But if it imposes upon them the duties under the words "common carrier," as interpreted, it is reasonable to suppose that the same words are intended to impose upon them the penalty inflicted on common carriers in case those duties are not performed. It is true that a doubt was raised by the wording of § 10 in the original act, whether corporations were indictable under it. This doubt was met by the act of February 19, 1903, chap. 708, § 1, 32 Stat. at L. 847, U. S. Comp. Stat. Supp. 1911, p. 1309. We do not perceive that any inference can be drawn *from this[390 source in favor of a construction of the later amendment other than that that we deem the natural one.

The power of Congress hardly is denied. The constitutionality of the statute as against corporations is established (New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 492, 53 L. ed. 613, 621, 29 Sup. Ct. Rep. 304), and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability, and to personify the company so far as to collect a fine by a proceeding against it by the company name. That is what we believe that Congress intended to do. It is to be observed that the structure of the company under the laws of New York is such that a judgment against it binds only the joint property, (National Bank v. Van Derwerker, 74 N. Y. 234), and that it has other characteristics of separate being (Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Re Jones, 172 N. Y. 575, 60 L.R.A. 476, 65 N. E. 570; Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108). Indeed, article 8 of the Constitution of the state, after providing that the term "corporations," as there used, shall be construed to include all joint stock companies, etc., having any of the powers or privileges of corporations not possessed by individuals or partnerships, as these companies do (Re Jones, 172 N. Y. 575, 579, 60 L.R.A. 476, 65 N. E. 570), goes on to declare that all corporations may sue and be sued 'in like cases as natural persons.' We do not refer to the law of New York in order to argue that by itself it would suffice to make applicable the principle of Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver), 10 Wall. 566, 19 L. ed. 1029. We refer to it simply to show the semicorporate standing that these companies already had locally as well as in the popular mind; and thus that the action of Congress was natural and to be expected, if we take its words to mean all that by construction they import.

Judgment reversed.

391]*NATIONAL SAFE DEPOSIT, SAVINGS, & TRUST COMPANY of the District of Columbia, Plff. in Err.,

v.

WILLIAM B. HIBBS.

(See S. C. Reporter's ed. 391–397.)

**Equitable estoppel — two persons equally innocent — conversion of stock certificate.**

A bank taking stock certificates duly assigned in blank and attested, as security for a loan, and intrusting them to a clerk who fraudulently or criminally takes the certificates to a stockbroker, by whom they are sold for the clerk's account in the ordinary course of business, to persons paying full value, must, rather than the stockbroker, answer for the loss because its misplaced confidence in the clerk made the wrong possible.

[For other cases, see Equity, 336–338; Estoppel, III., in Digest Sup. Ct. 1908.]

[No. 79.]

Argued April 14 and 15, 1913. Decided June 10, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, in favor of defendant in an action for conversion. Affirmed.

See same case below, 32 App. D. C. 459.

The facts are stated in the opinion.

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NOTE.—Effect of intrusting another with stock certificate indorsed or assigned in blank, to estop owner as against purchaser in good faith.

While certificates of stock are not, strictly speaking, commercial or negotiable paper under the law merchant, like promissory notes or bills of exchange, the recognized usage of indorsing such certificates in blank, and so transferring title to them and what they represent by delivery, has given them a quasi negotiable character to such an extent that they are often held, as they pass from hand to hand, free from undisclosed antecedent equities. Austin v. Hayden, 171 Mich. 38, 137 N. W. 317.

And a stockholder who intrusts another, for a special purpose only, with his stock certificates indorsed or assigned in blank, clothes such other with such indicia of ownership that an unauthorized sale or pledge of the certificates to an innocent vendee or pledgee for value binds the true owner, and prevents him from asserting a paramount interest in the shares. Brewster v. Sime, 42 Cal. 139, 14 Mor. Min. Rep. 573 (pledge); National Safe Deposit, Sav. & T. Co. v. Gray, 12 App. D. C. 276; Otis v. Gardner, 105 Ill. 436; Johnson v. Milmine, 150 Ill. App. 208 (pledge); Jarvis v. Rogers, 13 Mass. 105 (pledge), s. c. on subsequent appeal, 15 Mass. 389; Baker v. Davie, 211 Mass. 429, 97 N. E. 1094 (pledge); Austin v. Hayden, 171 Mich. 38, 137 N. W. 317 (pledge); Fatman v. Lobach, 1 Duer, 354 (pledge); Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317 (pledge); McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341 (pledge); Williams v. Walker, 9 N. Y. S. R. 60; Talcott v. Standard Oil Co. 149 App. Div. 694, 134 N. Y. Supp. 617 (pledge); Union Trust Co. v. Oliver, 155 App. Div. 646, 140 N. Y. Supp. 681, reversing 77 Misc. 652, 137 N. Y. Supp. 525 (voting trust certificate—pledge); Gray v. Fankhauser, 58 Or. 423, 115 Pac. 146 (pledge); Pennsylvania R. Co.'s Appeal, 86 Pa. 80; West Branch & S. Canal Co's Appeal 81 *Pa. 19; Burton's Appeal, 93 Pa. 214 (pledge); Garvin v. Pettee, 15 S. D. 266, 88 N. W. 573; Cherry v. Frost, 7 Lea, 1 (pledge).

As between the parties, the delivery of the certificate of stock, with assignment and power in blank indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable on its books. Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

The provisions of the U. S. Rev. Stat. § 5139, U. S. Comp. Stat. 1901, p. 3461, that national bank stock shall be transferred by indorsement on the books of the bank, does not prevent the application of this rule. Gray v. Fankhauser, 58 Or. 423, 115 Pac. 146.

And notwithstanding a statutory provision that transfers of stock shall be void unless made on the books of the corporation, stockholders are estopped by their delivery of their stock, indorsed with blank assignments and powers of attorney, from claiming any title to or interest in their stock as against bona fide purchasers thereof from those to whom such stockholders have delivered the certificates. O'Neil v. Wolcott Min. Co. 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 527.

Such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and no effect is to be given to them except for the protection of the corporation. Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Gray v. Fankhauser, 58 Or. 423, 115 Pac. 146.

Where there is a custom for certificates of stock with the transfer on the back signed in blank, to pass from hand to hand without inquiry, the owner of a certificate who gives it to a broker, thus signed, for the purpose of surrendering it to the company and obtaining a new certificate including additional stock, is estopped to claim title as against a bona fide pledgee to whom the

Mr. Charles L. Frailey argued the cause, and, with Mr. A. S. Worthington, filed a brief for plaintiff in error:

Certificates of stock, such as are concerned in this controversy, are not negotiable instruments, and do not fall within the purview of the negotiable instrument laws, even when indorsed in blank by the owner.

George H. Hammond & Co. v. Hastings, 134 U. S. 401, 404, 33 L. ed. 960, 962, 10 Sup. Ct. Rep. 727; Dewing v. Perdicaries, 96 U. S. 196, 24 L. ed. 655; O'Herron v. Gray, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L.R.A. 836, 7 Am. St. Rep. 73, 5 So. 317; Knox v.

broker fraudulently pledged the certificate to secure his own debt; and this is true whether the act of the broker amounted technically to larceny or not, and whether the owner of the stock knew of such custom or not. Russell v. American Bell Teleph. Co. 180 Mass. 467, 62 N. E. 751.

One who deposits a certificate of stock indorsed in blank, with his brokers, as security against loss from transactions on the market for his account, exposes himself to the risk of losing his stock if the person to whom it was improperly pledged by the brokers to secure a loan to them finds it necessary to sell in order to secure payment of his advances. The owner is estopped from asserting his title against one who has parted with value on the faith of the transfer he has made. Re McIntyre, 181 Fed. 955, 104 C. C. A. 419.

The true owner of the stock wrongfully pledged by such transferee would be entitled to redeem on payment of the amount actually advanced to the transferee at the time of the pledge, regardless of any pre-existing debts owing to the pledgee by the pledgeor, unless the pledgee proves that he changed his position as to these pre-existing debts for the worse, on the faith of the pledge. National Safe Deposit, Sav. & T. Co. v. Gray, 12 App. D. C. 276.

The owner of a stock certificate indorsed in blank, who, in pledging the same to a reputable going bank, is free from negligence, is not estopped from asserting title thereto as against an innocent purchaser for value who derives title through one who stole certificates from the bank where it was pledged, even though the thief be the cashier of the bank. Schumacher v. Greene Cananea Copper Co. 117 Minn. 124, 38 L.R.A.(N.S.) 180, 134 N. W. 510, Ann. Cas. 1913 C, 1115. The court concedes that if the sale of the certificate was the act of the bank, the owners should succeed under the rule that where by a wrongful or unauthorized act two innocent persons have been placed in a situation where a loss must be borne by one of them, it falls on the one who first trusted the wrongdoer and put in his hands the means of inflicting the loss, but holds that the act of the cashier in wrongfully appropriating the certificate for his own purposes is not the misappropriation of the bank to whose custody it was intrusted, even though the bank may be liable to the pledgeor.

The application of such an estoppel is not affected by the fact that the guaranty of the stockholder's signature was procured without the knowledge of the owner, after the certificate had been delivered, since intrusting the certificate to another in blank was, so far as innocent third persons are concerned, an authorization to fill in the instrument so as to make it effective to accomplish its apparent purpose. The guaranty of signature must necessarily be made after the signing, and is something with which the owner has no apparent connection. Baker v. Davie, 211 Mass. 429, 97 N. E. 1094.

The rule is different when the blank assignment and power of attorney is signed by executors of a deceased registered owner of shares, as such documents are not "in order," and persons dealing with them are put on notice. Colonial Bank v. Cady, L. R. 15 App. Cas. 267, 60 L. J. Ch. N. S. 131, 63 L. T. N. S. 27, 39 Week. Rep. 17.

The fact that the assignment and power of attorney are on a separate paper is not material. Talcott v. Standard Oil Co. 149 App. Div. 694, 134 N. Y. Supp. 617; Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; Crawford v. Dollar Sav. Fund & T. Co. 236 Pa. 206, 84 Atl. 694.

The true owner of corporate stock who has knowingly placed in another's hands for a special purpose his stock certificates, accompanied by a separate instrument of powers of attorney and transfer signed in blank, cannot assert his title as against a pledgee in good faith, no matter how faithless the pledgeor was to the agreement with the owner by which he obtained possession. Baker v. Davie, supra.

One who delivers a certificate of stock to another as security on account of a joint stock purchasing enterprise, to which the latter pins a blank assignment and power of attorney which the former had previously executed for another purpose, is estopped to assert his ownership as against an innocent pledgee who advanced the money thereon with which the projected stock purchase was made. Talcott v. Standard Oil Co. supra.

The owner of stock certificates who delivers them to his brokers, together with blank powers of attorney duly signed, to secure his indebtedness on margins, is estopped to assert ownership as against an innocent pledgee for value to whom the brokers had wrongfully hypothecated the stock after pinning to each certificate one of such blank powers of attorney. Crawford v. Dollar Sav. Fund & T. Co. supra.

On the effect of putting paper or securities transferable by delivery, or indorsed or assigned in blank, into another's possession, to estop owner as against purchaser in good faith—see note to McCarthy v. Crawford, 29 L.R.A.(N.S.) 252.

Eden Musee Americain Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Church v. Citizens' Street R. Co. 78 Fed. 526; American Press Asso. v. Brantingham, 75 App. Div. 435, 78 N. Y. Supp. 305.

And even where an instrument otherwise not negotiable has been made so by statute upon indorsement and delivery, all the incidents of indorsement and delivery of bills and notes before maturity do not necessarily ensue from the negotiation of the instruments made the subject of such statute.

Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 563, 564, 25 L. ed. 892–894.

No custom or usage can alter or affect a well-settled principle of law. Therefore no custom or usage of brokers tending to regard certificates of stock indorsed in blank as negotiable securities makes them such, or alters the principles of law applicable to them as non-negotiable instruments.

Thompson v. Riggs, 5 Wall. 663, 18 L. ed. 704; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L.R.A. 836, 7 Am. St. Rep. 73, 5 So. 317; Barstow v. Savage Min. Co. 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; Schumacher v. Greene Cananea Copper Co. 117 Minn. 124, 38 L.R.A.(N.S.) 180, 134 N. W. 510, Ann. Cas. 1913 C, 1115.

A pledgee of certificates of stock has sufficient title to maintain an action for damages for their conversion.

Smith v. Maberry, 61 Ark. 520, 33 S. W. 1068; Treadwell v. Davis, 34 Cal. 606, 94 Am. Dec. 770; United States Exp. Co. v. Meints, 72 Ill. 293; Adams v. O'Connor, 100 Mass. 517, 1 Am. Rep. 137.

Where personal property has been stolen from the rightful owner thereof, and the thief disposes of the same through a third person,—as, in case of stock, through a broker,—such third person is responsible for the conversion of the property, because he could not do as agent for the wrongdoer that which was unlawful for the wrongdoer himself to do; and it is immaterial that, as in this case, the agent was a broker, and in good faith believed that his client was the owner of the property sold.

Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324; Hoffman v. Carow, 22 Wend. 285; Swim v. Wilson, 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33; Bercich v. Marye, 9 Nev. 312, 13 Mor. Min. Rep. 544; Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; Coles v. Clark, 3 Cush. 399; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394, 59 N. W. 419; Fort v. Wells, 14 Ind. App. 531, 56 Am. St. Rep. 316, 43 N. E. 155.

The cases touching upon the validity of the title of a bona fide purchaser for value of certificates of stock, or other non-negotiable commercial instruments, as against the owner thereof, where they have passed through the hands of one having no right to transmit them to such purchaser, may be divided into two classes:

(1) Cases where the owner of the document voluntarily intrusts it to the possession of another in such form as to clothe the latter with the indicia of ownership, and that person converts it to his own use.

In this class the voluntary intrusting of possession of the instrument to another, thereby enabling the latter to deal with it as his own so far as his relations with the public are concerned, is held to be negligence; and is the controlling fact upon which an estoppel is predicated.

McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Pennsylvania R. Co's. Appeal, 86 Pa. 80; Burton's Appeal, 93 Pa. 214; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; Driscoll v. West Bradley & C. Mfg. Co. 59 N. Y. 96; Cushman v. Thayer Mfg. Jewelry Co. 76 N. Y. 365, 32 Am. Rep. 315; Cowdrey v. Vandenburgh, 101 U. S. 573, 25 L. ed. 923; Laughlin v. District of Columbia, 116 U. S. 485, 29 L. ed. 701, 6 Sup. Ct. Rep. 472; National Safe Deposit, Sav. & T. Co. v. Gray, 12 App. D. C. 276; Strong v. District of Columbia, 4 Mackey, 242; Scollans v. E. H. Rollins & Sons, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983; Knox v. Eden Musee Americain Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Russell v. American Bell Teleph. Co. 180 Mass. 467, 62 N. E. 751.

(2) Cases in which an employee, servant, or stranger had access to a document remaining in the possession of the owner, and took it out of such possession without the knowledge or consent of the latter, and converted it to his own use.

In this class, although the owner may have put sufficient confidence in the agent or servant to give him access to the instrument, and thus furnished an opportunity for theft, it is held that no negligence exists and no estoppel ensues.

Board of Education v. Sinton, 41 Ohio St. 504; Hill v. C. F. Jewett Pub. Co. 154 Mass. 172, 13 L.R.A. 193, 26 Am. St. Rep. 230, 28 N. E. 142; O'Herron v. Gray, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; Farmers' Bank v. Diebold Safe & Lock Co. 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518; Hall v. Wagner, 111 App. Div. 75, 97 N. Y. Supp. 570; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 563, 564, 25 L. ed. 892-894; Bangor Electric Light & P. Co. v. Robinson, 52 Fed. 520; Doran v. Miller, 124 Ill.

App. 551; Knox v. Eden Musee Americain Co. 148 N. Y. 441, 31 L.R.A. 783, 51 Am. St. Rep. 700, 42 N. E. 988; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L.R.A. 836, 7 Am. St. Rep. 73, 5 So. 317; Schumacher v. Greene Cananea Copper Co. 117 Minn. 124, 38 L.R.A.(N.S.) 180, 134 N. W. 510, Ann. Cas. 1913 C, 1115.

The elements necessary to an estoppel, gleaned from the authorities under the first head, are:

1. The voluntary surrender to another, by the owner or rightful holder of a certificate of stock or other instrument, of the possession thereof, in such condition as to clothe such other with the indicia of ownership, so as to enable him to deal with the public as its owner.

2. The commission of a fraud, or the perpetration of a crime such as larceny, is not necessary before the certificate or other document can pass out of the possession of the owner or rightful holder thereof.

3. The voluntary surrender to another of possession of such instrument, accompanied by the indicia of ownership, must be the proximate cause of the loss to the original owner.

In the cases under the second head, the above elements are absent and the existence of an estoppel is denied, because—

1. The possession of the document by the wrongdoer is obtained without the knowledge or consent of the owner of the instrument, and there is no voluntary surrender thereof to the former.

2. Before the wrongdoer can obtain possession of the document, a criminal act, such as larceny or a taking away without consent, is necessary, as distinguished from the possible use of a technical criminal act by way of fraud to induce a voluntary surrender of possession of the instrument.

3. The criminal act is the proximate cause of the loss or conversion of the document; or, in other words, is the proximate cause of the opportunity afforded the wrongful holder of the instrument to transfer it to an innocent purchaser or pledgee.

In the case of a corporation, the transfer from its possession and custody to the possession of a servant takes place when he does some act not within the scope of his employment, by which he appropriates the instrument and uses it as his own without the knowledge of his employer; for a corporation is not responsible for the unauthorized act of its servant not done within the scope of his duties.

Knox v. Eden Musee Americain Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Hill v. C. F. Jewett Pub. Co. 154 Mass. 172, 13 L.R.A. 193, 26 Am. St. Rep. 230, 28 N. E. 142; Farmers' Bank v. Diebold Safe & Lock Co. 66 Ohio St. 367, 58 L.R.A. 620, 90 Am. St. Rep. 586, 64 N. E. 518.

A crime is necessary in this class of cases before the wrongdoer may deceive others; he clothes himself with the indicia of ownership. For a servant to thus take away a document or other property from his master —although it has been intrusted to his custody,—and convert it to his own use, is larceny at the common law.

1 Wharton, Crim. Law, 8th ed. § 915; 2 Bishop, Crim. Law, 7th ed. §§ 824, 825; 18 Am. & Eng. Enc. Law, 2d ed. 474, 475, 511.

The defendant in error is liable, even though the court should consider the circumstances under which Myers obtained the stock in controversy such as to vest a good title in a bona fide purchaser for value.

Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; Swim v. Wilson, 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33.

Mr. J. J. Darlington and W. C. Sullivan argued the cause and filed a brief for defendant in error:

Certificates of stock are universally recognized as possessing certain attributes in common with commercial paper, which have led to their designation by some courts as "quasi negotiable," although the use of that term is condemned by the text writers as being, itself, misleading.

26 Am. & Eng. Enc. Law, 831; First Nat. Bank v. Lanier, 11 Wall. 369, 377, 20 L. ed. 172, 174; Earle v. Carson, 188 U. S. 42, 46, 47 L. ed. 373, 376, 23 Sup. Ct. Rep. 254; Supply Ditch Co. v. Elliott, 10 Colo. 333, 3 Am. St. Rep. 586, 15 Pac. 691; American Exch. Nat. Bank v. Woodlawn Cemetery, 120 App. Div. 119, 105 N. Y. Supp. 305; Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co. 137 N. Y. 238, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; Jarvis v. Rogers, 13 Mass. 105; Lyman v. State Bank, 81 App. Div. 371, 80 N. Y. Supp. 901; Bridgeport Bank v. New York & N. H. R. Co. 30 Conn. 275; Leitch v. Wells, 48 N. Y. 613; Steacy v. Little Rock & Ft. S. R. Co. 5 Dill. 348, Fed. Cas. No. 13,329; Matthews v. Massachusetts Nat. Bank, Holmes, 407, Fed. Cas. No. 9,286.

Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.

Robinson v. United States, 13 Wall. 363, 366, 20 L. ed. 653, 654; Hostetter v. Park, 137 U. S. 30, 40, 34 L. ed. 568, 572, 11 Sup. Ct. Rep. 1; Shipman v. Straitsville Cent. Min. Co. 158 U. S. 356. 364. 39 L. ed. 1015. 1018, 15 Sup. Ct. Rep. 886.

The cases principally cited on behalf of

the plaintiff in error are those in which property stolen from the true owner has been sold through the instrumentality of auctioneers, brokers, or the like, and in which the latter have been held liable to the owner for the value of the stolen property thus disposed of. To this class of cases belong—

Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324; Hoffman v. Carow, 22 Wend. 285; Swim v. Wilson, 90 Cal. 126, 13 L.R.A. 605, 25 Am. St. Rep. 110, 27 Pac. 33; Bercich v. Marye, 9 Nev. 312, 13 Mor. Min. Rep. 544; Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; Coles v. Clark, 3 Cush. 399; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394, 59 N. W. 419; Board of Education v. Sinton, 41 Ohio St. 504; Hill v. C. F. Jewett Pub. Co. 154 Mass. 172, 13 L.R.A. 193, 26 Am. St. Rep. 230, 28 N. E. 142; O'Herron v. Gray, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; Farmers' Bank v. Diebold Safe & Lock Co. 66 Ohio St. 367, 58 L.R.A. 620, 90 Am. St. Rep. 586, 64 N. E. 518; Bangor Electric Light & P. Co. v. Robinson, 52 Fed. 520; Doran v. Miller, 124 Ill. App. 551, 151 Ill. App. 527.

And with respect to the remaining citations for the plaintiff in error, if the transaction was not strictly one of theft, it will be found that the courts treated them as in substance cases of theft, and based their decisions upon that footing.

Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Schumacher v. Greene Cananea Copper Co. 117 Minn. 124, 38 L.R.A.(N.S.) 180, 134 N. W. 510, Ann. Cas. 1913 C, 1115.

Even in cases of theft it may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness.

Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 565, 25 L. ed. 894; Green v. Grigg, 98 App. Div. 449, 90 N. Y. Supp. 565.

Wherever the act, conduct, or omission of one party has led to such alteration in the position of another that, if the truth in respect thereto be shown, such other party will be damaged, the first party is thereby estopped to show the truth, however much he may be damaged by such estoppel, whether his fault consisted of fraud, misrepresentation, negligence or overconfidence in another.

Daniels v. Tearney, 102 U. S. 415, 420, 26 L. ed. 187, 188.

Where one of two innocent persons must suffer the loss occasioned by the wrongdoing of a third, the one who by his negligence or inadvertence has placed it in the power of the wrongdoer to perpetrate the wrong, which could not otherwise have been done, must suffer the loss, rather than the other innocent party.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 109, 110, 29 L. ed. 811, 816, 817, 6 Sup. Ct. Rep. 657; Fifth Cong. Church v. Bright, 28 App. D. C. 229; Commercial Nat. Bank v. Nacogdoches Compress & Warehouse Co. 66 C. C. A. 375, 133 Fed. 501; Fatman v. Lobach, 1 Duer, 354; Talcott v. Standard Oil Co. 149 App. Div. 694, 134 N. Y. Supp. 617; Armour v. Michigan C. R. Co. 65 N. Y. 122, 23 Am. Rep. 603; Cowdrey v. Vandenburgh, 101 U. S. 572, 574, 576, 25 L. ed. 923–925; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Kirk v. Hamilton, 102 U. S. 68, 77, 26 L. ed. 79, 82; Drexel v. Berney, 122 U. S. 241, 253, 30 L. ed. 1219, 1222, 7 Sup. Ct. Rep. 1200; Wehrman v. Conklin, 155 U. S. 314, 327, 39 L. ed. 167, 173, 15 Sup. Ct. Rep. 729; Green v. Grigg, 98 App. Div. 445, 90 N. Y. Supp. 565; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Driscoll v. West Bradley & C. Mfg. Co. 59 N. Y. 96; Merchants' Bank v. Livingston, 74 N. Y. 223; Simpson v. Del Hoyo, 94 N. Y. 189; Brady v. Mt. Morris Bank, 65 App. Div. 212, 73 N. Y. Supp. 532; Lyman v. State Bank, 81 App. Div. 367, 80 N. Y. Supp. 901; McLean v. Griot, 118 App. Div. 100, 103 N. Y. Supp. 129; Andrews v. Worcester, N. & R. R. Co. 159 Mass. 64, 33 N. E. 1109; Bank of Montreal v. Dewar, 6 Ill. App. 294, affirmed in 115 Ill. 22, 3 N. E. 746; McCarthy v. Crawford, 238 Ill. 38, 29 L.R.A.(N.S.) 252, 128 Am. St. Rep. 95, 86 N. E. 750; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; Delfosse v. Metropolitan Nat. Bank, 98 Ill. App. 123; Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co. 137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; Johnson v. Milmine, 150 Ill. App. 208; Strong v. District of Columbia, 4 Mackey, 252; National Safe Deposit, Sav. & T. Co. v. Gray, 12 D. C. App. 276; Johnston v. Laflin, 103 U. S. 804, 26 L. ed. 534; Leitch v. Wells, 48 N. Y. 585; Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; Cushman v. Thayer Mfg. Jewelry Co. 76 N. Y. 365, 32 Am. Rep. 315; Talmage v. Third Nat. Bank, 91 N. Y. 531; Laughlin v. District of Columbia, 116 U. S. 485, 29 L. ed. 701, 6 Sup. Ct. Rep. 472; Russell v. American Bell Teleph. Co. 180 Mass. 467, 62 N. E. 751; Gardner v. Beacon Trust Co. 190 Mass. 27, 2 L.R.A.(N.S.) 767, 112 Am. St. Rep. 303, 76 N. E. 455, 5 Ann. Cas. 581; Baker v. Davie, 211 Mass. 429, 97 N. E.

1094; Pennsylvania R. Co's Appeal, 86 Pa. 80; Cincinnati. N. O. & T. P. R. Co. v. Citizens' Nat. Bank, 56 Ohio St. 388, 43 L.R.A. 377, 47 N. E. 249; Board of Education v. Sinton, 41 Ohio St. 504.

392] *Mr. Justice Day delivered the opinion of the court:

This case is in this court upon writ of error to the judgment of the court of appeals of the District of Columbia (32 App. D. C. 459), affirming the judgment of the supreme court of the District of Columbia in an action brought by the plaintiff in error, hereinafter called the bank, against the defendant in error, for the alleged conversion of certain shares of stock. The case was tried upon an agreed statement of facts, from which it appears:

The plaintiff in error has been doing a general banking business in the city of Washington, including the making of loans to its customers on promissory notes secured by stock collateral, and, to a limited extent, the buying and selling of stock for its customers and occasionally for itself.

On March 12, 1903, the bank made a loan to one T. M. Kelley of $12,500, for which he gave his promissory note, payable on demand, and deposited with the bank certain stock certificates of the Mergenthaler Linotype Company as collateral security. Each of the certificates stood in the name of T. M. Kelley, and on its face recited that it was transferable by him, in person or by proxy, only upon the books of the company upon surrender of the certificate, and each upon its back contained an assignment with power of attorney to transfer the stock upon the books of the company, signed in blank by Kelley, whose signature was duly attested.

One Willard H. Myers had been in the continuous employ of the bank for over twenty years, and had committed no acts inconsistent with his duty to the bank, and was trusted as a faithful employee. During the last ten years of his employment he had been general bookkeeper and assistant note teller, a part of his duties being to receive and enter upon the cash book of the bank the payment of loans by customers, and to procure from one of the officers of the bank and deliver to such 393]customers *the collateral security pledged for the loans, it being usual, in the ordinary course of business, for the bank to thus deliver certificates to him upon his request. He had no authority and it was not a part of his employment to dispose of, by sale, pledge, or otherwise, any stock held as collateral by the bank, or owned by it or any of its customers.

On May 26, 1904, Myers requested the secretary of the bank to procure from the vault where such securities were kept the certificates deposited by Kelley, whereupon the secretary delivered the certificates to Myers, in the usual course of business, for the purpose of having them returned to Kelley, similar requests having been made by Myers prior thereto. Kelley had not paid the loan or asked for the delivery of the stock, and Myers made no entry in the cash book.

The day following, May 27th, Myers delivered two of such certificates to the cashier of the defendant in error, a stock broker, for sale on his account, and at the request of the cashier, as was the usual custom where the signatures of the assignor and attesting witness are unknown, Myers, as a further identification of such signatures, signed his name to the attestation clause of the assignment. The defendant in error being out of the city, the certificates were turned over to another broker, by whom they were on that day sold on the Washington stock exchange, and on the same day Myers received the check of the defendant in error for the proceeds of the sale, which he subsequently cashed.

Myers did not represent to the cashier of the defendant in error that he was selling the stock for the bank, or that he was acting for it in any way, or indicate that he did not own the stock, nor did the defendant in error or his cashier know or have cause to suspect that the stock did not belong to Myers. The stock was sold, however, without the knowledge or consent of the bank or Kelley. By *the cus-[394 tom of banks, brokers, and others dealing in stock, which custom was known to the bank, the possession of stock certificates assigned in blank and attested, as were the certificates here in controversy, has been recognized, in the absence of knowledge or cause of suspicion to the contrary, as evidence of ownership or of authority to sell, pledge, or otherwise deal with such certificates as the owner might do.

Certain of the other certificates deposited by Kelley were disposed of by Myers, some in like manner, through the defendant in error, for which Myers received the proceeds, others being hypothecated with the American Security & Trust Company, while the rest were surrendered by Myers to the authorities.

In this case conflicting legal principles are invoked and relied upon. For the defendant in error the familiar principle "that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" is advanced. The plaintiff in error invokes the principle that

where the owner of property, such as stock certificates, has lost it by the criminal or fraudulent act of another, the owner, not voluntarily or negligently conferring upon such another the indicia of ownership or apparent title, cannot be deprived of his property by the attempted transfer of title to a third person for value, no matter how innocent the purchaser may be of knowledge of the crime or fraud by which the property was acquired.

In this case the diligence of counsel has called to the attention of the court many cases more or less applicable to the facts herein involved. We will not stop to pass them in review. It is enough to say that they have been attentively considered.

Stock certificates are a peculiar kind of property. Although not negotiable paper, strictly speaking, they are the basis of commercial transactions large and small, and 395] *are frequently sold in open market as negotiable securities are. In First Nat. Bank v. Lanier, 11 Wall. 369, 377, 20 L. ed. 172, 174, this court said:

"Stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. . . . Whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him."

These principles are well known to business men and are constantly acted upon by them. This circumstance should be given due weight in determining the rights of the parties in this case.

In Russell v. American Bell Teleph. Co. 180 Mass. 467, 62 N. E. 751, a certificate of stock signed in blank was delivered to an agent for the purpose of surrendering it to the company in order to obtain a new certificate. He wrongfully obtained an advance on the strength of the certificate by putting it in pledge. Dealing with the contention that the case was like one where the certificate had been stolen, and therefore no title could be transferred, Mr. Justice Holmes, delivering the opinion of the court, said:

"In Scollans v. E. H. Rollins & Sons, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983, it is admitted that the general principle there laid down would not apply to an instrument indorsed in blank and stolen before it had been transferred. We shall not examine the premises of this defense because we cannot accept the conclusion. The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not intrusted the agent with the document, and therefore is not considered to have *done enough to be estopped as[396 against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in a case like the present, the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present and the estoppel arises. The distinction is not new. On the one side are cases like Knox v. Eden Musee Americain Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988, where an agent or servant simply had access to a document remaining in the possession of the owner; on the other, cases like Pennsylvania R. Co.'s Appeal, 86 Pa. 80, where possession is intrusted to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended the fraud from the outset."

We think this case correctly states the principle, and, applied to the case in hand, is decisive of it. Here one of two innocent persons must suffer and the question at last is, Where shall the loss fall? It is undeniable that the broker obtained the stock certificates, containing all the indicia of ownership and possible of ready transfer, from one who had possession with the bank's consent, and who brought the certificates to him, apparently clothed with the full ownership thereof by all the tests usually applied by business men to gain knowledge upon the subject before making a purchase of such property. On the other hand, the bank, for a legitimate purpose, with confidence in one of its own employees, intrusted the certificates to him, with every evidence of title and transferability upon them. The bank's trusted agent, in gross breach of his duty, whether with technical criminality *or not is unimportant,[397 took such certificates, thus authenticated with evidence of title, to one who, in the ordinary course of business, sold them to parties who paid full value for them. In such case we think the principles which underlie equitable estoppel place the loss up-

on him whose misplaced confidence has made the wrong possible. Applying this principle, we think the Court of Appeals was right in affirming the judgment of the Supreme Court, and its judgment is affirmed.

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PORTLAND RAILWAY, LIGHT, & POWER COMPANY, Plff. in Err.,
v.
RAILROAD COMMISSION OF OREGON.

(See S. C. Reporter's ed. 397–413.)

**Error to state court — Federal question — statutory construction.**

1. A decision of the highest state court that railway fares that are unreasonable or unjustly discriminatory as against a given locality come within the terms of Oregon Laws 1907, chap. 53, empowering the railroad commission to remedy discrimination in rates, is binding on the Federal Supreme Court when determining, on writ of error to the state court, whether the statute and an order of the commission made under it deny due process of law.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — state regulation of railway rates.**

2. A state, when empowering its railroad commission to remedy discrimination in railway fares, as is done by Oregon Laws 1907, chap. 53, may, consistently with due process of law, prohibit fares that are unreasonable and unjustly discriminatory as against a given locality, where the statute does not define unjust discrimination, but leaves it to the commission upon hearing to determine what rates are unjust and discriminatory, and to make orders for other fares which, in its judgment, are not open to such objection, and expressly provides for a judicial review of the commission's order.

[For other cases, see Constitutional Law, 608–628; Carriers, III. e, in Digest Sup. Ct. 1908.]

**Error to state court — review of facts.**

3. Facts found by the lower court and adopted by the highest court of a state, when supported by competent testimony, will not ordinarily be re-examined in the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — state regulation of railway fares — discrimination.**

4. The determination of a state railway commission, confirmed by the state courts, that a town on one division of a suburban electric railway was discriminated against, contrary to Oregon Laws 1907, chap. 53, empowering the railroad commission to remedy discriminatory rates, cannot be said to deny due process of law, where the findings, based on evidence, show that the fare without transfer privileges for a ride between the city terminus and the town in question was twice the fare with transfer privileges charged for a ride between such terminus and a town farther away on another division, and that the circumstances and conditions governing the transportation on the two divisions are similar except for the charging of the different rates and the giving of transfer privileges to the one division and withholding them from the other.

[For other cases, see Constitutional Law, 608–628; Carriers, III. e, in Digest Sup. Ct. 1908.]

**Carriers — rates — discrimination against locality.**

5. Charging a 10-cent fare without transfer privileges for a ride on a suburban electric railway from a city terminus to a specified town, and only a 5-cent fare with transfer privileges for a ride between such terminus and a town farther away on another division, is no less a violation of Oregon Laws 1907, chap. 53, prohibiting discriminations in railway fares as against a given locality, because the fare on the latter division is fixed at 5 cents by a contract with the railway company's predecessor, since such contract must be taken to have been made in view of the continuing power of the state to control the transportation rates of common carriers subject to its jurisdiction.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

[No. 119.]

Argued May 1 and 2, 1913. Decided June 10, 1913.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court of Marion County, in that state, refusing to enjoin the enforcement of an order of the state railroad commission regulating railway fares. Affirmed.

See same case below, 56 Or. 468, 105 Pac. 709, 109 Pac. 273.

Statement by Mr. Justice Day:

This case originated in a complaint made by the municipal corporation of Milwaukie, in the state of Oregon, before the railroad commission of that state, seeking an order restraining the Portland Railway, Light, & Power Company, the plaintiff in error, operating a system of street railways in the city of Portland, Oregon, and certain suburban roads in connection therewith, from practising certain alleged discriminations in

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NOTE.—As to reasonableness of state regulation of railway rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

On unconstitutionality, inequality, or discrimination in state regulation of toll or rates—see note to Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 46 L. ed. U. S. 92.

rates of fare, and fixing reasonable fares between the city of Portland and the town of Milwaukie. Upon hearing, the railroad commission found that the fares charged by the railway company were unjustly discriminatory against the inhabitants of Milwaukie, and ordered a reduction between Milwaukie and Portland from 10 cents to 5 cents, and ordered the railway company to furnish to the passengers traveling between such points the same transfer privileges as were given to passengers on the Mt. Scott line of the plaintiff in error. The circuit court refused to enjoin the enforcement of the order of the commission, and this judgment was affirmed by the supreme court of Oregon. 56 Or. 468, 105 Pac. 709, 109 Pac. 273. The case was then brought to this court upon writ of error.

An idea of the physical situation of this railroad may be had by an inspection of the attached plat, which may be used for illustration, and which is reproduced from one appended to plaintiff in error's brief (the city limits of Portland being represented by the dotted line).

The circuit court made the following findings of fact:

"1. That the plaintiff Portland Railway, Light, & Power Company is a corporation duly organized and existing under and by 400]virtue of the laws of the state of *Oregon, and owns and operates by electric power a suburban and interurban railroad as a common carrier in this state, between First and Alder streets in the city of Portland, and Canemah, Clackamas county, Oregon, known as the "Oregon City division," and also a line of railroad from said First and Alder streets to Lents and Lents Junction, Multnomah county, Oregon, known as the "Mount Scott division" and also a line of railroad from a point known as Golf Junction, on the first-mentioned line of railroad, easterly and southerly through Multnomah county to Nickum, Gates, and Cazadero, in Clackamas county, Oregon, said Nickum, Gates, and Lents being points outside of the city of Portland, Oregon.

"2. That the defendant is the duly appointed, organized, and acting railroad commission of Oregon, under the provisions of chapter 53 of the Laws of Oregon for the year 1907.

"3. That the town of Milwaukie is a municipal corporation duly organized under and existing by virtue of the laws of the state of Oregon.

"4. That the Portland Railway Company is a corporation organized and existing under and by virtue of the laws of the state of Oregon. That its street cars are operated by electric power within the city of Portland and to the city of St. Johns, Multnomah county, Oregon, and that it is a common carrier. That a majority of the capital stock of the said Portland Railway Company is owned by the plaintiff herein; and that the said Portland Railway Company and the plaintiff herein are operated under a common management.

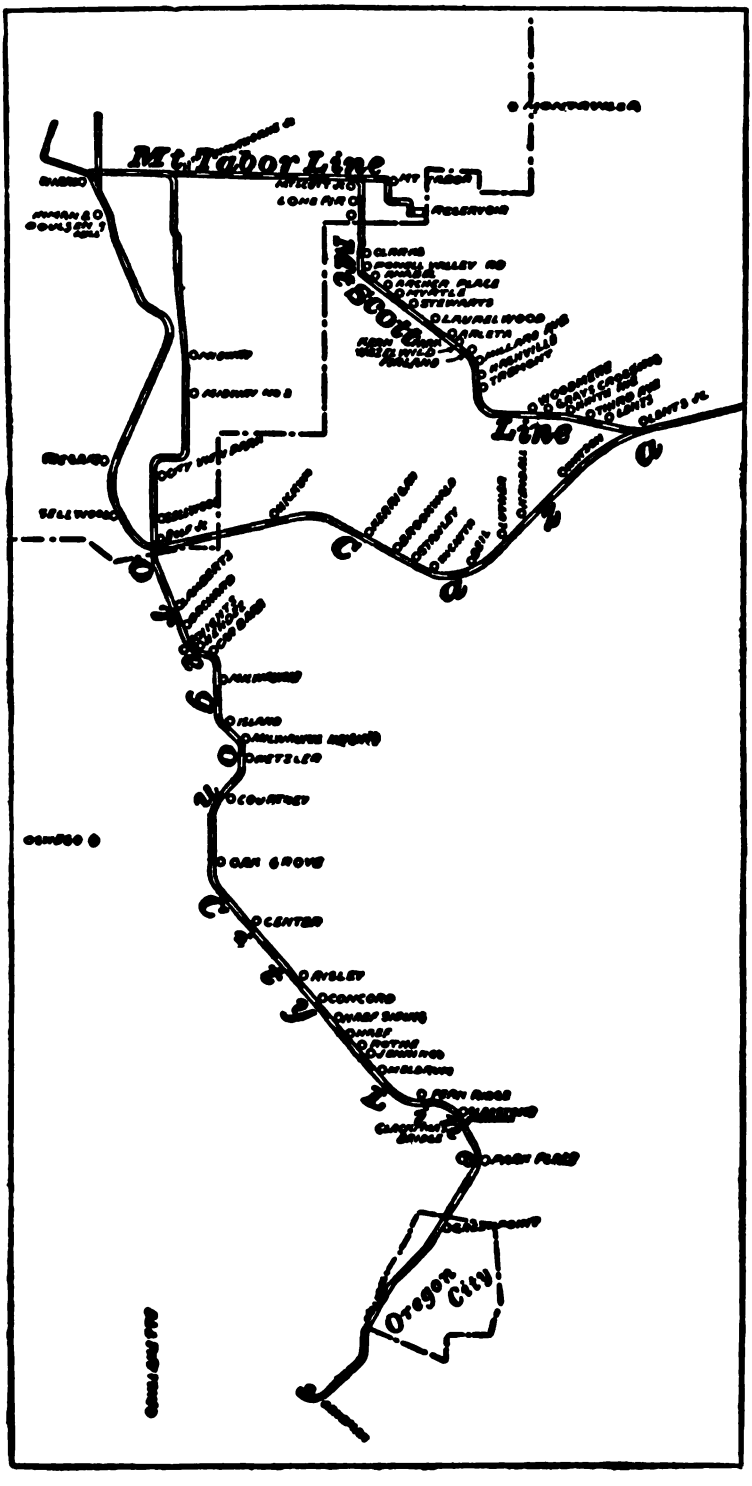
"5. That plaintiff has established rates of fare for the transportation of persons traveling as passengers *traveling* upon its said line of railway and between different points upon its said railways and its said terminus at First and Alder streets in said city of Portland, and between Golf Junction and the places and points named below, the *following rates, fares, and charges[401 being those so established and the distances being as given below:

Between Portland and

| | | | | |
|---|---|---|---|---|
| **On Oregon City Division.** | | | | |
| Golf Junction (within city of Portland) .. | 5.36 | miles | 5 | cents. |
| Lambert ..... | 5.93 | " | 10 | " |
| Knight ..... | 6.29 | " | 10 | " |
| Hendee ..... | 6.44 | " | 10 | " |
| Milwaukie ..... | 6.71 | " | 10 | " |
| Island ..... | 7.05 | " | 10 | " |
| Milwaukie Heights .. | 7.70 | " | 15 | " |
| Courtney ..... | 8.30 | " | 15 | " |
| Oak Grove ..... | 8.48 | " | 15 | " |
| Center ..... | 8.68 | " | 15 | " |
| Risley ..... | 9.26 | " | 15 | " |
| Oregon City ..... | 14.47 | " | 25 | " |
| Canemah ..... | 15.47 | " | 25 | " |
| **On Mt. Scott Division.** | | | | |
| Reservoir (within city of Portland) ..... | 4.69 | " | 5 | " |
| Lents ..... | 7.69 | " | 5 | " |
| Lents Junction ..... | 8.31 | " | 10 | " |
| **On Springwater Division.** | | | | |
| Golf Junction (within city of Portland).. | 5.35 | " | 5 | " |
| Nickum ..... | 6.51 | " | 5 | " |
| Kerrigan ..... | 7.26 | " | 10 | " |
| Bell ..... | 8.51 | " | 10 | " |
| Kendall ..... | 9.32 | " | 10 | " |
| Lents Junction .... | 10.71 | " | 10 | " |
| Gilbert ..... | 11.65 | " | 10 | " |
| Gates ..... | 12.38 | " | 10 | " |
| Wilson ..... | 13.00 | " | 15 | " |
| Sycamore ..... | 13.48 | " | 15 | " |
| Jenne ..... | 14.42 | " | 15 | " |

*Between Golf Junction and [402

| | | | | |
|---|---|---|---|---|
| **On Oregon City Division.** | | | | |
| Lambert ..... | .57 | " | 5 | " |
| Knight ..... | .93 | " | 5 | " |
| Hendee ..... | 1.08 | " | 5 | " |
| Milwaukie ..... | 1.35 | " | 5 | " |
| Island ..... | 1.69 | " | 5 | " |
| Milwaukie Heights.. | 2.34 | " | 10 | " |
| Courtney ..... | 2.94 | " | 10 | " |
| Oak Grove ..... | 3.12 | " | 10 | " |


Mt. Tabor Line
Line
Oregon City

| | | | | |
|---|---|---|---|---|
| Center | 3.32 | " | 10 | " |
| Risley | 3.90 | " | 10 | " |
| Oregon City | 9.21 | " | 20 | " |
| Canemah | 10.21 | " | 20 | " |
| On Springwater Division. | | | | |
| Nickum | 1.15 | " | 5 | " |
| Kerrigan | 1.90 | " | 5 | " |
| Bell | 3.15 | " | 5 | " |
| Kendall | 3.96 | " | 5 | " |
| Lents Junction | 5.35 | " | 5 | " |
| Gilbert | 6.29 | " | 10 | " |
| Gates | 7.02 | " | 10 | " |
| Wilson | 7.64 | " | 10 | " |
| Sycamore | 8.12 | " | 10 | " |
| Jenne | 9.07 | " | 10 | " |

"6. That the distance between Lents and the limits of the city of Portland on said plaintiff's line of railroad is 3.50 miles. That the station of Hazelwild on plaintiff's said Mt. Scott line is a mile and one half from Lents, and 2 miles outside the limits of the city of Portland. That the distance on the line of the said Portland Railway Company from the terminus of said company near First and Alder streets in the said city of Portland, to the terminus in the city of St. Johns, Oregon, is to wit: 9 miles. The distance from the said terminus in the city of Portland, Oregon, to the 403]city limits of the said *city of St. Johns, is about 7 miles, and from there to the terminus in the said city of St. Johns proper is about 2 miles.

"7. That the aforesaid places are suburbs of the city of Portland.

"8. That plaintiff's predecessor acquired about 4 miles of track and right of way which extended from Mt. Tabor Junction and Lents, on the 13th day of April, 1901, by and pursuant to an agreement wherein and whereby it was agreed in consideration thereof that not more than a 5-cent fare should be charged by plaintiff's said predecessor, its successors and assigns, for any ride between Lents and Portland. The plaintiff is carrying out said agreement. The said track and right of way are facilities, among other facilities, used by the plaintiff in the transportation of passengers between Lents and Portland.

"9. That before and at the time said Lents contract was entered into, the population of the territory contiguous to said railroad was small. That now the population of said territory is about 10,000; and the value of real estate in Lents and said territory has increased rapidly. That the said increase in population and land values has been and is due in a great measure to the fact that the plaintiff has charged and is charging but 5 cents for transportation of passengers between First and Alder streets in the city of Portland, and Lents, and intermediate points.

"10. That at the time said Lents contract was entered into the town of Milwaukie had a population of about 500 people; that at all times since said Lents contract was entered into the plaintiff and its predecessor companies have charged 10 cents for the transportation of passengers between First and Alder streets in the city of Portland and the town of Milwaukie. That since the 5 cents fare between Lents and Portland has been in *operation it has[404 caused the said Lents and Lents territory to increase in population as aforesaid, and said land values in said Lents and Lents territory to increase in value as aforesaid, and has stagnated the growth and population of the town of Milwaukie territory, and its business has not appreciably increased.

"11. That by reason of the fact that the inhabitants of the town of Milwaukie are charged double the fare charged the inhabitants of Lents for transportation between their respective residences and the city of Portland, the inhabitants of the town of Milwaukie have paid to the plaintiff large sums of money in the aggregate for transportation from the town of Milwaukie in excess of the charges made inhabitants of Lents for transportation from Lents to First and Alder streets in the city of Portland, to the great injury to the said inhabitants of Milwaukie; and that a just and reasonable rate, not discriminatory, to be charged to persons between First and Alder streets in the city of Portland and the town of Milwaukie, Oregon, is 5 cents.

"12. That the bulk of the inhabitants of the town and territory of Milwaukie are employed in the city of Portland, and go to and from their homes on the lines of plaintiff's said railroad to work mornings and evenings daily.

"13. That the population and territory between and including Lents and Hazelwild, a distance of 1½ miles, on plaintiff's Mt. Scott line, are substantially the same territory and population between Golf Junction on the city limits of Portland and Milwaukie, a distance of 1.31 miles, on plaintiff's Oregon City division. That the conditions and circumstances under which plaintiff transports passengers between First and Alder streets in said city of Portland, and the stations on the Mount Scott line from Hazelwild to Lents, inclusive, are substantially the same as the circumstances and conditions under which plaintiff transports passengers *from[405 said First and Alder streets to stations on the Oregon City line from said Golf Junction to Milwaukie, inclusive, except as to the rate of fare charged and the giving of

transfer privileges as hereinafter set forth, which fares and transfer privileges are in favor of the inhabitants of the territory from Hazelwild to Lents, inclusive.

"14. That Nickum is a station on the plaintiff's Springwater division, 1.15 miles easterly from Golf Junction, and about 3,000 feet outside the city limits of the city of Portland, Oregon. That the plaintiff operates but seven trains per day through Nickum, between Cazadero and Portland, in either direction. That otherwise, except as to the rates of fare charged and the giving of transfers, and conditions and circumstances as to the transportation of passengers between Nickum and the plaintiff's terminus at First and Alder streets, aforesaid, are substantially the same as between said terminus and Milwaukie, and except also that the travel between Milwaukie and Portland is greater than between Nickum and Portland.

"15. That from points on the Mt. Scott division without the city of Portland, and Nickum, on the Springwater division, and other points on said division, the plaintiff furnishes to passengers who pay fare to First and Alder streets in the city of Portland, transfers, entitling the holder thereof to transportation over the lines of the street railway of said Portland Railway Company in the city of Portland, and the city of St. Johns, and that such transfers are not furnished to the citizens of Milwaukie, traveling and paying fare from Milwaukie to said First and Alder streets.

"16. That the evidence does not show that, considered by themselves, or in comparison with other lines of travel, the charges of the plaintiff upon the Oregon City division are unreasonable, but that compared with the charges made by the plaintiff upon the Springwater and Mt. 406]Scott *divisions, the charges of the plaintiff for the transportation of passengers between said First and Alder streets and the town of Milwaukie are unjust and unreasonable, discriminatory, and give undue preference.

"17. That the evidence is not sufficient to show the value of the property of the plaintiff used in the operation of its road, or the value of any of the divisions thereof, heretofore mentioned; and that the evidence does not show the income or expenditures or profits or loss, if any, from the operation of the respective divisions of the plaintiff's line above mentioned, or the cost of transporting passengers upon any of such divisions.

"18. That the plaintiff operates its cars and transports passengers between First and Alder streets and Milwaukie either wholly over the Oregon City division, from the junction at the east end of the Madison street bridge, or from said junction over what it terms its Sellwood division to Golf Junction, and then over the Oregon City division to Milwaukie. The plaintiff credits all of the Milwaukie business transported by way of the Sellwood division to that division, and no credit or account is taken of it as in part earned by the Oregon City division. That the evidence does not disclose the length of haul of any of the passengers transported by the plaintiff. That the court is therefore unable to find as to the traffic density to and from Milwaukie, or on the Oregon City division, or any of the plaintiff's other divisions.

"19. That on to wit, January 30th, 1908, the defendant, after due notice and full hearing, made and entered, and caused to be served upon the plaintiff, the certain orders and findings set out as 'Exhibit A,' attached to the plaintiff's complaint. That upon the resubmission of the said matter to the said defendant, as aforesaid, the said defendant made a certain amendment to the said order, and returned the same into this court, and that *the same is[407 now on file herein. That the defendant has caused to be filed in this court a certified transcript of all its proceedings leading up to and including its said order and amendment. That the said order, amendment, and transcript are hereby made a part of these findings."

It should be noticed that by the laws of Oregon, Portland being a city exceeding fifty thousand in population, a greater fare than 5 cents cannot be demanded for a continuous trip in one general direction between any two points in the city. Bellinger & C. Anno. Codes & Stats. § 2096.

Messrs. Franklin T. Griffith and Joseph S. Clark argued the cause, and, with Mr. Frederick V. Holman, filed a brief for plaintiff in error:

If a railroad company can show that the prescribed rates will not allow it to earn a fair return, the rates will be declared unconstitutional, invalid, and void for the reason that they deprive the railroad company of its property without due process of law, and deny to it the equal protection of the laws.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The power of the state authorities to

regulate the railroads is limited to such regulations as can properly be designated reasonable and just.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 289, 45 L. ed. 195, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 75, 52 L. ed. 109, 28 Sup. Ct. Rep. 28.

The discrimination prohibited is unjust discrimination, which requires a judicial investigation of all the facts and circumstances, and there has been no such investigation in this case.

Galveston Chamber of Commerce v. Railroad Commission, — Tex. Civ. App. —, 137 S. W. 737; Railroad Commission v. Galveston Chamber of Commerce, 51 Tex. Civ. App. 476, 115 S. W. 94; Cohn v. St. Louis, I. M. & S. R. Co. 151 Mo. App. 661, 133 S. W. 59; State v. Central Vermont R. Co. 81 Vt. 463, 130 Am. St. Rep. 1065, 71 Atl. 194; Puget Sound Electric R. Co. v. Railroad Commission, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913 B, 763; Platt v. Le Cocq, 150 Fed. 391; Little Rock & Ft. S. R. Co. v. Oppenheimer, 64 Ark. 271, 44 L.R.A. 353, 43 S. W. 150; Louisville & N. R. Co. v. Com. 20 Ky. L. Rep. 1099, 46 S. W. 702; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Wright v. Baltimore & O. R. 32 Pa. Super. Ct. 5; People ex rel. Bloomington v. Chicago & A. R. Co. 67 Ill. 118; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169, affirmed in 61 C. C. A. 405, 125 Fed. 445; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Farmers' Loan & T. Co. v. Northern P. R. Co. 83 Fed. 249; Weil v. Pennsylvania R. Co. 11 Inters. Com. Rep. 627; Illinois C. R. Co. v. People, 121 Ill. 304, 12 N. E. 670; People v. Baltimore & O. S. W. R. Co. 246 Ill. 474, 92 N. E. 934.

The old rates were not unjustly discriminatory.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Railroad Commission v. Louisville & N. R. Co. 13 Inters. Com. Rep. 300; Perry v. Florida C. & P. R. Co. 3 Inters. Com. Rep. 740; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 145, 171, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45; Root v. Long Island R. Co. 114 N. Y. 300, 4 L.R.A. 331, 2 Inters. Com. Rep. 576, 11 Am. St. Rep. 643, 21 N. E. 403; Dallas Freight Bureau v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 427; Rice, Robinson & Witherop v. Western New York & P. R. Co. 2 Inters. Com. Rep. 298; Gillette v. Milwaukee & R. Co. 1 Wis. R. Com. Rep. 689.

Even if unjust discrimination has been established, that would not justify the commission in prescribing confiscatory or unreasonable rates.

Menacho v. Ward, 23 Blatchf. 502, 27 Fed. 529; Board of Trade v. Old Dominion S. S. Co. 6 Inters. Com. Rep. 632; Gillette v. Milwaukee & R. Co. 1 Wis. R. Com. Rep. 689; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118.

These orders of the commission are unreasonable, arbitrary, and unjust.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 469, 42 L. ed. 835, 18 Sup. Ct. Rep. 418; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

Mr. A. M. Crawford, Attorney General of Oregon, and Mr. Clyde B. Aitchison argued the cause, and, with Messrs. R. R. Giltner and R. M. Sewell, filed a brief for defendant in error:

Courts have no authority to re-examine the findings of a rate-making commission, such as the defendant in error, as to subjects properly within its jurisdiction, except for the purpose of determining whether the action of the commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifestly such an abuse of discretion as to be equivalent to an excess of authority, or based upon a mere shadow instead of substantial evidence.

United States v. Baltimore & O. R. Co. 225 U. S. 306, 56 L. ed. 1100, 32 Sup. Ct. Rep. 817; Interstate Commerce Commission

v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 251, 55 L. ed. 448, 456, 31 Sup. Ct. Rep. 392.

There can be no question raised that the delegation of power by the Oregon legislature to the defendant commission to apply the statutory rules laid down in the railroad commission act to specific facts, such as fixing reasonable railroad rates, is an unconstitutional delegation of power, or unconstitutionally intermingles the powers of government. This question—purely one of construction of the state Constitution—has been finally settled by the supreme court of Oregon in favor of the constitutionality of the railroad commission act.

State v. Corvallis & E. R. Co. 59 Or. 454, 117 Pac. 980.

Particular rates fixed by the legislature or commission may not be attacked without showing that the body of rates as a whole does not bring in sufficient return to the carrier. The carrier's concern is as to the returns from the business as a whole, and not the adjustment of particular rates among themselves.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Minneapolis & S. L. R. Co. v. Minnesota, 186 U. S. 257, 258, 46 L. ed. 1151, 1152, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 24, 25, 51 L. ed. 933, 944, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Gulf, C. & S. F. R. Co. v. Railroad Commission, 102 Tex. 338, 113 S. W. 741, 116 S. W. 795.

The return on the whole schedule affords no light on the reasonableness of a particular rate.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Noyes, Am. R. Rates, 25, 28, 35; Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 505; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Brewer v. Louisville & N. R. Co. 7 Inters. Com. Rep. 224.

There is no presumption of law that appellant will be injured by the reduction of rates ordered by the commission. The courts will not interfere until there has been an actual, bona fide trial of the new rates. This has not been had in this case. Between five and six years have elapsed since the orders were made, and they have never been enforced a single day.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Central of Georgia R. Co. v. McLendon, 157 Fed. 961; Quimby v. Clyde S. S. Co. 12 Inters. Com. Rep. 392; Brewer v. Louisville & N. R. Co. 7 Inters. Com. Rep. 224.

The record shows a very substantial return to the company from the schedule as a whole. The effect of the orders in question is problematical; in any event the loss in revenue to the company would be inconsiderable, and in all human probability the company's revenues would be increased by stimulation of business.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 42, 53 L. ed. 382, 395, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

This court does not have to speculate or guess as to results, nor does it have to analyze the capitalization of the company, nor go into minute calculations based on insufficient data, leading only to an unsatisfactory and inconclusive end.

Willcox v. Consolidated Gas Co. supra; Knoxville v. Knoxville Water Co. 212 U. S. 17, 53 L. ed. 381, 29 Sup. Ct. Rep. 148.

The inquiry as to the reasonableness of the rates involves a consideration:

1. Of the value of the service to the passenger.

2. Of the cost of the particular service,—which, as shown by Judge Noyes, cannot be ascertained with our present means of accounting, and certainly has not been developed in this case.

3. Of the charges made for similar services by the same and other carriers.

Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003.

The question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service.

Logan v. Chicago & N. W. R. Co. 2 Inters. Com. Rep. 431. See also 2 I. C. C. Rep. 604; Board of Trade v. Old Dominion S. S. Co. 6 Inters. Com. Rep. 632; Lincoln Bd. of Trade v. Burlington & M. River R. Co. 2 Inters. Com. Rep. 95, 2 I. C. C. Rep. 147; George Tileston Mill Co. v. Northern P. R. Co. 8 Inters. Com. Rep. 346.

Eliminating incompetent testimony, the most satisfactory testimony in the cases before the court as to comparisons with other rates is the tariff of appellant's own charges on other lines.

Interstate Commerce Commission v. East Tennessee, V. & G. R. Co. 85 Fed. 107, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep.

516; Interstate Commerce Commission v. Southern R. Co. 117 Fed. 741.

The value, if any, of evidence as to other rates, introduced under a showing as to the conditions and circumstances of transportation, was entirely for the commission.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

While it must be considered that passenger fares may usually be made on a mileage basis (Savannah Bureau v. Charleston & S. R. Co. 7 Inters. Com. Rep. 601), in this case the court considered all circumstances, and found that plaintiff was simply discriminating unjustly between localities, and applied the rule announced in Menacho v. Ward, 23 Blatchf. 502, 27 Fed. 529, after having first found that the services performed were of a like and contemporaneous nature.

The right of the carrier to fix rates which will yield a fair return on its investment is qualified by the rule that it cannot exact fares higher than the service is reasonably worth to the public requiring the service, or more than the traffic will bear.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Puget Sound Electric R. Co. v. Railroad Commission, 65 Wash. 83, 117 Pac. 739, Ann. Cas. 1913 B, 763.

The reasonableness of the rates has nothing to do with the question as to whether they are discriminatory; the Oregon legislature has forbidden rates which are unjustly discriminatory, as well as rates which are unreasonable. Reasonable charges may constitute an unjust discrimination, or create an unlawful preference. It is enough to show that the company carried at a lower rate for the same or a similar service.

Scofield v. Lake Shore & M. S. R. Co. 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907; Interstate Commerce Commission v. East Tennessee, V. & G. R. Co. 85 Fed. 107; State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 80 Minn. 191, 89 Am. St. Rep. 514, 83 N. W. 60; Cordele Machine Shops v. Louisville & N. R. Co. 6 Inters. Com. Rep. 361; Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; Kinnavey v. Terminal R. Asso. 81 Fed. 802; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 511, 42 L. ed. 243, 257, 17 Sup. Ct. Rep. 896, 998; Board of Trade v. Old Dominion S. S. Co. 6 Inters. Com. Rep. 632; Beale & W. Railroad Rate Regulation, § 839.

Preference of one locality over another without a lawful excuse is, in and of itself, an undue and unreasonable discrimination.

New York Produce Exch. v. Baltimore & O. R. Co. 7 Inters. Com. Rep. 613.

Differences in circumstances and conditions of transportation that are of the carrier's own creation or connivance, or that by a reasonable effort on its part might have been avoided, cannot justify a discrimination in rates.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 18, 45 L. ed. 725, 21 Sup. Ct. Rep. 516; Business Men's Asso. v. Chicago, St. P. M. & O. R. Co. 2 Inters. Com. Rep. 41, 2 I. C. C. Rep. 52; Rice v. Western New York & P. R. Co. 3 Inters. Com. Rep. 162, 3 I. C. C. Rep. 87.

In the cases before us the element of competition, the most powerful factor in ratemaking, is absent.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45.

No cases are found where the courts have set aside a particular rate fixed by a commission, because in fact unreasonable, when based on substantial, although conflicting, testimony.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 459, 51 L. ed. 1128, 1135, 27 Sup. Ct. Rep. 700; Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 154, 51 L. ed. 995, 1000, 27 Sup. Ct. Rep. 648; Spring Valley Waterworks v. San Francisco, 82 Cal. 306, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571; Steenerson v. Great Northern R. Co. 69 Minn. 376, 72 N. W. 713; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 529, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893, affirmed in 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; International & G. N. R. Co. v. Railroad Commission, — Tex. Civ. App. —, 86 S. W. 16, affirmed in 99 Tex. 332, 89 S. W. 961; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 265, 33 So. 214; Re Auburn & W. R. Co. 37 App. Div. 162, 55 N. Y. Supp. 895; People ex rel. Terminal R. Co. v. State R. Comrs. 53 App. Div. 61, 65 N. Y. Supp. 597; Re Amsterdam, J. & G. R. Co. 86 Hun, 578, 33 N. Y. Supp. 1009; Storrs v. Pensacola & A. R. Co. 29 Fla. 617, 11 So. 228; State ex

rel. State Railroad Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 420, 421, 53 L. ed. 577, 580, 581, 29 Sup. Ct. Rep. 357.

Any other conclusion would overwhelm the courts with appeals from such administrative tribunals, and cast upon the judiciary a burden which it is not permitted, constitutionally, to perform. Something may be intrusted to other branches of the government than the judiciary.

Chicago, B. & Q. Co. v. Babcock, 204 U. S. 585, 598, 51 L. ed. 636, 640, 27 Sup. Ct. Rep. 326.

On error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such finding.

1 Enc. U. S. Sup. Ct. Rep. 781; United States v. King, 7 How. 833, 12 L. ed. 934; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 83, 46 L. ed. 1058, 1064, 22 Sup. Ct. Rep. 747; Israel v. Arthur, 152 U. S. 355, 362, 38 L. ed. 474, 478, 14 Sup. Ct. Rep. 583; Egan v. Hart, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300.

Whenever a contract is made an instrument for creating and perpetuating a discrimination as unjust as that involved in the cases at bar, such contract cannot be used as a shield to protect the company in such discriminations.

(a) When said contract was executed, both parties had voluntarily become common carriers, and had assumed the duties which the law imposes upon a business clothed with a public interest. In the absence of a contractual waiver of the right to regulate, the state reserves as a continuing right the regulation of the business of a common carrier, to prevent extortion and to secure to its citizens the fullest justice and equity, both of charges and services. Whenever a carrier does a business which the state might properly do itself, it is a governmental agency for public purposes, although owned individually.

Talcot v. Pine Grove Twp. 1 Flipp. 120, Fed. Cas. No. 13,735, affirmed in 19 Wall. 666, 22 L. ed. 227; Holladay v. Patterson, 5 Or. 177; Ford v. Oregon Electric R. Co. 60 Or. 286, 36 L.R.A. (N.S.) 358, 117 Pac. 809.

Contracts such as the "Lents contract" involved in these cases are subject to the subsequent exercise of the police power.

Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76.

When a railroad contracts with the public concerning a matter which affects the public health, safety, and welfare, it does so subject to the subsequent exercise of the police power, which does not thereby impair the obligation of the contract.

Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57–72, 42 L. ed. 948–953, 18 Sup. Ct. Rep. 513.

One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract concerning them; and the contract carries the infirmity of the subject.

Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

The parties to said contract must be held to have had in mind the fact that the legislature might at some time during the life of the contract exercise its theretofore unused rights to prevent discriminations between localities and individuals; and when the legislature uses such right, it does not thereby impair the obligation of a contract, because the very regulative act of the legislature was a tacit part of the contract itself.

Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57–72, 42 L. ed. 948–953, 18 Sup. Ct. Rep. 513; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

When by general law the state forbids discrimination which may have been lawful theretofore, it is merely exercising a power which it reserved to itself in creating the corporations. The right to discriminate is not a "vested corporate right," because the manner in which the carrier shall conduct its business with the public is essentially a public matter, and the corporation is to that extent a mere agency of the state.

McCandless v. Richmond & D. R. Co. 38 S. C. 103, 18 L.R.A. 440, 447, 16 S. E. 429; Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co. 38 Mo. App. 191.

(b) Such a contract cannot hamper the police power of the state.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; People v. Hawley, 3 Mich. 342; New Haven & E. H. Toll Bridge Co. v. Bunnell, 4 Conn. 54; Re O'Neill, 41 Wash. 174, 3 L.R.A. (N.S.) 558, 83 Pac. 104, 6 Ann. Cas. 869.

Regulation of railroads is part of the police power of the state.

State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Atkinson v. Ritchie, 10 East, 530, 10 Revised Rep. 372.

A contract valid at the outset may become void whenever in the process of time, owing to changed conditions, its execution results in the violation of an act to regulate commerce.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 153 Fed. 1, affirmed in 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Bullard v. Northern P. R. Co. 10 Mont. 185, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120; Church v. Minneapolis & St. L. R. Co. 14 S. D. 443, 85 N. W. 1001; Brundred v. Rice, 49 Ohio St. 640, 34 Am. St. Rep. 589, 32 N. E. 169.

The Oregon act, is intended to cover just such cases as the Lents contract and the contract in the case of Root v. Long Island R. Co. 114 N. Y. 300, 4 L.R.A. 331, 2 Inters. Com. Rep. 576, 11 Am. St. Rep. 643, 21 N. E. 403.

Nothing in the record tends to show that the plaintiff in error has been deprived of property without due process of law, or in any way denied equal protection of the laws.

Davidson v. New Orleans, 96 U. S. 97, 104, 105, 24 L. ed. 616, 619, 620; Public Clearing House v. Coyne, 194 U. S. 497, 508, 509, 48 L. ed. 1092, 1098, 1099, 24 Sup. Ct. Rep. 789; Reetz v. Michigan, 188 U. S. 505, 508, 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

The contentions of violation of Federal right alleged to have been set up and denied in the state court, and therefore to be reviewable here, arise under the 14th Amendment to the Constitution, securing due process of law and equal protection of the laws as against state action.

The statute under which the railroad commission acted in this case provides:

"The term 'railroad' as used herein shall mean and embrace all corporations . . . that now, or may hereafter, own, operate by . . . electric . . . power, manage or control, any . . . interurban railroad . . . as a common carrier in this state." Laws of Oregon, 1907, chap. 53, § 11.

408] *"Upon complaint of any . . . municipal organization, that any of the . . . fares . . . are in any respect unreasonable or unjustly discriminatory, . . . the commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given, the commission may proceed to investigate the same. . . . If, upon such investigation, the . . . fares . . . complained of shall be found to be unreasonable or unjustly discriminatory, . . . the commission shall have power to fix and order substituted therefor such . . . fares, . . . as it shall have determined to be just and reasonable, and which shall be charged, imposed, and followed in the future." Id. § 28.

"Whenever, upon an investigation made under the provisions of this act, the commission shall find any existing . . . fares, . . . are unreasonable or unjustly discriminatory, . . . it shall determine and by order fix a reasonable . . . fare . . . to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory." Id. § 30.

"It shall be unlawful for any railroad to demand, charge, collect, or receive from any person, firm, or corporation a less compensation for . . . any service rendered or to be rendered by said railroad, in consideration of said person, firm, or corporation furnishing any part of the facilities incident thereto." Id. § 48.

"If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination." Id. § 49.

"The provisions of this act shall be liberally construed *with a view to the[409 public welfare, efficient transportation facilities, and substantial justice between . . . passengers and railroads." Id. § 59.

"The duties and liabilities of the railroads, defined in § 11 of this act, shall be the same as are prescribed by the common law, and the remedies against them the same, except where otherwise provided by the Constitution or statutes of this state, and the provisions of this act are cumulative thereto." Id. § 61.

Section 32 of the act provides that the railroad or the other party interested in any order of the commission fixing fares may commence a suit in the circuit court of Marion county against the commission, to vacate any such order, on the ground that the fares fixed are unlawful. Provi-

sion is made for the service of summons, the filing of an answer by the commission, and precedence of such a case, and that it shall be tried and determined as a suit in equity.

By § 34, if different or additional evidence is introduced by the plaintiff upon the trial, the court, before rendering judgment, is required, unless the parties stipulate otherwise, to transmit a copy of the evidence to the commission, which may alter, modify, amend, or rescind its order and report its action to the court. If the order is rescinded, the suit shall be dismissed; if it is changed, judgment shall be rendered on the modified order; and if it is not changed, judgment shall be rendered upon the original order.

Section 35 authorizes an appeal by either party to the supreme court, where also such a case shall have precedence.

The supreme court of Oregon held that the statute applied to localities as well as individuals, and that fares that were unreasonable or unjustly discriminatory as against a given locality came within its terms. This construction of the statute is 410]binding upon this court, and it *is to be considered as thus construed by the supreme court of Oregon.

The authority of the states to control by appropriate legislation the rates of fare to be charged by street railway companies and other common carriers wholly within their borders and subject to their laws is unquestionable. In the legitimate exercise of such authority we see no reason why a state may not, consistently with due process of law, prohibit any unjust discrimination by a domestic railroad company against certain localities upon its lines.

If the state may not thus legislate as to its domestic corporations, they, by merely arbitrary action, may so exercise their rate-fixing power as to build up one community and destroy another, and prevent that equality of treatment which it has been the object of many statutes of this kind, passed under state and Federal authority, to secure. The statute does not define unjust discrimination, but leaves it to the commission, upon hearing, to determine what rates are unjust and discriminatory, and to make orders for other fares, which, in its judgment, are not open to such objection. The statute expressly provides for a judicial review by the courts of the orders of the commission to test the lawfulness of the fares fixed and the reasonableness of regulations prescribed by the commission. We find nothing in the 14th Amendment which prevents a state from *making provision* for such relief to communities unjustly discriminated against by companies subject to the laws of the state in which they operate, and from which they derive their powers as common carriers and public-service corporations.

Nor do we understand the supreme court of Oregon to have construed the statute as permitting no consideration, in determining the question of discrimination, of the circumstances and conditions which may justify differences in rates, other than the number of miles which passengers are carried, as contended by the plaintiff in error. For, *upon rehearing, this contention[411 was noticed and the supreme court remarked that in the opinion in the case, notwithstanding it was said that the fares were not unreasonable when compared with the charges made by other railway companies for similar services, the court had held that the law extended to charges which were "unreasonable or unjustly discriminatory;" and it was said:

"The fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on Railroad Regulations, at § 839. 'If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale & Wyman, § 838."

In the light of this consideration of the statute, we will consider the contention that, in this particular case, there has been a deprivation of due process of law, within the meaning of the Federal Constitution.

Ordinarily, in cases which come before us for review, this court accepts the facts as found by the state supreme court. An examination of the record in this case convinces us that the conclusions reached by the court do not bring the case within that exceptional class where this court will reexamine the facts found, with a view to *ascertaining the correctness of the[412 conclusions reached. Kansas City Southern R. Co. v. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids,

223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822; Wood v. Chesborough (decided May 26, 1913), 228 U. S. 672, ante, 1018, 33 Sup. Ct. Rep. 706. In this case the facts found by the lower court and adopted in the supreme court are supported by competent testimony; and this court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the state having jurisdiction of the subject.

The findings show that the railway company carried passengers upon the Mt. Scott line between Portland and Lents for 5 cents each, and gave them a free transfer for carriage upon the lines of the Portland Railway Company in the city of Portland and the adjacent city of St. Johns, but charged a 10-cent fare to Milwaukie, and gave no transfers. The effect of such discrimination is found to have been the building up and development of Lents and the country along the line to Lents, and the retarding of the settlement and growth of the localities and communities situated upon the less favored division. Findings are made showing the conditions and circumstances under which transportation is made upon the divisions of the road, and the similarity of circumstances and conditions, except as to the charging of the different rates and the giving of transfer privileges to the one and the withholding of such privileges from the other. In view of these findings, based upon evidence, we cannot say that the determination of the commission, confirmed by the courts, that the rates of fare were discriminatory, was in deprivation of due process of law.

The contract set up by which the fares from Lents were required to be not greater than 5 cents cannot be held to justify the discrimination, as such contracts must be taken to have been made in view of the 413]continuing power *of the state to control the transportation rates of common carriers subject to its jurisdiction. Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

It is also argued that the rates established by the order of the commission are such as to be of a confiscatory nature and therefore within the prohibitions of the 14th Amendment. Upon this branch of the case the circuit court found that there was not evidence sufficient to show the value of the property or its divisions used in the operation of the road, nor sufficient to show the income or expenditures, or profit or loss from the operation of the different divisions, or the cost of transporting passengers upon any such divisions. An examination of the testimony does not satisfy us that the court below was without substantial proof in reaching this conclusion. The supreme court of Oregon, in view of its findings upon the discriminatory character of the rates established, did not find it necessary to consider by itself the reasonableness of the charge, and the record before it did not present a case of confiscatory rates so clear that this court should interfere because of the protection afforded by the Federal Constitution.

We find no violation of the 14th Amendment in the judgment of the Supreme Court of Oregon.

Affirmed.

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*PORTLAND RAILWAY, LIGHT, &[414
POWER COMPANY, Plff. in Err.,
v.
RAILROAD COMMISSION OF OREGON.

(See S. C. Reporter's ed. 414-416.)

This case is governed by the decision in Portland Railway, Light, & Power Company v. Railroad Commission of Oregon, ante, 1248.

[No. 120.]

Argued May 1 and 2, 1913. Decided June 10, 1913.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court of Marion County, in that state, confirming an order of the state railroad commission, regulating railway rates. Affirmed.

See same case below, 57 Or. 126, 105 Pac. 715.

The facts are stated in the opinion.

Messrs. Franklin T. Griffith and Joseph S. Clark argued the cause, and, with Mr. Frederick V. Holman, filed a brief for plaintiff in error.

Mr. A. M. Crawford, Attorney General of Oregon, and Mr. Clyde B. Aitchison argued the cause, and, with Messrs. R. R. Giltner and R. M. Sewell, filed a brief for defendant in error.

For contentions of counsel, see their briefs as reported in Portland R., Light & P. Co. v. Railroad Commission, ante, 1248.

Mr. Justice Day delivered the opinion of the court:

The Oak Park Improvement Association, a voluntary organization of persons residing in and about the stations on the Oregon City division of the plaintiff in error, the Portland Railway, Light & Power Company, known as the Oak Grove district, and comprising Milwaukie Heights, Courtney, Oak Grove, Center, and Risley, sought by complaint filed with the railroad commission of Oregon to have the commission fix reasonable fares, and to order their substitution for those found to be unreasonable and unjustly discriminatory. The commission, upon hearing, found that the 415]rate of fare of 15 cents charged *by the railway company between the city of Portland and the Oak Grove district was unreasonable and unjustly discriminatory, and ordered the railway company to charge in lieu thereof a 10 cent fare, and to give the same transfer privileges to passengers traveling between Portland and the Oak Grove district that were accorded to passengers on the Mt. Scott division of the plaintiff in error. The supreme court of Oregon, relying upon the conclusions reached by it in the Milwaukie Case (Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 468, 105 Pac. 709, 109 Pac. 273), decided this day by this court, and reported at 229 U. S. 397, ante, 1248, 33 Sup. Ct. Rep. 820, affirmed the decree of the circuit court, confirming the order of the commission (57 Or. 126, 105 Pac. 715), and the case is here on writ of error.

The findings of fact in the present case are practically identical with those in the Milwaukie Case, ante, 1248, except the exclusion of facts applying to Milwaukie alone, and the substitution of facts pertinent to the Oak Grove district, and show that the circumstances and conditions under which the plaintiff in error transports passengers between Portland and certain stations named for a fare of 10 cents, with transfer privileges, are substantially the same as the circumstances and conditions under which the plaintiff in error transports passengers between Portland and the Oak Grove district, except as to the rate of fare and the giving of transfers, and that, while the charges of the railway company upon the Oregon City division are not in themselves unreasonable, they are "unjust and unreasonable, discriminatory, and give undue preference."

This case, denominated the Oak Grove Case, and the Milwaukie Case, were heard together in the supreme court of Oregon, and have been presented together in this court. The contentions asserted in this case are the same contentions set up in the Milwaukie Case, and the opinion in the latter case (ante, 1248) has dealt with the controversy *here presented. In view[416 of the conclusions reached in that case, we see no reason to disturb the judgment of the Supreme Court of Oregon in the present case, and it is accordingly affirmed.

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WILLIAM STEWART MacLEOD, as Sole Surviving Partner of the Partnership of MacLeod & Co., Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 416-435.)

**War — result of occupation — governmental authority.**

1. A military occupation which will give the right to exercise governmental authority is not merely an invasion, but is an invasion plus possession of the enemy's country for the purpose of holding it temporarily, at least.

[For other cases, see War, VI., in Digest Sup. Ct. 1908.]

**Duties — exaction under military authority — port not under American control.**

2. The collection by the military authorities of the United States during military occupation of duties upon a cargo of rice imported from a foreign port into the port of Cebu, in the Philippine Islands, which was then occupied by a *de facto* insurgent government which had compulsorily required the payment of like duties, was not authorized by the Executive orders of the President of July 12, 1898, and December 21, 1898, which direct the collection of duties during military occupation at ports and places in the possession of the forces of the United States.

[For other cases, see Duties, 9-12, in Digest Sup. Ct. 1908.]

**Duties — exaction under military authority — port not under American control.**

3. The authority of the military commander at Manila, and those acting under his direction, during military occupation, to control shipments by persons trading at Manila and in vessels sailing from there of American registration, did not extend to the collection of duties upon a cargo of rice imported by residents of Manila doing business there, from a foreign port to a port in the island of Cebu, which was then occupied by a *de facto* insurgent government which had compulsorily required the payment of like duties.

[For other cases, see Duties, 9-12, in Digest Sup. Ct. 1908.]

**Duties — ratification of illegal collection.**

4. The unauthorized collection of duties by the military authorities of the United States during military occupation, where goods had been entered at a Philippine port

not under American control, but in the possession of a *de facto* insurgent government which had compulsorily required the payment of like duties, was not ratified by the act of June 30, 1906 (34 Stat. at L. 636, chap. 3912), legalizing tariff duties, import and export, imposed by the authorities of the United States or by the provisional military government in the Philippine Islands prior to March 8, 1902, the date of the act of Congress temporarily providing revenue for the Islands.

[For other cases, see Duties, 13-15, in Digest Sup. Ct. 1908.]

[No. 259.]

Argued April 25, 1913. Decided June 10, 1913.

APPEAL from the Court of Claims to review a judgment dismissing the petition in a suit to recover duties paid during military occupation of the Philippine Islands upon imports to a port not under American control. Reversed and remanded with instructions to enter judgment for claimant.

See same case below, 45 Ct. Cl. 339.

Statement by Mr. Justice Day:

The appellant, William Stewart MacLeod, surviving partner of MacLeod & Company, brought suit in the court of claims to recover from the United States the amount of certain duties paid by the firm under protest upon a cargo of rice imported into the island of Cebu at the city and port of the same name, in the Philippine Islands, on January 29, 1899. The court of claims decided in favor of the United States and rendered judgment dismissing the petition. 45 Ct. Cl. 339. The case was then appealed to this court.

The court of claims made findings of fact, the substance of which is as follows:

The claimant firm, comprised of the appellant (the survivor) and two others, all citizens of Great Britain, had its head office at Manila, and was engaged in doing a 418] *general mercantile business there and elsewhere in the Orient. On January 13, 1899, the claimants chartered an American steamship, the Venus, at Manila, and cleared her in ballast for Saigon, China, whence she sailed for the port of Cebu with a cargo of rice on January 22d, carrying the usual consular papers. Prior to that time it had been the practice of the military authorities at Manila to require importers, residing in that city and shipping rice to points in the Philippines not actually occupied by the United States forces, to present certified manifests covering their cargoes, and to pay the duties thereon to the United States military collector of customs at Manila, which practice was a matter of common knowledge and discussion among the business men in that city, but there is no other evidence charging the claimants with knowledge of the fact.

The collector at Manilla was informed by competitors of the claimants that the latter proposed to ship the cargo to Cebu without paying duty at Manila, and that, as they complied with the requirements of the United States authorities, they would be unable to compete, under such unfair conditions, with the claimants; and the collector received confirmation of such report from the consul at Saigon on the 21st of January, and on the 23d officially notified the claimants that a certified manifest must be presented and duties paid on the cargo at the custom house at Manila. The next day one of the claimants presented in person to the collector a letter stating that there had been no secret as to the movement of the Venus; that she had been openly despatched to Saigon to load a cargo of rice for the Philippines, and that the captain had instructions to secure consular papers, if ordered to Cebu, in case that port should be in the possession of the United States authorities upon his arrival, and that they presumed his papers were in order; that according to their advice, Cebu was in the hands of the republican government, *whose authorities would ex-[419 act the payment of duties, the same in amount as under the Manila tariff; that in selling the cargo they had been required to guarantee that the duties would not exceed those under the Manila tariff; that the claimants protested against paying the duties twice, as it was through no fault of theirs that the duties went to the Cebu authorities, and that, desiring to respect the notification, they would, if instructed, request their Cebu friends to protest against the payment in Cebu because, according to the notification, the Cebu customs were under the control of the United States. At the same time the collector was informed that a ship of the claimants was about to leave Manila for Cebu, which should arrive in time to head off the Venus (which did in fact sail from Manila that day and arrived in Cebu before the Venus); that their intention in so advising the collector was that he might take the steps he thought most expedient, but that the claimants, unless otherwise ordered by the United States, intended to carry out their contract with the purchasers of the cargo, even if required to pay double duties.

Upon the arrival of the Venus at Cebu, January 29, 1899, the native government demanded the payment of duties on the

cargo, and refused to allow its discharge until such payment was made. On February 4, 1899, the duties were paid and the cargo delivered to the purchasers. Upon the arrival of the Venus thereafter at Manila, with a cargo from Cebu, she was at first prevented from discharging her cargo without paying the duties involved in this case, but later was permitted to do so. Subsequently the collector refused to receive further business from the claimants until the duties in question were paid, and because of such refusal, and in order to transact further business with the collector, the claimants, involuntarily and under protest, paid the duties demanded.

420] *War was declared with Spain on April 25, 1898, and on May 1, 1898, the forces of the United States captured Manila bay and harbor. The following order of the President was thereafter promulgated:

Executive Mansion, July 12, 1898.

By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.

Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.

Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.

Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

William McKinley.

The protocol of August 12, 1898, provided that "the United States will occupy and hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines." [30 Stat. at L. 1742.] Manila was opened as a port of entry on August 20, 1898, and Cebu on March 14, 1899. The Executive order of July 12, 1898, was not proclaimed in Cebu until February 22, 1899, or later. The treaty of peace was signed on December 10, 1898, but ratifications were not exchanged until April 11, 1899. [30 Stat. at L. 1754.] The Spanish forces evacuated the island of Cebu on December 25, 1898, having first appointed a provisional governor. Shortly thereafter the native inhabitants, formerly in insurrection *against Spain, took possession of the [421 island, formed a so-called republic, and administered the affairs of the island until possession was surrendered to the United States on February 22, 1899, prior to which time no authorities of the United States had been in the island, and the United States had not been in possession or occupation of the island, it having been up to that time in the actual physical possession of the Spanish and the people of the island.

Messrs. Barry Mohun and L. T. Michener argued the cause, and, with Messrs. J. N. Wolfson and P. G. Michener, filed a brief for appellant:

As to third parties, or as to individual rights, the title to the island of Cebu did not vest until the exchange of ratifications by the signatory parties, April 11, 1899.

Dooley v. United States, 182 U. S. 222, 230, 45 L. ed. 1074, 1081, 21 Sup. Ct. Rep. 762; Haver v. Yaker (Jecker v. Magee) 9 Wall. 32, 19 L. ed. 571.

All rights to do business in the port of Cebu remained intact until its occupancy and possession by the United States, February 22, 1899, which rights necessarily included the right to import and sell rice, which is not a contraband of war, it being classed as food or provision.

Wheaton, International Law, 3d ed. pp. 640–642, 654; 7 Moore, International Law Dig. pp. 675, 692; Hall, International Law, 4th ed. pp. 687, 689.

The payment of duties by appellant's firm to the *de facto* government then in possession of the port of Cebu was lawful in all things, first, because the cargo of rice was not contraband of war and, second, because the duties were paid involuntarily to an existing government.

United States v. Rice, 4 Wheat. 246, 253–255, 4 L. ed. 562–564; Coleman v. Tennessee, 97 U. S. 536, 24 L. ed. 1129; Ford v. Surget, 97 U. S. 612, 24 L. ed. 1023; Baldy v. Hunter, 171 U. S. 393, 43 L. ed. 210, 18 Sup. Ct. Rep. 890; De Lima v. Bidwell, 182 U. S. 1, 184, 45 L. ed. 1041, 1051, 21 Sup. Ct. Rep. 743; Downes v. Bidwell, 182 U. S. 303, 45 L. ed. 1112, 21 Sup. Ct. Rep. 770; Pearcy v. Stranahan, 205 U. S. 257, 282, 51 L. ed. 793, 802, 27 Sup. Ct. Rep. 495; 1 Moore, International Law Dig. p. 41.

The order of President McKinley dated July 12, 1898, did not extend or apply to ports or places not actually occupied or possessed.

Lincoln v. United States, 197 U. S. 419,

49 L. ed. 816, 25 Sup. Ct. Rep. 455; The Venice (United States v. Cooke) 2 Wall. 259, 265, 277, 17 L. ed. 866–868; The Reform, 3 Wall. 617, 632, 18 L. ed. 105, 110; The Grapeshot, 9 Wall. 129, 131, 19 L. ed. 651, 653; Levy v. Stewart, 11 Wall. 244, 253, 20 L. ed. 86, 89.

The cargo of rice did not enter Manila, nor in any way come under the jurisdiction of the authorities there, nor was it discharged at a point possessed or occupied by the United States.

The Mary, 1 Gall. 206, Fed. Cas. No. 9,183.

The Executive order relates to a technical subject, uses technical terms, is to be construed in favor of the individual and according to the technical meaning and effect of the words used.

Hawley v. Diller, 178 U. S. 476, 478, 44 L. ed. 1157, 1158, 20 Sup. Ct. Rep. 986.

The Executive order uses words and terms that for a long time have had a settled and well-known meaning in the law of nations, in the conduct and declarations of our Executive Departments, and in our judicial decisions; and it is to be presumed that such words and terms were used in that sense in the order under consideration here.

Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655.

If there be doubt as to the meaning of the Executive order, it should be resolved in favor of this appellant.

Hartranft v. Wiegmann, 121 U. S. 609, 616, 30 L. ed. 1012, 1015, 7 Sup. Ct. Rep. 1240; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55.

The notice to appellant's firm by the collector at Manila, that a certified manifest of the cargo of rice must be presented and duties paid thereon at the custom house at Manila, was null and void, and gave no rights to the United States as against appellant's firm.

United States v. Rice, 4 Wheat. 246, 254, 4 L. ed. 562, 564.

The temporary allegiance owed by appellant to the United States as a conqueror in possession of Manila did not justify the exaction of these moneys from him as duties upon an importation into Cebu.

Dooley v. United States, 182 U. S. 222, 234, 45 L. ed. 1074, 1082, 21 Sup. Ct. Rep. 762; United States v. Rice, 4 Wheat. 246, 254, 4 L. ed. 562, 564; Lincoln v. United States, 197 U. S. 419, 427, 49 L. ed. 816, 818, 25 Sup. Ct. Rep. 455.

The act of June 30, 1906, applies to "tariff duties" imposed and collected, and to nothing else.

United States v. Heinszen, 206 U. S. 382, 51 L. ed. 1102, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688; Tillson v. United States, 100 U. S. 43, 46, 25 L. ed. 543, 544.

The general terms of the act should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence; and it is to be presumed that the Congress intended exceptions to its language, which would avoid results of this character.

United States v. Kirby, 7 Wall. 482, 486, 19 L. ed. 278, 280.

If the meaning of this act, or any part of it, is in doubt, it should be resolved in favor of the appellant.

Hartranft v. Wiegmann, 121 U. S. 609, 614, 30 L. ed. 1012, 1014, 7 Sup. Ct. Rep. 1240; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55.

The act of June 30, 1906, should not be so construed as to violate the law of nations, if any other possible construction remains.

Hilton v. Guyot, 159 U. S. 113, 163, 40 L. ed. 95, 108, 16 Sup. Ct. Rep. 139; Murray v. The Charming Betsy, 2 Cranch, 64, 118, 2 L. ed. 208, 226; The Habana, 175 U. S. 677, 700, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

It is not to be assumed lightly that the purpose of the act of June 30, 1906, was to abrogate the Hague Convention of 1899, but such purpose, to be effective, must appear clearly and distinctly from the words of the statute. The statute and the convention should be so construed as to give effect to both, if by any reasonable interpretation that can be done.

United States v. Lee Yen Tai, 185 U. S. 213, 221, 222, 46 L. ed. 878, 883, 22 Sup. Ct. Rep. 629; Chew Heong v. United States, 112 U. S. 536, 550, 28 L. ed. 770, 774, 5 Sup. Ct. Rep. 255.

The payment by appellant to the United States officials of Manila was under duress of business.

De Lima v. Bidwell, 182 U. S. 1, 174–180, 45 L. ed. 1041, 1047–1050, 21 Sup. Ct. Rep. 743; Downes v. Bidwell, 182 U. S. 244–247, 45 L. ed. 1088–1091, 21 Sup. Ct. Rep. 770; Radich v. Hutchins, 95 U. S. 210, 213, 24 L. ed. 409, 410; Maxwell v. Griswold, 10 How. 242, 256, 13 L. ed. 405, 411; Swift & C. & B. Co. v. United States, 111 U. S. 22, 28–30, 28 L. ed. 341, 343, 344, 4 Sup. Ct. Rep. 244; Robertson v. Frank Bros. Co. 132 U. S. 17, 23, 33 L. ed. 236, 238, 10 Sup. Ct. Rep. 5.

**Mr. Frederick De Courcy Faust** argued the cause and filed a brief for appellee:

The general right of a military commander, under the war power, to govern territory of the enemy, after the conquest,

and prior to the ratification of a treaty of peace, is not open to question.

Cross v. Harrison, 16 How. 164, 14 L. ed. 889; Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; Fourteen Diamond Rings v. United States, 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59; New Orleans v. New York Mail S. S. Co. 20 Wall. 387-394, 22 L. ed. 354-358.

While it is true that the treaty of peace between the United States and Spain was signed December 10, 1898, the war did not cease nor title to the island of Cebu vest in the United States, in so far as the rights of third parties were affected, until the exchange of ratifications, on the 11th of April, 1899.

Haver v. Yaker (Jecker v. Magee) 9 Wall. 32, 19 L. ed. 571; Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.

It follows, therefore, that until such ratification the island of Cebu continued to be hostile territory, and all commercial intercourse between its inhabitants and the inhabitants of Manila, then under military occupation of the United States, was prohibited by the rules of international law.

Wheaton, International Law, 422; Montgomery v. United States, 15 Wall. 395, 21 L. ed. 97.

The principle of United States v. Rice, 4 Wheat. 246, 255, 4 L. ed. 562, 564, upon which appellant relies, directly supports the government's contention in this case.

Appellant has apparently overlooked the fact referred to by this court in Lincoln v. United States, 202 U. S. 499, 50 L. ed. 1120, 26 Sup. Ct. Rep. 728, that after the treaty was signed, December 10, 1898, "the President, on December 21, issued an order proclaiming the sovereignty of the United States in the islands, and directing duties and taxes to be collected in future as public revenues for the support of the government."

Any doubt that might possibly exist as to the authority of the military collector at Manila to collect the duties here in question is completely removed by the terms of the ratification act of June 30, 1906.

United States v. Heinszen, 206 U. S. 381, 51 L. ed. 1101, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

When the Spanish fleet was destroyed at Manila, May 1, 1898, it became apparent [425] that the government of the *United States might be required to take the necessary steps to make provision for the government and control of such part of the Philippines as might come into the military occupation of the forces of the United States. The right to thus occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority, and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority, and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. Such was the course of the government with respect to the territory acquired by conquest and afterwards ceded by the Mexican government to the United States. Cross v. Harrison, 16 How. 164, 14 L. ed. 889. See also in this connection, Fleming v. Page, 9 How. 603, 13 L. ed. 276; New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 22 L. ed. 354; Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; 7 Moore's International Law Digest, §§ 1143 et seq., in which the history of this government's action following the Mexican War, and during and after the Spanish-American War, is fully set forth; and also Taylor on International Public Law, chapter IX.; Military Occupation and Administration §§ 568 et seq., and 2 Oppenheim on International Law, §§ 166 et seq.

There has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise governmental authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least. 2 Oppenheim, § 167. What should constitute military occupation was one of the matters before The Hague Convention in 1899, respecting laws and customs of war on land, and the following articles were adopted *by the na- [426] tions giving adherence to that Convention, among which is the United States (32 Stat. at L. 1821):

"Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation applies only to the territory where such authority is established, and in a position to assert itself.

"Article 43. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order

and safety, while respecting, unless absolutely prevented, the laws in force in the country."

A reference to the Messages and Papers of the Presidents, to which we may refer as matters of public history, shows that the President was sensible of and disposed to conform the activities of our government to the principles of international law and practice. See 10 Messages and Papers of the Presidents, 208, Executive order of the President to the Secretary of War, in which the President said (p. 210):

"While it is held to be the right of a conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation, the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contributions to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army."

427] *To the same effect, Executive order of the President to the Secretary of the Treasury in which the President said (p. 211):

"I have determined to order that all ports or places in the Philippines which may be in the actual possession of our land and naval forces by conquest shall be opened, while our military occupation may continue, to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the rates of duty which may be in force at the time when the goods are imported."

And the like Executive order of the President to the Secretary of the Navy (p. 212).

In pursuance of this policy, the order of July 12, 1898, was framed. By its plain terms the President orders and directs the collection of tariff duties at ports in the occupation and possession of the forces of the United States. More than this would not have been consistent with the principles of international law, nor with the practice of this government in like cases. While the subsequent order of December 21, 1898, made after the signing of the treaty of peace, is referred to in the brief of counsel for the government, it was not alluded to in the findings of fact of the court of claims; but we find nothing in that order indicating a change of policy in respect to the collection of duties. While the signing of the treaty of peace between the United States and Spain on December 10, 1898, was stated, the responsible obligations imposed upon the United States by reason thereof were recited and acknowledged, and the necessity of extending the government with all possible despatch to the whole of the ceded territory was emphasized, no disposition was shown to enlarge the number of ports and places in the Philippine Islands at which duties should be collected so as to include those not occupied by the United States, and the President said (p. 220):

*"All ports and places in the Phil-[428 ippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All goods and wares not prohibited for military reasons, by due announcement of the military authority, will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation."

The occupation by the United States of the city, bay, and harbor of Manila pending the conclusion of a treaty which should determine the control, disposition, and government of the Philippines was provided for by the protocol of August 12, 1898, and the necessity of further occupation, until the exchange of ratifications by the governments of Spain and the United States, was recognized by the President in the order of December 21, 1898. We have been unable to find anything in the Executive or congressional action prior to the importation of the cargo now in question having the effect to extend the executive order as to the collection of duties during the military occupation to ports and places not within the occupation and control of the United States.

The statement of the facts shows that the insurgent government was in actual possession of the customhouse at Cebu, with power to enforce the collection of duties there, as it did. Such government was of the class of *de facto* governments described in 1 Moore's International Law Digest, § 41, as follows:

"But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories, and against the rightful authority of an established and

lawful government; and (2) that while it 429]exists it must necessarily be *obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force." Thornington v. Smith, 8 Wall. 1, 9, 19 L. ed. 361, 363.

The attitude of this government toward such *de facto* governments was evidenced in the Bluefields Case, a full account of which is given in 1 Moore's International Law Digest, pp. 49 et seq. In that case General Reyes had headed an insurrectionary movement at Bluefields and acquired actual control of the Mosquito territory in Nicaragua. His control continued for a short time only, February 3 to February 25, 1899, and after the re-establishment of the Nicaraguan government at Bluefields it demanded of American merchants the payment to it of certain amounts of duty which they had been compelled to pay to the insurgent authorities during the period of their *de facto* control. The American government remonstrated, and the duties demanded by the Nicaraguan government were by agreement deposited in the British consulate pending a settlement of the controversy. The Department of State of the United States, upon receiving sworn statements of the American merchants to the effect that they were not accomplices of Reyes, that the money actually exacted was the amount due on bonds which then matured for duties levied in December, 1898, payments being made to the agent of the titular government who was continued in office by General Reyes, that payment was demanded under threat of suspension of importations, and that from February 3 to February 25 General Reyes was in full con-430]trol of the civil and military *agencies in the district,—expressed the opinion that to exact the second payment would be an act of international injustice; and the money was finally returned to the American merchants with the assent of the government of Nicaragua.

A similar case appears in 1 Moore's International Law Digest, p. 49, in which our government was requested by Great Britain to use its good offices to prevent the exaction by the Mexican government *of certain duties* at Mazatlan, which had *been previously* paid to insurgents. The then Secretary of State, Mr. Fish, instructed our Minister to Mexico as follows:

"It is difficult to understand upon what ground of equity or public law such duties can be claimed. The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. The pretension is analogous to that upon which vessels have been captured and condemned upon a charge of violating a blockade of a port set on foot by a proclamation only, without force to carry it into effect."

See also Colombian Controversy, 6 Moore's International Law Digest, pp. 995 et seq.

While differing somewhat in its circumstances, the case of United States v. Rice, 4 Wheat. 246, 4 L. ed. 562, is an instructive case. In that case, during the War of 1812, the port of Castine, Maine, was captured by the British forces, and during its occupation the British government exercised civil and military authority over the people, established customhouses. and collected duties on goods. After peace and the re-establishment of the American government *at Castine, the collector of cus-[431 toms claimed the right to collect duties upon the goods, and this court held that the duties could not be collected a second time. Mr. Justice Story, delivering the opinion of the court, after stating that the British government was in full control of the port, and authorized to collect duties, said (p. 254):

"Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they are so liable at the time of importation is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United

States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretense to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority."

We observe that the learned justice puts the case of the importation of goods into a foreign territory afterwards ceded to the United States as one which, under no pretense, would afford an authority to collect duties upon goods previously imported 432]there. We do not think that it was *the purpose of the Executive order under which the government at Manila was instituted and maintained at the time of this importation to direct the collection of duties at ports not in the occupation of the United States, and certainly not at one actually in the possession of a *de facto* government, as is shown in this case.

It is said, however, that the claimants resided and were doing business at Manila, and therefore were subject to the military authority there, and the authority of a conquering power, recognized in New Orleans v. New York Mail S. S. Co. 20 Wall. 394, 22 L. ed. 358, to regulate trade with the enemy and in its country is cited in support of the proposition. That there is such general authority, there can be no doubt. It is, however, not without limitation, and a local commander is certainly bound by the orders of the President as commander in chief, which in this case had limited tariff collections to ports and places occupied by the United States. And such authority is subject to the laws and usages of war, (ibid.) and, we may add, to such rules as are sanctioned by established principles of international law.

A state of war as to third persons continued until the exchange of treaty ratifications (Dooley v. United States, 182 U. S. 222, 230, 45 L. ed. 1074, 1081, 21 Sup. Ct. Rep. 762), and, although rice, not being contraband of war, might have been imported (7 Moore's International Law Digest, pp. 683, 684), the authority of the military commander, until the exchange of ratifications, may have included the right to control vessels sailing from Manila to trade in the enemy's country, and to penalize violations of orders in that respect. But whatever the authority of the commander at Manila, or those acting under his direction, to control shipments by persons trading at Manila, and in vessels sailing from there of American registration, such authority did not extend to the second collection of duties upon a cargo from a foreign port to a port occupied by a *de facto* government *which had com-[433 pulsorily required the payment of like duties.

It is further contended that, if the collection of duties was originally without authority, it was ratified by the act of June 30, 1906 (34 Stat. at L. 636, chap. 3912), which provides:

"That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed."

The history of this act and others growing out of the Spanish-American War is fully set forth in United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688. This court had held that the President had no authority to order the imposition of duties subsequent to the ratification of the treaty, with reference to Porto Rico (Dooley v. United States, supra), and with reference to the Philippine Islands (Fourteen Diamond Rings v. United States, 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59). The act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), was then passed by Congress, ratifying the action of the President in making the order of July 12, 1898, whereby duties had been collected at "all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States," and amendments of that order, and ratifying such action of the authorities in the Philippines as was done in accordance with the orders of the President. In Lincoln v. United States and *Warner, B. & Co. v. United States,[434 197 U. S. 419, 49 L. ed. 816, 25 Sup. Ct. Rep. 455, affirmed on rehearing in 202 U. S. 484, 50 L. ed. 1117, 26 Sup. Ct. Rep. 728, the act of July 1, 1902, was construed to apply only to duties collected prior to April 11, 1902

1899 (when the treaty became effective). In this situation, the month following the decision of this court in 202 U. S. 484, supra (affirming the Lincoln and Warner, B. & Co. Cases), Congress passed the ratifying act now in question. United States v. Heinszen, supra, 381.

Conceding that the act is broad enough in terms to cover tariff duties exacted under the authority of the President's orders before the ratification of the treaty, it is expressly limited to tariff duties, import and export, imposed by the authorities of the United States and of the provisional government of the Islands prior to March 8, 1902 (the date of the act of Congress temporarily providing revenue for the Philippine Islands, 32 Stat. at L. 54, chap. 140); and there is no expression of purpose in the statute to enlarge the Executive orders of the President, which limited the collection of duties during our military occupation to ports and places actually held and occupied by the forces of the United States, or to ratify collections made where goods had been entered at a port not under American control, and in possession of a *de facto* insurrectionary government, as is here shown.

The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law.

The act has the scope given to it in the case of United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 435]Ann. Cas. 688; namely, to ratify *"the collection of the duties levied under the order of the President;" which, as we have seen, were tariff duties imposed at ports in the occupation and possession of the United States. The tariff duties upon the cargo of rice here in question were paid to the *de facto* authorities at Cebu, where the cargo was entered, and the payment made at Manila was not a tariff duty, but an illegal and unwarranted exaction in the nature of a penalty, covered by neither the orders of the President nor the ratifying acts of Congress.

We think that the Court of Claims was in error in holding the duties collectible at Manila under the circumstances related, *and in* adjudging that the act of June 30, *1906, ratified* the conduct of the military authorities at Manila in compelling such payment. Its judgment will therefore be reversed and the case remanded to the Court of Claims, with instructions to enter judgment for the claimant.

Reversed.

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CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Appt.,

v.

CHICAGO TITLE & TRUST COMPANY, Trustee in Bankruptcy of Earl H. Prince, Bankrupt.

(See S. C. Reporter's ed. 435–447.)

**Bankruptcy — preference — margin certificates.**

1. A bank which had issued margin certificates to a depositor, evidencing deposits made by him to secure the performance of his dealings on the Chicago board of trade, did not receive a preference forbidden by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 60a and b, where such depositor, being in financial difficulties, afterwards transferred his open trades to a corporation which agreed to and did carry them out, substituting its own securities for his, and turning over the margin certificates thus secured to the bank, which, with reasonable cause to believe the depositor insolvent, and within four months of the proceedings in bankruptcy against him, applied the amount of the deposits to his indebtedness to the bank.

[For other cases, see Bankruptcy, VI. b, 2, b, in Digest Sup. Ct. 1908.]

**Bankruptcy — set-off — acquired claim.**

2. A claim against a bankrupt for use by way of set-off was not acquired contrary to the bankrupt act of July 1, 1898, § 68b, where a bank, having issued margin certificates to a depositor, evidencing deposits made by him to secure the performance of his dealings on the Chicago board of trade, and having again come into possession of such certificates as the result of an agreement by which such depositor, being in financial difficulties, transferred his open trades to a corporation which agreed to and did carry them out, substituting its own securities for the margin certificates in question, applied the amount of the deposits to the depositor's indebtedness to the bank, with reasonable cause to believe him insolvent, and within four months of the bankruptcy proceedings against him.

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

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Note.—On set-off by bank against bankrupt's deposit as a preference within the bankruptcy law—see note to Booth v. Prete, 20 L.R.A.(N.S.) 863.

As to set-off in bankruptcy cases generally —see note to Morgan v. Wordell, 55 L.R.A. 33.

**Bankruptcy — preference — set-off.**

3. A balance left in a deposit subject to check for specific purposes may be applied by the bank to the payment of the depositor's indebtedness to it without violating the prohibitions of the bankrupt act of July 1, 1898, § 60a and b, against preferential transfers, although the transaction was within four months of the bankruptcy proceedings against the depositor, and the bank at the time had reasonable cause to believe him insolvent.

[For other cases, see Bankruptcy, VI. b, 2, b; X. a, in Digest Sup. Ct. 1908.]

[No. 741.]

Argued January 6, 1913. Decided June 10, 1913.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the District Court for the Northern District of Illinois, Eastern Division, in favor of a trustee in bankruptcy, in a suit to recover certain alleged preferences. Reversed and remanded to the District Court for further proceedings.

See same case below, 118 C. C. A. 142, 199 Fed. 704.

The facts are stated in the opinion.

Mr. **Horace Kent Tenney** argued the cause, and, with Mr. Roger Sherman, filed a brief for appellant:

Where deposits are made in a bank after the bank has knowledge of the depositor's insolvency, the bank can apply the deposits on the depositor's notes held by the bank.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Re George M. Hill Co. 66 L.R.A. 68, 64 C. C. A. 561, 130 Fed. 315; Lowell v. International Trust Co. 86 C. C. A. 137, 158 Fed. 781.

In the absence of a special agreement, when moneys are deposited in a bank the bank gets the title to the funds deposited, and becomes a mere debtor to the depositor. The presumption is that, where deposits are made, the relation of debtor and creditor is established.

Minard v. Watts, 186 Fed. 245; Mutual Acci. Asso. v. Jacobs, 141 Ill. 261, 16 L.R.A. 516, 33 Am. St. Rep. 302, 31 N. E. 414.

Where moneys are held in trust by a bank, and are mingled with the other funds so that they cannot be traced, the depositor has no standing except as a general creditor.

Union Nat. Bank v. Goetz, 138 Ill. 127, 32 Am. St. Rep. 119, 27 N. E. 907.

Where the trust is fulfilled or fails, the moneys are due absolutely to the depositor.

American Exch. Nat. Bank v. Loretta Gold & S. Min. Co. 165 Ill. 103, 56 Am. St. Rep. 233, 46 N. E. 202.

Deposits in a bank are held by the bank as bailee (where the title remains in the depositor), or as debtor (where the title to the deposits has passed to the bank).

Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483; Brahm v. Adkins, 77 Ill. 263.

Deposits are presumed to be general unless the contrary is specified or distinctly implied.

Morse, Banks & Bkg. 4th ed. § 192.

The bankrupt's liability as indorser on a note not due at the time of bankruptcy can be set off by a bank against money on deposit in the bank, these debts being mutual within the meaning of the bankruptcy act.

Re Philip Semmer Glass Co. 67 C. C. A. 551, 135 Fed. 77; Germania Sav. Bank & T. Co. v. Loeb, 110 C. C. A. 263, 188 Fed. 285.

Set-offs of "mutual debts" were allowed in equity from the earliest times, and the meaning of the term in the bankruptcy act is the meaning it had at law when the act was passed.

Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148.

The deposit of funds in a bank, after knowledge on the part of the bank of the depositor's insolvency, does not constitute a preference.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Re George M. Hill Co. 66 L.R.A. 68, 64 C. C. A. 561, 130 Fed. 315; Lowell v. International Trust Co. 86 C. C. A. 137, 158 Fed. 781.

Deposits made with a bank after knowledge of insolvency are not preferences, although thereby the bank obtains an advantage over other creditors.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

Mr. **Edwin Terwilliger, Jr.**, argued the cause, and, with Mr. William J. Pringle, filed a brief for appellee:

The transfer of the bankrupt's "open trades" to Anderson was a transfer of property for the benefit of the bank.

National Bank v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 32 Sup. Ct. Rep. 633.

A preferential transfer includes every mode of disposing of property for the benefit of a creditor, and circuity of arrangement will not avail to save it.

Ibid; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; Hackney v. Hargreaves Bros. 68 Neb. 633, 99 N. W. 675.

The indorsement and delivery of the margin certificate to the bank was a transfer of the amounts of the margin securities held

by the bank as a board of trade depository to the bank as a creditor, and was a payment.

Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832; Ridge Ave. Bank v. Studheim, 76 C. C. A. 362, 145 Fed. 798; Lowell v. International Trust Co. 86 C. C. A. 137, 158 Fed. 781; Irish v. Citizens' Trust Co. 163 Fed. 880.

The deposit of more than enough to pay the specified checks under the special deposit arrangement was a preferential transfer.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339.

There was no right of set-off as to the margin securities, because the same were deposited as security with the bank in its capacity as a board of trade depositary, and not according to the custom of banks. They were special or specific deposits, and not general deposits, and created a trust relation, and not a relation of debtor and creditor.

Bolles, Bkg. § 3; Morse, Banks & Bkg. § 185; Woodhouse v. Crandall, 197 Ill. 104, 58 L.R.A. 385, 64 N. E. 292; Montagu v. Pacific Bank, 81 Fed. 602; Moreland v. Brown, 30 C. C. A. 23, 56 U. S. App. 722, 86 Fed. 257; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; People v. City Bank, 96 N. Y. 32; Anderson v. Pacific Bank, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063; Libby v. Hopkins, 104 U. S. 303, 26 L. ed. 769; Collins v. State, 33 Fla. 439, 15 So. 214; Shopert v. Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515.

A bank has no lien or right of set-off against special deposits or money deposited for a specific purpose, as for collateral security or for the payment of a particular debt.

3 Am. & Eng. Enc. Law, 2d ed. 822, 837; 5 Cyc. 552; Morse, Banks & Bkg. § 325; Reynes v. Dumont, 130 U. S. 390, 32 L. ed. 944, 9 Sup. Ct. Rep. 486; Wagner v. Citizens' Bank & T. Co. 122 Tenn. 164, 28 L.R.A.(N.S.) 484, 135 Am. St. Rep. 869, 122 S. W. 245, 19 Ann. Cas. 483; Smith v. Sanborn State Bank, 147 Iowa, 640, 30 L.R.A. (N.S.) 517, 140 Am. St. Rep. 336, 126 N. W. 779; Dolph v. Cross, 153 Iowa, 289, 133 N. W. 669; Re Davis, 119 Fed. 950; Germania Sav. Bank & T. Co. v. Loeb, 110 C. C. A. 263, 188 Fed. 285; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Gray v. Rollo, 18 Wall. 632, 21 L. ed. 928; Munger v. Albany City Nat. Bank, 85 N. Y. 589; Raleigh v. Raleigh, 35 Ill. 512.

There was no right of set-off as to the $575.79, because it was not treated by the parties as a general deposit, but was made "under special circumstances" amounting to a special deposit.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; Germania Sav. Bank & T. Co. v. Loeb, 110 C. C. A. 263, 188 Fed. 285.

The bank and bankrupt were in collusion to turn all the bankrupt's available assets over for the benefit of the bank. The alleged right of set-off was acquired with a view to such use.

Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; National Security Bank v. Butler, 129 U. S. 223, 32 L. ed. 682, 9 Sup. Ct. Rep. 281; Yardley v. Philler, 167 U. S. 344, 359, 42 L. ed. 192, 197, 17 Sup. Ct. Rep. 835.

Mr. Justice Day delivered the opinion of the court:

This is a controversy arising in a bankruptcy proceeding, and involves questions of the right to certain property, as between the appellant, the Continental & Commercial Trust & Savings Bank, and the Chicago Title & Trust Company, as trustee in bankruptcy of Earl H. Prince, bankrupt. Two items are involved: first, the sum of $4,250, the amount of certain margin certificates issued by the predecessor of the appellant bank to the bankrupt Prince; and second, a balance of $575.79 remaining in Prince's checking account with the bank of the predecessor of the appellant, therein deposited by the bankrupt. The trustee brought the suit to recover the amount of the margin certificates and the bank balance as having been preferentially transferred within the terms of the bankruptcy act. The district court held the trustee entitled to recover, and this decree was affirmed by the circuit court of appeals (199 Fed. 704), and the case comes here.

There is no controversy as to the facts. A petition in bankruptcy was filed against Prince February 15, 1905. He had been for several years a member of the Board of Trade of Chicago, buying and selling on the Board and subject to its rules. The Federal Trust & Savings Bank, the predecessor of the appellant, was engaged in the general *banking business in the city[439 of Chicago, and Prince did his banking business at that bank, and had a general deposit and checking account therein. By

the rules of the Board of Trade, purchasers and sellers might require of the other party to the trade a deposit of 10 per cent of the contract price of the property bought or sold, and further security from time to time as the margin might require. Certain banks, of which the Federal Trust & Savings Bank was one, were authorized to issue margin certificates, which were in the following form:

Federal Trust and Savings Bank,
Chicago, No.....
Deposited by E. H. Prince, $.....
..... Dollars
As security on a contract or contracts between the depositor and ....., which amount is payable on the return of this certificate, or the duplicate of the same (one of which being paid, the other shall become void), duly indorsed by both of the above-named parties, or on the order of the president of the Board of Trade of the city of Chicago, indorsed on either *of* the original or duplicate hereof, as provided by the rules of said Board of Trade under which the above-named deposit has been made.

Original.
Not negotiable or transferable.
.....
Cashier.

Margin certificates on various days from September 15, 1904, to February 9, 1905, in the form above set forth, had been issued to Prince, to procure which he had drawn his check against his checking account with the bank, or deposited with it the requisite sum of money. Each of the said certificates evidenced a liability of the bank to Prince for the amount stated in the certificate, unless, because of the default by Prince on the contract for which 440] *the certificate was held by the other party as security, it was paid to such other party. The record of certificates was kept in the margin register of the bank.

On the 14th of February, 1905, the vice president of the bank and Prince had a conference concerning the financial troubles of Prince, and one W. P. Anderson, of W. P. Anderson & Company, was called to the bank. A conference was had as to the best way of closing out Prince's open trades, with the result that Anderson agreed to act in the premises, and on the same day, February 14th, and the day following, Prince transferred all his open trades in accordance with the rules of the board to Anderson, for his company, and the latter agreed to carry out Prince's contracts, and proceeded to do so. Anderson & Company, on February 15, 1905, substituted its own securities for Prince's trades, and thereby recovered the certificates deposited by Prince, which were turned over to the Federal Trust & Savings Bank. Prince was at that time indebted to the bank in the sum of about $37,000, and the bank, upon the return of the certificates from Anderson & Company, applied the money secured by the certificates to Prince's indebtedness to the Bank. The master found:

"That taking the said open trades so transferred as a whole, the condition of the market at the time of the transfer was such that the aggregate sum of the amounts due thereon to Earl H. Prince from members of the Board of Trade, if he had then settled the trades, would have been greater than the aggregate sums of the amount then due thereon from Prince to others of said members of the Board; that among the open trades so transferred and settled were trades with the said members of the Board who held securities or margin certificates furnished by the said Prince.

"That on February 15, 1905, the market was constantly changing. If the trades with the members holding Prince's *margin[441 certificates had been closed at the opening of the Board on that day by the members holding them, there would have been due from them to Prince in the aggregate a balance of approximately one third of the amount of the certificates after deducting therefrom the amount that would have been due to them from Prince. If the trades had been closed later in the day, the balance coming to Prince would have been considerably less. However, if Prince had carried out all of these contracts, the profits which he would have made upon some of them would have been about balanced by the losses which he would have sustained on others."

Furthermore:

"That the plan adopted at the conference between Mr. Prince, Mr. Anderson, and Mr. Castle was doubtless the best plan that could have been adopted to avoid serious loss to Prince, or to his creditors. The condition of the market was such at that time that had Anderson & Company not taken charge of Prince's trades and carried them through, a panic might have ensued on the Board, and the market so fluctuated that the amount of all of the margin certificates, and quite likely a considerable more, would have been lost to Prince and his creditors."

The facts with respect to the bank balance of $575.79 are: On February 10, 1905, the bank called the loans of Prince, and, such loans not being paid, the bank applied to them the sum of $3,095 then on deposit in Prince's checking account,

leaving the sum of $3.25 in that account. On the same day the bank agreed with Prince that, if he would thereafter make deposits for such purpose, it would pay certain salary and pay roll checks of Prince and checks issued to the Board of Trade Clearing House. Checks were paid on divers days between the 4th and 14th of February, 1905, to the amount of $2,506.46, and Prince deposited with the bank between the 10th and 14th of February a 442]total of $3,079, *all such items being entered upon the books of the bank as of February 14, 1905. The amount deposited exceeded the amount checked out by $572.54, and this amount, with the $3.25 remaining to the credit of Prince, as above set forth, left a balance of $575.79, which the bank, on February 14th, applied to Prince's general indebtedness to it.

The bank had reasonable cause to believe that Prince was insolvent from and after February 10th, and during the transactions from that date to and including February 15th.

The trustee relies upon certain sections of the bankruptcy act, which he claims make the transaction with Prince by which the bank acquired the certificates and the bank deposit a preferential one, and therefore void within the terms of the act. The act provides:

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has . . . made a transfer of any of his property, and the effect of the enforcement of . . . such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"Sec. 60b. If a bankrupt shall have given a preference, and the person receiving it . . . shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. . . ." [As amended, 32 Stat. at L. 799, 800, chap. 487, § 13, U. S. Comp. Stat. Supp. 1911, p. 1506.]

On the other hand, the bank claims the right to set off the amount of the certificates and bank balance against the indebtedness of Prince to it by reason of § 68a of the bankruptcy act:

"Sec. 68a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid." [30 Stat. at L. *565, chap. 541,* U. S. Comp. Stat. 1901, *p. 3450.]*

*This case must be dealt with in the[443 light of certain principles, established by decisions of this court, in determining the applicable provisions of the bankruptcy act. To constitute a preferential transfer within the meaning of the bankruptcy act there must be a parting with the bankrupt's property for the benefit of the creditor, and a consequent diminution of the bankrupt's estate. New York County Nat. Bank v. Massey, 192 U. S. 138, 147, 48 L. ed. 380, 384, 24 Sup. Ct. Rep. 199; National Bank v. National Herkimer County Bank, 225 U. S. 178, 184, 56 L. ed. 1042, 1046, 32 Sup. Ct. Rep. 633.

Much discussion appears in the briefs of counsel as to whether the deposits evidenced by the margin certificates were general deposits, creating between the bank and the depositor the relation of debtor and creditor, or were special deposits which the bank had no authority to mingle with its general funds. We do not deem it necessary to enter into a discussion of this question, with a view to determining the technical question as to the nature of the relation thus created between the bank and the depositor. In cases of this character it is essential to learn just what has taken place between the parties, with a view to ascertaining whether a preferential transfer of property to a creditor has resulted.

The statement of facts already made shows that these certificates were payable to Prince, unless they were required to be paid to the party holding them as security for Prince's dealings upon the Board of Trade. It is further evident from the facts stated that without the co-operation of Anderson & Company, who took the place of Prince upon the Board of Trade, substituted their securities for those of Prince, and carried out his obligations, the certificates would have had no value to the estate. By the arrangement made, Anderson & Company took hold of the situation, and, carrying out the deals upon which Prince was bound, cleared the certificates of any obligation to others, and they thereby became *payable to Prince. What[444 was done did not in fact diminish the estate of Prince, otherwise available to the creditors in the bankruptcy administration, for the traders holding them would have had the benefit of the deposits under the terms of the certificates and the rules of the Board of Trade. It therefore appears that this essential element of a preferential transfer within the meaning of the bankruptcy act —diminution of the bankrupt estate—is wanting. The fact that what was done worked to the benefit of the creditor, and in a sense gave him a preference, is not enough, unless the estate of the bankrupt

was thereby diminished. New York County Nat. Bank v. Massey, supra.

It is contended, however, that the set-off cannot be allowed because of the provisions of § 68b of the bankruptcy act, which provides:

"Section 68b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

It is the main purpose of this statute, as its terms show, to prevent debtors of the bankrupt from acquiring claims against the bankrupt for use by way of set-off and reduction of their indebtedness to the estate. There is no question of the solvency of Prince when he deposited the money to secure the certificates, and what was done was not the acquisition of a claim against Prince with a view to setting it off against the bank's indebtedness on the certificates, but was the satisfaction, without diminution of the estate of the bankrupt, of possible claims of others, who, in the event of Prince's default, would have been entitled to the deposits represented by the certifi-445]cates. *We do not think such transaction comes within the language or reason of § 68b.

It is said, however, that the case of Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339, holds to the contrary. In that case, it appears, one Harrison, a bankrupt, was a debtor of the tie company, which presented a claim against the bankrupt estate of $24,358; that for some years prior to the bankruptcy it had been engaged with Harrison in removing timber from certain lands of the tie company, and converting it into ties. Harrison had conducted stores in the vicinity, and gave laborers groceries and other supplies. The tie company received a pay roll on which the name of each laborer was entered, together with the amount he earned and the value of the supplies he had received from Harrison, and it deducted from the earnings of the laborer the value of the supplies, a check for which was sent to Harrison, and a check for the balance was sent to the laborer. Four months before the filing of the petition in bankruptcy Harrison owed the tie company $20,000 and more. Within that time the company refused to pay Harrison, and retained and credited on its claim against him $2,210.73, which was due him for supplies he had furnished the laborers subsequent to November 30, 1902. Harrison was then insolvent, as the tie company knew, and it was found that it intended, by retaining the amounts, to secure to itself a preference over other creditors; but Harrison had no such intention. This court found that the application of the amounts advanced to the laborers did not amount to a voidable preference, since the agreement mentioned brought about no preference whatever; and upon the question as to whether the tie company was entitled to set off the deductions from the pay roll due Harrison, held that from the facts found it appeared that the tie company was obligated to remit to Harrison the amount of such deductions irrespective of the condition of the *account between[446 itself and Harrison, and that therefore the company stood to Harrison in the relation of trustee, and the case was not one of mutual credits and debts within the provisions of § 68a. And furthermore, that to allow the set-off would be in violation of § 68b, because, whether a trust relation existed or not, the result would be the same, for the company's knowledge of Harrison's insolvency when it acquired the claims of the latter against the laborers, with a view to using them by way of set-off, was to enable it thus to obtain an advantage over the other creditors, which it could not lawfully do.

In that case there was a specific finding that the tie company had appropriated money which it really held in trust for Harrison, and that it had acquired the claims of Harrison against the laborers with a view to the prohibited set-off. In the case at bar there was no finding that the bank held the money in trust for a specific purpose so as to deny it the right of set-off, or that it acquired any claim against the bankrupt with a view to making it a set-off. It is not shown that when Prince made the deposits for the margin certificates he was insolvent, and the deposits created no preference. What was done here, as we have said, consisted in procuring a broker to take up the trades of Prince, so that the certificates became clear of the rights of any third persons, and to do this without any diminution of the bankrupt estate. We think such a case as this is distinguishable from the case of Western Tie & Timber Co. v. Brown, supra, and does not come within the obvious reason and purposes of the prohibitions against acquiring set-offs, contained in § 68b.

As to the $575.79, we think the right to set off this deposit is established by the principles laid down in New York County Nat. Bank v. Massey, supra. Here there was a deposit subject to be checked out by

the bankrupt for specific purposes. The 447]money was not placed *in the bank with a view to giving it a benefit, except indirectly, because of the deposit. It was subject to Prince's check, and all of it might have been checked out for the purposes intended.

The decrees of the Circuit Court of Appeals and of the District Court are reversed, and the case remanded to the District Court for further proceedings in conformity with this opinion.

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PAUL CHARLTON, as Next Friend of Porter Charlton, Appt.,
v.
JAMES J. KELLY, Sheriff of Hudson County, New Jersey, et al.

(See S. C. Reporter's ed. 447–476.)

**Habeas corpus — as substitute for writ of error.**

1. Relief by habeas corpus will not be granted to inquire into a detention under an extradition warrant if the magistrate issuing such warrant had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of the crime with which he was charged in the complaint, which, according to the local law, would justify his apprehension and commitment for trial if the crime had been committed within the state.

[For other cases, see Habeas Corpus, I. b, 3; II. a, in Digest Sup. Ct. 1908.]

**Habeas corpus — scope of review — evidence.**

2. Mere errors in the rejection of evidence in extradition proceedings are not subject to review by a writ of habeas corpus.

[For other cases, see Habeas Corpus, II. c, in Digest Sup. Ct. 1908.]

**Extradition — evidence — insanity of accused.**

3. The right to introduce evidence of the insanity of the accused in proceedings for the extradition, conformably with the treaty with Italy of 1868 (15 Stat. at L. 629), of a fugitive from justice, was not given by the act of 1882 (22 Stat. at L. 215, chap. 378, U. S. Comp. Stat. 1901, p. 3594), § 3, providing the means, in foreign extradition proceedings, for obtaining the testimony and for the payment of the fees of witnesses whose evidence is material to the defense, and without which the accused cannot safely go to trial, since Congress cannot be deemed to have intended by this statute to depart from the provision of the first article of the treaty which requires that a surrender shall be made upon such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his arrest and commitment if the crime had been there committed.

[For other cases, see Extradition, IV., in Digest Sup. Ct. 1908.]

**Foreign extradition — procedure — formal demand.**

4. The requirement in the supplemental extradition treaty of 1884 with Italy, following provisions for arrest upon the exhibition of a certificate from the Secretary of State, attesting that a requisition has been made, and for the remand of the accused to prison until a formal demand for extradition shall be made and supported by evidence, that if "the requisition, together with the documents above provided for," shall not be made within forty days from the date of arrest, the accused shall be set at liberty, cannot be deemed to mean that "formal demand" must be proved in the preliminary proceedings within forty days after arrest, in view of the provisions of U. S. Rev. Stat. § 5270, U. S. Comp. Stat. 1901, p. 3591, applicable to all foreign extradition proceedings, authorizing the committing magistrate, upon complaint charging one of the crimes named in an extradition treaty, to issue his warrant of arrest, to hear the evidence of criminality, to commit the accused to jail, and to certify his conclusions to the Secretary of State, who, under §§ 5272, 5273, may issue his warrant for the surrender of the accused upon requisition of the proper authorities.

[For other cases, see Extradition, IV., in Digest Sup. Ct. 1908.]

**Foreign extradition — citizens of country of asylum — persons.**

5. There is no principle of international law by which citizens of the country of the asylum are excepted out of an extradition convention for the surrender of "persons," where no such exception was made in the treaty itself.

[For other cases, see Extradition, III., in Digest Sup. Ct. 1908.]

**Foreign extradition — citizens of country of asylum — persons.**

6. Citizens of the country of asylum are "persons" within the meaning of the extradition treaty of 1868 with Italy, by which the two governments mutually agree to deliver up all persons who, having been convicted of or charged with any of the crimes specified, committed within the juris-

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NOTE.—On habeas corpus in extradition cases—see note to Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; *Glass v. The Betsey*, 1 L. ed. U. S. 489; *United States v. Hamilton*, 1 L. ed. U. S. 490; Ex parte Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

As to extradition of persons accused of crime on demand of foreign government—see note to Kentucky v. Dennison, 16 L. ed. U. S. 717.

diction of one of the contracting parties, shall seek an asylum in the other.

[For other cases, see Extradition, III., in Digest Sup. Ct. 1908.]

**Courts — political question — breach of extradition treaty — waiver.**

7. Executive recognition of the obligation of the United States to surrender its own citizens under the extradition treaty with Italy of 1868, and the supplemental treaty of 1884, notwithstanding the refusal of the Italian government to surrender fugitives of Italian nationality committing crimes in the United States, is a waiver of the breach, if any, and leaves the treaty in force as the supreme law of the land, which must be recognized by the courts.

[For other cases, see Courts, I. e, 2, b, in Digest Sup. Ct. 1908.]

[No. 232.]

Argued April 18, 1913. Decided June 10, 1913.

APPEAL from the Circuit Court of the United States for the District of New Jersey, to review a judgment dismissing a petition for relief by habeas corpus, sought by a person detained under an extradition warrant. Affirmed.

See same case below, 185 Fed. 880.

Statement by Mr. Justice Lurton:

This is an appeal from a judgment dismissing a petition for a writ of habeas corpus, and remanding the petitioner to custody under a warrant for his extradition as a fugitive from the justice of the Kingdom of Italy.

The proceedings for the extradition of the appellant were begun upon a complaint duly made by the Italian vice-consul, charging him with the commission of a murder in Italy. A warrant was duly issued by the Hon. John A. Blair, one of the judges of 449]New Jersey, *qualified to sit as a committing magistrate in such a proceeding, under § 5270, Revised Statutes (U. S. Comp. Stat. 1901, p. 3591). At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice, and that he was the person whose return to Italy was desired, and that there was probable cause for holding him for trial upon the charge of murder, committed there. He thereupon committed the appellant, to be held until surrendered under a warrant to be issued by the Secretary of State. A transcript of the evidence and of the findings was duly certified as required by § 5270, Revised Statutes, and a warrant in due form for his surrender was issued by the Secretary of State. Its execution has, up to this time been prevented by the habeas corpus proceedings in the court below and the pendency of this appeal.

The procedure in an extradition proceeding is that found in the treaty under which the extradition is demanded, and the legislation by Congress in aid thereof. Thus, article 1 of the treaty with Italy of 1868 [15 Stat. at L. 629] (vol. 1, Treaties, Conventions, etc., of the United States, 1910, p. 966), reads as follows:

"The government of the United States and the government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other; Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed."

One of the crimes specified in the section following is murder.

By article 5 it is provided that:

"When, however, the fugitive shall have been merely *charged with crime, a[450 duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States, or the proper executive authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases."

That article was amended by the additional treaty of 1884 (vol. 1, Treaties and Conventions, p. 985) by a clause added in these words:

"Any competent judicial magistrate of either of the two countries shall be authorized, after the exhibition of a certificate signed by the Minister of Foreign Affairs [of Italy] or the Secretary of State [of the United States], attesting that a requisition has been made by the government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime for which, pursuant to this convention, extradition may be granted, and on complaint duly made under oath by a

person cognizant of the fact, or by a diplomatic or consular officer of the demanding government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated, to the end that he or she may be brought before the said magistrate, so that the evidence of his or her criminality may be heard and considered; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence, as above provided; if, however, the requisition, together with the documents 451] *above provided for, shall not be made, as required, by the diplomatic representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty." [24 Stat. at L. 1002.]

Mr. R. Floyd Clarke argued the cause, and, with Mr. William D. Edwards, filed a brief for appellant:

The rules of international law, except as modified by statutes or treaty, are a part of the municipal law of the land.

Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Murray v. The Charming Betsy, 2 Cranch, 64, 2 L. ed. 208; The Nereide, 9 Cranch, 388, 3 L. ed. 769; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; The Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

"Due process of law," in our constitutional limitation, means the same thing as "law of the land."

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

This means a law operating on all alike, and which does not subject the individual to an arbitrary exercise of the powers of government (Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721), except where the law-making power, in view of the conditions, by express terms in the statute, has granted the discretion to an executive officer.

Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

Arbitrary discretion violates the "due process of law" clause.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

*To justify extradition*, there must be a *treaty or law imposing* an obligation under it to extradite, or containing express words conferring on the Executive the power to act.

Ex parte McCabe, 12 L.R.A. 589, 46 Fed. 363.

It is both the province and the duty of the court to construe the treaty, if necessary, in defiance of the diplomatic construction, where the facts are admitted.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201.

A treaty may be broken—

(a) By inconsistent legislative action.

Chinese Exclusion Case, 130 U. S. 581, 599, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623; Fong Yue Ting v. United States, 149 U. S. 730, 37 L. ed. 910, 13 Sup. Ct. Rep. 1016; 5 Moore, International Law Dig. p. 366, § 776.

We who have exercised the right at least five times (See French act of 1798, 5 Moore, International Law Dig. pp. 356, 357; Chinese Exclusion Case, 130 U. S. 581, 599, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623; Fong Yue Ting v. United States, 149 U. S. 698, 763, 37 L. ed. 905, 930, 13 Sup. Ct. Rep. 1016; Head Money Cases [Edye v. Robertson] 112 U. S. 580, 600, 28 L. ed. 798, 804, 5 Sup. Ct. Rep. 247; The Exchange v. M'Faddon, 7 Cranch, 116, 136, 3 L. ed. 287, 293) and who claimed that our act of 1798 repudiating our obligations under the French treaty operated both municipally and internationally, are not now in a position to deny a similar power in the Italian sovereignty (5 Moore, International Law Dig. 357).

(b) By inconsistent executive action.

For we have consistently maintained that a sovereignty is bound in its international relations by the action of its executive, independent of its legislative powers.

Prize Cases, 2 Black, 635, 17 L. ed. 459; Dana's Wheaton, International Law, § 543, note, 250; 1 Kent, Com. 165; Heffter, § 84; Vattel, Nations, 54, 55, chap. 2, § 14; Wharton, International Law Dig. § 131; 3 Moore International Law Dig. § 759, p. 231; Halleck, International Law, 854. See also 6 Moore, International Law Dig. pp. 1017–1021.

Although the Judicial Department has no treaty-making power or legislative power, it is still the peculiar province of that department to construe treaties and statutes.

Wilson v. Wall, 6 Wall. 83, 89, 18 L. ed. 727, 729.

The question is judicial, not diplomatic. United States v. Rauscher, supra.

An admitted breach of a treaty is just

as binding on the court, as a fact from which the legal conclusion of the court must flow, as an award of arbitrators determining that a breach has occurred.

Re Cooper, 143 U. S. 472, 499, 36 L. ed. 232, 240, 12 Sup. Ct. Rep. 453; The La Ninfa, 21 C. C. A. 434, 44 U. S. App. 648, 75 Fed. 513.

Evidence for the defense is competent.

1 Moore, Extradition, § 346, p. 526; Wharton, Crim. Pl. & Pr. § 70; Bishop, Crim. Proc. § 233.

Before the act of 1882 the cases had been conflicting.

Ex parte Ross, 2 Bond, 252, Fed. Cas. No. 12,069, had held that introduction of evidence in defense, negativing the charge of criminality, was permissible.

A similar ruling had been made in—

Re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

A contrary decision had been made in—

Re Dugan, 2 Low. Dec. 367, Fed. Cas. No. 4,120.

This statute is a clear legislative expression of the intent that a defense to an extradition is proper, and that a trial of the issues raised by the extradition is intended.

Re Oteiza y Cortes, 136 U. S. 330, 334, 34 L. ed. 464, 467, 10 Sup. Ct. Rep. 1031, 8 Am. Crim. Rep. 241; Re Wadge, 15 Fed. 866; Re Kelley, 25 Fed. 268.

The precedents in the proceedings in the State Department are to the effect that the defense of insanity is a bar to the application for extradition.

Case of R. 4 Moore, International Law Dig. p. 221; Catlow Case, cited in 1 Moore, Extradition, § 346, p. 528.

Insanity at the time of the hearing is always a matter for the court to take into account.

22 Cyc. 1215; 12 Cyc. 509, 510; State v. Peacock, 50 N. J. L. 36, 11 Atl. 270.

The issue of sanity in criminal cases is one on which the prosecution always has the burden of proof.

Davis v. United States, 160 U. S. 469, 487, 40 L. ed. 499, 505, 16 Sup. Ct. Rep. 353; Brotherton v. People, 75 N. Y. 159, 3 Am. Crim. Rep. 218.

In Tucker v. Alexandroff, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195, § 5280 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 3598, required proof of the ship's roll, or a similar document, to be presented before the commissioner in connection with the prosecution thereunder. Both the prevailing and dissenting opinions treat this requirement as absolutely a condition precedent to the validity of the prosecution.

Again, under the provisions of the Revised Statutes as to interstate extradition, requiring a governor of a state to honor a requisition when accompanied by an affidavit, this court held that the governor of a state has no authority, under the United States statutes, to honor requisitions, unless accompanied by an affidavit mentioned in the act.

Compton v. Alabama, 214 U. S. 1, 6, 53 L. ed. 885, 886, 29 Sup. Ct. Rep. 605, 16 Ann. Cas. 1098.

On habeas corpus and writ of certiorari to review the decision of the magistrate in extradition proceedings, the hearing must be on the record below.

Sternaman v. Peck, 26 C. C. A. 214, 51 U. S. App. 312, 80 Fed. 883; Selz v. Presburger, 49 N. J. L. 396, 8 Atl. 118; 4 Enc. Pl. & Pr. pp. 277, 280–284, 1058; Re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563; Ex parte Lane, 6 Fed. 34; Knowlton's Case, 5 Crim. L. Mag. 257; 9 Am. & Eng. Enc. Law, 199, 256; Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

It is settled law in this court that when in matters of this character the treaty or statute requires some act to be done, based on the presence or absence of certain formal documents, the existence of such formal documents is jurisdictional; without them the case falls.

See Tucker v. Alexandroff, supra; Compton v. Alabama, supra.

Questions of this character are law questions for this court, and not political questions to be foreclosed from inquiry by this court, under the guise of diplomatic construction.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222.

The writ of habeas corpus is a proper remedy for reviewing proceedings for the deportation of an alien, but only for the purpose of ascertaining whether or not jurisdiction has been exceeded.

21 Cyc. 292; United States v. Jung Ah Lung, 124 U. S. 621, 31 L. ed. 591, 8 Sup. Ct. Rep. 663.

The writ of habeas corpus is a proper means for reviewing proceedings for the extradition of a fugitive from justice; but if the officer has jurisdiction of person and subject-matter, and there is competent legal evidence on which to exercise his judgment, his action is conclusive, and the accused is not entitled to be discharged.

21 Cyc. 292.

No rule of international law fastens on any government the obligation to extradite a fugitive from justice from a foreign government seeking refuge on our shores, whether such fugitive be a citizen of the

demanding government or of the United States.

4 Moore, International Law. Dig. § 580.

In the absence of a statute or treaty to that effect, there is no legal power in the Executive Department to extradite criminals seeking refuge here, whether citizens of a foreign government or of the United States.

4 Moore, International Law Dig. §§ 581, 582, pp. 248, 249; 1 Ops. Atty. Gen. 509, 521; 3 Ops. Atty. Gen. 661; 2 Ops. Atty. Gen. 267; 6 Ops. Atty. Gen. 148; 1 Moore, Extradition, §§ 21, 35, 167; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Terlinden v. Ames, 184 U. S. 270, 289, 46 L. ed. 534, 545, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; Tucker v. Alexandroff, 183 U. S. 424, 431, 46 L. ed. 264, 268, 22 Sup. Ct. Rep. 195.

The constitutional guarantys do not apply to aliens, and the government has the power, under international law—

(a) To exclude aliens from the country.

Chinese Exclusion Case, 130 U. S. 581, 609, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623.

(b) To deport them even after entering and becoming residents here.

Fong Yue Ting v. United States, 149 U. S. 730, 37 L. ed. 919, 13 Sup. Ct. Rep. 1016.

A true distinction exists, under the extradition act, as between the rights of a citizen of the United States and of an alien.

Chae Chen Ping v. United States, 130 U. S. 581, 611, 32 L. ed. 1068, 1077, 9 Sup. Ct. Rep. 623; Fong Yue Ting v. United States, supra.

An extradition treaty is in the nature of a deportation act, and is within the constitutional powers of the nation under the treaty-making power; but neither the Executive nor the courts, under the Constitution, are entitled to go beyond the enactment so made.

Ex parte McCabe, 12 L.R.A. 589, 46 Fed. 363.

On the breach of a treaty by a foreign government, the Executive has the power to suspend the operation of the treaty, or to refuse to be bound by it, or even to denounce it, and is not bound to wait until Congress has acted in the premises.

1 Willoughby, Const. p. 518, § 223; Kennett v. Chambers, 14 How. 38, 14 L. ed. 316; United States v. Trumbull, 48 Fed. 104; The Itata, 5 C. C. A. 608, 15 U. S. App. 1, 56 Fed. 510; Foster v. Neilson, 2 Pet. 253, 307, 7 L. ed. 415, 433; United States v. Arredondo, 6 Pet. 691, 711, 8 L. ed. 547, 554; Prize Cases, 2 Black, 635, 17 L. ed. 459; Pom. Const. Law, pp. 669, 670, 672; Wharton, International Law Dig. 2d ed. p. 551; Durand v. Hollins, 4 Blatchf. 451, Fed. Cas. No. 4,186; 22 Ops. Atty. Gen. 13. See also Cuba–Cables (1899) 22 Ops. Atty. Gen. 408, 514; Cross v. Harrison, 16 How. 164, 14 L. ed. 889; Garcia v. Lee, 12 Pet. 511, 9 L. ed. 1176; Williams v. Suffolk Ins. Co. 13 Pet. 415, 10 L. ed. 226; Gelston v. Hoyt, 3 Wheat. 246, 324, 4 L. ed. 381, 401.

Mr. Pierre P. Garven argued the cause and filed a brief for appellees:

In order to ascertain the real intention of the contracting parties the entire treaty should be examined.

United States v. Texas, 162 U. S. 1, 37, 40 L. ed. 867, 879, 16 Sup. Ct. Rep. 725.

The Italian government passed an act prohibiting the extradition of its citizens, and as a result, it is claimed, whatever obligations rested upon this government have become dissolved. The validity of this so-called legislative release is not a matter for the judiciary, and the question whether this government is justified in recognizing its obligations under the treaty is not for the court to determine.

Chae Chan Ping v. United States, 130 U. S. 581, 602, 32 L. ed. 1068, 1074, 9 Sup. Ct. Rep. 623; Terlinden v. Ames, 184 U. S. 270, 287, 46 L. ed. 534, 544, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

The offer of evidence to prove insanity was properly excluded.

Pettit v. Walshe, 194 U. S. 205, 48 L. ed. 938, 24 Sup. Ct. Rep. 657; Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; 2 Bl. Com. Cooley's ed. p. 459.

All requirements of the treaty relating to the formal demand were strictly complied with.

Castro v. De Uriarte, 16 Fed. 93; Grin v. Shine, 187 U. S. 180, 189, 47 L. ed. 130, 135, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:

A writ of habeas corpus cannot be used as a writ of error. If Judge Blair had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of this crime with which the appellant was charged in the complaint, which, according to the law of New Jersey, would justify his apprehension and commitment for trial if the crime had been committed in that state, his decision may not be reviewed on habeas corpus. Terlinden v. Ames, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am.

Crim. Rep. 424; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; McNamara v. Henkel, 226 U. S. 520, ante, 330, 33 Sup. Ct. Rep. 146.

By a stipulation filed in the case for the purpose of this review, it is agreed that the evidence presented to Judge Blair of the murder with which the accused was charged, and of his criminality, was sufficient to meet the treaty and statutory requirements of the case, and the errors assigned in this court, questioning its legality and competency, as well as those as to the alleged absence of a warrant or deposition upon which such warrant was issued, have been withdrawn. But neither this stipulation, nor the withdrawal of the assignments of error referred to, is to affect any of the matters raised by other objections pointed out in other assignments.

The objections which are relied upon for 457]the purpose of *defeating extradition may be conveniently summarized and considered under four heads:

1. That evidence of the insanity of the accused was offered and excluded.

2. That the evidence of a formal demand for the extradition of the accused was not filed until more than forty days after the arrest.

3. That appellant is a citizen of the United States, and that the treaty, in providing for the extradition of "persons" accused of crime, does not include persons who are citizens or subjects of the nation upon whom the demand is made.

4. That if the word "person," as used in the treaty, includes citizens of the asylum country, the treaty, in so far as it covers that subject, has been abrogated by the conduct of Italy in refusing to deliver up its own citizens upon the demand of the United States, and by the enactment of a municipal law, since the treaty, forbidding the extradition of citizens.

We will consider these objections in their order:

1. Was evidence of insanity improperly excluded?

It must be conceded that impressive evidence of the insanity of the accused was offered by him and excluded. It is now said that this ruling was erroneous. But if so, this is not a writ of error, and mere errors in the rejection of evidence are not subject to review by a writ of habeas corpus. Benson v. McMahon, 127 U. S. 457, 461, 32 L. ed. 234, 236, 8 Sup. Ct. Rep. 1240; Terlinden v. Ames, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; McNamara v. Henkel, 226 U. S. 520, ante, 330, 33 Sup. Ct. Rep. 146. In the McNamara Case, certain depositions had been received for the prosecution over objection. This court said that there was legal evidence on which to base the action of the commissioner in holding the accused for extradition, irrespective of the depositions objected to.

But it is said that the act of 1882 (22 Stat. at L. 215, § 3, *chap. 378, U.[458 S. Comp. Stat. 1901, p. 3594), requires that the defendant's witnesses shall be heard. That section is most inartificially drawn. It reads as follows:

"That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged, setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpœnaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpœnaed in behalf of the United States."

The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty. To this we cannot agree. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses, and to provide for their fees. In no sense does the statute make relevant, legal, or competent evidence which would not have been competent before the statute upon such a hearing. True, the statute speaks of evidence "material for his defense, without which he cannot go safely to trial," but we cannot discover that Congress intended to depart from the provisions of the 1st article of the treaty, which requires that a surrender shall be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed." The provision is common to many treaties, and Congress, by § 5270, Revised Statutes, has, in aid *of[459 such treaties, prescribed the procedure upon such a hearing in these words:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, com-

missioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Judge Blair made the certificate in form and substance in conformity with the statute, and upon the receipt of that, a warrant was duly issued for the surrender of the appellant to the agents of the Italian government.

In Benson v. McMahon, supra, this court said of a similar provision in the treaty with Mexico [12 Stat. at L. 1199], in connection with § 5270, Revised Statutes,—

"Taking this provision of the treaty and that of the Revised Statutes above recited, 460]we are of opinion that *the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that 'the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.' This prescribes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

"We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him, or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress, and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government."

To repeat, the act of 1882 does not prescribe the extent *to which evidence[461 thus obtained shall be admitted, and we quite agree with the view expressed by Judge Brown, in Re Wadge, 15 Fed. 864, who said:

"The phrase in § 3 of the act of August 3, 1882, 'that he' (the accused) 'cannot safely go to trial without them' (witnesses), cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice; *viz.*, such as is appropriate to a hearing having reference only to a commitment for future trial."

There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the state makes a prima facie case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed.

In this case the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradi-

tion is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error, not reversible by habeas corpus. To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the government. This distinction was taken by Mr. Justice Washington in the case of United States v. White, 2 Wash. C. C. 29, Fed. Cas. No. 16,685, when he said:

462] *"Generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the judge may examine witnesses who were present at the time when the offense is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution is certainly improper."

We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense, and the burden of making it out is upon the defendant. Graves v. State, 45 N. J. L. 203, 4 Am. Crim. Rep. 386; State v. Maioni, 78 N. J. L. 339, 341, 74 Atl. 526, 20 Ann. Cas. 204; State v. Peacock, 50 N. J. L. 34, 36, 11 Atl. 270. A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded. 1 Chitty, Crim. Law, 318; United States v. White, supra; Respublica v. Shaffer, 1 Dall. 236, 1 L. ed. 116; United States v. Palmer, 2 Cranch, C. C. 11, Fed. Cas. No. 15,989; United States v. Terry, 39 Fed. 355, 362.

2. It was next objected that no formal demand for the extradition of the appellant was made within forty days after his arrest, and that he was therefore entitled to 463]be *set at liberty. The objection is founded upon the supplemental convention with Italy of 1884, heretofore set out.

A "certificate," such as was indicated by that convention, was undoubtedly "exhibited" to the committing magistrate, and was the basis of his action. The other parts of the provision are not clear. What is referred to by the phrase, "the requisition, together with the documents above provided," etc., which is required to be made within forty days, or the person set at liberty? The "certificate" attesting "that a requisition has been made," etc., was "exhibited" to Judge Blair; and we fail to find in this clause of the treaty any requirement that the subsequent "formal demand" for the extradition shall be filed with the magistrate within forty days after the arrest of the accused, or at any other time. The whole of the convention should be read together and in connection with § 5270, Revised Statutes, which is applicable to all treaties. Under § 5270, any one of the judicial officers named therein may, upon complaint, charging one of the crimes named in the treaty, issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail, and to certify his conclusion, with the evidence, to the Secretary of State, who may then, "upon the requisition of the proper authorities of such foreign government, issue his warrant for the surrender of the accused. Revised Statutes, §§ 5272, 5273. Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements above referred to, is to supersede the statute in so far as there is a necessary conflict in the carrying out of the extradition obligation between this country and Italy. But, as observed in Grin v. Shine, 187 U. S. 181, 191. 47 L. ed. 130, 136, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366, "Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare *that foreign criminals shall be[464 surrendered upon such proofs of criminality as it may judge sufficient. Castro v. De-Uriarte, 16 Fed. 93. This appears to have been the object of § 5270, which is applicable to all foreign governments with which we have treaties of extradition." This section, by its very terms, applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." Had there been no law of Congress upon the subject, the method of procedure prescribed by the supplementary treaty of 1884 would necessarily have been the proper one, and the committing magis-

trate could have proceeded only according to the treaty, for that would have been the only law of the land applicable to the case and the only source of his authority.

It was therefore competent for Judge Blair to act upon the complaint made before him independently of any preliminary mandate or certificate, such as was in fact issued and "exhibited" to him in this case, being plainly authorized so to do by the terms of § 5270. The personal rights of the accused are saved by the provisions of the same section, since he could only have been surrendered upon the warrant of the Secretary of State, based upon the evidence presented upon the hearing, and the conclusion of the sufficiency of the evidence of criminality certified to the Secretary of State, and upon a formal requisition for extradition. Castro v. DeUriarte, 16 Fed. 93, 97; Grin v. Shine, supra.

Construed in the light of the original and supplementary conventions with Italy, and of § 5270, Revised Statutes, we do not find that it was obligatory that the "formal demand" referred to in the 1884 clause should be proven in the preliminary proceeding within forty days after the arrest. That is a demand made upon the executive authority of the United States by the executive authority of Italy. Its presentation was not necessary to give the examining magistrate jurisdiction. Such a 465]formal demand *was in fact made on July 28, 1910, less than forty days after the arrest. That, together with the certificate of the magistrate and the evidence submitted to him, was the authority of law under which the Secretary of State issued his warrant of extradition. Every requirement of the law, whether it appears in the treaty or in the act of Congress, was substantially complied with. This was the construction placed upon the treaty by Mr. Secretary Knox in answer to the same objection made to him before he issued his warrant, and also of Judge Rellstab, who dismissed the petition for a writ of habeas corpus, and from whose decree this appeal comes.

3. By article 1 of the extradition treaty with Italy, the two governments mutually agree to deliver up all persons who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other, etc. It is claimed by counsel for the appellant that the word "persons," as used in this article, does not include persons who are citizens of the asylum country.

That the word "persons" etymologically *includes citizens* as well as those who are not can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. This was the position taken by the Foreign Minister of Italy in a correspondence in 1890 with the Secretary of State of the United States, concerning a demand made by the United States for the extradition of Bevivini and Villella, two subjects of Italy whose extradition was sought, that they might be tried for a crime committed in this country. Their extradition was refused *by Italy[466 on account of their Italian nationality. The Foreign Minister of Italy advanced in favor of the Italian position these grounds: (a) That the Italian Penal Code of 1890, in express terms provided that, "the extradition of a citizen is not permitted;" (b) that a crime committed by an Italian subject in a foreign country was punishable in Italy, and, therefore, there was no ground for saying that unless extradited the crime would go unpunished; and (c) that it has become a recognized principle of public international law that one nation will not deliver its own citizens or subjects upon the demand of another, to be tried for a crime committed in the territory of the latter, unless it has entered into a convention expressly so contracting; and that the United States had itself recognized the principle in many treaties by inserting a clause exempting citizens from extradition. (United States Foreign Relations 1890, p. 555.) Mr. Blaine, then Secretary of State of the United States, protested against the position of the Italian government, and maintained the view that citizens were included among the persons subject to extradition unless expressly excluded. His defense of the position is full and remarkably able. It is to be found in United States Foreign Relations for 1890, pp. 557, 566.

We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citizens, for that has no bearing upon the question now under consideration, which is whether, under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of

Italy, and by the thorough consideration of 467]the whole subject by Mr. John *Basset Moore, in his treatise on extradition, chap. V., pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the 18th century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may therefore be divided into two classes: those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of "persons," without limitation or qualification, are the following:

With Great Britain, November 10, 1842, [8 Stat. at L. 572], extended July 12, 1889 [26 Stat. at L. 1508], United States Treaties 1910, pp. 650 and 740.

With France, April 13, 1844, id. p. 526 [8 Stat. at L. 580].

With Italy, March 23, 1868, id. p. 966 [15 Stat. at L. 629].

With Venezuela, August 27, 1860, id. p. 1845 [12 Stat. at L. 1143].

With Ecuador, 1872, id. p. 436 [18 Stat. at L. 756].

With Dominican Republic, 1867, id. p. 413 [15 Stat. at L. 473].

The treaty with Japan of 1886, id. p. 1025, contains a qualification in these words:

"Art. 7. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up, if, in their discretion, it be deemed proper to do so." [24 Stat. at L. 1017].

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such 468]an exception in some of *its conventions and not in others demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude, will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the government in this very instance. A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on Extradition, vol. 1, p. 170, § 138, where he says:

"'Persons' includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term 'persons,' or 'all persons.' Hence, where no express exception is made, the treaties warrant no distinctions as to nationality. Writing on the general subject of the extradition treaties of the United States and the practice thereunder, Mr. Seward said: 'In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered. Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad.' Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term 'all persons' is used."

The effect of yielding to the interpretation urged by Italy would have brought about most serious consequences as to other treaties then in force. One of these was the extradition treaty with Great Britain, made as far back as 1843. *Inas-[469 much as under the law of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted.

4. We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900, which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens.

During a preliminary correspondence between the Department of State and the Italian *Chargé d'Affaires*, in reference to the provisional arrest and detention of the appellant under articles 1 and 2 of the treaty, as extended by article 2 of the additional convention of 1884, Mr. Knox, the then Secretary of State, inquired "whether

or not the Department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your government wishes to be understood as surrendering its view heretofore entertained, and as being now willing to adopt as to cases which may hereafter arise between the two governments, the view that the extradition treaties of 1868, 1869 [16 Stat. at L. 767], and 1884, between the United States and Italy, require the surrender by each government, of any and all persons, irrespective of the nationality, who, having been convicted for or charged with, commission of any of the crimes specified in the treaty, within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other; and further and specifically to inquire whether the government of Italy now proposes as to all cases arising in the future, to deliver to the government of the United States, under and in 470]accordance with *the treaty provisions, those Italian subjects who, committing crimes in the United States, take refuge in Italy."

The reply to this was as follows:

"July 1, 1910.

"Mr. Secretary of State: By telegram of June 24, last, your Excellency inquired whether, in instituting extradition proceedings in the case of Porter Charlton, who confessed having committed murder at Moltrasio, the King's government intended to depart from the rule, heretofore observed, not to surrender its own subjects, and whether it was to be inferred that Italians guilty of an offense committed on American territory, who should take refuge in Italy, should hereafter be delivered without fail to the American government.

"I now have the honor to inform your Excellency that the King's government cannot depart from the principle established by our law, that our nationals cannot be surrendered to foreign powers. Furthermore, this principle does not conflict with the provisions of the extradition convention. Indeed, it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the convention itself, be guided by the spirit of its own legislation.

"The Italian law does not consent to the extradition of nationals, but the Italian courts are competent to try, on the request of a foreign government, their nationals who may have committed offenses on that government's territory.

"*Contrariwise*, the laws of the United States, by not permitting local tribunals to try American citizens for offenses committed abroad, seem to admit of their being extradited. Otherwise an offender would, under the egis of the law itself, escape the punishment he deserves.

"I have the honor to inform your Excellency that the requisite extradition papers in the case of Porter Charlton *will[471 be forwarded to me without delay, and in the meanwhile I beg you kindly to cause the prisoner to be held in provisional detention."

On July 28, 1910, the following communication was addressed to the Secretary of State, and was received on July 30, 1910:

"Mr. Secretary of State: Referring to previous communications, and in accordance with the provisions of article 5 of the extradition convention of March 23, 1868, I have the honor to lay before your Excellency a formal request for the extradition of Porter Charlton, who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in article 2, § 1, of the said convention.

"Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last, the preliminary certificate of arrest provided by article 2 of the additional convention of June 11, 1884, with a view to the provisional arrest of the abovenamed accused.

"In support of this request, I have the honor to transmit herewith to your Excellency the record of proceedings conducted by the court of Como in the case of the aforesaid murder. The papers are regularly visèd by the Embassy of the United States at Rome.

"Awaiting the Federal 'warrant' and the kind return of the inclosed papers for submission to the competent court, I avail myself of this opportunity to renew to your Excellency, together with my thanks in advance, the assurance of my highest consideration."

To this the Secretary of State, after the conclusion of the hearing before Judge Blair, and the receipt by the Department of his judgment and the evidence produced before him, replied as follows:

Washington, December 10, 1901.

"Excellency: In compliance with the request made by your Embassy in its note of July 28 last, and in pursuance *of exist-[472 ing treaty stipulations between the United States and Italy, I have the honor to inclose a warrant of surrender in the case of Porter Charlton, charged with murder, committed within the jurisdiction of the Kingdom of Italy, and examined and com-

mitted for surrender by the Honorable John A. Blair, judge of the court of common pleas in and for the county of Hudson, in the state of New Jersey.

"Accept, Excellency, the renewed assurance of my highest consideration."

The attitude of the Italian government, indicated by proffering this request for extradition "in accordance with article 5 of the treaty of 1868," is, as shown by the communication of July 1st, set out above, substantially this,—

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must therefore go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second. Such was not the case with Italy, since, under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third. That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other presented a situation in which the United States might do either of two things; namely, abandon its own interpretation of the word "persons" as including citizens, or adhere to its own interpretation and surrender the appellant, although 473]the obligation had, *as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including *all persons*, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which, in its judgment, had occurred, and conform to its own obligation as if there had been no such breach. 1 Kent, Com. p. 175.

Upon this subject Vattel, Nations, *452, says:

"When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements cannot be binding on him with respect to the party who, on his side, pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory."

Grotius says (bk. 3, chap. 20, ¶ 38):

"It is honourable and laudable to maintain a peace, even after it has been violated by the other party: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it."

*In 5 Moore's International Law[474 Digest, page 366, it is said:

"A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

In the case of Re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13,887, Mr. Justice Blatchford (then district judge) said:

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."

In the case of Terlinden v. Ames, 184 U. S. 270, 285, 46 L. ed. 534, 544, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said:

"And without considering whether extinguished treaties can be renewed by tacit

consent under our Constitution, we think that on the question, whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the reasons 475] *of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty, or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect, and has answered the obligations imposed thereby, and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would therefore appear to reduce itself to one of interpretation of the meaning of the treaty, the government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it cannot surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased, that the word 'persons' includes citizens. We are therefore committed to that 476] interpretation. The fact that *we have for reasons already given ceased generally to make requisition upon the government of Italy for the surrender of Italian subjects under the treaty would not require *of necessity* that we should, as a matter of logic or law, regard ourselves as free from, the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy, even though Italy should not, by reason of the provisions of her municipal law, be able to surrender its citizens to us."

The Executive Department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land, and as affording authority for the warrant of extradition.

Judgment affirmed.

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## CITY OF PADUCAH, Kentucky, Appt.,
## v.
## EAST TENNESSEE TELEPHONE COMPANY.

(See S. C. Reporter's ed. 476-480.)

**Appeal — final decree.**

A decree enjoining a municipality from interfering with the operation of a telephone franchise until such municipality shall put in force an ordinance carrying out a compromise agreement between it and the telephone company, the decree reciting that, it being the intent to give the city the option of permitting the present status to remain, or else to enact the agreed-upon ordinance, the court reserves the right and power to make any orders needful to enforce the injunction, or to meet any emergency that may arise out of an attempt to exercise the option,—is not final for the purpose of appeal.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

[No. 246.]

Argued April 22, 1913. Decided June 10, 1913.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree enjoining a municipality from interfering with the operation of a telephone franchise until such municipality shall put in force an or-

NOTE.—As to final judgments for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302; Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

dinance carrying out a compromise agreement between it and the telephone company. Dismissed for lack of final judgment.

The facts are stated in the opinion.

**Mr. James Campbell, Jr.,** argued the cause and filed a brief for appellant:

The chief test of the finality of the judgment is that such judgment must have been rendered after a trial of the case upon its merits, and the rights of the respective litigants adjudicated according to the merits of the case, so that no further adjudication of such rights is necessary. We do not understand the law to be that the judgment, to be final, must completely and absolutely wind up the case so that no further orders or steps are necessary to be taken.

Providence Rubber Co. v. Goodyear, 6 Wall. 155, 18 L. ed. 764; Forgay v. Conrad, 6 How. 203, 12 L. ed. 405; Beebe v. Russell, 19 How. 283, 15 L. ed. 668; Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111; Thomson v. Dean (Dean v. Nelson) 7 Wall. 344, 19 L. ed. 94; Tuttle v. Claflin, 13 C. C. A. 281, 26 U. S. App. 678, 66 Fed. 7.

**Messrs. A. Y. Martin, H. S. Corbett, James Campbell, Jr., and W. F. Bradshaw, Jr.,** also filed a brief for appellant.

**Mr. William L. Granberry** argued the cause, and, with Mr. Hunt Chipley, filed a brief for appellee:

This appeal is not from a final decree.

Jones v. Craig (Barker v. Craig) 127 U. S. 213, 32 L. ed. 147, 8 Sup. Ct. Rep. 1175; Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 118, 22 Sup. Ct. Rep. 50; Lea v. Kelly, 15 Pet. 213, 10 L. ed. 715; Martinez v. International Bkg. Corp. 220 U. S. 223, 55 L. ed. 443, 31 Sup. Ct. Rep. 408; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Clark v. Kansas City, 172 U. S. 334, 43 L. ed. 467, 19 Sup. Ct. Rep. 207; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46.

The decree not being final, this court is without jurisdiction to entertain the appeal.

Canter v. American Ins. Co. 3 Pet. 319, 7 L. ed. 692; Beebe v. Russell, 19 How. 283–287, 15 L. ed. 668–670; United States v. Girault, 11 How. 32, 13 L. ed. 592.

**Mr. Justice Lurton** delivered the opinion of the court:

The appellee has raised a question as to the finality of the decree from which this appeal was taken, and has moved that the appeal be dismissed as premature.

The motion must be granted.

From the bill it appears that a controversy had arisen concerning the legality of a "tax" in the nature of an annual rental for the privilege of maintaining upon the streets the poles which had been placed there by "permission" of the city, many years before, and also as to the character and duration of the "permission" under which the telephone company, or its predecessors, had placed and maintained the poles and wires upon the streets for the conduct of a telephone system. It also appeared from the bill and its exhibits that, for the purpose of settling every question at issue, an agreement was made between the parties, whereby the terms of a new ordinance were settled upon, under which ordinance the telephone company was to purchase a franchise at public sale, if *it[478 should be the highest bidder, the terms of which should be according to those arranged between the city and the company, which terms were to be enacted into an ordinance by the council. The company upon its part agreed to pay to the city in full settlement of the controversy as to the pole rentals which had been imposed and of all other questions, a certain sum, and to dismiss its litigation concerning the same. The company made the payment and it was accepted by the city. An ordinance was thereupon passed, which granted to the company the right to maintain its poles and wires upon the streets for a term of twenty years, and imposed conditions as to the maximum charge for telephone service which the company claims *were radically different from those which had been agreed upon*, and which, the bill avers, were so unreasonably low as to prevent a profitable conduct of its business. For this reason it refused to accept the ordinance, and reverted to its original rights under the permission heretofore referred to, and such other rights as had resulted from its long occupation of the streets with its poles and wires with the acquiescence of the city. Thereupon, the city council passed certain ordinances and resolutions and gave certain notices which the bill claims constituted an impairment of the company's contract and property rights in the streets, in contravention of the contract and due process clauses of the Constitution of the United States. A temporary injunction was granted against any action by the city interfering with the continuance of the company's poles and wires upon the streets and the conduct of its business as it had theretofore been carried on.

The city answered, denying, in substance,

that it had entered into any such agreement as charged, and also its authority to make such an agreement. It admitted the receipt of the payment as charged and tendered its return, with interest. Upon a 479]final hearing the contention of the *telephone company was upheld. That part of the judgment appealed from is in these words:

"And the defendant, city of Paducah, having, as shown by the record, failed to carry out the agreement of compromise entered into between it and the complainant, though receiving parts of the proceeds of said compromise, the said city of Paducah, its officers, agents, employees, and all other persons, are hereby enjoined and restrained from interfering with or obstructing the complainant in operating a telephone exchange in said city, and in connection therewith erecting poles and stringing wires thereon until the defendant city shall duly enact and put into force an ordinance in the exact form and of the exact substance agreed upon between the parties, as set forth in the bill of complaint, and also until, under such ordinance, the franchise therein referred to has been fairly and in good faith offered at public sale, and has fairly and in good faith been sold in the way therein provided for; but nothing herein shall be deemed or taken to interfere with the power of the defendant, city of Paducah, in all reasonable and proper ways to regulate such setting of poles and stringing of wires in the legitimate exercise of the police power of said city as affecting said telephone exchange and its appliances, nor shall anything herein be construed as prohibiting the said city from making rates for telephone service lower than those named in said ordinance, if it shall hereafter result that said rates yield to the complainant, or any other person who may purchase the franchise at the sale made pursuant to such ordinance, more than a fair return upon the reasonable value of the property at the time it is being used. It is the intention of this judgment to give to the city of Paducah the option of permitting the present status to remain perpetually, or else to enact the agreed-upon ordinance and fairly to put it into force, and the court now reserves the right and the power to make any orders that may be need-480]ful not only *to enforce the injunction, but also to meet any emergency that may arise should the city, in the exercise of such option, enact and put into force the ordinance referred to; and the case is held open for these purposes."

*Thereupon the* city, without exercising *its option or making* any declaration of a purpose not to enact the ordinance, appealed.

No time within which the city was to elect to pass the ordinance, carrying out the contract, which the court held it had made with the telephone company, was fixed by the decree. If that had been done, the mere failure to take action within that time might well be held as a conclusive rejection of the option to carry out the agreement, and would have the effect of making final the decree maintaining the pre-contract status. Tuttle v. Claflin, 13 C. C. A. 281, 26 U. S. App. 678, 66 Fed. 7. This decree on its face is not final, and the test of finality for the purposes of review by this court by appeal is the face of the decree appealed from. If the city had elected to carry out its agreement, and had passed an ordinance in supposed accord with the decree, it must be accepted by the court as a compliance. Judge Evans foresaw that there might arise many questions out of an attempt to exercise the option, and therefore reserved power to deal with them when they should arise. An affirmance of the decree by this court would require that the cause be remanded for further proceedings to make the decree final. The right to elect will remain open, and, until exercised or renounced by the city, will leave both parties in a state of suspension as to their rights and duties until further action is had. Such a decree, being interlocutory, is not final for the purposes of appeal. Grant v. Phœnix Mut. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; Jones v. Craig (Barker v. Craig) 127 U. S. 213, 32 L. ed. 147, 8 Sup. Ct. Rep. 1175.

This appeal must be dismissed as premature, and the cause remanded for further proceedings.

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*SINGER SEWING MACHINE COM-[481
PANY OF NEW JERSEY, Appt.,
v.
JAMES F. BENEDICT, Treasurer, etc., et al.

(See S. C. Reporter's ed. 481-488.)

**Equity — objection to jurisdiction — adequate legal remedy.**

1. The objection made by demurrer and later by the answer to the bill, that a plain, adequate, and complete remedy may be had

NOTE.—As to what remedy at law will prevent remedy in equity—see note to Tyler v. Savage, 36 L. ed. U. S. 83.

As to injunction against illegal taxation—see notes to Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

at law, is, if well founded, as available to the defendants in the circuit court of appeals to prevent a decree against them there as it was in the circuit court.

[For other cases, see Equity, I. b, in Digest Sup. Ct. 1908.]

**Equity — remedy at law — enjoining illegal taxes.**

2. A foreign corporation cannot maintain a suit in equity in the Federal courts to enjoin the collection of city and county taxes in Colorado, which it claims were illegal and assessed without notice, where, under the Colorado law, the company could have recovered back from the county the money so paid if the taxes were illegal.

[For other cases, see Equity, I. c; Courts, 859–862; Injunction, I. k, in Digest Sup. Ct. 1908.]

[No. 289.]

Argued May 5, 1913. Decided June 9, 1913.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Colorado, dismissing the bill in a suit to enjoin the collection of taxes. Affirmed.

See same case below, 103 C. C. A. 186, 179 Fed. 628.

The facts are stated in the opinion.

Messrs. R. H. Gilmore and Henry A. Prince argued the cause and filed a brief for appellant:

The trial court by overruling the demurrer adjudged the bill to be sufficient on its face. That was an adjudication. The respondents submitted to that adjudication, and answered to the whole bill. If defendants answered over, after the demurrer was overruled, instead of standing on the demurrer, which they had a right to do, they thereby waived all defects in the bill, covered by the demurrer.

Great Northern R. Co. v. McLaughlin, 17 C. C. A. 333, 44 U. S. App. 189, 70 Fed. 669; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 641, 19 U. S. App. 576, 60 Fed. 316; Huntington v. Laidley, 79 Fed. 865; Mercantile Trust Co. v. Missouri, K & T. R. Co. 84 Fed. 383; Bryant Bros. Co. v. Robinson, 79 C. C. A. 259, 267, 149 Fed. 321; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; Tyler v. Savage, 143 U. S. 97, 36 L. ed. 89, 12 Sup. Ct. Rep. 340.

The complainant's remedy at law, to be adequate, must be a remedy available in a Federal court, where the jurisdiction in equity is sought.

Coler v. Stanley County, 89 Fed. 257; Smythe v. Ames, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; Jones v. 57 L. ed.

Mutual Fidelity Co. 123 Fed. 518; United States L. Ins. Co. v. Cable, 39 C. C. A. 264, 98 Fed. 761; Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579, 37 L. ed. 853, 856, 13 Sup. Ct. Rep. 936.

It is not enough that there may be a legal remedy in a state tribunal.

Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 456.

The question of equity jurisdiction, if raised by the "plea," was not passed upon by the trial court, and was therefore (a) waived, and (b) cannot be revived by the respondents in the appellate court on the complainant's appeal.

Simkins, Fed. Eq. Suit, p. 31; Warmath v. O'Daniel, 16 L.R.A.(N.S.) 414, 86 C. C. A. 277, 159 Fed. 87; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 641, 19 U. S. App. 576, 60 Fed. 316; Less v. English, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 471; International Trust Co. v. Norwich Union F. Ins. Soc. 17 C. C. A. 608, 36 U. S. App. 277, 71 Fed. 81; Huntington v. Laidley, 79 Fed. 865; Bryant Bros. Co. v. Robinson, 79 C. C. A. 267, 149 Fed. 321; Adams v. Howard, 20 Blatchf. 38, 9 Fed. 347; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Gates v. Bucki, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 961.

Fraud, accident, and mistake are acknowledged grounds of equity jurisdiction.

Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 456.

Injunction was the proper and only adequate remedy to prevent the collection of the tax.

Cobban v. Meagher, 42 Mont. 399, 113 Pac. 293; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Colorado Farm & Live Stock Co. v. Beerbohm, 43 Colo. 481, 96 Pac. 443; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 164, 54 L. ed. 423, 430, 30 Sup. Ct. Rep. 280; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286.

The complainant is entitled to a prompt and speedy remedy. It has a right to have this lien canceled and its property relieved, and no other remedy is as efficient and adequate as a suit in equity.

Schmidt v. West, 104 Fed. 274; Mutual L. Ins. Co. v. Pearson, 114 Fed. 397; United States L. Ins. Co. v. Cable, 39 C. C. A. 264, 98 Fed. 761; Bank of Kentucky v. Stone, 88 Fed. 383; Union L. Ins. Co. v. Riggs, 123 Fed. 317.

There may be a legal remedy, and yet it is

more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction.

Wylie v. Coxe, 15 How. 415, 420, 14 L. ed. 753, 755; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 12, 43 L. ed. 341, 346, 19 Sup. Ct. Rep. 77; Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 621, 20 L. ed. 501, 503; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; Tyler v. Savage, 143 U. S. 79, 95, 36 L. ed. 82, 88, 12 Sup. Ct. Rep. 340.

Mr. J. A. Marsh argued the cause, and, with Mr. W. H. Bryant, filed a brief for appellees:

The bill, when considered alone or in connection with the testimony, presents no case within the jurisdiction of a court of equity.

State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Milwaukee v. Koeffler, 116 U. S. 219, 29 L. ed. 612, 6 Sup. Ct. Rep. 372; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 516, 28 L. ed. 516, 5 Sup. Ct. Rep. 601; Pittsburgh. C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 33, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; Cruickshank v. Bidwell, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. ed. 651, 23 Sup. Ct. Rep. 452; Odlin v. Woodruff, 31 Fla. 160, 22 L.R.A. 699, 12 So. 227.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit by the Singer Company, a New Jersey corporation, to enjoin the collection of taxes levied by the city and county of Denver, in the state of Colorado. The company made a return of taxable personal property at a valuation of $3,800, to which the assessor added other personalty at a valuation of $62,500, making a total assessment of $66,300, which was afterwards embodied in a tax list delivered to the treasurer for collection. The company tendered payment of $126.50, the amount of taxes due on the property returned by it, and refused to pay the amount attributable to the additional assessment. The treasurer declined to accept the tender, and was threatening to enforce the entire tax, when the suit was brought. The bill charged that the assessor, although required by law to give the company timely notice of the additional assessment, had failed to give it any notice, and that it was thereby prevented from pre-
484] senting *objections to the increase and obtaining a hearing and ruling thereon by the assessor and by the proper reviewing authority, to which it was entitled by the *local law*. There were also allegations to *the effect that* the company had no property within the city and county other than that returned by it; that the additional assessment and the taxes levied thereon were illegal because of the assessor's failure to give the required notice; and that to enforce the collection of such taxes would be violative of designated provisions of the Constitution of the United States. The defendants demurred on the ground that the bill did not state a case for equitable relief, but the demurrer was overruled. The defendants then answered, repeating the objection made in the demurrer, and interposing other defenses which need not be noticed now. Upon the hearing a decree was entered dismissing the bill, and the company appealed to the circuit court of appeals. That court held that there was an adequate remedy at law, and affirmed the decree. 103 C. C. A. 186, 179 Fed. 628. The company then took the present appeal.

In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law. The statute so declares, Rev. Stat. § 723, U. S. Comp. Stat. 1901, p. 583, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682. There was no waiver here. The objection was made by the demurrer and again by the answer; and so, if it was well grounded, it was as available to the defendants in the circuit court of appeals to prevent a decree against them there as it was in the circuit court. Boisé Artesian Hot & Cold Water Co. v. Boisé City, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426.

*In the last case it was said of the [485
pertinency of the guiding rule in cases such as this (p. 281): "A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state courts in cases of this kind are in conflict and we need not examine them. It is a mere matter of choice of convenient remedy for a state to permit its courts to enjoin the collection of a state tax because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount,

sovereignty, interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity."

A statute of Colorado enacted in 1870, (Laws 1870, p. 123, § 106), and embodied in subsequent revenue acts (2 Mills's Anno. Stat. § 3777; Laws 1902, p. 146, § 202; Rev. Stat. 1908, § 5750), declares that "in all cases where any person shall pay any tax, interest, or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous or improper assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer." This statute 486] *imposes upon the county commissioners the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon the taxpayer a correlative right to enforce that duty by an action at law. As long ago as 1879 the supreme court of the state, in holding that the invalidity of a tax afforded no ground for enjoining its enforcement, said of this statute: "Against an illegal tax, complainant has a full and adequate remedy at law; and we see no reason why in this case he should not be remitted to that remedy." Price v. Kramer, 4 Colo. 546, 555. And again: "The statute furnishes another remedy in such cases which is complete and adequate." Woodward v. Ellsworth, 4 Colo. 580. And that this view of the statute still prevails is shown in Hallett v. Arapahoe County, 40 Colo. 308, 318, 90 Pac. 678, decided in 1907, where, in refusing equitable relief against the collection of taxes alleged to be illegal, the court said: "By § 3777, 2 Mills's Anno. Stat., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate."

We refer to these cases, not as defining the jurisdiction in equity of the circuit court, for that they could not do (Payne v. Hook, 7 Wall. 425, 430, 19 L. ed. 260, 261; Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Smyth v. Ames, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418, but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the circuit court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. Ex parte McNeil, 13 Wall. 236, 243, 20 L. ed. 624, 626; United States Min. Co. v. Lawson, 67 C. C. A. 587, 134 *Fed.[487 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them, and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate, and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. Dows v. Chicago, 11 Wall. 108, 112, 20 L. ed. 65, 67; State Railroad Tax Cases, 92 U. S. 575, 613, 614, 23 L. ed. 669, 673, 674; Shelton v. Platt, 139 U. S. 591, 597, 35 L. ed. 273, 276, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 661, 35 L. ed. 303, 304, 11 Sup. Ct. Rep. 682; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 686, 47 L. ed. 651, 654, 23 Sup. Ct. Rep. 452.

But it is said that in an action to recover back the money, the tax list would be treated as the judgment of a special tribunal, conclusively determining all questions in favor of the validity of the tax. It well may be that, if the list were regular on its face, it would be presumptive evidence that the tax was valid, but we find nothing in the statutes of Colorado or in the decisions of its supreme court which goes to the length suggested. The plain implication of the section providing for repayment is otherwise. Another section (Rev. Stat. § 5677) declares that the tax list "shall be prima facie evidence that the amount claimed is due and unpaid," and the only decision cited by the company speaks of the assessment as being presumptively right "in the absence of any evidence to the contrary." Singer Mfg. Co. v. Denver, 46 Colo. 50, 103 Pac. 294.

It also is said that there were special circumstances calling for equitable relief,

in that the act of the assessor in making the additional assessment without giving any notice of it was necessarily a fraud, an accident, or a mistake. No such claim was made in the bill, and even had it been, it would be unavailing unless founded upon something more than the charge that no 488]notice was given, and that *the company had no property within the city and county other than that returned by it. We say this because the fraud, accident, or mistake which will justify equitable relief must be something more than what is fairly covered by the charge here made, for otherwise the well-settled rule that mere illegality in a tax affords no ground for such relief would be a myth. There really would be no case in which the illegality could not be said with equal propriety to be the result of fraud, accident, or mistake, for it always arises out of some deviation from law or duty.

Concluding, as we do, that the company had a plain, adequate, and complete remedy at law, the decree dismissing the bill is affirmed.

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GEORGE W. BOND et al., Appts.,
v.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al.

(See S. C. Reporter's ed. 488–493.)

**Private land claims — Spanish land grant — communal or individual — unallotted land.**

1. Title to, and the power of disposal of, the unallotted land within the exterior boundaries of a Spanish land grant, must be deemed to have remained in the Crown, and passed to the United States upon the acquisition of the territory, where the governor made the grant "to be without prohibition to anyone desiring to settle the same," juridical possession to be by "giving in all cases to each one the portion he may be entitled to," and where juridical possession and allotment were made to some persons not petitioning, while no land was allotted to some of the petitioners, such grant being therefore communal, in which settlers, and no others, could by allotment obtain individual, several interests.

[For other cases, see Private Land Claims, I. d, 1, in Digest Sup. Ct. 1908.]

**Private land claims — confirmation — communal grant — effect.**

2. A patent issued to the town of Tomé, New Mexico, following congressional confirmation by the act of December 22, 1858 (11 Stat. at L. 374, chap. 5), of a Spanish communal grant, passed title to all the unallotted land from the United States to the town, unburdened by any trust for the heirs or grantees of the persons named in the original petition or grant.

[For other cases, see Private Land Claims, III. f, in Digest Sup. Ct. 1908.]

[No. 558.]

Submitted December 17, 1912. Decided June 9, 1913.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for the County of Valencia, in that territory, dismissing a suit for partition and to quiet title. Affirmed.

See same case below, 16 N. M. 660, 120 Pac. 707.

The facts are stated in the opinion.

Mr. Richard H. Hanna submitted the cause for appellants. Mr. Francis C. Wilson was on the brief:

The findings of the surveyor general's report, that the grant was complete and perfect in the heirs and assigns at the time of the treaty of Guadalupe Hidalgo, is conclusive, and cannot be reviewed by any court.

Tameling v. United States Freehold & Emigration Co. 93 U. S. 644–663, 23 L. ed. 998–1003; Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 80, 37 L. ed. 376, 13 Sup. Ct. Rep. 457.

The appellants did not ask the lower court, and are not now asking this court, to sit in judgment upon the recitals of facts contained in the report, nor to set aside the act of Congress, but, instead, are resting their case upon those recitals, and asking that the confirmation to the town of Tome be construed in the light and according to their true intent and meaning. This the court can and will do where a proper case for relief is shown.

Maxwell Land Grant Case, 121 U. S. 325, 382, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015.

The intention of the granting power as to title and quantity conveyed must be derived from an examination of all the documents composing the expediente of title.

Sheppard v. Harrison, 54 Tex. 95; United States v. Morant, 123 U. S. 335, 31 L. ed. 172, 8 Sup. Ct. Rep. 189; United States v. Larkin, 18 How. 557, 15 L. ed. 485.

The condition that the grant should be made subject to the right of others to settle upon the same was a condition subsequent, and seems to have been made for the purpose of permitting other settlers to take advantage of the grant. But it will not be disputed that, if the original grantees prohibited such settlement, no one could avoid the grant for such violations of its condition except the granting power.

Fremont v. United States, 17 How. 542, 15 L. ed. 241; United States v. Arredondo, 6 Pet. 718, 8 L. ed. 557.

The act of possession in the civil law as applied by the Spanish government was essentially similar to the livery of seisin at the common law, and transferred, as did the latter ceremony, what was equivalent to a freehold estate.

United States v. Pico, 5 Wall. 536, 18 L. ed. 695; Graham v. United States, 4 Wall. 259, 18 L. ed. 333; Rio Arriba Land & Cattle Co. v. United States, 167 U. S. 298, 42 L. ed. 175, 17 Sup. Ct. Rep. 875; Malarin v. United States, 1 Wall. 282, 17 L. ed. 594; United States v. Pena, 175 U. S. 500, 506, 44 L. ed. 251, 253, 20 Sup. Ct. Rep. 165.

Whether or not the alcalde had the power to place the grantees in possession of the entire tract cannot at this date be questioned.

Strother v. Lucas, 12 Pet. 437, 9 L. ed. 1147.

Prescription against the Crown was recognized by the laws of Spain.

Carino v. Philippine Islands, 212 U. S. 445–463, 53 L. ed. 594–598, 29 Sup. Ct. Rep. 334.

There could be no title in the United States which could by any act of Congress defeat the equities of the heirs, successors, and assigns of the grantees. The change in sovereignty did not alter the title or the rights of the real parties in interest, and the act of confirmation could not destroy the title of the claimants, which was complete and perfect at the date of the treaty of Guadalupe Hidalgo.

Ainsa v. New Mexico & A. R. Co. 175 U. S. 76, 79, 44 L. ed. 78, 80, 20 Sup. Ct. Rep. 28; United States v. Percheman, 7 Pet. 86, 87, 8 L. ed. 617, 618; Tremier v. Stewart, 101 U. S. 797–810, 25 L. ed. 1021–1024; United States v. Chaves, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57.

The surveyor general, without careful examination of his instructions, recommended confirmation to the town of Tome, simply because the existence of such a town was proven at the time the United States took possession, overlooking the fact that the grant was not made to a town or to any corporation, but to individuals, and that the application for confirmation before him was not made by a corporation, a city, or a town, but by individuals claiming to be the heirs, successors, and assigns of the original grantees, to whom, as they alleged, the grant was made in fee. His conclusion, then, that the grant was to the town of Tome and should be so confirmed, is obviously, in view of his findings, an erroneous conclusion of law, which courts of equity will always correct by such a construction of the law as will prevent injustice from resulting.

Moore v. Robbins, 96 U. S. 535, 24 L. ed. 851; Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345.

Confirmations of Spanish and Mexican grants are merely recognitions of the claim, and inure to those showing the best right thereto by a resort to the ordinary remedies at law or in equity, according to the nature of the claim.

Bissell v. Penrose, 8 How. 317, 12 L. ed. 1095; Hogan v. Page, 2 Wall. 605, 607, 17 L. ed. 854, 855; Carpenter v. Rannels, 19 Wall. 138, 142, 146, 22 L. ed. 77, 79, 80; Watterston v. Bennett, 18 La. Ann. 250; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421; Rachal v. Irwin, 8 Mart. N. S. 331; Connoyer v. Schaefer, 22 Wall. 254, 22 L. ed. 837.

Equities prior to the patent may be examined.

Carpentier v. Montgomery, 13 Wall. 480, 488, 20 L. ed. 698, 699; Salmon v. Symonds, 30 Cal. 301; Catron v. Laughlin, 11 N. M. 604, 72 Pac. 26.

And courts of equity will hold the patentee as trustee for those who have equitable interests in the lands, to the full extent of their interests.

Carpentier v. Montgomery, 13 Wall. 480, 488, 20 L. ed. 698, 699; Townsend v. Greeley, 5 Wall. 326, 18 L. ed. 547; Bernier v. Bermier, 147 U. S. 247, 37 L. ed. 155, 13 Sup. Ct. Rep. 244.

Since a suit in partition, under the New Mexico statutes, is a cause in chancery, the district court in which this case was filed, sitting as a court of equity, could inquire into and determine all questions involving the rights of the parties in this suit, in order to give complete relief. The court could, therefore, in the exercise of its chancery powers, have declared the trust in the town of Tome, and could have proceeded to partition the equitable estate of the tenants in common. Such an interest is subject to partition, since it is not necessary that the plaintiffs in an action for partition should have the legal estate.

Watson v. Sutro, 86 Cal. 507, 24 Pac. 172, 25 Pac. 64; Gates v. Salmon, 35 Cal. 592, 95 Am. Dec. 139; Luco v. De Toro, 91 Cal. 405, 27 Pac. 1082; Royston v. Miller, 76 Fed. 50, 18 Mor. Min. Rep. 418; Stein v. McGrath, 128 Mass. 175, 30 So. 792.

The defense that the pretended incorporation could deprive the tenants in common of their right to partition has no standing, as a matter of law, under any circumstances.

Freeman, Cotenancy, 2d ed. 99; Mitchell v. Starbuck, 10 Mass. 5.

Where cities and towns are incorporated by virtue of a general statute, the courts, while they will take notice of the statute, will not take notice of the fact that a particular town or place has incorporated under it, and this fact must be proved as any other fact.

Hopkins v. Kansas City, St. J. & C. B. R. Co. 79 Mo. 98; State v. Cleveland, 80 Mo. 108; Johnson v. Indianapolis, 16 Ind. 227; Temple v. State, 15 Tex. App. 304, 49 Am. Rep. 200; Patterson v. State, 12 Tex. App. 222.

Mr. Frank W. Clancy submitted the cause for appellees:

The alcalde could not have intended to exceed the authority given by the governor, and all that he did must be considered and construed in the light of what he was authorized to do, because, if he went beyond what the governor directed to be done, his act would be a nullity.

Pinkerton v. Ledoux, 129 U. S. 354, 32 L. ed. 709, 9 Sup. Ct. Rep. 399.

As to the eight of the original petitioners to whom no possession was delivered, it must be clear, according to appellants' contention at the present time, that they have no title whatever, as the delivery of possession is admittedly a necessary part of the investiture of title.

Van Reynegan v. Bolton, 95 U. S. 35, 24 L. ed. 351; More v. Steinbach, 127 U. S. 79, 32 L. ed. 54, 8 Sup. Ct. Rep. 1067.

This case is governed by the decisions in Rio Arriba Land & Cattle Co. v. United States, 167 U. S. 298, 42 L. ed. 175, 17 Sup. Ct. Rep. 875; United States v. Sandoval, 167 U. S. 278, 42 L. ed. 168, 17 Sup. Ct. Rep. 868; United States v. Pena, 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165.

It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action.

Tameling v. United States Freehold & Emigration Co. 93 U. S. 662, 23 L. ed. 1003; United States v. Maxwell Land-Grant Co. 121 U. S. 366, 30 L. ed. 953, 7 Sup. Ct. Rep. 1015; Lafayette v. Kenton, 18 How. 198, 199, 15 L. ed. 346, 347; Astiazaran v. Santa Rita Land & Min. Co. 148 U. S. 82, 37 L. ed. 377, 13 Sup. Ct. Rep. 457.

Any disregard of treaty stipulations cannot be reviewed in the courts, but the judiciary is bound by whatever Congress may declare.

Botiller v. Dominguez, 130 U. S. 246, 247, 250, 32 L. ed. 928, 929, 930, 9 Sup. Ct. Rep. 525; Mitchell v. Furman, 180 U. S. 436, 45 L. ed. 611, 21 Sup. Ct. Rep. 430; Barker v. Harvey, 181 U. S. 486, 45 L. ed. 965, 21 Sup. Ct. Rep. 690.

Appellants' counsel appear to think that it is only "the recitals of matters of fact by the surveyor general" which are binding upon, and not reviewable by, the courts, overlooking the fact that this court regards "his decision declaring the validity of the grant" in the same light.

Tameling v. United States Freehold & Emigration Co. 93 U. S. 662, 23 L. ed. 1003.

Mr. Justice Van Devanter delivered the opinion of the court:

This suit was begun by a petition for partition and to quiet title, filed by George W. Bond and eighty-two others in the district court of Valencia county, New Mexico, against the unknown heirs of twenty-nine persons named, all deceased, and the unknown owners, proprietors, and claimants of the premises commonly called the Tomé grant, situate in that county, and described as containing 121,594.53 acres. The plaintiffs alleged that they were owners of an undivided half interest.

The town of Tomé appeared and answered, denying any title or interest in the plaintiffs, averring that the grant by Spain was to the town in communal right, was confirmed by act of Congress to the town, a then-existing municipality, was so patented by the United States, and was incorporated under the laws of New Mexico; that allotments were made of parts of the land to settlers on the grant in fee in severalty, and ownership of the residue was in the municipality and had been held by it exclusively and adversely since it was patented, April 5, 1871.

Doroteo Chaves, with three hundred and ninety-one others, appeared and answered, denying any individual right in any of the plaintiffs, adopting the answer of the town as to the communal character of the grant, averring that they were themselves severally owners in fee of parts of the grant, and resisting partition.

*Translations of the title papers[490 were, by stipulation, made parts of the answers. Demurrers to the latter were overruled, and a reply was filed, to which there was a demurrer. This demurrer was sustained, and the plaintiffs electing to stand upon their reply, judgment was rendered dismissing the suit. Upon the plaintiffs' appeal, the supreme court of the territory affirmed the judgment (16 N. M. 660, 120 Pac. 707), and on a further appeal the case is now before this court.

The facts are settled by the pleadings. The questions here are whether the original grant made by the Crown of Spain in 1739 was in fee in individual right or in com-

munal right to the town, title remaining in the Crown except as to specific parcels allotted to individuals, and whether, if it was a grant in individual right, the confirming act of Congress, and the patent pursuant thereto, changed its character.

The facts, as shown by the record, are these: Juan Barela, with twenty-eight others, in 1739 petitioned that the governor "be pleased to donate to them the land called Tomé Dominguez, granted to those who first solicited the same and whom declined settling thereon." The governor did "grant to them, in the name of his Majesty, whom may God preserve, the land petitioned for, called the land of Tomé Dominguez, for themselves, their successors, and whomever may have a right thereto under the conditions and circumstances required in such cases, and which is to be without prohibition to anyone desiring to settle the same, holding and improving it during the time required by law. In view of which, I should order, and did order, that said senior justice or his lieutenant, whose duty it is, shall place them in possession of the aforementioned lands, giving in all cases to each one the portion he may be entitled to in order to avoid difficulties which may occur in the future."

There was a giving of "juridical posses-
491]sion,"—a form and *ceremony essential to the passing of title by grant under the Spanish law. The report of the officer conducting this ceremony, so far as here material, is as follows: "In the new settlement of 'Nuestra Señora de la Concepción de Tomé Dominguez,' instituted and established by Don Gaspar Mendoza, actual governor and captain general of this Kingdom of New Mexico, on the thirtieth day of the month of July, in the year one thousand seven hundred and thirty-nine, . . . the parties concerned being together, I proceeded to the above-mentioned place, and all being present, I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned. . . . And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition . . . at which principal boundaries I ordered them to perpetuate their existence with permanent landmarks, pointing out to them also, as a means of good economy, their common pastures, water, and watering places, and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounce this royal possession as sufficient title for themselves, their children, heirs, and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances; and for their greater quietude, peace, tranquillity, and harmony, I proceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows:" Here follow nineteen names of original *petitioners as[492
given allotments of land, the name Manuel Carrillo appearing twice. Ten of the petitioners were not allotted lands, and among those who obtained allotments were five who were not petitioners.

It is unnecessary to discuss at length the question whether the grant made in 1739 passed a title to the persons therein named to the whole tract, or whether this was merely a grant in severalty of the lands allotted to the persons named in the report showing juridical possession, leaving title to the unallotted lands in the Crown, to be allotted to future settlers. Examination shows that the petition, decree, and report of juridical possession, are in form substantially like those in United States v. Sandoval, 167 U. S. 278, 42 L. ed. 168, 17 Sup. Ct. Rep. 868, wherein the effect of such instruments is discussed at length. See also United States v. Santa Fé, 165 U. S. 675, 41 L. ed. 874, 17 Sup. Ct. Rep. 472; Rio Arriba Land & Cattle Co. v. United States, 167 U. S. 298, 42 L. ed. 175, 17 Sup. Ct. Rep. 875; United States v. Pena, 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165.

The fact that the governor made the grant "to be without prohibition to anyone desiring to settle the same," that the juridical possession was to be by "giving in all cases to each one the portion he may be entitled to," and that juridical possession and allotment of land was made to persons not petitioning,—in the theory of the plaintiffs, not beneficiaries of the decree,—while no land was allotted to ten of the petitioners, who, according to the same theory, were beneficiaries, is not explicable on any other theory than that the grant was communal, in which settlers and no others could by allotments obtain individual, several interests. On this construction the omission of allotments to petitioners not identifying themselves with the new settlement would be the necessary consequence, as also would be the allot-

ments to new settlers who were not petitioners.

Had the matter stopped there—had no grant been made by Congress—the grant must have been effective only as to the lands allotted in several right to those 493]named in *the report of juridical possession. Title to and power of disposal over the residue of the land remained in the Crown, and passed to the United States upon the acquisition of the territory.

There was, however, Congressional confirmation of the grant. In 1856 the inhabitants of Tomé petitioned the surveyor-general for New Mexico for confirmation of the grant to the town, conformably to the act of July 22, 1854 (10 Stat. at L. 308, chap. 103). It was so confirmed by the act of December 22, 1858 (11 Stat. at L. 374, chap. 5); and April 5, 1871, patent issued to the town of Tomé. It is said that the legal title so passed is subject to a trust for the heirs of the original petitioners, who, it is claimed, were beneficiaries of the decree of the Spanish governor in 1739.

As no benefit of that decree, and no title to any of the land, passed to any of the petitioners save those to whom allotments were made, and only to the allotted tracts, no further discussion is necessary. When patent to the entire grant issued to the town of Tomé, title to all the unallotted land passed from the United States to the town, unburdened with any trust for heirs or grantees of persons named in the original petition and decree.

Judgment affirmed.

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494] *NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS et al., Appts.,

v.

J. E. PARRISH.

(See S. C. Reporter's ed. 494-497.)

**Interest — recovery against governmental agency.**

The exemption of the United States from the recovery of interest on its contractual obligations unless there be an authorized stipulation to pay interest, or a statute permitting its recovery, does not extend to the Mountain Branch of the National Home for Disabled Volunteer Soldiers, created by the legislation embodied in U. S. Rev. Stat. §§ 4825 et seq. (U. S. Comp. Stat. 1901, p. 3337), as a governmental agency for the care of disabled volunteer soldiers of the United States Army, and invested as a distinct corporate entity with various powers, duties, and responsibilities, including the right and liability to sue and be sued in courts of law and equity.

[For other cases, see Interest, I. b, 3, in Digest Sup. Ct. 1908.]

[No. 678.]

Submitted May 5, 1913. Decided June 9, 1913.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Tennessee, allowing interest upon the amount due a contractor upon contracts for the construction of buildings for a soldiers' home. Affirmed.

See same case below, — L.R.A.(N.S.) —, 114 C. C. A. 576, 194 Fed. 940.

The facts are stated in the opinion.

Assistant to the Attorney General Fowler and Assistant Attorney General Adkins submitted the cause for appellants. Mr. Karl W. Kirchwey was on the brief:

The National Home is a governmental agency.

Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; Overholser v. National Home, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487; Lyle v. National Home, 170 Fed. 842.

The liability of the government, whether state or Federal, to pay interest on claims against it, is well defined. Interest is never recoverable unless the sovereign has expressly assumed the obligation therefor, either by legislative premission or authorized contract stipulation.

United States v. Sherman, 98 U. S. 565, 25 L. ed. 235; Tillson v. United States, 100 U. S. 43, 25 L. ed. 543; Harvey v. United States, 113 U. S. 243, 249, 28 L. ed. 987, 989, 5 Sup. Ct. Rep. 465; United States ex rel. Angarica v. Bayard, 127 U. S. 251, 32 L. ed. 159, 8 Sup. Ct. Rep. 1156; United States v. North Carolina, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920.

The requirement that the assent of Congress to such liability must be express has been strictly adhered to. A special statute authorizing recovery against the United States in a certain case or class of cases does not justify the court in awarding interest upon the claim, unless Congress has declared that to be its intention, in explicit terms.

Tillson v. United States, 100 U. S. 43, 25 L. ed. 543; Harvey v. United States, 113 U. S. 243, 249, 28 L. ed. 987, 989, 5 Sup. Ct. Rep. 465; United States v. Barber, 20 C. C. A. 616, 41 U. S. App. 424, 74 Fed. 483; Watts v. United States, 129 Fed. 222; Pennell v. United States, 162 Fed. 75.

The principle upon which the rule rests is commonly stated to be that "delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes."

United States v. Sherman, 98 U. S. 567, 568, 25 L. ed. 236, 237; United States v. North Carolina, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920.

The immunity of the sovereign, to be more than nominal, must extend to its agencies, whatever their nature or shape; to an arm of government clothed with the corporate entity, as to a department thereof, or its head in his official capacity. An officer who makes an authorized contract for his government incurs no personal liability thereon (Hodgson v. Dexter, 1 Cranch, 345, 2 L. ed. 130; District of Columbia v. Camden Iron Works, 181 U. S. 453, 460, 45 L. ed. 948, 952, 21 Sup. Ct. Rep. 680). A claimant cannot, by bringing mandamus against the Secretary of State, or of the Treasury, compel that officer to pay over interest from public funds in his custody, unless the United States would be liable for that interest in a direct action (United States v. Sherman, 98 U. S. 565, 25 L. ed. 235; United States ex rel. Angarica v. Bayard, 127 U. S. 251, 32 L. ed. 159, 8 Sup. Ct. Rep. 1156). It should be equally impossible to compel this corporation—acting as a mere conduit of Federal authority—to respond in damages which could not, in the absence of that conduit, be recovered from the government itself.

The liability enforced in Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Redfield v. Ystalyfera Iron Co. 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570, and Redfield v. Bartels, 139 U. S. 694, 35 L. ed. 310, 11 Sup. Ct. Rep. 683, was primarily a personal one. At common law a revenue officer was individually liable for moneys collected illegally and paid under protest, even though he acted in good faith and under instructions from his superior (Elliott v. Swartwout, 10 Pet. 137, 156, 9 L. ed. 378, 380). In the United States, the Federal government has stepped in and taken over this liability by statute, thus relieving the collector (Arnson v. Murphy, 109 U. S. 238, 243, 27 L. ed. 920, 922, 3 Sup. Ct. Rep. 184; Treat v. Farmers' Loan & T. Co. 108 C. C. A. 98, 185 Fed. 760). It is but natural, however, that those statutes should not be held to have altered the nature or extent of the obligation. Since the revenue officer was obliged to pay interest as an individual, it follows that the government, standing in his shoes, becomes subject to the same measure of damages. The difference between this and the case at bar is obvious. One is the assumption of an existing personal liability; the other the extension of the governmental liability to a new entity, the corporation appellant.

A well-recognized distinction exists between an officer's personal liability for tortious or unlawful acts done under the alleged authority of the state, and his responsibility as a representative of his government, and upon that distinction often depend the nature and extent of the remedy against him, and the court's jurisdiction of the suit (see Stanley v. Schwalby, 147 U. S. 508, 512, 518, 37 L. ed. 259, 263, 13 Sup. Ct. Rep. 418). And a like distinction between personal and representative rights determines the availability, against the officer, of defenses to which the state is not subject (Wasteney v. Schott, 58 Ohio St. 410, 51 N. E. 34). The underlying principle, of course, is that the court will look behind the parties of record to determine the real parties in interest and that respective rights and liabilities will be governed accordingly.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; United States v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

In this connection, the cases dealing with the court's jurisdiction of a suit against the officers of a state, under the 11th Amendment of the Constitution, may prove enlightening.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; McGahey v. Virginia, 135 U. S. 662, 684, 34 L. ed. 304, 312, 10 Sup. Ct. Rep. 972.

In several respects the rights and liabilities of corporations like the appellant have been assimilated to those of the states they represent.

Maia v. Eastern State Hospital, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; Moody v. State Prison, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131; Thomas v. Illinois Industrial University, 71 Ill. 310; Patterson v. Pennsylvania Reform School, 92 Pa. 229; Phillips v. University of Virginia, 97 Va. 472, 47 L.R.A. 284, 34 S. E. 66; Eastern State Hospital v. Graves (Eastern State Hospital v. Winston) 105 Va. 151, 3 L.R.A.(N.S.) 746, 52 S. E. 837, 8 Ann. Cas. 701; Cox v. University of Alabama, 161 Ala. 639, 49 So. 814.

The power to sue and be sued, conferred on the Home by its charter, does not render it liable to the payment of interest.

Maia v. Eastern State Hospital, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617.

Mr. R. E. L. Mountcastle submitted the cause for appellee:

If this were a suit against the United States in the sense in which the expression "United States" is used in the cases referred to, the suit would not be maintainable in the first instance, it having been repeatedly held that a money judgment cannot be maintained against the United States in any Federal court except the court of claims.

Case v. Terrell, 11 Wall. 201, 20 L. ed. 134.

It might well be said that a suit against a customs officer to collect excess duty paid under protest might be a claim referable to the court of claims, or might be a claim founded upon a law of Congress, regulation of the Executive Department, or a contract, expressed or implied, with the government of the United States; yet this court in such a case, affecting the taxing power of the government and seeking to reach its funds, has held that such demand against the customs officer, where such excess duties have been collected, is entitled to bear interest from the date of the demand by suit, and discusses the question of interest in cases of this kind at length.

Redfield v. Bartels, 139 U. S. 695, 35 L. ed. 311, 11 Sup. Ct. Rep. 683; Redfield v. Ysalyfera Iron Co. 110 U. S. 174, 176, 28 L. ed. 109, 110, 3 Sup. Ct. Rep. 570. See also Shanley v. Herold, 141 Fed. 423.

If this had been an action against a charitable institution supported by the government, for a tort or negligence of its officers, the cases cited in analogy would apply in defeat thereof. But in this case the same authorities support the proposition in our favor that, where the corporation is intrusted with certain duties and powers, and acts under them, and incurs certain obligations thereby to others, these obligations may be enforced, with the same duties and incidents and remedies as allowed to other persons and governed by the same rules.

Williamson v. Louisville Industrial School, 95 Ky. 25, 23 L.R.A. 200, 44 Am. St. Rep. 244, 24 S. W. 1065; Moody v. State Prison, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131; Maia v. Eastern State Hospital, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617.

Mr. Justice Van Devanter delivered the opinion of the court:

This appeal brings under review a decree allowing interest on the amount found due a contractor upon two contracts for the construction of buildings for the Mountain Branch of the National Home for Disabled Volunteer Soldiers.

The Home is a Federal corporation created by legislation now embodied in Rev. Stat. §§ 4825 et seq. (U. S. Comp. Stat. 1901, p. 3337), as "an establishment for the care of disabled volunteer soldiers *of the United States Army." The[495 erection of the buildings was undertaken by the Home in pursuance of express congressional authority, and after an appropriation for that purpose had been made from the national treasury. 31 Stat. at L. 745, chap. 184, U. S. Comp. Stat. 1901, p. 3346. The contracts called for the completion of the work by the contractor on or before designated dates, which were extended. At the expiration of the last extension the contractor was in default, although the work was largely performed, and the Home, under power reserved in the contracts, proceeded with the completion of the buildings.

In a bill exhibited by the Home against the contractor, in the circuit court of the United States for the eastern district of Tennessee, and in a cross bill by the contractor, the parties presented for judicial determination various matters of difference arising out of the contracts and what was done under them. A hearing resulted in a decree awarding the contractor, upon the contracts, the sum of $21,139.12, to which interest was added from the date when the buildings were fully completed and occupied by the Home. From so much of the decree as allowed interest, the Home appealed to the circuit court of appeals, which rendered a decision of affirmance (—L.R.A.(N.S.)—, 114 C. C. A. 576, 194 Fed. 940); and then the Home appealed here. The sole error assigned challenges the allowance of interest. It is not insisted, nor could it reasonably be, that this allowance was inequitable or an abuse of discretion in the particular circumstances; so the only question is whether in law there was an insuperable obstacle to allowing interest.

The Home is without capital stock, shares, or shareholders; is an eleemosynary institution created by the government to manifest and discharge its sense of gratitude towards those who rendered service in its defense; is under the ultimate supervision of Congress; is supported and maintained from the national treasury, and *is essentially a governmental agency.[496 In defining its powers the statute declares that it shall "have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government

of the home, and to affix penalties thereto" (§ 4825); also "to procure . . . sites, . . . and to have the necessary buildings erected" (§ 4830).

It is not questioned that the Home was empowered to make the contracts upon which the recovery was had, or that it was suable thereon; but it is urged that interest is not recoverable against the United States in the absence of some statutory provision or authorized stipulation, and that, as the Home is a governmental agency, a like exemption applies to it.

It is quite true that the United States cannot be subjected to the payment of interest unless there be an authorized engagement to pay it or a statute permitting its recovery. United States ex rel. Angarica v. Bayard, 127 U. S. 251, 260, 32 L. ed. 116, 162, 8 Sup. Ct. Rep. 1156; United States v. North Carolina, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 Sup. Ct. Rep. 920. But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest, the settled rule is that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector, but directly from the treasury. Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Redfield v. Bartels, 139 U. S. 694, 35 L. ed. 310, 11 Sup. Ct. Rep. 683.

Without now attempting to lay down a rule for all governmental agencies, we think the exemption of the United States is not applicable to the Home. It is a distinct corporate entity, invested with powers, duties, and responsibilities which, in the judgment of Congress, required that it be given power to sue in its own name, 497] *and be subjected to liability to be sued. Although under the ultimate supervision of Congress, it has a board of managers which exercises a general control over its affairs, and has a corps of other officers of its own, who are in immediate charge of its articities. It makes contracts and incurs contractual liabilities in its own name, expends and disburses the moneys available for its support and maintenance, and in general occupies a position which takes it without the reasons underlying the government's exemption from interest. It is significant that the statute permitting suits in the court of claims against the government contains a provision expressly restricting the allowance of interest (Rev. Stat. § 1091, U. S. Comp. Stat. 1901, p. 747), while the statute authorizing suits against the Home contains no such restriction. And it is also significant that the latter authorization is not confined to any particular court, but extends generally to "courts of law and equity." It may be, as has been held elsewhere, that such authorization does not embrace suits for tortious acts of the officers of the Home (see Overholser v. National Home, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487; Lyle v. National Home, 170 Fed. 842), but, if so, this does not prove or indicate that in suits to enforce contractual obligations the amount of the recovery is not to be determined by the standards applicable to other litigants.

We think the courts below took the right view of the question, and the decree is accordingly affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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*UNITED STATES, Appt., [498
v.
MILLE LAC BAND OF CHIPPEWA INDIANS in the State of Minnesota.

(See S. C. Reporter's ed. 498-510.)

**Indian claims — effect of jurisdictional act.**

1. A forum for the adjudication of the claim according to applicable legal principles is all that is provided by the act of February 15, 1909 (35 Stat. at L. 619, chap. 126), authorizing the court of claims to hear and determine a suit or suits to be brought by and on behalf of Indians, against the United States, on account of losses sustained by reason of the opening of the Indian reservation to public settlement; and such act does not contemplate a recovery founded upon a merely moral obligation, or upon any interpretation of treaties or statutes that fails to give effect to their plain import because of any supposed injustice to the Indians.

[For other cases, see Claims, 157-161, in Digest Sup. Ct. 1908.]

**Indians — tribal agreement — existing entries.**

2. Existing bona fide pre-emption or homestead entries in the Mille Lac reservation, including entries theretofore passed to patent, were embraced by the proviso for perfecting subsisting pre-emption and homestead entries if found regular and valid, contained in § 6 of the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), assented to by the Mille Lac and other bands of Chippewa Indians in Minnesota, whereby the Indians were to cede and relinquish their various reservations to the United States, since this act must be deemed intended to adjust and compose the then-existing controversy as to the rights of the Mille Lacs

in their reservation after the treaty of May 7, 1864 (13 Stat. at L. 693), by putting the lands in that reservation in the same category as those in the other reservations relinquished under the act.

[For other cases, see Indians, V., in Digest Sup. Ct. 1908.]

**Indian claims — trust in proceeds of sale of ceded land.**

3. The United States, having disposed, under the general land laws, of the lands in the Mille Lac Indian reservation not filed upon, instead of selling them as "pine" or "agricultural" lands, and holding the proceeds in trust for the Indians, as was contemplated by the act of January 14, 1889, under which they were ceded to the United States, is liable to the Indians for the resulting loss, although such wrongful disposal was in obedience to directions given in the joint resolutions of Congress of December 19, 1893 (28 Stat. at L. 576), and May 27, 1898 (30 Stat. at L. 745), which were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to and did assert an unqualified power of disposal over the lands as the absolute property of the government.

[For other cases, see Claims, I. a; Indians, V., in Digest Sup. Ct. 1908.]

[No. 736.]

Argued April 8 and 9, 1913. Decided June 9, 1913.

APPEAL from the Court of Claims to review an award to Indians on account of losses sustained by them by the opening of their reservation to public settlement. Reversed and remanded for further proceedings.

See same case below, 47 Ct. Cl. 415.

The facts are stated in the opinion.

Assistant Attorney General Adkins and Mr. George M. Anderson argued the cause and filed a brief for appellant:

The jurisdictional act creates no liability, but simply furnishes a forum for the adjudication of the claim.

Stewart v. United States, 206 U. S. 185, 194, 51 L. ed. 1017, 1021, 27 Sup. Ct. Rep. 631; Sac & F. Indians v. Sac & F. Indians, 220 U. S. 481, 489, 55 L. ed. 552, 556, 31 Sup. Ct. Rep. 473.

Congress has plenary power and control over the Indian tribes.

Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Lone Wolf v. Hitchcock, 187 U. S. 565, 47 L. ed. 306, 23 Sup. Ct. Rep. 216.

Congress did not intend by the act of 1909 to authorize the courts to inquire into the justice and fairness of its dealings with the Indians.

United States v. Choctaw Nation, 179 U. S. 494, 531, 535, 45 L. ed. 291, 305, 307, 21 Sup. Ct. Rep. 149; United States v. Old Settlers, 148 U. S. 427, 466, 37 L. ed. 509, 523, 13 Sup. Ct. Rep. 650.

The construction given to the treaty by the Interior Department will be given great weight by the courts.

Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648.

The United States deals with tribes, and not individual Indians.

Blackfeather v. United States, 190 U. S. 368, 377, 47 L. ed. 1099, 1102, 23 Sup. Ct. Rep. 772.

The lands on the Mille Lac tract were not to be sold under the Nelson act; only lands which were ceded to the United States were to be sold.

14 Land Dec. 497.

Assuming that the Mille Lac tract should be treated as a reservation under the Nelson act, the judgment of the court of claims overlooks the fact that 55,000 acres had been filed upon, and that such land, under the provisions of § 6, cannot be sold for the benefit of the Indians.

Re Walters, 12 Land Dec. 54; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

It will be contended for the Indians that the Mille Lac tract was an Indian reservation, on which, under the law, entries could not be made, but such contention goes too far, for it nullifies the entire proviso.

American Security & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553; United States v. Hartwell, 6 Wall. 396, 18 L. ed. 832.

Under the regulations and decisions in force in the Department of the Interior, all entries made in 1871 and 1872, and between 1877 and 1884, were valid subsisting entries at the time of the passage of the Nelson act.

Re Walters, 12 Land Dec. 52.

If the Nelson act be inapplicable, the loss sustained by the Indians is merely the value of their right of occupancy, and not the fee-simple value of the land.

United States v. Cook, 19 Wall. 591, 22 L. ed. 210.

Messrs. George B. Edgerton and F. W. Houghton argued the cause, and, with Messrs. Harvey S. Clapp and Daniel B. Henderson, filed a brief for appellee:

Equity jurisdiction is not conferred upon the court of claims, and hence the findings of the court of claims determine all matters of fact, precisely as the verdict of a jury.

Stone v. United States, 164 U. S. 380, 382, 383, 41 L. ed. 477, 478, 17 Sup. Ct. Rep. 71; McClure v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321;

Tillson v. United States, 100 U. S. 43, 25 L. ed. 543; Harvey v. United States, 105 U. S. 671, 26 L. ed. 1206; United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 44 L. ed. 223, 20 Sup. Ct. Rep. 168.

By each of the treaties, to wit, of March 11, 1863, and May 7, 1864, the Mille Lac Reservation was reserved to the Mille Lac band of Chippewa Indians, the appellee herein, as and for an Indian reservation to be occupied by them as such so long as they should not in any way interfere with or in any manner molest the persons or property of the whites.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Mitchel v. United States, 15 Pet. 52, 10 L. ed. 658; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Spaulding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662; California & O. Land Co. v. Worden, 85 Fed. 94; California & O. Land Co. v. Rankin, 87 Fed. 532; United States v. Thomas, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650.

The court will construe the treaties of March 11, 1863, and May 7, 1864, and the instrument by which the Mille Lac band relinquished their right of occupancy of the Mille Lac Reservation in 1889, as the Indians understood such treaties and such instrument.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; United States v. Winans, 198 U. S. 371, 380, 49 L. ed. 1089, 1092, 25 Sup. Ct. Rep. 662; Jones v. Meehan, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Cherokee Intermarriage Cases, 203 U. S. 76, 88, 90, 51 L. ed. 96, 101, 102, 27 Sup. Ct. Rep. 29: Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75.

By the very instrument of cession and relinquishment by the Mille Lacs to the United States on October 5, 1889, thereafter approved by President Harrison, the United States acknowledged the Indian title of the Mille Lac Reservation to be then in the Mille Lac band of Chippewas of Mississippi.

White v. Wright, 83 Minn. 222, 86 N. W. 91.

The cession and relinquishment of the Chippewa Indians of Minnesota of their various reservations in Minnesota under the act of January 14, 1889, including the cession and relinquishment by the Mille Lac band of Chippewas, and its relinquishment of the Mille Lac Reservation, was a cession and relinquishment of each of said reservations to the United States in trust, which trust is expressed in the provisions of the act of January 14, 1889.

Minnesota v. Hitchcock, 185 U. S. 373, 394, 46 L. ed. 954, 965, 22 Sup. Ct. Rep. 650.

The failure of the United States to carry out the provisions of the act of January 14, 1889, and the adoption by Congress of the joint resolution of December 19, 1893, confirming certain entries made upon the Mille Lac Reservation mentioned in said resolution, constituted such a failure of duty on the part of the United States as gives the Mille Lac band a right of action against the United States for damages under the jurisdictional act.

United States v. Blackfeather, 155 U. S. 180, 39 L. ed. 114, 15 Sup. Ct. Rep. 64; Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; Lone Wolf v. Hitchcock, 187 U. S. 553, 564, 567, 47 L. ed. 299, 305, 307, 23 Sup. Ct. Rep. 216; United States v. Carpenter, 111 U. S. 347, 28 L. ed. 451, 4 Sup. Ct. Rep. 435; Spalding v. Chandler, 160 U. S. 404, 40 L. ed. 473, 16 Sup. Ct. Rep. 360.

The measure of damages for the opening up of such reservation to settlement under the public land laws is the reasonable value of the pine timber and agricultural lands on such reservation on December 19, 1893, with interest thereon at the rate of 5 per cent from such date.

United States v. Blackfeather, 155 U. S. 180, 39 L. ed. 114, 15 Sup. Ct. Rep. 64; United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; United States v. Cherokee Nation, 202 U. S. 101, 50 L. ed. 949, 26 Sup. Ct. Rep. 588.

The passage of the joint resolution of December 19, 1893, and the passage of the joint resolution of May 27, 1898, do not indicate any intention on the part of Congress to confiscate the Mille Lac Reservation, nor that in the exercise of its plenary power Congress intended to take from the Chippewas of Minnesota the value of such reservation.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115.

Mr. C. E. Richardson also filed a brief for appellee.

Mr. Justice Van Devanter delivered the opinion of the court:

This suit was begun under the act of February 15, 1909 (35 Stat. at L. 619, chap. 126), which authorized the court of claims "to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac band of Chippewa Indians in the state of Minnesota against the United States, on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation . . . to public settlement under the general land laws of the United States."

The lands to which the act and the suit relate are four fractional townships bordering on the Mille Lac in Minnesota, and three islands in that lake, comprising in all a little more than 61,000 acres. The suit was begun in the name of the Mille Lac band, and the court of claims, two judges dissenting, gave judgment against the United States in the sum of $827,580.72, with a direction, in substance, that the amount recovered be credited to the Chippewas of Minnesota and distributed among them under the provisions of § 7 of the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), 47 Ct. Cl. 415. The case is here upon the appeal of the United States.

The judgment was sought and was rendered on the theory that the lands were set apart and reserved for the occupancy and use of the Mille Lac band by treaties of February 22, 1855 (10 Stat. at L. 1165), March 11, 1863 (12 Stat. at L. 1249), and May 7, 1864 (13 Stat. at L. 693), and were subsequently relinquished to the United States pursuant to the act of January 14, 1889, supra, upon certain trusts therein named, and that in violation of those [500] treaties and that act they were opened to settlement and disposal under the general land laws of the United States and were disposed of thereunder, to the great loss and damage of the Mille Lac band or the Chippewas of Minnesota.

The arguments at the bar and the briefs are addressed to these questions: 1. The scope of the jurisdictional act. 2. The rights of the Indians in the lands under the treaties of 1863 and 1864. 3. The effect to be given to the act of 1889 and its acceptance by the Indians. 4. Whether the disposal of the lands, or any of them, under the general land laws, was violative of the rights of the Indians.

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. United States v. Old Settlers, 148 U. S. 427, 469, 37 L. ed. 509, 524, 13 Sup. Ct. Rep. 650; United States v. Choctaw Nation, 179 U. S. 494, 535, 45 L. ed. 291, 307, 21 Sup. Ct. Rep. 149; Sac and F. Indians v. Sac & F. Indians, 220 U. S. 481, 489, 55 L. ed. 552, 556, 31 Sup. Ct. Rep. 473.

Under the treaty of 1855, supra, there were reserved for the occupancy and use of the Mississippi bands of Chippewas, of which the Mille Lac band was one, six separate tracts of land in Minnesota. One of these embraced the townships and islands before mentioned, and came to be separately occupied by the Mille Lacs, although all the reservations were claimed in common by all the bands. By the treaty of 1863, supra, the lands in the six reservations, the one occupied by the Mille Lacs being in terms included, were expressly ceded to the United States (art. 1), and one large tract of other lands in Minnesota was reserved for the future home of all the bands, including the Mille Lacs [501] (art. 2). Provision was made (art. 4) for clearing and breaking a limited area in the new reservation for each of the bands, the Mille Lacs being in terms included, and (art. 6) for removing the agency and sawmill from one of the ceded reservations to the new. Article 12 of this treaty was as follows,—special importance being now attached to its proviso:

"It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: Provided, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

The treaty of 1864, supra, superseded that of 1863, and in so far as their provisions are material here they were identical, so we shall speak only of the later one. In addition to the creation of the single large reservation, provision was made for the payment of large annuities to the Indians in consideration for the cession of the six original reservations, and it is not questioned that these annuities were duly paid to all the bands, including the Mille Lacs,

nor that there was a full compliance with articles 4 and 6.

A treaty negotiated in 1867 (16 Stat. at L. 719) eliminated a considerable portion of the large tract reserved by article 2 of the treaty of 1864 and substituted a new tract, consisting of thirty-six townships, which came to be known as the White Earth Reservation. This treaty is not important here, save as it explains subsequent references to the White Earth Reservation.

A controversy soon arose over the mean-[502]ing and effect *of the proviso to article 12 of the treaty of 1864, declaring, "that, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove [from the old reservation to the new one] so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." On the part of the executive and administrative officers it was insisted—not, however, without some differences among themselves—that the proviso did not invest the Mille Lacs with any right in the old reservation expressly ceded by article 1 of the treaty, but merely permitted them to remain thereon as a matter of favor; that one purpose of the cession was to enable the government to survey the lands and open them to settlement, and that it was not intended that the permission to remain should interfere with this. But the Mille Lacs maintained that the proviso operated to reserve the lands for their occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites in that vicinity. The survey was made, the lands were declared open to settlement and entry, and entries in considerable numbers were allowed from time to time; but the Mille Lacs persisted in their claim and refused to move, although repeatedly entreated to do so. This continued to be the situation until the act of 1889 was passed by Congress and accepted by the Mille Lacs and other Chippewas of Minnesota. In the meantime an order was issued by one Secretary of the Interior, suspending the allowance of further entries, as also further action upon those already allowed, and this order was recalled by a succeeding Secretary. Congress then passed the act of July 4, 1884 (23 Stat. at L. 76, 89, chap. 180), directing that the lands should not "be patented or disposed of in any manner until further legislation." The entries allowed up to that time covered about 55,000 acres, or approximately nine tenths of the [503]lands, and some were under *investigation upon charges that they were fraudulent. After the passage of the act of 1884, all further action was suspended awaiting further legislation.

That legislation came in the act of 1889. It provided for a commission to negotiate with all the bands of Chippewas in Minnesota for the cession and relinquishment of all their reservations, excepting the White Earth and Red Lake Reservations, and for the cession and relinquishment of so much of them as should not be required for allotments. It further provided that the cession and relinquishment should be obtained as to each reservation, other than the Red Lake, through the assent in writing of two thirds of the male adults of the band "occupying and belonging to" it, and, as to the Red Lake Reservation, through a like assent of two thirds of the male adults of all the Chippewas in the state; that the cession and relinquishment as to each reservation should be subject to the approval of the President, and when approved should operate as a complete extinguishment of the Indian title "for the purposes and upon the terms" stated in the act; that thereupon all the Chippewas in the state, excepting those on the Red Lake Reservation, should be removed to and take up their residence on the White Earth Reservation, and receive allotments in severalty therein, and allotments to those on the Red Lake Reservation should be made in that reservation; that any Indian residing on any of said reservations might, in his discretion, take his allotment "on the reservation where he lives . . . instead of being removed;" that the ceded lands not so allotted should be classified as "pine lands" and as "agricultural lands," and be disposed of in the manner and at the prices stated in the act; and (§ 7) that all moneys accruing from their disposal, after deducting expenses, should be placed in the treasury of the United States to the credit of all the Chippewas of Minnesota as a trust fund, drawing interest at 5 per cent per annum, the interest to be used *for their bene-[504] fit and the principal to be distributed among them at the end of fifty years. In § 6 there was a proviso, deemed important here, declaring "that nothing in this act shall be held to authorize the sale or other disposal under its provisions of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon."

Through negotiations conducted under the authority of that act, the commissioners secured agreements with the Indians embodying the contemplated cessions and relinquishments, and these, upon submission

to the President, were approved by him March 4, 1890. The agreement with the Mille Lacs, in addition to embodying a cession and relinquishment of the lands in the White Earth and Red Lake Reservations not required for allotments, contained an express assent to all the provisions of the act of 1889, and an express relinquishment of the lands in the Mille Lac Reservation, as is shown by the following excerpt from the agreement:

"We, the undersigned, being male adult Indians over eighteen years of age, of the Mille Lac band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864 (13 Stat. at L. p. 693), do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of Congress, approved January 14, 1889, entitled, 'An Act for the Relief and Civilization of the Chippewa Indians, in the State of Minnesota' (Public, No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the 505]provisions *thereof, . . . and we do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864."

This agreement was negotiated at a council of the Mille Lacs, wherein they reiterated their claim under article 12, and at first declined to assent to the act of 1889, but upon further consideration assented and then signed the agreement. The commission, in reporting the result of its labors, gave a tabulated statement of the reservations, with the area of each, covered by the relinquishments, and included the Mille Lac Reservation, with an area of 61,014 acres, in the statement. In submitting the agreements, including that with the Mille Lacs, to the President, with the recommendation that each be separately approved, as was done, the Secretary of the Interior referred to the prolonged controversy with the Mille Lacs and said: "The rights of the Indians upon this reservation have been a vexed question, full of difficulties and embarrassments; but it is hoped that this agreement will furnish a basis for its early and final solution." Upon approving the agreements (they were sometimes spoken of as constituting in the aggregate a single document) the President transmitted a copy of them and of the accompanying papers to Congress for its information, and in the letter of transmittal said: "Being satisfied from an examination of the papers submitted that the cession and relinquishment by said Chippewa Indians of their title and interest in the lands specified and described in the agreement with the different bands or tribes of Chippewa Indians in the state of Minnesota was obtained in the manner prescribed in the 1st section of said act, and that more than the requisite number have signed said agreement, I have, as provided by said act, approved the said instruments in writing constituting the agreement entered into by the commissioners with said Indians." Shortly *thereafter,[506 and before the Mille Lacs removed from the old reservation, Congress passed the act of July 22, 1890 (26 Stat at L. 290, chap. 714), whereby a railroad right of way, including station grounds, was granted through that reservation upon condition that compensation therefor be paid to the United States for the use of the Indians, and that a failure to use the right of way and station grounds for railroad purposes should inure to the benefit of the Indians, thereby recognizing that the Indians had then come to have an interest in the disposal of the lands.

After the Mille Lacs gave their assent to the act of 1889 the entries theretofore allowed were examined and passed upon by the Land Department in regular course, and such as were found to be regular and bona fide were passed to patent. The remaining lands in the reservation were subsequently disposed of, not under the act of 1889, but under the general land laws, in pursuance of directions contained in the joint resolutions of December 19, 1893 (28 Stat. at L. 576), and May 27, 1898 (30 Stat. at L. 745).

Whatever might be said of its merits, it is apparent that there was a real controversy between the Mille Lacs and the government in respect of the rights of the former under article 12 of the treaty of 1864, and that the controversy was still subsisting when the act of 1889 was passed by Congress and assented to by the Indians. And we think it also is apparent that this controversy was intended to be and was thereby adjusted and composed. A manifest purpose of the act was to bring about the removal to the White Earth Reservation of all the scattered bands residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others; and this was to be accomplished, not through the exertion of the plenary power of Congress, but through negotiations with and the assent of the Indians. The provision in § 6 for perfecting subsisting pre-

emption and homestead entries, if found regular and valid, pointed most persuasively 507]to a *purpose to extend the negotiations to the Mille Lac Reservation. The commission, the Secretary of the Interior, and the President, in seeking, obtaining, and approving the relinquishment of that reservation, all treated it as within the purview of the act, and the Mille Lacs did the same. Then, too, Congress recognized by the act of 1890, shortly following the approval of the agreement, that the Indians had come to have an interest in the disposal of the lands in that reservation.

But while the government thus waived its earlier position respecting the status of the reservation, and consented to recognize the contention of the Indians, this was done upon the express condition, stated in the proviso to § 6, "that nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the time of its allowance, and if found regular and valid, patents shall issue thereon." In other words, the controversy was intended to be and was adjusted and composed by concessions on both sides, whereby the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act, but subject to the condition and qualification that all subsisting bona fide pre-emption and homestead entries should be carried to completion and patent under the regulations and decisions in force at the time of their allowance.

True, it is said on behalf of the Indians that they did not so understand the act; that is, did not understand that existing entries could be thus carried to patent. But of this it is enough to observe that the language of the proviso to § 6 is plain and unambiguous; that the agreement recites that the Mille Lacs "do hereby accept 508]and consent to and *ratify the said act, and each and all of the provisions thereof;" and that the Indians, no less than the United States, are bound by the plain import of the language of the act and the agreement. Not only so, but the act conferred upon the Mille Lacs many very substantial advantages which doubtless constituted the inducement to the adjustment and composition to which they assented. Among other advantages, it enabled them to share in the proceeds of the disposal of a vast acreage of lands in which they otherwise would have had no interest.

On behalf of the Indians it also is said that the proviso was limited to "regular and valid" pre-emption and homestead entries, and that no entry of lands within an Indian reservation could come within that limitation. But this assumes the existence of the Mille Lac Reservation at the time of the entries, which was the very matter in dispute. Besides, the interpretation suggested could not be accepted without wholly rejecting the proviso, for if it was inapplicable to entries in the Mille Lac tract, it was equally inapplicable to any in the other tracts relinquished under the act. In saying this we do not indicate that there were other entries, for the reports of the Land and Indian Offices, which were before Congress when the act of 1889 was passed, disclosed the entries in the Mille Lac tract and did not show any others. Of course, the proviso cannot be rejected. It had an office to perform and must be given effect. It meant, as its terms plainly show, that entries made in accordance with existing regulations and decisions could, if bona fide, be carried to completion and patent in the usual way; and the phrase "if found regular and valid" was evidently used with special reference to the charge that some of the entries were fraudulent, and with the purpose of eliminating such as were of that character.

We are accordingly of opinion that the act of 1889, to which the Indians fully assented, contemplated and *authorized[509 the completion, and the issuing of patents on, all existing pre-emption and homestead entries in the Mille Lac tract which, in the course of proceedings in the Land Department, should be found to be within the terms of the proviso to § 6, and therefore that no rights of the Indians were infringed in so disposing of lands embraced in such entries. And we think the evident purpose of the proviso requires that it be held to include entries of that class theretofore passed to patent, of which there were some instances during the early period of the controversy.

As respects other lands in that tract, that is, such as were not within the terms of the proviso, we are of opinion that they came within the general provisions of the act, and were to be disposed of thereunder for the benefit of the Indians, in like manner as were the ceded lands in the other reservations, of which it was said in Minnesota v. Hitchcock, 185 U. S. 373, 394, 46 L. ed. 954, 965, 22 Sup. Ct. Rep. 650: "The cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the

Treasury of the United States, to the credit of the Indians, such sum to draw interest at 5 per cent."

As before stated, the lands not within the proviso were disposed of, not under the act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights. This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle it is as if the lands had been disposed of conformably to the act of 1889, and the net proceeds placed in the trust fund created by § 7, and the government then had used the money, not for the benefit of the Indians, but for some wholly different purpose. That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolu-[510]tions, *unlike the legislation sustained in Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115, and Lone Wolf v. Hitchcock, 187 U. S. 553, 564, 568, 47 L. ed. 299, 305, 307, 23 Sup. Ct. Rep. 216, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the government. Doubtless this was because there was a misapprehension of the true relation of the government to the lands, but that does not alter the result.

The court of claims gave no effect to the proviso to § 6, and the findings afford no basis for separating the damages rightly recoverable from those erroneously assessed on account of lands disposed of under preemption and homestead entries allowed prior to the act of 1889. The case must therefore be remanded for a reassessment of the damages.

By reason of a contention advanced in the briefs, it is well to observe that the damages should be assessed on the basis of the prices which would have been controlling had the act of 1889 been rightly applied.

The judgment is reversed, and the case is remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice McKenna and Mr. Justice Day dissent.

Leave granted on June 16, 1913, to present a petition for rehearing herein within *sixty days*, on motion of Mr. C. C. Calhoun, on behalf of counsel for the appellee.

*CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Plff. in Err., [511

v.

WILLIAM H. HALL.

(See S. C. Reporter's ed. 511-516.)

**Bankruptcy — avoiding liens on exempt property.**

1. Liens against property which may be set aside to the bankrupt as exempt, and to which, therefore, the trustee in bankruptcy, under the act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 70, acquires no title, are included in the provisions of § 67f of that act, which declares that all liens obtained through legal proceedings against an insolvent within four months of the bankruptcy proceedings shall be deemed null and void in case he is adjudged a bankrupt, notwithstanding a further provision that the property affected by the lien shall be released from the same, and shall pass to the trustee as a part of the estate of the bankrupt.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

**Bankruptcy — jurisdiction — suit affecting exemption.**

2. Rights in exempt property, acquired by contract or by waiver of the exemption, may be enforced or foreclosed by a judgment obtained even after a petition in bankruptcy has been filed.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 249.]

Submitted April 21, 1913. Decided June 9, 1913.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Douglas County, in that state, in favor of plaintiff in an action to recover wages from a railway company, which had been garnished by proceedings in the courts of another state within four months of proceedings in bankruptcy against him. Affirmed.

See same case below, 88 Neb. 20, 128 N. W. 645.

Statement by Mr. Justice Lamar:

Hall, a resident of Douglas county, Nebraska, was employed by the railroad as switchman in its yards in Omaha. His wages were exempt from garnishment by the laws of Nebraska. In July, 1907, he was insolvent, and *in that month,[512 while temporarily in the state of Iowa, two proceedings were instituted against him, in which he was personally served, and the railroad, which owed him $122 as wages, was garnisheed. In one of these cases

Rawles sued on an open account for $54.20, the railroad being required to answer on August 10th. In the other, Torrey, holding a judgment for $22.40, rendered in 1894, served a summons of garnishment on the railroad, requiring it to answer on August 27, 1907.

While these proceedings were pending in the Iowa courts, Hall returned to Nebraska, and, on August 7, 1907, he was, on his own application, adjudged a bankrupt, his wages being claimed as exempt, and the two Iowa plaintiffs included in his list of creditors. Notice of the bankruptcy proceeding was given to them and to the railroad.

Thereafter, on August 10th, the railroad answered in the Rawles suit, admitting that it owed Hall $122, and a judgment was accordingly entered against the railroad as garnishee for $61.60. On August 27, it answered in the Torrey suit, and the court entered judgment against it as garnishee for $56.91. Hall, in the bankruptcy proceedings, had asked that, as allowed by the laws of Nebraska, his wages be set apart as exempt, and filed a petition praying that the railroad should be summarily ordered to pay him the amount due for work done in June and July, 1907. The application was resisted by the railroad and was denied by the court, which held, on the authority of Ingram v. Wilson, 60 C. C. A. 618, 125 Fed. 913, that the bankruptcy court could determine that the property was exempt, but had no jurisdiction to compel its payment.

In view of that ruling, Hall made a further application to have the $122 set off to him as exempt. An order to that effect was passed by the referee. Hall was discharged as a bankrupt in April, 1908, and then sued the railroad and recovered a 513]judgment, which was affirmed *by the supreme court (88 Neb. 20, 128 N. W. 645), and the case was brought here.

**Messrs. T. Byron Clark and Arthur R. Wells submitted the cause for plaintiff in error:**

The Iowa courts refuse to give effect to the exemption laws of other states, and when, as in this case, a creditor can be reached by garnishment process in the Iowa courts, it is no defense for the debtor to show that the fund in the garnishee's hands is exempt under the laws of another state. Although Hall did not appear and claim his exemptions under the Nebraska laws, it would not have availed him if he had done so.

Mooney v. Union P. R. Co. 60 Iowa, 346, 14 N. W. 343; Broadstreet v. Clark, 65 Iowa, 670, 22 N. W. 919; Willard v. Sturm, 96 Iowa, 555, 65 N. W. 847.

By the service of the garnishment process, which afterwards matured into judgments against the railroad company, the plaintiff obtained liens, or specific claims in the nature of liens, upon the funds in the garnishee's hands belonging to Hall, or which the garnishee owed Hall, which liens or claims dated from the service of the garnishment process.

Buck Reiner Co. v. Beatty, 82 Iowa, 353, 48 N. W. 96; Minthorn v. Hemphill, 73 Iowa, 257, 34 N. W. 844; 20 Cyc. 1058; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131; Re Maher, 169 Fed. 997; Gilmore v. Cohn, 102 Iowa, 254, 71 N. W. 244; Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 47 L.R.A. 131, 77 Am. St. Rep. 539, 80 N. W. 345; Rock Island Plow Co. v. Reardon, 222 U. S. 354, 56 L. ed. 231, 32 Sup. Ct. Rep. 164.

The bankruptcy proceedings did not affect the creditors' rights to or liens on the bankrupt's exempt property.

Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751, Ingram v. Wilson, 60 C. C. A. 618, 125 Fed. 913; Re Orear, 111 C. C. A. 150, 189 Fed. 888; Huntington v. Baskerville, 113 C. C. A. 137, 192 Fed. 813; Re Cale, 111 C. C. A. 89, 191 Fed. 31; Re National Grocer Co. 30 L.R.A.(N.S.) 982, 104 C. C. A. 47, 181 Fed. 33; Bank of Nez Perce v. Pindel, 113 C. C. A. 545, 193 Fed. 917; Re Nye, 66 C. C. A. 139, 133 Fed. 33; Huenergardt v. John S. Brittain Dry Goods Co. 53 C. C. A. 505, 116 Fed. 31; Steele v. Buel, 44 C. C. A. 287, 104 Fed. 969; Woodruff v. Cheeves, 44 C. C. A. 631, 105 Fed. 601; B. F. Roden Grocery Co. v. Bacon, 66 C. C. A. 497, 133 Fed. 515; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; Gregory Co. v. Cale, 115 Minn. 508, 37 L.R.A.(N.S.) 156, 133 N. W. 75.

The adjudication in bankruptcy did not annul or prevent the enforcement of the Iowa judgments against the railroad company in the garnishment suits. Those judgments are in full force and effect. And the decision below denies them full faith and credit under the Constitution.

Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Dimock v. Revere Copper Co. 117 U. S. 559, 29 L. ed. 994, 6 Sup. Ct. Rep. 855; Jaquith v. Rowley, 188 U. S. 620, 626, 47 L. ed. 620, 623, 23 Sup. Ct. Rep. 369; Bardes v. First Nat. Bank, 178 U. S. 524, 537, 44 L. ed. 1175, 1181, 20 Sup. Ct. Rep. 1000; Scott v. Ellery, 142 U. S. 381, 384, 35 L. ed. 1050, 1051, 12 Sup. Ct. Rep. 233; Doe v. Childress, 21 Wall. 643, 22 L. ed.

549; Jerome v. McCarter, 94 U. S. 737, 24 L. ed. 138; Davis v. Friedlander, 104 U. S. 570, 26 L. ed. 818; Brackett v. Dayton, 34 Minn. 219, 25 N. W. 348; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Mauran v. Crown Carpet Lining Co. 23 R. I. 344, 50 Atl. 387; Francisco v. Shelton, 85 Va. 779, 8 S. E. 789; State ex rel. Heckman v. King County Super. Ct. 28 Wash. 35, 92 Am. St. Rep. 826, 68 Pac. 170; Rosenthal v. Nove, 175 Mass. 559, 49 Am. St. Rep. 512, 56 N. E. 884; Pickens v. Dent, 45 C. C. A. 522, 106 Fed. 653; Davis v. Wakelee, 156 U. S. 680, 689, 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 555; Boynton v. Ball, 121 U. S. 457, 30 L. ed. 985, 7 Sup. Ct. Rep. 981; Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96; Johnston v. Spencer, 115 C. C. A. 167, 195 Fed. 215; First Nat. Bank v. Hopkins, 118 C. C. A. 321, 199 Fed. 873; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Re Rathman, 106 C. C. A. 253, 183 Fed. 913; Babbitt v. Dutcher, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969; Gregory v. Cale, 115 Minn. 508, 133 N. W. 75; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67; Pickens v. Roy, 187 U. S. 177, 47 L. ed. 128, 23 Sup. Ct. Rep. 78; Jones v. Springer, 226 U. S. 148, ante, 161, 33 Sup. Ct. Rep. 64.

These judgments constituted a good defense to the suit of Hall in the Nebraska courts, and the decision of the state supreme court in holding otherwise denies to the Iowa judgments that full faith and credit to which they are entitled under § 1 of art. 4 of the Constitution.

Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; Louisville & N. R. Co. v. Deer, 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207; Moore v. Chicago, R. I. & P. R. Co. 43 Iowa, 385; Chicago, B. & Q. R. Co. v. Moore, 31 Neb. 629, 28 Am. St. Rep. 534, 48 N. W. 475; Hadacheck v. Chicago, B. & Q. R. Co. 74 Neb. 385, 104 N. W. 878.

**Mr. Ralph W. Breckenridge** submitted the cause for defendant in error. Mr. J. O. Detweiler was on the brief:

It was the intention of Congress and the public policy embodied in the bankrupt law to divide the estate of the bankrupt between him and his wife and children on the *one hand*, and his creditors on the other *hand, as the laws of the state of his domicil* authorize its division under like circumstances.

Re McKenzie, 73 C. C. A. 483, 142 Fed. 383.

An adjudication in bankruptcy, whether voluntary or involuntary proceedings, renders void a judgment against a garnishee rendered in an action brought against the bankrupt within four months prior to the filing of the petition and when he was insolvent, and discharges the garnishee from liability thereon; and such judgment must thereafter be treated as a nullity wherever drawn in question, whether directly or collaterally.

Cavanaugh v. Fenley, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711; Thompson v. Ragan, 117 Ky. 577, 78 S. W. 485; Re Beals, 116 Fed. 530; Re Stevens, 2 Biss. 373, Fed. Cas. No. 13,392; Re Tune, 115 Fed. 906; Re Forbes, 108 C. C. A. 191, 186 Fed. 79; Re Ellis, 1 Nat. Bankr. Reg. 555, Fed. Cas. No. 4,400; Wood v. Carr, 115 Ky. 303, 73 S. W. 762; Re McCartney, 109 Fed. 621; Re Griffin, 2 Nat. Bankr. Reg. 254, Fed. Cas. No. 5,813; Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865; Cook v. Robinson, 114 C. C. A. 505, 194 Fed. 785; Re Walsh Bros. 159 Fed. 560; Re West Side Paper Co. 159 Fed. 241; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co. 123 Mo. App. 249, 100 S. W. 680; Hatfield v. Moller, 4 Fed. 717; Re D. H. Dougherty Co. 109 Fed. 480; Alexander v. Wilson, 144 Cal. 5, 77 Pac. 706; Goodnough Mercantile Co. v. Galloway, 48 Or. 239, 84 Pac. 1053; Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363; Smalley v. Laugenour, 196 U. S. 93, 49 L. ed. 400, 25 Sup. Ct. Rep. 216.

The argument that § 67f, in question here refers only to liens upon property which, if such liens were null, would pass to the trustee of the bankrupt, is unsound.

First Nat. Bank v. Staake, 202 U. S. 148, 50 L. ed. 970, 26 Sup. Ct. Rep. 580.

Mr. Justice **Lamar**, after making the foregoing statement of facts, delivered the opinion of the court:

Hall, a married man, head of a family, and insolvent, worked as a switchman for the railroad company in Nebraska, his wages being exempt from garnishment by the laws of that state. While temporarily absent in Iowa, two suits were there brought against him, summons of garnishment being served upon the railroad's agent in Iowa, where it had been held that the Nebraska exemption statute had no extraterritorial effect.

While these two suits were pending in Iowa, Hall returned to Nebraska, was adjudged a bankrupt, and claimed his wages

as exempt. No defense was made to the Iowa suits, and in both cases judgment was entered against the railroad as garnishee. For this reason it refused to pay Hall when he demanded the money, which had been set apart to him as exempt by the referee. He then sued the company and recovered a judgment, which was affirmed by the supreme court of Nebraska. The railroad sued out a writ of error to test its liability in this class of cases, which it insists are constantly arising, because of the employment of many persons on its lines, extending into different states, with varying garnishment laws. It contends that the laws of Iowa do not recognize the Nebraska exemption of wages from garnishment; that Hall was personally served in the Iowa suits, and that the judgments therein entered against the railroad as garnishee [514] are unreversed and binding; that to compel it to pay Hall and these Iowa plaintiffs also is to impose upon it a double liability, and to deny to the judgments of the Iowa courts the full faith and credit to which they are entitled under the Federal Constitution.

But if they were nullified by 67f of the bankruptcy act, they are entitled to no faith and no credit. That they were so nullified is Hall's contention; for he insists that if there was a lien against his wages, it was obtained by garnishment served within four months of his bankruptcy, and discharged by virtue of the provisions of 67f, which declares that "all . . . liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450.]

The railroad, on the other hand, contends that under § 70 the trustee acquires no title "to property which is exempt," and that liens thereon are not discharged by 67f, since that section has reference only to liens on property which can "pass to the trustee as a part of the estate of the bankrupt."

On this question there is a difference of opinion, some state and Federal courts holding that the bankruptcy act was intended to protect the creditors' trust fund, and not the bankrupt's own property, and that therefore liens against the exempt property were not annulled even though obtained by legal proceedings within four months of filing the petition. Re Driggs, 171 Fed. 897; Re Durham, 104 Fed. 231. On the other hand, Re Tune, 115 Fed. 906; Re Forbes, 108 C. C. A. 191, 186 Fed. 79, holds that 67f annuls all such liens, both as against the property which the trustee takes and that which may be set aside to the bankrupt as exempt. [515]

This view, we think, is supported both by the language of the section and the general policy of the act, which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt. Both of these objects would be defeated if judgments like this present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the bankruptcy act to secure to the debtor.

Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months' period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. "All liens obtained by legal proceedings" within that period are declared to be null and void. That universal language is not restricted by the later provision that "the property affected by the . . . lien shall be released from the same, and pass to the trustee as a part of the estate of the bankrupt." It is true that title to exempt property does not vest in the trustee, and cannot be administered by him for the benefit of the creditors. But it can "pass to the trustee as a part of the estate of the bankrupt," for the purposes named elsewhere in the statute, included in which is the duty to segregate, identify, and appraise what is claimed to be exempt. He must make a report "of the articles set off to the bankrupt, with the estimated value of each article," and creditors have twenty days in which to except to the trustee's report. Sec. 47 (11) and general orders in bankruptcy 17. In other words, the property is not automatically exempted, but must "pass to the trustee as a part of the estate,"—not to be administered for the benefit of creditors, but to enable him to perform the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt. [516] Custody and possession may be necessary to carry out these duties, and all levies, seizures, and liens obtained by legal proceedings within the four months, that

may or do interfere with that possession, are annulled, not only for the purpose of preventing the property passing to the trustee as a part of the estate, but for all purposes, including that of preventing their subsequent use against property that may ultimately be set aside to the bankrupt. This property is withdrawn from the possession of the trustee, not for the purpose of being subjected to such liens, but on the supposition that it needed no protection, inasmuch as they had been nullified.

The liens rendered void by 67f are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed, under the principle declared in Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751. But Hall did not waive his exemption in favor of the Iowa plaintiffs, and they had no right against his wages except that which was obtained by a legal proceeding within four months of the bankruptcy. Those liens, having been annulled by 67f of the bankruptcy act, furnished no defense to the railroad when sued by Hall for his wages, earned in Nebraska, exempt by the laws of that state, and duly set apart to him by the referee in bankruptcy. The judgment of the Supreme Court of Nebraska is affirmed.

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517] *AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, Plff. in Err.,

v.

A. L. MILLER, Agent of the First National Bank of Macon, Georgia.

(See S. C. Reporter's ed. 517–522.)

**Banks — collection — sending check direct to drawee bank.**

1. The performance by a bank on which a check is drawn of the dual function of collecting and crediting when such a check is sent directly to that bank for collection closes the transaction, and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course.

[For other cases, see Banks, I. e, in Digest Sup. Ct. 1908.]

**Notice — imputing knowledge of president to bank.**

2. A bank taking its president's check on account of his illegal overdraft is not chargeable in law with the knowledge that he was insolvent and was indebted on unmatured paper to the bank on which the check was drawn, since it was to his personal interest to conceal any fact which would prevent his bank from receiving paper in satisfaction of a debt which had been unlawfully contracted by reason of his official position.

[For other cases, see Notice, II., in Digest Sup. Ct. 1908.]

[No. 325.]

Argued May 9, 1913. Decided June 9, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Middle District of Tennessee in favor of plaintiff in a suit by the agent of an insolvent national bank. Affirmed.

See same case below, 107 C. C. A. 456, 185 Fed. 338.

The facts are stated in the opinion.

Mr. John M. Gaut argued the cause, and, with Mr. J. S. Pilcher, filed a brief for plaintiff in error:

The American National Bank, at the time when it made the book entries and mailed the letter of advice, was in total ignorance of Plant's insolvency, suspension, and bankruptcy.

Having acted under mistake of fact, that bank had the right, as between itself and Plant or anyone standing in his shoes, to revoke the book entries and make the set-off.

Re Farmers' & M. Bank, 13 Fed. 361; Re Dickinson, 5 B. R. 483; Union Nat. Bank v. McKey, 102 Fed. 662; Kelly v. Solari, 9 Mees. & W. 54, 11 L. J. Exch. N. S. 10, 6 Jur. 107; Bell v. Gardiner, 4 Mann. & G. 11, 1 Dowl. N. S. 683, 4 Scott, N. R. 621; French v. DeBow, 38 Mich. 708; Noble v. Doughten, 72 Kan. 336, 3 L.R.A.(N.S.) 1167, 83 Pac. 1048.

The American Bank also had the right, as between itself and the First National, to revoke the book entries on the ground of mistake. The latter bank, having given no value for the check, and suffered no injury by its reception, the equities of the former were superior.

Guild v. Baldridge, 2 Swan, 295; Bank of Republic v. Baxter, 31 Vt. 101; 5 Cyc. 542b.

It was a wrong upon the American Bank

NOTE.—On sending paper directly to drawee bank for collection—see notes to Anderson v. Rodgers, 27 L.R.A. 248; Farley Nat. Bank v. Polak, 2 L.R.A.(N.S.) 194; and Winchester Mill. Co. v. Bank of Winchester, 18 L.R.A.(N.S.) 441.

On imputation of knowledge of bank officers to bank, where officers are personally *interested—see note* to Lilly v. Hamilton *Bank, 29 L.R.A.(N.S.)* 558.

for Plant, in his condition of insolvency, to draw and deliver the check, and especially wrong, after this act of notorious insolvency, not to notify that bank of the fact.

Kerr, Fr. & Mistake, 109; Mitchell v. Worden, 20 Barb. 253; Pequeno v. Taylor, 38 Barb. 375; Chaffee v. Fort, 2 Lans. 81; Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161.

If the First National knew of his state of insolvency, and especially of either one of his notorious acts of insolvency, at any time before the contract and act of deposit was consummated, it was *particeps criminis* in not informing the American National of such insolvency.

Peterson v. Union Nat. Bank, 52 Pa. 206, 91 Am. Dec. 146.

The First National, at the time it received the check, knew of this indebtedness of Plant to the American by the imputation of Plant's knowledge.

St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390.

Mr. Sloss D. Baxter argued the cause and filed a brief for defendant in error:

When, in the absence of fraud, a check is presented to a bank by a payee, and received as a deposit, and credited on his account in the bank, the check is paid, and the bank has no authority to charge back the amount of the check against the payee, as was done in this case.

New York County Nat. Bank v. Massey, 192 U. S. 145, 48 L. ed. 383, 24 Sup. Ct. Rep. 199; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; City Nat. Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 138; American Exch. Nat. Bank v. Gregg, 138 Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 839; Levy v. Bank of United States, 4 Dall. 234, 1 L. ed. 814; Briggs v. Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285; Board of Education v. Robinson, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105; Hoffman v. First Nat. Bank, 46 N. J. L. 604; Daniel v. St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214; Montgomery County v. Cochran, 62 C. C. A. 70, 126 Fed. 456; First Nat. Bank v. Burkhardt, 100 U. S. 689, 25 L. ed. 768.

The agent's knowledge of transactions which he gained in affairs in which he was acting for himself alone, and not for his principal, cannot raise a legal presumption of knowledge on the part of the principal.

J. J. McCaskill Co. v. United States, 216 U. S. 514, 54 L. ed. 596, 30 Sup. Ct. Rep. 388; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433; McCalmont v. Lanning, 84 C. C. A. 138, 154 Fed. 353; Earle v. Munce, 133 Fed. 1008; Union Cent. L. Ins. Co. v. Robinson, 8 L.R.A.(N.S.) 883, 78 C. C. A. 268, 148 Fed. 358; Bank of Overton v. Thompson, 56 C. C. A. 554, 118 Fed. 798; Thomp. Corp. § 4657; Morawetz, Priv. Corp. 2d ed. 504c; 1 Morse, Banks & Bkg. 104; Levy & C. Mule Co. v. Kauffman, 52 C. C. A. 126, 114 Fed. 170; Waite v. Santa Cruz, 89 Fed. 619; Skud v. Tillinghast, 115 C. C. A. 83, 195 Fed. 5; Melton v. Pensacola Bank & T. Co. 111 C. C. A. 166, 190 Fed. 126.

If the insolvency of Plant and the further fact were known to the American National Bank, that he (Plant) intended to prefer the First National Bank, and take from his estate a sufficient amount of funds to pay the First National Bank of Macon his entire indebtedness, neither the American National Bank nor any of his creditors could, even by injunction, maintain a suit against him to enjoin him from making such a payment or preference.

Bamberger v. Schoolfield, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; Crawford v. Neal, 144 U. S. 595, 36 L. ed. 556, 12 Sup. Ct. Rep. 759.

To take an amount from the account of one depositor, and apply it to the indebtedness of an independent debtor of the bank, is revolutionary.

Hoffman v. National City Bank, 12 Wall. 181, 20 L. ed. 366; Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318.

Mr. Justice Lamar delivered the opinion of the court:

R. H. Plant, of Macon, Georgia, kept a deposit account with the American National Bank of Nashville, and, on May 16, 1904, was indebted to it in the sum of $50,000 on paper which matured two or three weeks later. He was generally regarded as a wealthy man, but was in fact insolvent. While so insolvent he, on May 13, 1904, gave to the First National Bank of Macon, of which he was president, a check for $3,000 on account of an indebtedness due by him to it.

The Macon bank at once mailed the check to the Nashville bank with instructions to place it to the credit of the Macon bank. The check was received by the Nashville bank at 8 o'clock Monday morning, May 16th. The letter was opened shortly after 9 o'clock, and was credited to the Macon bank's account about 11 o'clock A. M.,—an hour or so after a petition in bankruptcy had *been filed against[520 Plant in Macon. His failure precipitated a run on the Macon bank, and, the same day, by direction of the Comptroller of the

Treasury, a receiver was appointed for it under Rev. Stat. § 5234, U. S. Comp. Stat. 1901, p. 3507.

The Nashville bank was not advised of either of these failures, and about 2 o'clock it charged the $3,000 check to Plant's account, and the same day mailed to the Macon bank a letter stating that its account had been credited with $3,000. Four or five days later, having learned of Plant's bankruptcy, it charged off the $3,000, claiming that Plant's insolvency, on May 16th, gave to the Nashville bank the right of set-off even as against the unmatured drafts. Carr v. Hamilton, 129 U. S. 256, 32 L. ed. 670, 9 Sup. Ct. Rep. 295.

The plaintiff was subsequently appointed agent of the Macon bank under Rev. Stat. § 5234, and brought suit against the Nashville bank for the recovery of $3,000. Most of the facts were agreed upon, but much evidence was taken for the purpose of showing that the Macon bank had notice of Plant's insolvency, and at the conclusion of the testimony each party moved that a verdict be directed in its favor. Beutell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566. The court instructed the jury to find for the plaintiff. The judgment was affirmed (107 C. C. A. 456, 185 Fed. 338) by the circuit court of appeals.

There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but when such bank performs the dual function of collecting and crediting the transaction is closed, and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course. First Nat. Bank v. Burkhardt, 100 U. S. 689, 25 L. ed. 768. In the present case it was as though an officer of the Macon bank had presented the check to the teller of the Nashville bank, and, on receiving the money, had paid it back over the counter for deposit to the credit of the Macon bank.

The Nashville bank, however, claims that 521]there was *here the element of fraud and mistake which entitles it to cancel the credit; insisting that the Macon bank, having notice that Plant was insolvent, could not collect the check for $3,000 without notifying the Nashville bank of such insolvency, so that it might assert its superior right under its banker's lien, and set off the $3,000 deposit against Plant's debt of $50,000.

The law undoubtedly permits an insolvent to prefer one creditor over another, and allows such creditor to retain such preferential payment against all persons, except the trustee in bankruptcy, when the payment has been made within four months of the filing of the petition in bankruptcy, and with reasonable cause to believe that a preference would be effected. We do not enter upon the question as to whether this right to be preferred is modified by principles of equity, or whether the holder of a check, in presenting it to a bank for payment, is bound to give information that the bank's depositor and debtor was insolvent. For in this case it distinctly appears that the officers of the Macon bank did not know that Plant was insolvent at the time he gave the check, at the time they mailed the check, or at the time it was received by the Nashville bank, nor did they know that Plant was indebted to the Nashville bank. Such notice, however, is sought to be imputed to the Macon bank because Plant was its president, and it is argued that what he knew the bank must be considered as knowing.

This presents another phase of the oft-recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject, it is unnecessary to do more than to apply them to the facts of this case. If Plant, within the scope of his office, had knowledge of a fact which it was his duty to declare, and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is *then[522 presumed to have done what he ought to have done, and to have actually given the information to his principal.

But if the fact of his own insolvency and of his personal indebtedness to the Nashville bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon bank, of which he was president, with notice of facts which the agent not only did not disclose, but which he was interested in concealing.

Plant was a private banker in Macon, and as such indebted to the First National Bank of Macon, of which he was president, and so far dominated as to compel it to take care of the large balances against him in the clearing house, frequently more than 50 per cent of the $200,000 capital of the Macon bank. On May 13th Plant was indebted to the Macon bank on this account between $75,000 and $100,000. A national bank examiner was in the city, and it was expected that he would examine the books of the Macon bank within a few days, when this illegal overdraft by the president would appear. Rev. Stat. § 5200, U. S. Comp. Stat. 1901, p. 3494; Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668. Plant thereupon gave the bank checks and commercial paper to pay the balance. It was

to his personal interest to conceal any fact which would prevent the Macon bank from receiving paper in satisfaction of a debt which had been unlawfully contracted by reason of his official position. An element of that interest was that he should conceal not only the fact of his insolvency, but the fact of his indebtedness to the Nashville bank, lest the Macon bank should thereby refuse to take the $3,000 check at its face value. Without, therefore, inquiring as to what would have been the duty of the Macon bank had it known of Plant's insolvency and indebtedness on the $50,000 drafts, we hold that as it had no such knowledge in fact, it was not charged with such knowledge in law. The judgment is affirmed.

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522] *J. BUTLER STUDLEY, Trustee in Bankruptcy of the Collver Tours Company, Appt.,

v.

BOYLSTON NATIONAL BANK OF BOSTON.

(See S. C. Reporter's ed. 523–529.)

**Bankruptcy — preference — check by depositor in bank's favor.**

1. Payment of a depositor's notes given to the bank by checks drawn on his deposit account within four months of proceedings in bankruptcy against such depositor does not amount to a preference forbidden by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), where the bank had no reasonable cause to believe that a preference would thereby be effected.

[For other cases, see Bankruptcy, VI. b, 2, b, in Digest Sup. Ct. 1908.]

**Bankruptcy — preference — enforcement of banker's lien or right of set-off.**

2. The enforcement by a bank of its lien or right of set-off by applying deposits, honestly made in due course of business, and without intent to prefer the bank, to the payment of the depositor's notes in the bank's favor as they matured, does not, though within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the act of July 1, 1898, there being nothing in § 68a of that act which prevents the parties from voluntarily doing before the petition is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted.

[For other cases, see Bankruptcy, VI. b, 2, b; X. a, in Digest Sup. Ct. 1908.]

[No. 899.]

Argued April 14, 1913. Decided June 9, 1913.

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of Massachusetts, dismissing a suit by a trustee in bankruptcy to recover an alleged preference. Affirmed.

See same case below, 118 C. C. A. 435, 200 Fed. 249.

The facts are stated in the opinion.

Mr. J. Butler Studley argued the cause, and, with Messrs. William H. Dunbar and Stewart C. Woodworth, filed a brief for appellant:

No more can be required than that the trustee prove that at the time of the transfer the creditor knew that the debtor was insolvent.

Western Tie & Timber Co. v. Brown, 196 U. S. 502, 508, 509, 49 L. ed. 571, 574, 25 Sup. Ct. Rep. 339; Re Andrews, 135 Fed. 599; Ogden v. Reddish, 200 Fed. 977; Sundheim v. Ridge Ave. Bank, 138 Fed. 951; Remington, Bankr. §§ 1399, 1410.

Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose.

Coder v. McPherson, 82 C. C. A. 99, 152 Fed. 953; Wright v. William Skinner Mfg. Co. 89 C. C. A. 23, 162 Fed. 315; Tilt v. Citizens' Trust Co. 191 Fed. 441; Crandall v. Coats, 133 Fed. 965; Hamilton Nat. Bank v. Balcomb, 100 C. C. A. 575, 177 Fed. 155; Ernst v. Mechanics' & Metals Nat. Bank, 200 Fed. 295.

This court should follow the findings of fact made by the district court.

Re Noyes Bros. 62 C. C. A. 218, 127 Fed. 286; Re Dorr, 116 C. C. A. 112, 196 Fed. 294; Re Pettingill & Co. 70 C. C. A. 338, 137 Fed. 840.

The set-off provisions of the bankruptcy act are applicable only to set-offs made after a bankruptcy petition has been filed, and as of the date of the filing of the petition.

Re Michaelis, 196 Fed. 719.

Decisions of the lower Federal courts since the Massey Case have pointed out the distinction between the Massey Case and a case like the case at bar, where a set-off was made prior to the bankruptcy.

Irish v. Citizens' Trust Co. 163 Fed. 880; Re Perlhefter, 177 Fed. 302; Ridge Ave. Bank v. Studheim, 76 C. C. A. 362, 145 Fed. 798.

The court cannot construct a right of set-off that never came into existence.

NOTE.—On set-off by bank against bankrupt's deposit as a preference within the bankruptcy law—see note to Booth v. Prete, 20 L.R.A.(N.S.) 863.

Irish v. Citizens' Trust Co. 163 Fed. 880.

Three of the payments in question were made by checks drawn by the depositor and accepted by the bank. If the bank had any lien or any right of set-off, it did not exercise it.

Ridge Ave. Bank v. Studheim, 76 C. C. A. 362, 145 Fed. 798; Irish v. Citizens' Trust Co. 163 Fed. 880; Re Perlhefter, 177 Fed. 299.

The set-off provisions of the bankruptcy statutes were enacted to enable a creditor to set off demands not due when the bankruptcy proceedings were instituted; for in the absence of such provisions a bank, for example, holding a note not matured at the time of its depositor's bankruptcy, would be obliged to surrender the bankrupt's deposit to his trustee, and prove its claim *pari passu* with other creditors.

Lowell, Bankr. pp. 188, 194.

Mr. Hollis R. Bailey argued the cause and filed a brief for appellee:

Concurrent action of two courts below upon a question of fact will not be disturbed by the upper court except for manifest error.

First Nat. Bank v. Littlefield, 226 U. S. 110, ante, 145, 33 Sup. Ct. Rep. 78.

Where a bank receives deposits in regular course of business, subject to check, without collusion or fraud, and holds notes signed by the depositor, it has a right, when the notes are due, to offset the amount due to it on the notes against the amounts due from it on deposit account. The right of set-off exists under the bankrupt act, § 68, and also exists apart from the bankrupt act. This right exists even if the depositor is insolvent when the notes become due, and even if such insolvency is known to the bank.

Demmon v. Boylston Bank, 5 Cush. 194; New York County Nat. Bank v. Massey, 192 U. S. 138, 49 L. ed. 380, 24 Sup. Ct. Rep. 199; Re Scherzer, 130 Fed. 631; Lowell v. International Trust Co. 86 C. C. A. 137, 158 Fed. 781; Re Percy Ford Co. 199 Fed. 334; Whitaker v. Crowder State Bank, 26 Okla. 786, 110 Pac. 776; Tomlinson v. Bank of Lexington, 76 C. C. A. 400, 145 Fed. 826; Chicago Title & T. Co. v. Federal Trust & Sav. Bank, 192 Fed. 967; Germania Sav. Bank & T. Co. v. Loeb, 110 C. C. A. 263, 188 Fed. 285; West v. Bank of Lahoma, 16 Okla. 328, 85 Pac. 469; Frank v. Mercantile Nat. Bank, 182 N. Y. 264, 108 Am. St. Rep. 805, 74 N. E. 841; Irish v. Citizens' Trust Co. 163 Fed. 880; Booth v. Prete, 81 Conn. 636, 20 L.R.A. (N.S.) 863, 71 Atl. 938, 15 Ann. Cas. 306; Re George M. Hill Co. 66 L.R.A. 68, 64 C. C. A. 561, 130 Fed. 315; Re Philip Semmer Glass Co. 67 C. C. A. 551, 135 Fed. 77; Re Myers, 99 Fed. 691; Re Little, 110 Fed. 621; Re Medaris-Vine Carriage Co. 17 Am. Bankr. Rep. 897; Jordan v. National Shoe & Leather Bank, 74 N. Y. 473, 30 Am. Rep. 319; Pearsall v. Nassau Nat. Bank, 74 App. Div. 89, 77 N. Y. Supp. 11; Steinhardt v. National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23; Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108; Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655; Furber v. Dane, 203 Mass. 117, 89 N. E. 227; Knapp v. Cowell, 77 Iowa, 528, 42 N. W. 434; National Bank v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 32 Sup. Ct. Rep. 633.

The right of set-off prior to bankruptcy was recognized and allowed in the following cases, which were all cases in bankruptcy.

Re George M. Hill Co. 66 L.R.A. 68, 64 C. C. A. 561, 130 Fed. 315; Lowell v. International Trust Co. 86 C. C. A. 137, 158 Fed. 781; Re V. & M. Lumber Co. 182 Fed. 231; Chicago Title & T. Co. v. Federal Trust & Sav. Bank, 192 Fed. 967; Re Medaris-Vine Carriage Co. 17 Am. Bankr. Rep. 897; Booth v. Prete, 81 Conn. 636, 20 L.R.A. (N.S.) 863, 71 Atl. 938, 15 Ann. Cas. 306; West v. Bank of Lahoma, 16 Okla. 328, 85 Pac. 469.

The fact that checks were given in certain instances in connection with the payment of the notes is not material. The right of set-off which the bank had was not destroyed or diminished by the giving of the checks. The result accomplished was precisely the same in the one case as in the other. The checks were given by the depositor for its own convenience.

Irish v. Citizens' Trust Co. 163 Fed. 880; Re Lynn Camp Coal Co. 168 Fed. 998.

The opinion of the district judge is not a part of the record.

North American Loan & T. Co. v. Colonial & U. S. Mortg. Co. 28 C. C. A. 88, 55 U. S. App. 157, 83 Fed. 796; England v. Gebhardt, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287; Williams v. Norris, 12 Wheat. 117, 6 L. ed. 571; Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733.

An opinion does not take the place of findings of fact.

Re Pettingill & Co. 70 C. C. A. 338, 137 Fed. 840.

Recourse cannot be had to the opinion to ascertain the facts.

Townsend v. Beatrice Cemetery Asso. 70 C. C. A. 521, 138 Fed. 381; Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28

Sup. Ct. Rep. 32; Re Boston Dry Goods Co. 60 C. C. A. 118, 125 Fed. 229.

Mr. Justice Lamar delivered the opinion of the court:

The Collver Tours Company was engaged in the business of conducting touring par-[524]ties around the world, charging *a lump sum for the tickets, which were paid for in advance. It had expended about $40,000 in advertising, which it carried on its books as an asset, and since the character of its business did not involve the possession of tangible property, it had nothing except cash on hand, good will and its earning capacity as a means of paying debts.

In 1907 the company opened an account with the Boylston National Bank, with which it subsequently did all of its banking business of depositing, checking, and borrowing. It notified the bank in 1909 that it had no other liabilities except what was due to the bank, and it was given a line of credit of $25,000. It borrowed that sum on the promise to repay it that year; but as it used a part of its funds to open a letter-of-credit account in the bank, it was permitted to renew the notes. In December, 1909, it made a statement to the Massachusetts Corporation Commission which showed that the company did not have assets sufficient to pay its liabilities, and an officer of the bank saw this statement, but the representative of the Collver Company went over the matter with the bank officers, made an explanation, and borrowed an additional sum of $5,000 in the spring or summer of 1910. During the year 1910 the debt of $25,000 was reduced to $10,000 went back to $25,000, was reduced again to $15,000, and increased to $30,000,—the Collver Company making to the bank encouraging statements of its prospects and of an anticipated large sale of tickets for round-the-world tours. One note for $5,000 was paid, and the then debt of $25,000 was represented by five notes for $5,000 each, maturing September 12, 20, 30, October 3 and 14th.

The balances in bank to the credit of the Collver Company fluctuated greatly from time to time, varying from almost nothing up to as high as $54,000. As a result of sales of tickets, the company deposited large sums in August and September and smaller sums in October and November. During that period $22,500 was paid to the [525] *bank, the three notes due September 12, 20, and 30 being paid by checks on the Boylston National Bank. The note for $5,000, due October 3, was charged to the company's account, and on the same day a renewal note for $2,500 was discounted. The note for $5,000 which fell due on October 14 was also charged to the deposit account, according to the custom of the bank of which the Collver Company had notice, and to which it assented. On the date of the payment by such charging of the last note to the account, the company had $19,000 left to its credit. The Collver Company continued to make deposits and to draw checks, and applied for a new loan, which was refused by the bank. On December 16, 1910, a petition in bankruptcy was filed against the company, and after his election the trustee brought suit against the bank to recover the $22,500, claiming that it had notice of the Collver Company's insolvency and that the payments of $22,500 were transfers which had operated to give the Boylston Bank a preference within four months of filing the petition.

In its answer the bank alleged that it was informed and believed that the company was doing a large and constantly increasing business and was in every way responsible; that the company for a long time kept its general deposit with the bank and was constantly making deposits therein, some large, some small, upon all of which the bank had a lien and a right of set-off, and that "this right of set-off was not affected by the fact, if it be a fact, that the company was at any of the times of the exercise of said right of set-off insolvent;" and it claimed that the exercise of its right of set-off did not and could not constitute a preference within the meaning of the bankruptcy act or any amendment thereto.

The case was tried by the referee, who sustained the bank's claim of set-off, holding that the payments were not transfers; or, if transfers, that the trustee could not *recover the money because the bank [526] had no reasonable cause to believe that the payment of the notes would operate as a preference. On exceptions to the report it was sustained on the ground that the deposits had been honestly made in due course of business, and that the defendant, by virtue of its banker's lien and right of set-off, could retain the money. That judgment was affirmed on the same ground by the circuit court of appeals. 200 Fed. 249. The case was then brought here by the trustee, who insists that all the payments were transfers; that if the notes charged to the account are not transfers, certainly the giving of the three checks for $5,000 were transfers, and that in receiving the same the bank necessarily knew that it was obtaining a preference.

But if, as found by the referee, the bank had no reasonable cause to believe such

transfers would effect a preference, the payments by checks for $15,000, drawn on the deposit account, are as much protected as if on the same dates similar checks had been given in payment of like amounts due another bank with which the Collver Company kept no account. For there is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The bankruptcy act contemplates that by remaining in business and at work, an insolvent may become able to pay off his debts. It does not prevent him from continuing in trade, depositing money in bank, drawing checks and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues, all payments thus made, within the four months period, may be recovered by the trustee, if the creditor had reasonable cause to believe that a preference would be thereby effected.

In this case the referee found as a fact 527]that the bank *had no reasonable cause to believe that a preference would result. The district judge made no finding of fact, though in his opinion, which cannot be considered as a finding of fact, he did state that the bank had a right to examine the company's books, and could have discovered that a preference would result. The circuit court of appeals made no ruling on this subject, and we therefore pass to the consideration of the right of set-off in the light of the finding by the referee, by the district judge, and by the court of appeals, that the deposits were honestly made, in due course of business, and without any intent to prefer the bank.

The money so deposited was the proceeds of the sale of tickets to a large party of round-the-world tourists, and was put in bank, not for the purpose of preferring it, but in the expectation of being used for carrying on the business in the future as in the past. Indeed, the payments were made with the statement that the company would expect the bank to discount other notes. We find nothing in the record to indicate that the deposits were made for the purpose of enabling the bank to secure a preference by the exercise of the right of set-off. The case, therefore, comes directly within the decision in New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199, where $3,884 deposited by an insolvent customer, in good faith, four days before the filing of the petition against him, was allowed to *the bank by way of set-off on notes of the bankrupt held by it.*

An effort is made to distinguish that case from this, by calling attention to the fact that here, by checks drawn on the account or notes charged to the account, the parties themselves voluntarily made the set-off before the petition was filed; while in the Massey Case the trustee, under the supervision of the referee, stated an account and allowed the set-off as permitted by 68a, which provides "that in all cases of mutual debt, or mutual credits between *the[528 estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

That section did not create the right of set-off, but recognized its existence, and provided a method by which it could be enforced even after bankruptcy. What the old books called a right of stoppage—what business men call set-off—is a right given or recognized by the commercial law of each of the states, and is protected by the bankruptcy act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.

The banker's lien on deposits, the right of retention and set-off of mutual debts, are frequently spoken of as though they were synonymous, while in strictness, a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries, and suit is brought by one against the other, the defendant, to avoid a circuity of action, may interpose his mutual claim by way of defense, and if it exceeds that of the plaintiff, may recover for the difference. Such counterclaim can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B when B owes A. If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the trustee. But there is nothing in 68a which prevents the parties from voluntarily *doing, before[529 the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.

The bank was indebted to the Collver Company as a depositor some $54,000 for

money deposited in good faith in the usual course of business, and with no purpose of enabling the bank to secure the right of set-off. The Collver Company, on the other hand, was indebted to the bank $25,000 on notes maturing at various dates. These were mutual debts, and if, on the date the first note became due, the Collver Company had failed to pay it, the bank could have enforced its banker's lien or its right of set-off, by applying $5,000 of the deposits in payment of the note which matured that day, and so on as each of the other notes became due. It cannot have been illegal for the parties on September 12, 20, 30, October 3 and 14, to do what the law would have required the trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance; for, whether the checks for $5,000 were paid or notes for $5,000 was charged was, in either event, a book entry equivalent to the voluntary exercise by the parties of the right of set-off.

The bankruptcy act recognizes this right, and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the trustee is authorized to sue and recover if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference. But to deny the right of set-off in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy, and so interfere with the course of business as to produce evils of serious and far-reaching consequence.

Affirmed.

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530] *JOSEPH PARKER CAMP, Appt.,

v.

KATE WILLARD BOYD, Henry K. Willard, and George E. Howe, Devisees in Trust under the Last Will of Caleb C. Willard, Deceased.

(See S. C. Reporter's ed. 530–560.)

**Equity — doing complete justice — multiplicity of suits.**

1. Persons having the equitable but not the legal title to two of three parcels of a lot are not precluded from invoking the aid of a court of equity to restrain the prosecution of an ejectment suit involving the entire lot, because they may have the legal as well as the equitable title to the third parcel.

[For other cases, see Equity, 13–29, 79–86, in Digest Sup. Ct. 1908.]

**Equity — things done which ought to have been done — defective deeds — ground rents.**

2. Purchasers at a judicial sale manifestly intended by court and parties to dispose of the entire beneficial interest of the judgment debtor in certain parcels of land which he had leased for a stipulated rental for "ninety-nine years, renewable forever," became, upon payment of the purchase price, the owners in equity of his reversionary interest, where the deeds executed in order to carry out the decree of sale failed to convey what was intended because they followed the decree in denominating the interest sold as ground rents.

[For other cases, see Equity, 289–295, in Digest Sup. Ct. 1908.]

[No. 71.]

Argued February 28, March 3 and 5, 1913.
Decided June 9, 1913.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, establishing complainants' title to land, and enjoining defendant from prosecuting an action of ejectment, or otherwise asserting title thereto. Affirmed.

See same case below, 35 App. D. C. 159.

The facts are stated in the opinion.

Mr. **Hugh T. Taggart** argued the cause, and, with Mr. William E. Ambrose, filed a brief for appellant:

A covenant to renew the lease is a covenant whereby the lessor binds himself to make another lease, at the expiration of the term, either to the lessee or his assigns, for the same or some other period mentioned.

Martindale, Conv. § 354.

Rent is incident to the reversion, and therefore by a general grant of the reversion the rent will pass, though by the grant of the rent generally the reversion will not pass.

Broom Legal Maxims, 8th ed. 493; 3 Washb. Real Prop. § 2304.

Severance of the rent from the reversion takes place not only when the landlord transfers the reversion without the rent, but also when he transfers the rent without the reversion.

1 Tiffany, Land. & T. 1107.

The lessor or lessors who made the lease and in favor of whom the rent is reserved are the persons entitled to each instalment of the rent as it falls due, unless and until the right has become devested out of them by a transfer, voluntary or involuntary.

Id. 1100.

A general grant of the reversion passes

all the leases to which the property is subject, including the rent reserved as incident to the grant. But a lessor may assign the rent to become due upon a lease without assigning the reversion; or he may grant the reversion, and by special words reserve the rent.

2 Taylor, Land. & T. § 426.

An order drawn by a landlord, to pay accruing rent to a third person, operates as an assignment of the rent; and the tenant is bound to pay to such person, whether he has accepted the order or not.

Id. § 428.

If the tenant under the lease were to convey the lease in fee to a third party, the latter would have no better right to contest the title of the lessor than the lessee himself.

1 Washb. Real Prop. § 748.

But the mere conveyance by the lessee would not of itself operate as a disclaimer; it could only operate as an assignment of such estate as the grantor had.

Id. § 757.

In relation to leases for years, as well as those for life, the happening of the cause of forfeiture only renders the lease void as to the lessee. It may be affirmed by the lessor, and then the rights and obligations of both parties will continue with regard to the forfeiture.

Doe ex dem. Bryan v. Bancks, 15 Eng. Rul. Cas. 566, note; Clark v. Jones, 1 Denio, 516, 43 Am. Dec. 706.

Even if the tenant forfeits his estate, he does so only at the option of the landlord. If the landlord desires, he may overlook the tortious act of his tenant, and assert his rights at the end of the term for years, or of the life estate.

Jones, Land. & T. § 479; Warvelle, Ejectment, §§ 115, 116, 459–462.

Where it is the duty to inquire, it is the duty to learn; and a party will be charged with knowledge of all facts which he could have ascertained upon proper inquiry, whether he makes the inquiry or not.

Wade, Notice, § 96; Myers v. Silljacks, 58 Md. 320; Beaufort v. Neeld, 12 Clark & F. 248, 9 Jur. 813.

It was essential under the leases that the lessee should avail himself of the privilege of election under the options during the term; and the lessee under each of the leases having failed to exercise the privilege during the term, and the lessor having been in no manner responsible for the lessee's failure to do so, the privilege has been lost.

1 Parsons, Contr. 7th ed. p. 532; 11 Am. & Eng. Enc. Law, 611; 1 Washb. Real Prop. § 668; Lloyd v. Collett, 4 Bro. Ch. 469, 4 Ves. Jr. 689, note; Benedict v. Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484; Fry, Spec. Perf. 513, note; 1 Page, Contr. §§ 23, 39, 41, 42; Waterman v. Banks, 144 U. S. 394, 401, 36 L. ed. 479, 482, 12 Sup. Ct. Rep. 646; Coleman v. Applegarth, 68 Md. 27, 6 Am. St. Rep. 417, 11 Atl. 284; Codding v. Wamsley, 1 Hun, 585, affirmed in 60 N. Y. 644; Wade, Notice, § 378; Kelsey v. Crowther, 162 U. S. 407, 40 L. ed. 1018, 16 Sup. Ct. Rep. 808; Pom. Spec. Perf. § 387; Pom. Eq. Jur. § 807.

The lessees' right to a renewal of the leases, and their right to acquire the demised premises, depended on the precedent condition that they should be exercised within the time stipulated in the leases.

Renoud v. Daskam, 34 Conn. 516.

Even in the case of a breach of covenant which is caused by ignorance of the existence of the covenant, due to the fact that the lessee neglected to refer to the lease which contained it, before doing the act which constituted the breach, a court of equity will not relieve against a forfeiture.

Barrow v. Isaacs [1891] 1 Q. B. 417, 60 L. J. Q. B. N. S. 179, 64 L. T. N. S. 686, 39 Week. Rep. 338, 55 J. P. 517, 15 Eng. Rul. Cas. 770; Beauchamp v. Winn, L. R. 6 H. L. 223, 22 Week. Rep. 193, 22 Eng. Rul. Cas. 889; Thiebaud v. First Nat. Bank, 42 Ind. 212.

Mr. R. Ross Perry argued the cause, and, with Messrs. William F. Mattingly, John B. Larner, and R. Ross Perry, Jr. filed a brief for appellees:

The sale of the ground rents of parcels A and B was the sale of Blodget's reversion.

Banks v. Haskie, 45 Md. 207; Meyers v. Silljacks, 58 Md. 319; Ogle v. Reynolds, 75 Md. 145, 23 Atl. 137; Jones v. Rose, 96 Md. 483, 54 Atl. 69.

The conveyance of the usufruct of a property imports the conveyance of the ownership thereof.

De Peyster v. Michael, 6 N. Y. 467, 57 Am. Dec. 470; Kerry v. Derrick, Cro. Jac. 104.

The appellees and those under whom they claim have had adverse possession of lot 20, claiming title thereto as against all the world, from the time of the sales and conveyances under the Bickley chancery suit.

Willison v. Watkins, 3 Pet. 43, 7 L. ed. 596; Wadsworthville Poor School v. Jennings, 40 S. C. 168, 42 Am. St. Rep. 854, 18 S. E. 257, 891.

The opinions of title examiners sustain the claim of the appellees.

Doe ex dem. Poor v. Considine, 6 Wall. 458, 18 L. ed. 869.

The long-continued possession of the appellees and of their grantors warrants presumptions of grants and conveyances from original lessees.

Jones, Ev. 1st ed. §§ 72-73; Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398; McClanahan v. Davis, 8 How. 170, 12 L. ed. 1033.

Upon the supposition that the purchasers of parcels A and B from Brant, trustee, did not acquire a fee-simple title, then they had a clear equity to enforce a renewal of their leases, and to the rights of purchase in said leases contained.

Banks v. Haskie, 45 Md. 207.

The bill presents a case within the jurisdiction of a court of equity.

Langstraat v. Nelson, 40 Fed. 783; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia, affirming a decree of the supreme court, establishing the title of the complainants (now appellees) to a lot of land in the city of Washington, and granting a perpetual injunction against the further prosecution of an action of ejectment that was brought by the appellant, Joseph Parker Camp, against Caleb C. Willard, the devisor of the complainants, to recover possession; and also enjoining Camp and all persons claiming under him from instituting any further proceedings at law or in equity for the possession of, or for asserting any claim to, the land. The cause was heard in the supreme court upon a demurrer to the bill of complaint, which was overruled (37 Wash. L. Rep. 14); and the defendant having elected to stand upon his demurrer, a final decree followed as of course. The decision of the court of appeals is reported, 35 App. D. C. 159.

Both parties claim under Samuel Blodget, Jr., who owned the property in the early days of the Federal Capital. The bill of complaint sets forth the full history of the title, with copies of the instruments of conveyance and other documents necessary 532]to a complete understanding *of the controversy. All the facts hereinafter stated respecting the title are derived from the averments of the bill and from the documents filed with it and by reference made parts of it.

The property in question is described as —"Original lot numbered twenty, in square numbered two hundred and fifty-four, in the city of Washington, in the District of Columbia, as the same is laid down on the ground plan or map of said city." This square is bounded by E and F streets, and by 13th and 14th streets, in the northwest section; lot No. 20 being on the southerly side of F street.

Under the act of Congress entitled—"An Act for Establishing the Temporary and Permanent Seat of the Government of the United States," passed July 16, 1790 (1 Stat. at L. 130, chap. 28), three commissioners were appointed by President Washington, and they in the following year made a friendly agreement with the original landholders, which resulted in laying out the city in squares and streets, and the subdivision of the squares; and, in the year 1792, a partition of the lands was made between the original proprietors and the commissioners. In that division this lot was amongst those set off to the commissioners, and it, with some adjoining lots, was sold by them to Blodget in the same year. But no conveyance was made to him, and he therefore acquired only an equitable interest.

Blodget about that time organized a lottery under the sanction of the commissioners, and advertised it as done "by the commissioners appointed to prepare the public buildings, etc., within the city of Washington, for the reception of Congress, and for the permanent residence after the year 1800." It was announced as "a lottery for the improvement of the Federal City." It was stated that the sole design of the lottery was to facilitate other improvements together with the public buildings. The capital prize announced was—"One superb hotel, with *baths, outhouses, etc., etc.,[533 to cost $50,000," with cash prizes aggregating $300,000 in addition. The advertisement stated that "the keys of the hotel, when complete, will be delivered to the fortunate possessor of the ticket drawn against its number," and that "$100 will be given for the best plan of an elegant and convenient hotel or inn, with hot and cold baths, stable," etc. The advertisement was subscribed, "S. Blodget, Agent for the Affairs of the City." Large sales of tickets having been made by Blodget, and by Colonel William Deakins, Jr., who appears to have been his partner in the scheme, and some time having elapsed without a drawing being made, the commissioners became uneasy because of their real or supposed responsibility for the prizes, whereupon Blodget and Deakins gave them a written declaration under seal, dated September 20, 1793, agreeing to indemnify the commissioners from all claims and demands by reason of

any prize to be drawn. Afterwards, and at the request of the commissioners, Blodget, who appears to have been a large landowner in the District, made a mortgage or deed of trust, under date of January 28, 1794, to Thomas Johnson, Jr., and Thomas Peter, as trustees, for securing the payment of the prizes and for the indemnity of Thomas Johnson, David Steuart, and Daniel Carroll, the commissioners, their successors, etc. By the mortgage, Blodget transferred in fee to Thomas Johnson, Jr., and Thomas Peter—"all the lands and real estate and property of him, the said Samuel Blodget, situate and being within the territory of Columbia, with their . . . appurtenances, and all the estate, right, title, etc., in law and in equity" of Blodget therein. The defeasance clause provided that Blodget should "pay all prizes and sums of money with which he is or may be chargeable, or for which he may be liable for or on account of the said lottery, and shall in all things save, indemnify, and keep harmless 534] the said Thomas Johnson, David *Steuart, and Daniel Carroll, their successors, etc., against all suits," etc.

Thereafter, and in the year 1801, Blodget made three leases of as many several parcels of lot 20. The lot has a frontage of 51 feet, 11 inches, upon the southerly side of F street, and a depth of 159 feet running to an alley. One lease was dated April 13, 1801, and demised to James Daugherty the easterly portion of the whole lot, having a frontage of 20 feet upon the street, and running the full depth to the alley; the second lease was to Edward Frethy, dated April 14, 1801, and covered the westerly portion of the lot, having a frontage of 19 feet, 11½ inches, and running of that width to the alley; the third lease, covering the intervening portion of the whole lot, having a frontage of 11 feet, 11 inches, on the street, and running the full depth, was dated April 15, 1801, and made to Edward Fennell. The Daugherty and Frethy leases were recorded within the year. The Fennell lease, for some reason, was not promptly acknowledged or recorded, and therefore a new lease was made by Blodget to Fennell, dated April 20, 1804, and recorded a few days later. These leases all ran for ninety-nine years from their respective dates in 1801, the terms, however, "to be renewable forever." They were sealed instruments, elaborate in form, signed and acknowledged by lessor and lessee in each instance, and recorded in the *Land Records* of the District of Columbia. *A copy of the* Daugherty lease is set forth in the margin.† *The Frethy lease was[535 substantially like it. The Fennell lease of April 20, 1804, contained a recital of the previous lease to him and the failure to record it, and the making *of the[536 present instrument in the place of it; the demise then proceeded in substantially the same form as in the other leases.

The Daugherty lease reserved a yearly rent of $40, *payable annually, with an[537 option of purchase in fee at the price of $500; the Frethy lease was the same in these respects; the Fennell lease called for a rent of $24 per annum and a purchase price of $300. The leases were alike in that they provided for terms of ninety-nine years each, with a right of perpetual renewals; with right of re-entry by the lessor for forty days' default in payment of the rent, or distress, at his option; two of them provided that for sixty days' default in the payment of the rent the lessor might re-enter and terminate the lease; each lease contained an option for a purchase in fee at a price of which the annual rent was equivalent to eight per cent; each required the lessee to erect a dwelling house upon the premises during the year of the making of the lease. The Fennell lease differed in containing no

†[Copy of Lease—Samuel Blodget to James Daugherty.]

This indenture made the thirteenth day of April in the year of our Lord one thousand eight hundred and one Between Samuel Blodget of Philadelphia State of Pennsylvania of the one part and James Daugherty of the City of Washington in the Territory of Columbia of the other part witnesseth that the said Samuel Blodget for and in consideration of the payment of the rent and performance of the Covenants hereinafter mentioned on the part of the said James Daugherty his executors administrators and assigns to be paid and performed Hath demised granted leased and to farm lett and by these presents Doth demise grant lease and to farm lett unto the said James Daugherty his executors administrators and assigns. All that Lott of twenty feet front on F. Street in Lott number twenty in square number two hundred and fifty four in the City of Washington aforesaid Together with all improvements, alleys, ways water & water courses privileges, easements and emoluments belonging or appertaining to said Lott. To have and to hold said lott of ground with the appurtenances unto the said James Daugherty his executors administrators and assigns from this the thirteenth day of April above mentioned for and during and unto the full term of Ninety nine years from thence next ensuing and full to be compleated and ended yielding and paying therefor yearly and every year during said term unto the said Samuel Blodget his heirs and assigns

provision for forfeiture of the [illegible] said defendant Blodget, nonpayment of the rent, and in [illegible] tween the said Blodget, particulars. Edward Frithey, one

In October, 1802, one Robert [illegible] the other part, began suit against Samuel Bl[illegible] day of April, 1801, others by bill in chancery in the [illegible] and rents reserved court for the District of Columbia, [illegible] dget by indenture up the history of the above-mentioned [illegible] Samuel Blodget of tery; the public advertisement of the [illegible] Daugherty, one scheme; that Bickley, in reliance upon the [illegible] the other part, proposed plan, purchased a ticket; [illegible] day of April, that the sale and disposal of the tickets [illegible] purposes afore- was intrusted wholly to Blodgett and to [illegible] was appointed William Deakins, Jr., since deceased. The [illegible] He was di- bill set out the making of the indemnity [illegible] public auc- agreement of September 20, 1793, by Blod- [illegible] ort the sale get and Deakins, and the making of the [illegible] ation of it, mortgage by Blodget on January 28, 1794, [illegible] oney, "the [illegible] eeds good

the yearly rent or sum—forty dollars current money of the United States free and clear of all taxes assessments or public dues nor or hereafter to be laid taxe-or assessed on sd. demised premises in annual payments on the said thirteenth day of April in each and every year—the said term of ninety nine years to be renewable forever. Provided always and it is the true intent and meaning of these presents that if it shall happen that if the said yearly rent shall be in arrear and unpaid by the space of forty days next after the time on which the same is above reserved to be paid, then it shall and may be lawful to and for the said Samuel Blodget his heirs or assigns unto the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess occupy and enjoy as in his or their former estate until all such arrearages of rent with legal interest thereof and all and every cost charge and expenses incurred by the said Samuel Blodget his heirs or assigns by reason of the non-payment of said rent shall be fully satisfied and paid or make distress therefor at his or their option and also if the said yearly rent Shall be in arrear and unpaid by the space of sixty days next after the time on which the same is above reserved to be paid then it may be lawful to and for the said Samuel Blodget his heirs and assigns unto the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess occupy and enjoy as in his or their former estate and that then in such case this Indenture and every clause matter and thing therein contained shall from henceforth be utterly void and of no effect and the said James Daugherty for himself his executors administrators and assigns doth covenant and agree to and with the said Samuel Blodget his heirs and assigns well and truly to pay the above reserved yearly rent or sum of forty dollars at the time before within mentioned and also that he the said James Daugherty his executors administrators and assigns shall and will erect and build a good and substantial dwelling house to be com-

pleted [illegible] present [illegible] plied [illegible] binds [illegible] ministrat[illegible] said Samue[illegible] the damage[illegible] him or them [illegible] over in case [illegible] in payment of [illegible] then and in [illegible] which shall be [illegible] premises shall [illegible] Blodget his heirs [illegible] Samuel Blodget [illegible] assigns doth covenant [illegible] and with the said [illegible] heirs executors admini[illegible] that he the said James [illegible] or assigns at any time [illegible] the continuances of this [illegible] ture demise on the request [illegible] costs and charges of the [illegible] erty his heirs, or assigns and [illegible] payment or tending in payment [illegible] Samuel Blodget his heirs [illegible] principal sum of five hundred [illegible] and will make and execute a [illegible] simple for said Lott and premises [illegible] demised to the said James Daugherty [illegible] heirs and assigns forever with such [illegible] of General Warrantee as he or they may require. It is further agreed that the said James Daugherty his heirs or assigns may pay unto the said Samuel Blodget his heirs or assigns any proportion of the principal of five hundred dollars not less than one tenth of that sum and so much of the principal as shall be paid so much in proportion of the rent shall be lessened reserving unto the said Blodget his heirs or assigns all penalties and forf-itures within before mentioned until the whole sum of five hundred dollars, is paid when the whole rent shall cease In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

Sam Blodget. [Seal.]
James Daugherty. [Seal.]
Signed, sealed, and delivered, etc.

try the issue joined therein, it was mutually agreed between Bickley and Blodget, with the leave of the court, that the jury should be discharged from giving their verdict, and should be empowered to act as referees, to determine and order what sum of money if any, should be paid by Blodget to Bickley, and if they thought proper, to order titles and conveyances and other acts by either party to the other as justice should require; whereupon the jury as referees awarded that Blodget should convey to Bickley, in fee simple, the hotel and the lots of ground belonging to it, and should also pay to Bickley the sum of $21,500 with costs, for the payment of which, and the performance of the award, the property in the city of Washington mortgaged by Blodget to the commissioners was by the terms of the award to be first resorted to; that upon the report of the jury as referees, the court gave judgment in favor of Bickley against Blodget, for said sum of $21,500 and costs, and that the report of the jury as referees should be in all its other parts confirmed and carried into full and complete execution. That by virtue of the deed of trust of January 28, 1794, all the real property which Blodget had within the limits of the territory of Columbia was pledged and made answerable to make good to the fortunate adventures the prizes they should draw in the lottery, and "that your orator has his claim to be paid out of that property still further confirmed by the award and the judgment hereinbefore set forth." The bill then set forth that the "lands and real estate and property" of Blodget, situate within the territory of Columbia "as well in law as in equity, as by the said deed is expressed, consisted of," etc. following with a detailed enumeration of 539]many tracts and parcels *of land, among which is—"the following property which the said Blodget purchased of the said commissioners at the times hereinafter mentioned, which being fully paid for by the said Blodget certificates in due form have regularly issued therefor, but the commissioners meaning to hold the same as security to themselves and to the fortunate adventurers in the said lottery, have not delivered the same to the said Blodget or caused them to be recorded, but whilst they remained in office held the same, and when they went out of office, the same fell into the hands of Thomas Munroe, Superintendent of City Affairs, who now holds them; that is to say, lots numbered 20 and 21 in square 254 in the said city, sold to the said Blodget on the 8th day of *October, 1792*," etc., etc. The bill specified *by lot and* square numbers those lots that had been appropriated by Blodget for the hotel, averring that the legal title to some of them was in Munroe, Superintendent for City Affairs, certain of them having been conveyed by Blodget to the commissioners, others having remained in their ownership, and the legal title to the remainder being in Blodget. Sundry deeds of conveyance made by Blodget to various purchasers for portions of the lands covered by the deed of trust were then set forth. In this connection the leases made by Blodget to Daugherty and Frethy, respectively, in April, 1801, for parcels of lot No. 20 in square 254, were set out, and these lessees were made parties defendant. The Fennell lease was not mentioned, apparently because it was not upon record at the time of the filing of the bill. The prayer was, that Blodget might be required to convey to Bickley the hotel with the lots pertaining thereto; that Munroe, as superintendent of the city should be compelled to convey to Bickley that portion of the lots pertaining to the hotel of which he held the certificates; and that the residue of the property set forth in the bill of complaint, or so much thereof as necessary, should be sold *to pay the money ad-[540 judged to Bickley by the award and judgment in the Pennsylvania suit.

Annexed to this bill of complaint as exhibits were copies of the deed of trust of January 28, 1794, a transcript of the proceedings in the Pennsylvania suit, and other documents sustaining and supplementing the averments of the bill. Among the parties named as defendants were Blodget, Thomas Munroe, Superintendent of City Affairs, Frethy, Daugherty, and other grantees of Blodget. Frethy was served with process and filed an answer setting up that he had assigned his lease to one Betz. Daugherty being a nonresident, notice appears to have been published against him. Blodget answered, admitting in part and denying in part the averments of the bill. Annexed to the answer was a formal admission of "the execution of the various exhibits at this time filed by complainant, and that they may be read in evidence." Thomas Munroe, as superintendent of the city of Washington, filed an answer admitting the principal averments of the bill, and setting up that he, as superintendent, had in his hands the certificates of sale evidencing Blodget's purchases of various lots from the former commissioners; that the commissioners had withheld the certificates from Blodget's possession "as security for the fortunate adventures in the said lottery who should have claims against the said Blodget." Lot 20 in square 254 does not appear among the lots enumer-

ated in this connection. Thomas Peter, the surviving trustee under the mortgage or deed of trust of January 28, 1794, does not appear among the parties named as defendants in the original bill filed by Bickley, but he filed an answer admitting the execution of that deed, and that it was made at the instance of the then commissioners of the city of Washington to secure the punctual payment of the prizes drawn in the lottery therein mentioned; and—"that this defendant knows not what prop-[541]erty is included or comprehended *by the said deed, but this defendant, further answering, admits that whatever property he does hold in virtue of the said deed is held by him in trust for the purposes in the said deed mentioned, and subject to any order or decree which this honorable court shall make respecting the same." Thereafter, Peter seems to have been treated as a party defendant. On September 24, 1804, a written stipulation was filed in the cause, signed by the respective solicitors for complainant and for the defendant Blodget, in the following terms: "It is agreed by the complainants and the defendants in this cause, by their solicitors, that a decree shall pass immediately by consent for conveying to the complainant the hotel and the lots appropriated for the same. That the execution and truth of all the exhibits referred to in and by the complainants is hereby admitted, all form as to the *of* (*sic*) proceeding waived. This admission in no wise to give validity or authenticity to the award obtained in the court of Pennsylvania or the judgment thereon rendered, but that is to stand on its own merits unaffected by this agreement. This cause set down by consent for hearing at the next term." An interlocutory decree was made accordingly, under date October 1, 1804, requiring Blodget and Thomas Peter to convey to Bickley, lot 1 in square 430, with the buildings and improvements thereon, and requiring Munroe, as superintendent, to convey and assure to Bickley lots 1, 2, 3, 4, and 5 in that square; and retaining the cause as to all other property and as to all other objects and purposes mentioned in the bill. October 4, 1805, a further decree was made, requiring the defendant Blodget to pay to the complainant, Bickley, on or before a date in November, the amount of the debt due to him, being the sum of $26,635.13, besides costs, and decreeing that, on failure thereof, certain designated sections and lots of ground, situate in the city of Washington, or so much thereof as should be [542]sufficient *to raise and pay the said several sums of money, should be sold, and it was further decreed "that certain ground rents reserved by the said defendant Blodget, by indenture made between the said Blodget, of the one part, and Edward Frithey, one of the defendants, of the other part, bearing date on the 4th day of April, 1801, and certain other ground rents reserved by the said Samuel Blodget by indenture made between the said Samuel Blodget of the one part, and James Daugherty, one of the said defendants, of the other part, bearing date on the 13th day of April, 1801, be also sold for the purposes aforesaid." Daniel Carroll Brent was appointed trustee for making the sale. He was directed to sell the property at public auction, after advertisement, report the sale to the court, and upon confirmation of it, and payment of the purchase money, "the said trustee by a deed or deeds good and operative in law, etc., shall give, grant, bargain, and sell, release and confirm to the respective purchasers and their heirs, respectively, all the right, title, and interest therein which was or is in the said Samuel Blodget, and all the right, title, or interest therein which the said Thomas Peter derived in and thereto by virtue of the deed in the said bill of complaint mentioned (referring to the deed of trust of January 28, 1794) . . . and the purchaser or purchasers respectively, and their respective heirs, shall thereupon hold the same by them respectively purchased free, clear, and discharged from all claims of the said Samuel Blodget and of the other defendants." It was further decreed that the defendant Thomas Peter, upon the request of the trustee, should join and become a party in and to all deeds to be executed by the trustee in virtue of this decree; and that in all cases where the outstanding legal title remained in Thomas Munroe as superintendent, he, Munroe, should, at the request of the trustee, join in and become a party to the deed. "And lastly, as to all the property in the said bill of complaint mentioned, *and as to all the[543 objects of the said bill not in and by this decree specially and particularly decreed upon, this cause is retained for further proceedings hereafter to be had thereupon, and for that purpose is ordered to be continued."

Brent accepted the appointment as trustee, gave bond, and, after advertisement, made a public sale of the property. The notices, after describing many tracts of land by lot and square numbers, contained the following: "Also several certain ground rents reserved by said Blodget, amounting in the whole to $80 per annum." His report of sale was made under date of January 21, 1806. It mentions "ground rent on James Daugherty's lease," as sold

to Henry Pratt for $360, and "ground rent on Edward Frithy's lease," as sold to Robert F. Howe for $400. No mention is made of the remainder of lot 20 in square 254, nor of the ground rent on the Fennell lease. By decree made under date June 25, 1806, the report was approved and the sales confirmed (with an exception not now material), and it was ordered that the proceeds of sale, after paying expenses, taxes, etc., be paid over to complainant towards the discharge of the moneys theretofore decreed to be due from the defendant Blodget to him. It further appears that the purchases made by Pratt (including the Daugherty ground rent) were made for the benefit of Bickley, the complainant; and Pratt assigned his bids to Bickley, October 31, 1806. Brent reported this to the court and asked for leave to make deeds for the Pratt purchases to Bickley, and the court accordingly made an order that Brent, together with Thomas Peter and Thomas Munroe, should convey to Bickley all the property purchased by Pratt at the sale.

Pursuant to these proceedings, Brent, trustee, Thomas Peter, and Thomas Munroe, superintendent, etc., joined in a deed dated April 3, 1807, to Bickley, reciting the decree of October 4, 1805, ordering 544]among other things *"that sundry squares, lots, and portions of ground and ground rents in the said city of Washington" be sold, reciting the advertisement and sale made in pursuance thereof, and that at the sale certain lots particularly mentioned "and the ground rent reserved by the said Samuel Blodget by indenture made between him and James Daugherty, one of the defendants, bearing date on the 13th day of April, 1801," were sold to Pratt; the assignment of Pratt's bid to Bickley, etc. Brent as trustee thereby conveyed "all the right, title, and interest of, in, and to the beforementioned squares, lots, and portions of ground and ground rents in the city of Washington aforesaid which was in the said Samuel Blodget. Peter conveyed all his right, title, and interest under the mortgage or deed of trust of January 28, 1794; and Munroe joined in conveying certain of the lands described in the deed, but not the "ground rents" in question.

By indenture dated January 15, 1807, Daniel C. Brent, trustee, and Thomas Peter, conveyed to Robert F. Howe the property purchased by the latter at the trustee's sale. The deed recites the decree, and the sale made thereunder, and that "among other property and ground rent so set up and exposed to sale was the ground rent reserved by the said Blodget by indenture made between him and the said Edward Frethy, one of the defendants, bearing date on the fourth day of April, 1801, when the said Robert F. Howe, being the highest bidder therefor, became the purchaser thereof at and for the sum of $400," and in consideration thereof, conveyance is made to Howe of "all the right, title, and interest of, in, and to the said ground rent reserved by the said Samuel Blodget by indenture made between him and the said Edward Frethy, dated on the 4th day of April, 1801, as aforesaid, which was in the said Samuel Blodget, previous to and at the time of making the said decree, and all the right, title, and interest therein and which *the said Thomas[545 Peter derived in and thereto, by virtue of the deed referred to in the said deed to have been given by the said Samuel Blodget to the said Thomas Peter and Thomas Johnson, Jr., since deceased, bearing date on the 28th day of January, 1794," etc.

On May 28, 1810, a supplemental bill was filed, reciting that the sale made by Brent had fallen short of paying the money decreed to be due to Bickley, and that he had lately discovered other property not included in the former bill and decree, consisting of sundry lots particularly described, and "that the said Samuel Blodget was also on the said 28th day of January, in the year 1794, seized and possessed of and entitled to sundry lots in the said city, which he afterwards let on ground rent, reserving an annual rent for the said property, to divers persons hereinafter particularly set forth, which tenants your petitioner does not wish to disturb or interfere with, but wishes to leave them in the quiet enjoyment of their leases under the said Blodget, under the terms and conditions expressed in the said leases respectively, but wishes and prays of this court to direct the ground rents reserved thereon, and the reversionary interests of the said Blodget therein, whatsoever the same may be, to be sold for the benefit of your petitioner, which lots so leased on ground rent are as follows: to wit, 11 feet, 11 inches, more or less, fronting on F street, north, extending in depth 159 feet to an alley, being part of lot No. 20 in square No. 254, leased to a certain Edward Fennell, his executor, etc., for a term of years, renewable from time to time forever, reserving the quarterly rent of $24 payable to the said Blodget." Several other like leases are mentioned, and this averment follows: "To all of which ground rents the said Blodget now claims title, and is in the actual receipt thereof." The prayer was for a sale of the property thus mentioned, to raise the balance due to complainant. *Blodget answered, admit[546

ting the facts stated in the supplemental bill, with an exception not now material, and stating that he had no objection to a decree as prayed. A decree was made accordingly, under date November 5, 1813, and Washington Boyd was appointed trustee to make the sale. Some years later he made a report of sale in writing, and afterwards represented to the court that in consequence of ill health he would be required to leave the District for some time, and requested the court to appoint some other person to make conveyances, suggesting John Davidson for this purpose. The court appointed Davidson accordingly.

By indenture dated May 8, 1818, Davidson, as such trustee, conveyed to Charles Glover, in consideration of $405.50, "all the interest, claim, and right of the said Samuel Blodget" in certain lots sold by Boyd as trustee, pursuant to the decree of November 5, 1813, and, among others, "part of lot 20, in square 254, fronting 11 feet, 11 inches on North F street, leased to Edward Tennell (*sic*) for ninety-nine years, renewable forever, under the annual ground rent of $24."

This completes the recital of the proceedings in the chancery suit of Robert S. Bickley against Samuel Blodget and others, and of the sales and conveyances made pursuant to the decrees therein, so far as they pertain to the interest of Blodget in the land now in controversy. We proceed to a statement of the subsequent transfers, so far as necessary for a determination of the questions presented.

By indenture dated May 1, 1813, Bickley, in consideration of $400, conveyed to James Daugherty, his heirs and assigns, "all that part of lot No. 20 in square No. 254, fronting on F street north, 20 feet," which was leased by Blodget to Daugherty. The deed mentions the date of the lease, and recites that "all the estate, interest and claim of the said Samuel Blodget in and 547]to the said part *of a lot and premises was afterwards sold and conveyed by Daniel C. Brent as trustee, under a decree of the said circuit court of the District of Columbia for the county of Washington, to the said Robert S. Bickley." This deed contained a covenant of general warranty.

Assuming the above-mentioned deed from Brent, trustee, and others to Bickley had the effect to vest in Bickley all the reversion that was in Blodget, subject to the Daugherty lease, this deed from Bickley to Daugherty brought about a merger of the leasehold and the reversion.

By mesne conveyances, all of Daugherty's interest came to be vested in one Benjamin F. Isherwood in the year 1852.

As already pointed out, the ground rents under the Frethy lease were conveyed by Brent, trustee, and Thomas Peter, by deed dated January 15, 1807, to Robert F. Howe. It appears that Frethy had assigned his lease to one Frederick Betz, by recorded deed dated September 19, 1801; Frederick Betz assigned it to George Betz by recorded deed of January 24, 1803; and George Betz assigned it to John Thorp by recorded deed of February 15, 1804. Each of these instruments transferred all right and interest of the assignor in the land, describing it by measurements and abuttals, and referring to the lease thereof made by Blodget to Frethy for "ninety-nine years, renewable forever."

It is admitted that William Dowling probably succeeded to the ownership of this leasehold by an unrecorded assignment of Thorp's interest. Dowling claimed in a deed made by him to Robert F. Howe, presently to be mentioned, that he was the owner of the leasehold interest.

In 1830 the corporation of the city of Washington made a tax deed to Dowling for "part of lot 20 and the improvements in square 254" for unpaid taxes assessed against it "as the property and in the name of Robert F. Howe," for the years 1819 to 1824, inclusive. Dowling, *by a deed[548 made in 1831, reciting this tax title, conveyed to Howe and his heirs "all the right, title, interest, and estate of him, the said William Dowling," in the part of the lot conveyed to him by the tax deed, "except the leasehold right belonging to him in the same," the deed declaring it to be the intention of the parties "that the said William is not to surrender his leasehold interest in the said part of lot and premises." Robert F. Howe, by his will, dated in 1830, authorized his executors to sell all his estate for the purpose of paying certain legacies, and thereafter his executors, by deed dated in 1835, conveyed this plot to William Dowling, the deed reciting that Robert F. Howe "held under a deed of conveyance to him from Daniel C. Brent, trustee, and Thomas Peter, made the 15th day of January, in the year of our Lord 1807," and that at the time of the making of that deed the property "was subject to a lease for ninety-nine years, renewable forever," as will appear "by reference to an indenture of lease dated April 4th, 1801, and recorded," etc.

Under the will of William Dowling, and by mesne conveyances thereafter, whatever estate Dowling had in this parcel became vested in Benjamin F. Isherwood in the year 1865.

As already pointed out, the ground rents of the Fennell lease—for the word *Tennell* in the deed is obviously a mistake—became

vested in Charles Glover; but that deed likewise included "all the interest, claim, and right" of Blodget in that part of lot 20 that was covered by the Fennell lease; thus evidently conveying the reversion. The bill avers that this part of lot 20 was conveyed by Abraham Bradley's heirs to Benjamin F. Isherwood in 1852. It does not appear when or how (if at all) Fennell's leasehold became merged in the reversion. Nor does it seem to be material, for if not merged, it lapsed on the expiration of the ninety-nine year term and fail-549]ure to renew, and this *before the ejectment suit was commenced. Respecting this parcel, the contention of appellant is, that the bill of complaint of the appellees shows no reason for equitable relief, because, if they have the title they claim to have, it is a sufficient title to constitute a good defense to an action at law.

Whatever interests Benjamin F. Isherwood may have acquired by the abovementioned conveyances in the several portions of lot 20 admittedly became vested in Caleb C. Willard, the devisor of the appellees, in or about the year 1882.

On the other hand, whatever reversionary rights (if any) remained in Samuel Blodget have admittedly become vested in the appellant.

The bill of complaint herein avers that the defendant, now appellant, claims to be the assignee of the heirs at law of Blodget; and that he claims that after the execution of the leases there remained in Blodget and his heirs a reversion in fee in lot 20; that only a rent charge passed under the proceedings in Bickley v. Blodget; that as the leases have expired without purchase or renewal by the lessees, the reversion has come into possession, and that therefore, as plaintiff in ejectment, he has the right to recover possession and title in fee simple.

These contentions are in fact made here in behalf of the appellant with respect to so much of lot 20 as was leased to Daugherty and to Frethy respectively.

As to the Fennell lot, it is insisted that by the very language of the supplemental bill in the Bickley suit, and the decree for sale made pursuant to it, and the terms of the deed made by Davidson, trustee, thereunder, the purchaser acquired a legal title to the reversion, and not merely to the ground rents; and that therefore on the theory that the averments of the bill are true, the appellees have an absolute fee-simple title to the Fennell lot, such as to constitute a plain, adequate, and com-550]plete defense *to the ejectment suit. *And it is pointed* out that under the local *practice* (D. C. Code, §§ 993, 1000, [31 Stat. at L. 1348, 1349, chap. 854]) defendants may separately defend to that parcel.

The question for decision, therefore, is whether the appellees have a good title as against the appellant; and, if so, whether the nature of their title is such as to render it unavailable at law, and to require the intervention of a court of equity for their relief against appellant's claims.

It is suggested, rather than urged, as a ground of equitable jurisdiction, that because Blodget never received a deed of conveyance from the commissioners for lot 20 in square 254, his title was never more than an equitable title; and that since both parties claim under him, the controversy is a matter proper for the cognizance of a court of equity, whatever be the grounds of controversy as between the parties. We doubt whether this view is tenable. There is no question that Blodget, and those claiming under him, have openly asserted title to the property, at least from the year 1801 down to the present time; and while the bill herein contains no averments respecting possession, it may be assumed that, for a long time, at least, possession has followed the title. Assuming Blodget and those inheriting from him, and under whom appellant claims, were equitably entitled to the reversion, subject only to the ninety-nine year terms, any possession of the lessees has been, as against the outside world, the possession of the appellant and his predecessors in title. Therefore it is more than probable that any legal title remaining in the commissioners has become barred by long possession. Besides, it might, perhaps, after one hundred and twenty years, be presumed at law, as well as in equity, that the commissioners had made a deed or deeds to Blodget that had since been lost. And, since both parties to the present controversy claim under Blodget, and would probably in an action of ejectment be required to trace title no further back than the common source, it is better, we think, to lay aside for *present pur-[551 poses the theory that the equitable jurisdiction in this action can be supported upon the ground that Blodget derived only an equitable title from the commissioners.

This brings us to the real controversy, which is the effect of the proceedings and decree in the Bickley suit, and the deeds made thereunder by Brent, trustee, to the purchasers of the "ground rents."

For present purposes, we may accede to the contention of appellant that the bill of complaint herein shows, with respect to the parcel that was covered by the Fennell lease, the title to which passed under the supplemental bill and decree in the Bickley

suit, that the effect of the proceedings, and the language of the decree, and of the deed made by Davidson, trustee, thereunder, was such as to pass to the purchaser a legal title to the reversion.

Assuming this, however, it does not follow that the appellees, if they have the *equitable as well as the legal title to the Fennell parcel*, and if, at the same time, they have the *equitable but not the legal title to the Daugherty and Frethy parcels*, may not properly invoke the aid of equity against the ejectment suit. If the appellant had limited his action at law to the Fennell parcel, his contention that if the Willard title to that parcel is good at all, it is as good at law as in equity, and therefore available as a defense in the ejectment suit, would demand consideration.

But appellant brought the action of ejectment for an entire lot made up of three parcels, of which the Fennell plot lies between the other two. The appellees, if driven to invoke the aid of equity against that action because they had an equitable, and not a legal, title to the Daugherty and Frethy parcels, were fairly entitled to bring the entire controversy into the court of equity, so that it might be adjudicated in a single suit.

A court of equity ought to do justice completely, and not by halves. Decker v. 552]Caskey, 1 N. J. Eq. 427, 433; *Williams v. Winans, 22 N. J. Eq. 573, 577; Knight v. Knight, 2 Eq. Cas. Abr. 169, pl. 25, 3 P. Wms. 331; Story, Eq. Pl. §§ 72, 174.

One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority. Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 228, 21 L. ed. 43, 44; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Reynes v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; Gormley v. Clark, 134 U. S. 338, 349, 33 L. ed. 909, 914, 10 Sup. Ct. Rep. 554. And since there is no question that the equitable title of appellees to the Fennell lot is good, if their equitable title to the Daugherty and Frethy lots is good, we may proceed at once to the question of the effect of the proceedings and decree in the Bickley suit, and the deeds made thereunder, as bearing upon these two lots.

In strictness of law, the deeds made by Brent, trustee, purporting to convey the "ground rents" on the Daugherty and Frethy leases, cannot be deemed to have included the reversion. The rule at law is, that by a grant of the reversion, the rent reserved will pass; but that by a grant of the rent, the reversion will not pass. "The incident, accessary, appendant, and regardant, shall in most cases pass by the grant of the principal, without the words *cum pertinentiis*, but not *é converso;* for the principal doth not pass by the grant of the incident, etc. *Accessorium non ducit, sed sequitur, suum principale.*" 1 Shep. Touch. 89. And see 1 Co. Litt. 152a; Broom, Legal Maxims, 7th ed. 491, 493.

The contention of appellant is that the term "ground rents," as employed in the decree of the court in the case of Bickley v. Blodget, has a plain and clear meaning, ascertainable without recourse to outside evidence; and it is insisted that the rents referred to were limited to the *terms[553 of ninety-nine years, because the only rents mentioned in the leases are the annual rents reserved by Blodget in each demise, to be paid during the respective terms of ninety-nine years, and which therefore would cease with the expiration of the term.

The argument elaborates the legal status of the lessor and lessee under the leases. It is said that the import of the contract is plain; that a lease for a specific and definite term of ninety-nine years, and no longer, was created; and that an option was given in connection therewith to the respective lessees and their successors in interest for other and further terms of similar duration, and also an option for the purchase of the demised premises during the terms created or any future term. And it is insisted that the leases extended only until the expiration of their respective terms, and did not, *proprio vigore*, extend or continue such terms for a definite or indefinite period; that the options made the existence of new leases in the future possible, but not certain; that the creation of future leases depended wholly on the exercise of the privilege of a renewal by each lessee or his successor in interest; and that the privilege not having been exercised in either instance, all rights of the lessees expired at the end of ninety-nine years.

All this may be assumed, as matter of law, without advancing us far towards the solution of the real question presented. If the appellant is entitled to the reversion, the question whether the appellees or their predecessors in title have lost the right of renewal or purchase by failure to exercise the option, and whether equity will relieve them by decreeing a renewal on proper terms, may require consideration.

But the question must first be answered

whether, in the sight of equity, the appellant is entitled to the reversion. The appellees, besides showing a title to the leasehold interests of Daugherty and Frethy, 554]respectively claim *to have acquired also the reversion in fee that remained in Blodget; and this they claim under the decree in the Bickley suit, and the deeds made thereunder, in which the interest was denominated "ground rents." Now, while we cannot say that this term is the recognized equivalent of any legal estate in lands, it is clear that as a descriptive term it has and had, at the time of the proceedings under consideration, some recognized meaning that may be resorted to as evidence of the intent of the parties, and from which may be determined what effect ought in equity to be given to the proceedings and decree in the Bickley suit.

In Bosley v. Wyatt (1852) 14 How. 390, 396, 14 L. ed. 468, 470, this court (by Mr. Chief Justice Taney) said, with respect to a somewhat similar lease made by a resident of the city of Baltimore for lands in Baltimore county:

"In the case before us, the interest which the testator had in this land at the time of making his will was converted into money by his contract with Armstrong. It was a sale and an agreement to convey his whole interest in the land. It is therefore unlike the case of a lease for years, or of ninety-nine years, renewable forever, in which the lessor retains the reversion, and does not bind himself to convey it on any terms to the lessee. The form of the contract adopted in this instance, between the testator and Armstrong, is in familiar use in the sale of lands in the city of Baltimore and the adjacent country. It has nearly, if not altogether, superseded the old forms of contract where the vendor conveyed the lands and took a mortgage to secure the payment of the purchase money, or gave his bond for the conveyance and retained the legal title in himself until the purchase money was paid. And it has taken the place of these forms of contract because it is far more convenient both to the seller and the purchaser. For it enables the vendee to postpone the payment of a large portion of the pur-555]chase money *until he finds it entirely convenient to pay it; and at the same time it is more advantageous to the vendor, as it gives him a better security for the punctual payment of the interest; and while an extended credit is given to the vendee, it is to the vendor a sale for cash. For if his ground rent is well secured, he can at any time sell it in the market, for the balance *of the purchase* money left in the hands of *the vendee.* It will be observed that the rent reserved is precisely the interest on the amount of the purchase money remaining unpaid."

That leases for ninety-nine years, renewable forever, were common in Maryland, and therefore presumably well understood in Washington at the time of the Bickley foreclosure, appears from Banks v. Haskie (1876) 45 Md. 207, 213, 217; Myers v. Silljacks (1882) 58 Md. 319, 330; Ogle v. Reynolds (1891) 75 Md. 145, 150, 23 Atl. 137; Jones v. Rose, 96 Md. 483, 484, 54 Atl. 69. It is contended that these cases, and especially Banks v. Haskie, show a departure from the principles that anciently obtained in that State, and that the contracts between Blodget and his lessees were made in view of the law as understood in the year 1801. We need not stop to discuss this, because we are dealing with the term "ground rents," not as a term of law, but as a term of description, and we cite the Maryland cases as historical authorities, irrespective of their authority as law.

The contention of the appellant that the term *ground rents*, as used in the proceedings and deeds in question, imported only the rents that were to accrue during the residue of the ninety-nine year terms of the Daugherty and Frethy leases, respectively, will not bear analysis.

In the first place, it was of the essence of both leases that the terms were "ninety-nine years, *renewable forever*." The rent was to be the same for the extended terms as for the initial term of ninety-nine years. It certainly cannot have been within the contemplation of *the parties that the[556 lessee or his assigns would not find it advantageous to renew at the end of ninety-nine years. The lessees were required to put substantial buildings upon the lots. And all the circumstances show that the parties contemplated that long before the expiration of the lease, the lands demised would be in the midst of a real, and not a "paper," city.

Moreover, the theory that it was intended to separate the right to the rentals until the year 1900 from the right to those that would accrue under renewals of the term, presupposes that the parties intended to separate the ground rents from the reversion. But such a separation is hardly conceivable. The only real security that the lessor had for the payment of the rents was the right reserved to him to enter and repossess the land until the arrearages were paid, or to terminate the lease should they not be paid. It is obvious that if the owner of the ground rents had no right to the estate upon the termination of the lease, his action in terminating it would benefit not

himself, but the owner of the reversion. In short, this view would leave the payments to accrue during the residue of the ninety-nine years, no longer entitled to be designated as "ground rents." They would in effect stand as ordinary choses in action, resting for security upon the personal responsibility of the lessees, or their assignees in possession; subject to be rendered valueless by the insolvency of the lessee, or perhaps defeated, so far as the assignee's liability was concerned, by an assignment to a pauper. Valliant v. Dodemede, 2 Atk. 546; Lekeux v. Nash, 2 Strange, 1221.

Nor is it reasonable to suppose that the parties intended to reserve in Blodget any estate in the lands, present or future. We say *the parties*, because in equity the decree, and the deed made thereunder, must, we think, be deemed to be the act of Blodget as well as of Bickley and the other parties to the cause.

557] *The action was not, as it has been termed by counsel, a "creditor's suit." It was a foreclosure suit, brought to enforce the mortgage that Blodget had given for the purpose of securing to the fortunate holders of winning tickets in his much advertised lottery the prizes he had promised them. That all of Blodget's interest in the lands was pledged under the mortgage has already been stated; that he recognized his equitable obligation is evident from the record. In the common-law action brought by Bickley against him in Philadelphia, he agreed that the jury might act as arbitrators not only with respect to the amount of money due from him to Bickley, but with respect to enforcing the award upon his lands in the District of Columbia. When the foreclosure suit was commenced, he aided it by admissions, consents, and stipulations, showing himself in every way willing to forward the object aimed at by Bickley; namely, to subject the mortgaged property to the performance of his obligations arising out of the lottery scheme.

It was clearly the purpose to sell all the beneficial interest that Blodget had in the several plots in question, subject to the leases. This reserved interest was denominated "ground rents" (using a phrase evidently in popular use) without distinction as to their duration, and therefore presumably meaning that they should be perpetual, as well as the leases under which they were derived; but subject, of course, to commutation by the exercise of the lessee's option of purchase at an amount of which the annual rental was the equivalent of 8 per centum.

The proceedings in the Bickley-Blodget suit show beyond cavil or question that it was the purpose not only of the parties to the action, but of the court, that all of Blodget's right, title, and interest in lot 20 should be sold towards paying the debt he owed to the complainant. The reservation of any interest in Blodget was inconsistent with *the very object of[558 the suit. The reversion would be practically valueless for approximately ninety years; its then present purchase-value would be altogether insignificant. A purpose to reserve it in Blodget is not supposable. If it had been thought of as a substantial interest, separate from that described as "ground rents," it would have been mentioned, as it was mentioned, and in terms included, in the decree made on the supplemental bill. In no event would Blodget have been permitted to retain it.

Nor is there any room to doubt that bidders at the sale, including the successful bidders who became the purchasers, supposed that in buying the "ground rents" they were buying an investment security representing the substantial fruits, and the entire fruits, of ownership reserved by Blodget on the leases; and not for mere terms of ninety-nine years, but for such terms "*renewable forever*." That the interest of Blodget sold for its fair market value is beyond question, for otherwise the court would not have confirmed the sales.

After the sales were confirmed, only two things remained to be done in order to carry the decree of the court into effect so far as concerned the passing of title. One was—"the payment of the whole purchase money for the respective parts of the said property so sold;" the other was that "the said trustee by a deed or deeds good and operative in law, to be acknowledged, etc., shall give, grant, bargain and sell, release and confirm to the respective purchasers and their heirs respectively" the property sold; with Peter and Munroe joining, in order to make sure that no legal title should remain outstanding.

There is no doubt that the purchase price was paid; indeed, one of the purchasers in question was Bickley, the complainant, for whose benefit the sale was made. Such payment being made, the purchasers at once became the owners, in equity, of the reversionary interest of *Blodget. But[559 the decree entitled them to the legal title.

And deeds of conveyance were made in order to carry out the decree. But one thing was lacking; the deeds were not "good and operative in law," because, although they described well enough according to the common intent what was intended to be conveyed, they did not define it according to the legal formula. And so the form of the deeds was undoubtedly defective. This, upon all the evidence, was a

mistake, pure and simple. And it was the mistake of a public officer. To say that when such a mistake occurs in carrying out the decree of a court of equity,—a court possessed of full jurisdiction over the subject-matter and all the parties,—harmful consequences shall be permitted to fall upon the purchasers who, in reliance upon the apparent regularity of the proceedings, have paid the purchase money to the officer of the court in the belief that they would get as good a title as the court could give them, and as good as the court could require any of the parties before it to give them,—would be nothing less than a reproach upon the administration of justice.

The equitable principles upon which our decision must turn are simple and fundamental. Equity regards that as done which ought to be done. It looks to the true intent and meaning, rather than to the form. It relieves against the consequences of accident and mistake, as well as of fraud.

In Lytle v. Arkansas, 9 How. 314, 333, 13 L. ed. 153, 160, this court (by Mr. Justice McLean) said: "It is a well-established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." In Williams v. United States, 138 U. S. 514, 517, 34 L. ed. 1026, 1028, 11 Sup. Ct. Rep. 457, the court (by Mr. Justice Brewer) said: "It cannot be doubt-560]ed *that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to devest a title acquired thereby. This is equally true in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So of any other inadvertence and mistake, vital in its nature, by which a title is conveyed when it ought not to have been conveyed." See also Morrison v. Stalnaker, 104 U. S. 213, 26 L. ed. 741; Ard v. Brandon, 156 U. S. 537, 541, 39 L. ed. 524, 525, 15 Sup. Ct. Rep. 406; Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 590, 43 L. ed. 820, 822, 19 Sup. Ct. Rep. 549.

In our opinion the averments of the bill herein, admitted by the demurrer, show that, with respect to the Daugherty and Frethy lots, the appellees have a good title in equity, but not at law, as against the appellant, and therefore are entitled to restrain him, and those claiming under him, from prosecuting an action of ejectment, or otherwise asserting title to those plots. And, with respect to the Fennell plot, the same result follows, for reasons above given, although appellees' title, besides being good in equity as against that of the appellant, is also good at law, and therefore might have been availed of as a legal defense.

Decree affirmed.

Leave granted on June 16, 1913, to present a petition for rehearing within sixty days on motion of Mr. William E. Ambrose, counsel for the appellant.

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*CHARLES M. CAMPBELL, Appt., [561
v.
NORTHWEST ECKINGTON IMPROVEMENT COMPANY, T. Cushing Daniel, and Samuel C. Redman.

(See S. C. Reporter's ed. 561-585.)

**Partnership — what constitutes — developing and marketing real estate.**

1. An agreement between the owners of unimproved property and a builder and manager of real estate developments, whereby, in consideration of his undertaking to give his skill as a builder and his financial assistance in improving and marketing the property, he is to become possessed of an undivided one-third interest in said property, constitutes the parties in effect partners in respect of developing and marketing the property.

[For other cases, see Partnership, I. a, in Digest Sup. Ct. 1908.]

**Evidence — to outweigh pleading.**

2. A sworn answer responsive to the bill must be overcome by satisfactory evidence of two witnesses, or the evidence of one witness, corroborated by circumstances equivalent to another.

[For other cases, see Evidence, XII. g, 2, in Digest Sup. Ct. 1908.]

**Evidence — to overcome writing — deed or mortgage.**

3. To justify construing a deed absolute on its face as given merely as security, the evidence should be clear, unequivocal, and convincing.

[For other cases, see Evidence, XII. g, 1, in Digest Sup. Ct. 1908.]

**Partnership — accounting — advances.**

4. A partner in a scheme to develop and market undeveloped property should, on an accounting, be credited with whatever he has fairly and properly expended for the common enterprise, whether the particular expenditure can be shown to have materially profited the enterprise or not, where the partnership agreement provided that "ac-

NOTE.—As to what constitutes partnership as between parties—see note to Meehan v. Valentine, 36 L. ed. U. S. 836.

count is to be taken of all moneys and interest he has already advanced under contracts in relation to said property, already entered into between the parties hereto."

[For other cases, see Partnership, V. c, in Digest Sup. Ct. 1908.]

[No. 251.]

Argued and submitted April 23 and 24, 1913. Decided June 9, 1913.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which, on a second appeal, affirmed a decree of the Supreme Court of the District, declaring a deed absolute on its face to be given as security merely, and canceling certain contracts, and settling an account. Reversed and remanded, with directions to reinstate the first decree of the Supreme Court of the District, and to proceed to an accounting in accordance with the opinion.

See same case below on first appeal, 28 App. D. C. 483; second appeal, 36 App. D. C. 149.

The facts are stated in the opinion.

Mr. John Ridout argued the cause and filed a brief for appellant:

The proof in this record falls far short of that clear and convincing character which this court has always so wisely insisted upon.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93.

The answer is responsive, and is evidence in favor of defendant, which can only be overcome by the relevant testimony of two witnesses, or by strong corroborating circumstances.

Vigel v. Hopp, 104 U. S. 441, 26 L. ed. 765; Greenl. Ev. 15th ed. § 290; Conley v. Nailor, 118 U. S. 127, 134, 30 L. ed. 112, 114, 6 Sup. Ct. Rep. 1001; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; Morrison v. Shuster, 1 Mackey, 190; Dulany v. Rogers, 50 Md. 533.

The complainants do not come into court with clean hands. Courts of equity do not tolerate such conduct.

Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328, 3 Mor. Min. Rep. 688.

Mr. Holmes Conrad submitted the cause for appellees.

Mr. Justice Pitney delivered the opinion of the court:

This appeal brings under review a decree of the court of appeals affirming a decree of the supreme court of the District of Columbia that declared a deed of conveyance, absolute on its face, made by the Northwest Eckington Improvement Company to Charles M. Campbell, to have been intended only to secure to Campbell his share of the profits of an enterprise previously undertaken by the parties to the action for the development of the lands described in the deed. The decree also canceled the contracts between the parties respecting the enterprise, settled an account between them, decreed that Campbell should pay a certain sum found due from him on balance, required him to reconvey the land, and granted incidental relief. The decree thus affirmed was rendered pursuant to the mandate of the court of appeals upon the reversal of a former decree which was in Campbell's favor. The successive decisions, so far as reported, are to be found in 28 App. D. C. 483; 38 Wash. L. Rep. 79; 36 App. D. C. 149.

The present appellant assails the decree in respect of its main features, and also in respect of the principle adopted in the accounting. A somewhat particular recital of the facts in evidence, with the grounds of decision in the courts below, seems to be called for.

In the year 1902, the Eckington Company held the legal title to a tract of land lying in a suburb of Washington, containing about 10½ acres. The appellees Daniel and Redman were the owners and holders of practically all the stock in the company, and had entire *charge of its affairs.[563 Redman was president, and Daniel, secretary; Daniel, with Redman's assent, represented the latter, and also the company, in the various transactions out of which the controversy arises. The property was unimproved and unproductive, and its value problematical. It was encumbered with a deed of trust, held by a Mrs. Franz, given to secure promissory notes of Daniel, upon which approximately $32,000 were due. Interest and taxes were in arrears. In the early part of the year negotiations took place between Daniel and Redman, on the one hand, and Campbell, the appellant, on the other, with the object of interesting Campbell, who was a builder and a manager of real estate developments and as a result a written agreement was made between them, of which the following is a copy:

Washington, D. C., March 13, 1902.

Whereas T. C. Daniel and S. C. Redman, of Washington, D. C., acting for themselves and the Northwest Eckington Improvement Company, of the District of Columbia, a corporation incorporated under the laws of the state of Virginia, are owners of a certain tract of land in northwest Eckington, subject to trust interest

and taxes fully described by the plats and printed matter of the above company, consisting of 10½ acres more or less, desire to dispose of the same, they hereby agree with C. M. Campbell, of Washington, D. C., in consideration of $1 in hand paid by him, and other valuable consideration, that if he will organize or be instrumental in organizing a company, even with the assistance of T. C. Daniel or others, for the purchase of said ground, and give the necessary time and attention to that end, they agree, in case his plans work out so that they accept the consideration said company offers for said ground, to give him a third of the amount they receive, whether of money, stock, or property, and that in the event of such sale or disposition of said 564]property he is to become *possessed of an undivided one-third interest in the property. In case less than the whole tract is sold, then said Campbell is to become possessed of an undivided one-third interest in the amount sold.

[Northwest Eckington Improvement Co. Seal.]

T. Cushing Daniel. [Seal.]
Samuel C. Redman. [Seal.]
C. M. Campbell. [Seal.]

Approved and accepted.

Northwest Eckington Improvement Co.
S. C. Redman, Prest. T. C. Daniel, Sec.

Pursuant to this agreement, Campbell caused a corporation to be formed, with the title of "Washington Sanitary Dwellings Company," and endeavored to sell enough of its stock to provide for taking over the property and constructing sanitary dwellings thereon for workingmen and their families.

Mrs. Franz was pressing for money, and, in order to satisfy her, Campbell agreed to pay her, and did pay her, $500 on account of the amount due upon the deed of trust, and at the same time a memorandum was signed, of which the following is a copy:

Washington, D. C., June 19th, 1902.

Whereas a certain agreement was entered into, March 13, 1902, between T. Cushing Daniel, S. C. Redman, and C. M. Campbell, which agreement was accepted by the Northwest Eckington Improvement Company, now this further memorandum witnesseth: That the company which said Campbell agreed to organize, as stipulated in said agreement, has been organized to our satisfaction; that the deed conveying said property to said company has been *prepared and* properly executed, and that *the $500 which* said Campbell this day advances to meet the requirements of the holder of the deed of trust on said property is done upon acceptance of the above facts. Said transfer will be made upon the terms of acceptance noted *in the[565 minutes of the Sanitary Dwellings Company, which are accepted. *Any monies advanced by said Campbell in handling the property in question shall be returned* returned *to him out of first sales.*

And all rights of said Campbell under said agreement of March 13, 1902, shall remain unimpaired.

[Seal.] T. C. Daniel,
[Seal.] C. M. Campbell,
Northwest Eckington Improvement Company,
—— ——, President. T. C. Daniel, Sec'y.

According to Campbell's testimony,—undisputed so far as we have observed,—the clause italicized was inserted by Daniel in his own handwriting in order to emphasize the assurance that Campbell was to have rights prior to the others to the extent of reimbursement of his advances. The paper was not signed by Redman, nor formally by the company,—a matter that is of no present consequence in view of its subsequent recognition.

Besides the $500 paid to Mrs. Franz, Campbell paid out in June $122.91 for taxes upon the property, and during the spring and summer incurred expenses aggregating $481.81 in organizing and promoting the Washington Sanitary Dwellings Company. Daniel himself, called as a witness for the complainants, testified upon the subject as follows: "Mr. Campbell worked on the sale of stock in the company; employed others to assist him in placing the stock, but after finding that he could not make it a success, he admitted the same to me, and asked whether something could not be done to save the $1,000 that he had spent in that effort; we then agreed to abandon the Sanitary Dwellings enterprise." After some discussion the parties, under date of October 23, 1902, entered into a further agreement in writing of which the following is a copy:

Whereas a contract was entered into March 13, 1902, *between T. C. Daniel[566 and S. C. Redman and the Northwest Eckington Improvement Co., a corporation, and C. M. Campbell, stipulating for the services of said Campbell, it is further agreed, while preserving to said Campbell any rights he may have under said contract, as follows:

1. In consideration of the services *of* said Campbell has already performed, and for the purpose of securing his further services and co-operation in the handling

and improvement of said property, it is agreed to make certain extension of the provisions of said contract.

2. It is now decided to release the Sanitary Dwellings Company, if necessary, from any obligations it may have assumed in in regard to any agreement to purchase said property.

3. The said Daniel, Redman, and the Northwest Eckington Improvement Company have decided to improve and market said property, as fast as may be possible, by building houses thereon.

4. To this end they desire to utilize the skill of said Campbell as a builder and his assistance financially.

5. It is agreed by said Daniel, Redman, and the Northwest Eckington Improvement Company to employ said Campbell as a skilful builder in the erection of said houses, he to take charge of said work, with such assistance as the other parties to this contract may be able to furnish, and pursue such work industriously and with all the ability and skill he can bring to the work.

6. In the borrowing of the money that may be needed in developing said enterprise, he is to use his credit by joining the other parties to this contract in the making or indorsing of any notes that may be required in negotiating the necessary loans for the making of said improvements and in paying off the loan of $32,000 now due on said property. In doing this, account is to be taken of all moneys and interest he has already advanced under contracts in 567] *relation to said property already entered into between the parties hereto. And any sums advanced or to be advanced by any of said parties for the same purpose under said agreements is likewise to be accounted for.

7. It is proposed to erect at once five houses on said property, and follow them with others as soon as such a course is warranted by the results and approved by the judgment of the parties to this agreement, said Campbell to industriously push said improvements with his best skill and ability, as provided in paragraph 5 herein, without any further compensation for his services than are provided for herein.

8. In return for said undertaking on said Campbell's part he is to become possessed of an undivided one-third interest in said property.

Witness our hands and seals this 23d day of October, 1902.

Northwest Eckington Improvement Co.,
By Samuel C. Redman, Pres.
Thos. C. Daniel, Sec'y.
Samuel C. Redman.
T. C. Daniel.
C. M. Campbell.

The execution of this instrument, at least by the Eckington Company, appears to have been deferred until the latter part of the month of November, awaiting its approval by a stockholders' meeting. Shortly afterwards, and in order to carry out the provisions of the 7th paragraph, an agreement in writing was made under date December 2d between the individuals Daniel, Redman, and Campbell, of the one part, and Mrs. Franz, of the other, whereby the amount due upon the promissory notes of Daniel, secured by her deed of trust, was ascertained at $32,938.66; she agreed to release a plot sufficient for five houses on payment of a special consideration, to be credited as part payment upon the notes; they agreed to *erect five substantial[568 brick dwellings, to cost not less than $3,000 each, and pay off the taxes on the entire property; and they (including Campbell, who was not until then personally responsible to Mrs. Franz), guaranteed the payment of the balance remaining due upon the promissory notes, when and as they should respectively become due; but it was agreed that upon the making of the part payment provided for, the time for payment of the balance was to be extended for two years.

Pursuant to this, the plot upon which the five houses were to be built was released by Mrs. Franz from the deed of trust, and conveyed by the Eckington Company to Daniel, Redman, and Campbell as individuals, and they placed upon it a new mortgage for the amount of $12,500, paying a part of this money to Mrs. Franz as consideration for her release, and placing the residue of the loan at the disposal of Campbell, to be used in the construction of the houses.

Under the agreement with Mrs. Franz, Campbell found it necessary to pay $957.55 for the taxes upon the entire property, and this he paid from his own funds on December 8. This, with some small items that need not be specified, added to his expenditures prior to October 23, already mentioned ($500 to Mrs. Franz, $122.91 for taxes, and $481.81 advanced on behalf of the Sanitary Dwellings Company enterprise), made an aggregate of $2,094.62. Campbell became uneasy respecting his position in the matter, and an agreement

was drawn up by his counsel, bearing date December 10, 1902, for execution by the Eckington Company, and by Daniel, Redman, and Campbell as individuals, and was tendered by Campbell to Daniel for the purpose; which paper, after a preamble that recited the agreement of October 23d, contained a repetition of the provisions of that agreement, with the addition of several clauses, by one of which "the Eckington Company agrees to execute at once a 569]conveyance of said undivided *one-third interest to said Charles M. Campbell in fee simple."

This instrument was never executed, and, after some further discussion, the deed in question was prepared and presented by Campbell to Daniel. The latter testified: "He [Campbell] said that Mr. Ridout had drawn that contract up for him, and he did not see any reason why we should not sign. I read it over pretty carefully, and when I saw that it was a deed for a one-third undivided interest, I knew or thought that it tied Mr. Campbell to the proposition so that he could not get any way of deeding that third interest away until he had earned it by the carrying out of his contract, and, thinking it over, it seemed to me that it would be a rather reasonable request, if he was going to put in a great deal of money to build up that entire property, and I thought he should have insisted upon some security on the record; I think I would have insisted upon something like that myself, and it was a business proposition, and I submitted it to Mr. Redman and told him I did not think there was anything wrong about it—(interrupted)—I told Mr. Campbell after thinking it over, I would be perfectly willing to execute that as security to him, to protect him. . . . At that time I believed that he was going to carry out the contract, and it would be all satisfactory."

The deed was actually executed and delivered on January 16, 1903, and thereby the Northwest Eckington Improvement Company, for "divers valuable considerations, and the sum of $10," conveyed to Campbell, his heirs and assigns, an undivided one-third interest in the property in question, excepting the portions theretofore conveyed. It contained a special warranty excepting recorded encumbrances.

Before the first five houses were completed, and in the spring of 1903, the parties proceeded with the construction of another row of five houses under an ar-570]rangement similar *to the former one, including a building loan to pay the cost of construction, the proceeds (over and *above the* amount necessary to procure the *release from the* deed of trust) being placed in Campbell's hands. While matters were thus progressing, and when the first five houses were nearly or quite completed, the opportunity was offered to dispose of a considerable plot of the unimproved land to one Malnati, and the sale was made in November, 1903, and consummated during the following month, at the price of $15,200,—a price evidently deemed highly favorable by the owners. Of the proceeds, $6,000 were paid on the Franz mortgage and the taxes. Before the sale was consummated Campbell demanded that out of the balance he should be paid a sum approximating $4,000 for what was due to him for advances on the joint account, including the $2,094.62 that he had expended prior to the making of the deed, and the excess cost of the ten houses to date, over and above the proceeds of the building loans. Campbell's position seems to have been that the agreement expressed in the memorandum of June 19, 1902, to the effect that all moneys advanced by him in handling the property should be returned to him out of the first sales, was still in force; and that as the sale to Malnati was the first sale, he was entitled to be reimbursed out of the proceeds in order to put him upon an equality with the others, who had advanced nothing or practically nothing. Daniel resisted Campbell's demand, his view being that the June memorandum was superseded in this respect by the sixth clause of the October agreement, and that while "account was to be taken" of Campbell's advances, they were not to be returned to him out of the first sales. Daniel asked Campbell for an accounting and an informal account was rendered, to which Daniel made objections on the ground that it was unaccompanied with vouchers; and an arrangement was made whereby $4,000 of the proceeds of the sale to Malnati were left in the hands of *a[571 third party to await the settlement of the controversy, and the balance was divided, one third to Campbell and the remainder to the Eckington Company.

The controversy continued, however, with increasing acrimony, until February 8, 1904, when the appellees filed in the supreme court of the District their present bill in equity against Campbell, setting up the history of the above transactions from their standpoint, and asserting that the deed of January 16, 1903, was given not as an absolute conveyance, but by way of security. The bill further alleged that he had failed to perform his obligations under the contract of October 23, 1902, had involved the complainants in debt, refused to inform them as to the cost of buildings, or in any satisfactory manner

to account for the large sums of money placed at his disposal for the building operations, and threatened to embarrass complainants in making any disposition whatever of the property, etc. The prayer was that Campbell be required to account; that all contracts between the parties be canceled; and that he be required to reconvey to the Improvement Company the undivided third interest conveyed to him by that company.

Campbell answered under oath, denying that the conveyance was intended as security, and averring that the complainants had recognized his right to such a conveyance, and that it was made to convey absolute title to him in consideration of his undertakings, set out in the agreement of October 23, 1902, and the other agreements between the parties.

Voluminous testimony was taken on both sides, the essence of which we have endeavored to state, and the cause was brought on to hearing before the supreme court. That court, by Mr. Justice Anderson, delivered an opinion reviewing the history of the transactions, the successive written agreements between the parties, and the evidence respecting various items of disburse-572]ment claimed to have *been made by Campbell, and claimed by the complainants not to have been satisfactorily accounted for by him. Upon the principal issue the view of the court was expressed as follows:

"Coming now to the specific question whether the deed to Campbell was intended to be absolute or merely as security, there are but two witnesses testifying about it. One is Daniel, who says that it was understood to be only as security, and that thereafter in July, 1903, Campbell for the second time presented the proposed contract of December 10, 1902, providing for a conveyance to him of an undivided third interest in fee simple, and said that his attorney advised that it be executed. The other is Campbell, who says that the deed was intended to be absolute, and that the proposed agreement of December 10, 1902, was never presented to Daniel after the execution of the deed. In this state of the case, it may be inquired what light the circumstances of the case throw upon this question; but such inquiry would seem rather to bear out, if anything, the position of Campbell than that of Daniel. Campbell and the other parties went into the joint enterprise to endeavor by their conjoint efforts to make something out of a piece of property which was heavily encumbered and becoming more and more encumbered every day, because it could not take care of the fixed charges upon it continually arising. They all recognized that something might be made out of the property if diligent effort was made to develop it, but the hope of making anything out of it seemed to reside more in diligent efforts to be made than in the property itself. Accordingly, the joint enterprise was undertaken. They all joined together, Campbell being joined because of his skill as a builder in addition to his general business ability and the assistance which he might give, together with the others, in the way of making and indorsing notes; and the other parties being joined to contribute to the enterprise the property which *it was sought to[573 so develop as to make it a success, instead of the failure which it had theretofore been, as also to contribute their general business ability. In such an arrangement it certainly was not unreasonable to give Campbell a status as the owner of an undivide interest in the enterprise. On the contrary, it would have been rather unusual and unreasonable to treat him in any other manner, because he was, by virtue of the contract, made a sharer in the failure as well as in the success of the enterprise. He stood to lose as well as to gain, and in the event of loss, nothing whatever could be reaped by him for his contribution of skill and money.

"But even if the circumstances in the case could be construed as in some manner tending to support the position of the complainants, certainly it could not be said that they are of a strength equal to the testimony of a witness, which would be required in order to establish the complainants' position, they not having waived by their bill answer under oath, and the defendant having answered under oath. Vigel v. Hopp, 104 U. S. 441, 26 L. ed. 765.

The court therefore held that the prayers of the bill asking that the deed to Campbell be declared to be a security merely, and that the contracts be canceled, should be denied; and that the cause should be referred to the auditor for a full accounting respecting the affairs of the joint enterprise, including that portion relating to the Sanitary Dwellings Company. A decree was entered accordingly, bearing date January 4, 1906.

The complainants appealed, and the court of appeals (28 App. D. C. 483) held that the deed of January 16, 1903, was not absolute, but intended merely as security for Campbell in the event of his performance of the agreement of October 23, 1902. The decree of the supreme court, so far as it denied the prayers for a cancelation of the agreements and a reconveyance from the

defendant, was reversed, and the cause re-
574]manded with direction to *enter a decree declaring the true intent and purpose of the deed of January 16, 1903, to be as indicated in the opinion of the court of appeals.

That court, while conceding the evidential weight of Campbell's sworn answer, under the rule laid down in Vigel v. Hopp, supra, differed from Mr. Justice Anderson in his view of the circumstances surrounding the transaction under inquiry. The liberal terms conceded to Campbell in the agreement of March 13, 1902, were attributed to the fact that the complainants were then apprehensive of the foreclosure of the mortgage upon the land. The view was expressed that the condition of the property had greatly improved during the succeeding months, on account of certain railroad developments; that the parties were agreed as to the reasonable prospect of building houses thereon and securing income therefrom; that it was apparent the cash value of the land had advanced considerably beyond the amount of the Franz mortgage, and apprehension of its loss by foreclosure was greatly if not entirely relieved; that Campbell submitted estimates for the erection of as many as forty houses, and the probable income therefrom, as indicating successful development in that way; and the parties then entered into the contract of October 23, 1902. The opinion proceeds (28 App. D. C. 494):

"The legal effect of this contract was to make the complainants partners with Campbell in the development of the land by building houses; they furnishing the land and Campbell undertaking the erection of the houses. All were to join in using their credit in obtaining money to erect houses, and pay off the $32,000 encumbrance; and the sums advanced by the respective parties were to be accounted for. Five houses were to be erected at once, to be followed by others if results were approved. The last paragraph of the agreement was that 'in return for said undertaking on said Camp-
575]bell's part, he is to become *possessed of an undivided one-third interest in said property.' Clearly this did not contemplate that Campbell should at once become the absolute owner of this one-third of the land. It was necessarily conditioned upon the terms of his undertaking, before recited in the contract. He had no immediate right to demand a conveyance thereunder, and none when the deed was actually executed and delivered to him on January 16, 1903. Complainants contended that this deed was made, at Campbell's request, to secure him *in his rights under the contract.*"

*And again (p. 496):*

"*When the deed was executed, on January 16, 1903, it is not pretended that there was any new consideration for its execution. It was founded wholly upon the provisions of the contract of October 23, 1902, no matter what may have been the private opinion of the respective parties as to Campbell's rights thereunder; and its meaning, purpose, and effect are determined thereby.*

"The difficulty attending the correction of a deed or instrument carrying into effect a previous parol agreement is obviated when it appears to have been prepared and executed in pursuance of a written agreement. When it appears that the instrument intended to give effect to a written agreement is inconsistent with its terms there is a manifest equity to correct the error. Adams, Eq. 169; Elliott v. Sackett, 108 U. S. 132, 141, 27 L. ed. 678, 681, 2 Sup. Ct. Rep. 375.

"As before stated, there is nothing which tends to show that Campbell was to become the absolute owner of one third of the complainants' land without regard to the performance of the joint undertaking contemplated in the contract of October 23, 1902. It is true that contract is inartificial and somewhat vague, but no such meaning can be imputed to it.

"In the light of the circumstances pointed out, we can come to no other conclusion than that complainants' statement of the purposes of this deed is the correct one. *They represent it as given to secure[576 Campbell in their performance of the contract. It was not a security, or an additional security, in the ordinary sense, but it did make Campbell secure, in the case of his endeavor to carry out that contract, by giving him at once the conveyance that he might thereafter become entitled to, and enabling him, by its registration, to give notice of his rights under the contract, to all persons who might thereafter acquire any interest from the complainants.

"The decree, in so far as this conveyance is concerned, is interlocutory in its nature, and for the guidance of the auditor in stating the account between the parties; and, instead of virtually establishing it as an absolute deed, should have declared it to be merely a conditional one, dependent upon the performance of the agreement in accordance with which it was made. The question whether it shall be canceled is a final one that can only be properly determined upon the coming in of the auditor's report with the account that has been ordered to be taken by him."

Upon the going down of the mandate, the supreme court entered an interlocutory decree in accordance with it, and thereafter the hearing before the auditor proceeded; but the accounting was made, or at least attempted to be made, not upon

the original theory of a joint ownership in the property, but upon a theory of the rights of the parties under the agreement of October 23, 1902, that resulted from the decision of the court of appeals.

The auditor stated an account charging the defendant with his actual receipts from the proceeds of the building loans, and from other sources connected with the enterprise, and giving him credit for his expenditures for construction and payments made to the complainants. An elaborate report was made, to which exceptions were filed by the complainants, and these the supreme court sustained in part and over-577]ruled in part, reserving certain of *the questions for disposition on the final hearing, and meanwhile ordering the auditor to restate the account, which was done, and to this second report both parties took exceptions.

The case then came on for final hearing before the supreme court upon the whole record, including the pleadings, the evidence, and the exceptions. Respecting the disputed matters in the accounting, we need say no more than that the court sustained Campbell's right to credit for the $500 paid by him to Mrs. Franz in June, 1902, and $122.91 paid about the same time for taxes, but overruled his claim for an allowance of the $481.81 paid on account of the Sanitary Dwellings Company, upon the ground that this expenditure was made for his own account and at his own risk, and had not benefited the common enterprise.

Upon the main questions the court (38 Wash. L. Rep. 79), following the lines laid down in the opinion of the court of appeals, held as follows:

(1) That the deed of January 16, 1903, was not intended to convey a present absolute title, but was only to secure the defendant his share of the profits of the enterprise when he should perform his share of the work of building houses and making sales; and that to the extent that he had performed his contract obligations, the security should be kept intact;

(2) That as to the ten houses and the land on which they stood, the defendant had an undivided one-third interest under the two deeds executed to him and to the complainants Daniel and Redman, that title being absolute, subject to encumbrances;

(3) That the contracts which were executed between the parties plaintiff and defendant ought to be canceled, because there was no prospect of any amicable continuation of operations under them, even if there were any desire by either party to continue;

578] *(4) That the defendant should reconvey to the Eckington Company the title received from it by the deed of January 16, 1903, on being paid or satisfactorily secured what, if anything, remained due to him on settlement of accounts on the lines previously indicated;

(5) That if the defendant had become bound to pay any portion of the encumbrance on the unimproved land held by Mrs. Franz, the complainants should either obtain his release therefrom or indemnify him against the same.

This result was carried into the final decree, with a variance that is unexplained by anything in the opinions, or elsewhere in the record, so far as we have observed; *viz.*, the decree subjects Campbell's interest in the ten houses to a charge in favor of Daniel and Redman of $1,237.65, "being the balance due by him on his one third of the excess cost of building said houses and obtaining a release of the said ten lots from a mortgage or deed of trust thereon known as the Franz mortgage or deed of trust, over and above the money obtained for this purpose by loans secured by Daniel, Redman, and Campbell." Perhaps it was intended to charge Campbell's interest in the ten houses, in favor of his cotenants, with a sum found to be due upon the theory of accounting that resulted from the decision of the court of appeals.

The defendant Campbell appealed to the court of appeals, where the decree was affirmed, the court adhering (36 App. D. C. 149) to its former view. As to the item of $481.81, the court expressed concurrence with the view of the supreme court, saying: "This item benefited the complainants in no way, and we do not think its repayment was contemplated by the October contract."

Upon the main question, the court, treating the deed of January 16, 1903, as given only to secure Campbell for his share of the profits when he should perform his part of the agreement, proceeded to consider the question of his conduct after the making of the deed. The court found him *at fault, because he stopped when ten[579 houses were constructed, although the income upon them was not sufficient to liquidate the fixed charges upon the balance of the property. It was in effect held that he was at fault in employing a superintendent of construction, and in failing to keep careful accounts of receipts and expenditures, and preserve all vouchers. His conduct in demanding reimbursement of the moneys he had advanced, and a third of the net proceeds, upon the sale to Malnati, "although under his contract he was fully protected," was characterized as arbitrary, as was his receipt of one third of the balance, "when that sum, as he was in-

formed and had every reason to know, was needed to develop the remaining land." His conduct after the Malnati sale was likewise criticized, and the opinion concludes (36 App. D. C. 158):

"From a careful examination of the entire record, we are forced to the conclusion that the decree was right. It is difficult to perceive wherein the defendant had been injured. He was to receive a one-third interest in certain property upon the theory of services performed in the improvement and sale of that property. To the extent that he has performed the obligation imposed upon him by the contract his interests have been fully protected by the decree; more, he has no right to expect, and more a court of equity certainly ought not to award him."

From our examination of the record, we are constrained to the view that the court of appeals erred in adjudging that the deed in question was given as security merely, and not as an absolute conveyance. The court conceded that the burden was upon the complainants to prove that this instrument did not express the intention of the parties at the time, and that if the general rule laid down by this court in Vigel v. Hopp, 104 U. S. 441, 26 L. ed. 765, were applicable, the bill must in that respect be dismissed. The opposite conclusion was reached in view of the circumstances 580] *surrounding the transaction, and because of the construction that the learned court placed upon the contract of October 23, 1902.

We place a different construction upon that contract, and also take a different views of the circumstances under which it was made. Avoiding repetition so far as possible, our view may be expressed as follows:

We agree that the legal effect of this contract was to make the complainants in effect partners with Campbell in the development of the land by building houses, they furnishing the land, and he undertaking the erection of the houses. But it seems to us that the agreement recognized that the joint enterprise had commenced in March and had continued ever since; and that Campbell was not only entitled to consideration for the services he had "already performed,"—that is, for what he had done under the March agreement,—but was entitled to reimbursement for whatever money he had advanced, with interest on those moneys.

The March agreement shows upon its face (and all the circumstances corroborate this) that the prime object of the parties *was to dispose of* the property. and that *the particular* method of disposing of it was not of the essence of the matter. This is plain from the language—"That if he [Campbell] will organize or be instrumental in organizing a company, even with the assistance of T. C. Daniel or others, for the purchase of said ground, and give the necessary time and attention to that end, they agree, in case his plans work out so that they accept the consideration said company offers for said ground, to give him a third of the amount they receive, whether of money, stock, or property, and that in the event of such sale or disposition of said property he is to become possessed of an undivided one-third interest in the property. In case less than the whole tract is sold, then said Campbell is to become possessed of an undivided one-third interest *in the amount sold." This[581 agreement is inartificially expressed, and requires construction. It was hardly intended that Campbell should have one third of the consideration received by the vendors, and also an undivided one-third interest in the property. Neither did it mean that in case less than the whole tract should be sold he was to become possessed of an undivided one-third interest in the land sold. What it meant was, that he should have, directly or indirectly, one-third interest in the proceeds of the property. In short, he was to be a "partner" in the enterprise.

The court seems to have considered that this agreement virtually expired with the failure of the scheme for financing the Sanitary Dwellings Company. We do not so regard it. The conduct of the parties from March until October, the wording of the memorandum of June 19th, the negotiations leading up to the abandonment of the Sanitary Dwellings Company scheme, and the making of the October agreement instead,—one of the inducements to which, according to complainants' uncontradicted evidence, was to enable Campbell to recoup the money he had expended on the Sanitary Dwellings Company,—and finally the language of the October agreement, all go to show that the main purpose, and the association of the parties to accomplish it, were never abandoned.

We do not think this agreement can be properly considered as foreclosing all rights that Campbell had under previous agreements, saving as expressly reserved. By its terms, after reciting the contract of March 13, it declared: "It is further agreed, *while preserving to said Campbell any rights he may have under said contract*, as follows: 1. In consideration of the *services said Campbell has already performed*, and for the purpose of securing his further services and co-operation in the

handling and improvement of said property, 582]it is agreed to make certain *extension *of the provisions of said contract.*" Then follow the clause providing for a release of the Sanitary Dwellings Company; the recital of the purpose to improve and market the property as fast as possible by building houses upon it; the desire to utilize the skill of Campbell as a builder, and his assistance financially; the agreement that he is to "take charge of said work, with such assistance as the other parties may be able to furnish;" that in borrowing the money needed for developing the enterprise he is to use his credit by joining with the other parties in making notes, etc., for the necessary loans; and that "in doing this, *account is to be taken of all moneys and interest he has already advanced under contracts in relation to said property, already entered into between the parties hereto.* And any sums advanced or to be advanced by any of said parties for the same purpose under said agreements is likewise to be accounted for." The 7th clause is: "It is proposed to erect at once five houses on said property and follow them with others as soon as such a course is warranted by the results and approved by the judgment of the parties to this agreement, said Campbell to industriously push said improvements, etc., without further compensation for his services than are provided for herein." And 8: "*In return for said undertaking on said Campbell's part, he is to become possessed of an undivided one-third interest in said property.*"

The agreement reads plainly that Campbell was to have this interest in the property, not for performance, but for *his undertaking.* In short, as we think, he was to be presently vested with a one-third interest in the equity of the property, and to be thereby put upon an equal footing with Daniel and Redman, who, through their stock interest in the Eckington Company, would be entitled to a two-third's interest.

The view adopted by the court below would leave Campbell's position—he being the 583]only one of the party *able and willing to advance cash for the development of the enterprise—altogether precarious. It was in contemplation that the expenditures made by him should be made for the common benefit, and that the property would be enhanced in value if the enterprise proved successful. And it seems most improbable that he should be willing to devote his time and experience and also pledge his credit to the extent necessary to pay off the existing loan of $32,000, and whatever more was needed to put up the houses, and await a successful outcome before being assured of his reward.

Besides, the undertaking would not be fully completed *until the property had been marketed;* that is, had passed into the hands of third parties. How could he then "become possessed" of an undivided one-third interest in it?

It is not strange that Campbell very shortly found that his position was insecure without a deed that should vest in him the legal title to the undivided one-third. Shortly after the execution of the agreement of October 23d, he began to insist that his rights under it should be secured to him. The proposed agreement of December 10, 1902, was submitted and rejected. Afterwards, and in response to his insistent demands, the deed in question was made and delivered to him in January. For a sufficient consideration, it is not necessary to look beyond the situation evidenced by the agreement of October 23d; for it seems to us that the act of the parties in making the deed is clearly in accord with the view we take of that contract, and amounted to a practical interpretation of it; the purpose in making the deed being to simply put into legal form what equity would perhaps have required to be done for carrying that contract into effect.

If we need to look elsewhere for the intent of the parties, then in addition to the rule respecting the weight that shall be given to a sworn answer in chancery, invoked *and relied upon in Vigel v. Hopp,[584 104 U. S. 441, 26 L. ed. 765, and in numerous other cases,—Union R. Co. v. Dull, 124 U. S. 173, 175, 31 L. ed. 417, 418, 8 Sup. Ct. Rep. 433; Southern Development Co. v. Silva, 125 U. S. 247, 249, 31 L. ed. 678, 680, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Beals v. Illinois, M. & T. R. Co. 133 U. S. 290, 295, 33 L. ed. 608, 611, 10 Sup. Ct. Rep. 314; Monroe Cattle Co. v. Becker, 147 U. S. 47, 54, 37 L. ed. 72, 76, 13 Sup. Ct. Rep. 217,—this case is a proper one for the application of the well-known principle that to justify the setting aside of a solemn instrument of conveyance, deliberately made by parties *sui juris,* and the giving to it of an effect different from its plain purport, the evidence should be clear, unequivocal, and convincing. Maxwell Land-Grant Case, 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015. The evidence of the complainants does not, we think, measure up to the standard.

The result of these views is that the decree, in so far as it sets aside the deed of January 16, 1903, as being merely conditional and dependent upon performance by

Campbell of the agreement of October 23, 1902, should be reversed, because the deed must be held to be what it purports to be, —an absolute conveyance.

For the same reasons the decree, so far as it cancels the contracts of March 13, 1902, and of October 23, 1902, should be reversed.

The original prayer of the complainants for an accounting should be sustained; but the accounting should be made upon the basis of the agreements; Campbell and the others being treated as quasi partners respecting the improvement and marketing of the property in question from the making of the agreement of March 13, 1902. He should be charged with all moneys received by him as proceeds of loans or otherwise, and, on the other hand, should be credited with whatever he has fairly and properly expended for the common enterprise, whether the particular expenditure can be shown to have ultimately profited the enterprise or not. This includes the $481.81 disbursed on account of the Sanitary Dwellings Company, and other expenditures made under 585] the agreement of *March 13, 1902; his right thereto being preserved by the contract of October 23d, as moneys "advanced under contracts in relation to said property already entered into between the parties hereto;" and, under the same clause, he is entitled to interest upon his advances.

We need not pass upon other questions raised respecting the accounting, except to say that we of course do not agree with the view expressed by the court of appeals respecting the conduct of Campbell subsequent to the making of the deed. The court deemed that in employing a superintendent of construction he violated the letter or spirit of the contract of October 23d. That agreement contemplated that his skill as a builder, and his assistance generally, should be utilized, and he was to take charge of the work, with such assistance as the other parties might be able to furnish. It does not necessarily follow that he was personally to fill the place of superintendent of construction. It is of course true that Campbell ought to have kept a proper account of his receipts and disbursements, and so far as he failed to do this or to preserve proper vouchers, the matter may be dealt with on the accounting according to the usual principles.

The decree of the Court of Appeals reversed, with costs in this court and costs of both appeals in the Court of Appeals; and the cause remanded with directions to reinstate and affirm the decree of the Supreme Court of the District of Columbia, *bearing date* January 4, 1906, and to *reverse and set aside* all subsequent decrees so far as inconsistent therewith, and remand the cause to said Supreme Court, with directions to proceed to an accounting between the parties, or a revision of the accounting already had in that court, and further proceedings thereon as equity may require, in accordance with the views above expressed.

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*LEM WOON, Plff. in Err., [586
v.
STATE OF OREGON.

(See S. C. Reporter's ed. 586-590.)

**Error to state court — Federal question — local law.**

1. The contention that a person charged with crime by information before the adoption of a state constitutional amendment requiring criminal prosecutions to be by indictment could not thereafter be prosecuted under such information presents only a question of local law, not reviewable on writ of error from the Federal Supreme Court to a state court, where the latter court has construed such amendment as affecting only prosecutions thereafter instituted.

[For other cases, see Appeal and Error, 1584-1594, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — criminal prosecutions without indictment.**

2. Authorizing criminal prosecutions to be instituted by an information filed by the district attorney without any preliminary examination or commitment of the accused, as was done by the Oregon act of February 17, 1899, did not contravene the due process of law clause of the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 789-795, in Digest Sup. Ct. 1908.]

[No. 261.]

Submitted April 25, 1913. Decided June 9, 1913.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a conviction of murder in the Circuit Court of Multnomah County, in that state. Affirmed.

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NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On constitutional or statutory provisions for prosecution of felony upon information without indictment as *ex post facto* law—see note to Garnsey v. State, 38 L.R.A. (N.S.) 600.

See same case below, 57 Or. 482, 107 Pac. 974; on rehearing, 57 Or. 499, 112 Pac. 427.

The facts are stated in the opinion.

Messrs. James E. Fenton and John F. Logan submitted the cause for plaintiff in error. Messrs. Frank E. Freeman and Ralph E. Moody were on the brief.

Mr. A. M. Crawford, Attorney General of Oregon, and Mr. Dan J. Malarkey submitted the cause for defendant in error. Mr. Walter H. Evans was on the brief.

Mr. Justice Pitney delivered the opinion of the court:

On March 9, 1908, Lem Woon, the plaintiff in error, was accused by a sworn complaint, made before a committing magistrate of the city of Portland, of the crime 587] *of murder in the killing of Lee Tai Hoy, and, being arraigned before the magistrate, waived examination, and was held to answer the charge. On April 1, 1908, the district attorney of the proper district filed in the proper circuit court an information charging him with the crime of murder in the first degree in respect of the same homicide. The institution of the prosecution by such an information was at that time authorized by § 1 of an act of 1899, known as the "information law," Sess. Laws 1899, p. 99, Bellinger and Cotton's Anno. Codes & Statutes, § 1258, which reads as follows:

"Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file in the proper circuit court an information charging any person or persons with the commission of any crime defined and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed."

The Constitution and laws of Oregon at that time in force did not require any examination, or commitment by a magistrate, as a condition precedent to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath. State v. Belding, 43 Or. 95, 99, 71 Pac. 330; State v. Guglielmo, 46 Or. 250, 69 L.R.A. 466, 79 Pac. 577, 80 Pac. 103, 7 Ann. Cas. 976.

On June 12, 1908, the plaintiff in error, having pleaded not guilty, was placed on trial before the circuit court and a jury, and, being found guilty as charged in the indictment, was afterwards sentenced to death.

On June 1, 1908, after the filing of the information, and before his trial thereunder, § 18 of article 7 of the Constitution of Oregon, under which, as it previously stood, prosecutions by information were permitted, was amended so as to provide as follows: "No person shall be charged in any circuit court with the commission of any *crime or misdemeanor defined or[588 made punishable by any of the laws of this state, except upon indictment found by a grand jury."

Plaintiff in error appealed to the supreme court of the state, which affirmed the judgment of conviction (57 Or. 482, 107 Pac. 974), and denied a petition for a rehearing (57 Or. 499, 112 Pac. 427), and the case comes here under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227].

Two Federal questions were raised in the state courts and there decided adversely to the plaintiff in error, and are here assigned for error.

First, that the "information act" of February 17, 1899, is in contravention of the "due process of law" clause of the 14th Amendment of the Constitution of the United States.

Second, that the adoption of the amendment of the state Constitution after the plaintiff in error was charged with the crime operated to repeal all laws in conflict therewith immediately upon its adoption, and therefore he could not be tried, convicted, and sentenced without indictment by grand jury.

The second point was abandoned upon the argument, doubtless because it was considered to be foreclosed by the decision of this court in the recent case of Ross v. Oregon, 227 U. S. 150, 164, ante, 458, 464, 33 Sup. Ct. Rep. 220. In that case the plaintiff in error was tried and convicted in a prosecution instituted by information, and his case was pending on appeal in the state court at the time of the adoption of the constitutional amendment. He advanced the contention that the amendment had the effect of repealing the "information law," and made it impossible to enforce the judgment against him because of the due process of law clause. But the state court ruled (55 Or. 450, 479, 42 L.R.A.(N.S.) 601, 104 Pac. 596, 106 Pac. 1022), that the amendment of the state Constitution was prospective, and did not affect pending cases. This court held that this decision involved nothing more than the construction of the amendment, *which was a[589 question of local law, not reviewable here.

The case of the present plaintiff in error is not distinguishable upon the ground that he had not yet been put upon trial when the amendment was adopted; for the construction placed by the supreme court of Oregon upon the amendment is that it had no effect upon the "information law" ex-

cept with respect to prosecutions *thereafter instituted*. So it was held in State v. Ju Nun, 53 Or. 1, 9, 98 Pac. 513, 514, the court saying: "It will be observed that the amendment does not provide that a person shall not be 'tried' or 'prosecuted' for a criminal offense, except upon indictment, but simply that he shall not be charged therewith. . . . When we speak of charging a person with the commission of a crime, we ordinarily mean the commencement of the proceeding, by the filing of a written complaint or accusation; and in our opinion it was in this sense that the words were used in the constitutional amendment in question." The decision of this point in the Ross Case was rested by the state court upon the authority of the Ju Nun decision; and it was upon the same authority that, in the present case, the court set aside the contention that the "information law" was repealed by the constitutional amendment. Therefore our decision in Ross v. Oregon, supra, is controlling.

And so the only question is whether the information law is in conflict with the "due process of law" clause. This would seem to be sufficiently set at rest by repeated decisions. Hurtado v. California, 110 U. S. 516, 532, 538, 28 L. ed. 232, 237, 239, 4 Sup. Ct. Rep. 111, 292; McNulty v. California, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; Hodgson v. Vermont, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80; Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; Dowdell v. United States, 221 U. S. 325, 55 L. ed. 753, 31 Sup. Ct. Rep. 590.

The supreme court of Oregon has upheld the validity of the information law in sev-590]eral decisions, based upon the *authority of the Hurtado Case: State v. Tucker, 36 Or. 291, 51 L.R.A. 246, 61 Pac. 894; State v. Guglielmo, 46 Or. 250, 251, 262, 69 L.R.A. 466, 79 Pac. 577, 80 Pac. 103, 7 Ann. Cas. 976; State v. Ju Nun, 53 Or. 1, 97 Pac. 96, 98 Pac. 513.

The distinction sought to be drawn between the present case and that of Hurtado, on the ground that the Oregon system did not require that the information be preceded by the arrest or preliminary examination of the accused, is untenable.

Although the plaintiff in error waived examination, we prefer not to rest upon the circumstance as a ground of decision. For if (as seems to be conceded) the preliminary examination had no lawful status under the laws of Oregon, it is not easy to see how his position was altered for the worse by his waiving such examination.

But since, as this court has so often held, the "due process of law" clause does not require the state to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory upon the states.

The matter is so clearly settled by our previous decisions that further discussion is unnecessary.

Judgment affirmed.

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OSCAR WILKINSON and Thomas J. Kemp, Plffs. in Err.,
v.
OSCAR A. M. McKIMMIE and Simon McKimmie.

(See S. C. Reporter's ed. 590–593.)

**Principal and surety — release of surety — change in contract.**

A contract for the conveyance of a parcel of land to a person who was to erect certain houses upon two lots in such parcel, and reconvey them to the vendors, free and clear of all encumbrances, is not so changed as to release the surety on the bond conditioned for the vendee's faithful performance of the contract by an arrangement by which the two lots were reserved from the conveyance in order to save the expense of their reconveyance.

[For other cases, see Principal and Surety, III. f, in Digest Sup. Ct. 1908.]

[No. 273.]

Argued May 1, 1913. Decided June 9, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiffs in an action against the sureties upon a bond. Affirmed.

See same case below, 36 App. D. C. 336.

The facts are stated in the opinion.

Messrs. Charles Poe and Alfred D. Smith argued the cause and filed a brief for plaintiffs in error.

Mr. John Ridout argued the cause, and, with Mr. W. E. Ambrose, filed a brief for defendants in error.

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NOTE.—As to when variation of contract discharges surety—see note to Miller v. Stewart, 6 L. ed. U. S. 190.

On discharge of surety, generally—see notes to Bank of Uniontown v. Mackey, 35 L. ed. U. S. 486; and Griswold v. Hazard, 35 L. ed. U. S. 679.

Mr. Justice Pitney delivered the opinion of the court:

By the judgment here under review the court of appeals affirmed a judgment in favor of the Messrs. McKimmie against Wilkinson and Kemp in an action upon a bond they had signed as sureties for one Horton. By an agreement in writing, the McKimmies agreed with Horton to convey to him four lots in block 9 of Todd and Brown's subdivision of Mount Pleasant and Pleasant Plains for $11,500, which he agreed to take and pay for as follows: To assume a mortgage of $3,000 and pay $1,000 on delivery of the deed; to reconvey to the Messrs. McKimmie two lots, each 16 feet 8 inches front on Brightwood avenue (part of the land above described), free and clear of encumbrances, and erect on each of these lots a two-story brick dwelling, according to approved plans and specifications, within eight months from the date of the agreement, for which construction and completion, clear of mechanics' liens or other encumbrances, Horton agreed to furnish a sufficient and satisfactory bond to the McKimmies; and for the balance of the pur-592]chase price, $500, Horton was *to give two notes, secured by a second deed of trust upon two other lots in the tract, "upon which he is to erect houses similar to those herein described." The agreement expressly provided that "the said houses contracted for to be constructed as aforesaid shall be delivered upon their completion to the parties of the first part [the Messrs. McKimmie] as their property in fee simple, and shall be free and clear of all encumbrances or liens."

The bond in suit recited the agreement, and was conditioned for its faithful performance by Horton.

The opinion of the court of appeals (36 App. D. C. 336) sets forth the full history of the controversy and the course of the trial. We deem it necessary to mention only one of several matters that were discussed in argument before us, and that is, the contention that the plaintiffs in error were discharged from responsibility as sureties because of the fact that by arrangement made between the Messrs. McKimmie and Horton, instead of their conveying to him the two lots that were to be theirs in the outcome, and upon which he was to build the houses that were to become their property, they had, with his consent, reserved these two lots from the conveyance.

We agree with the court of appeals that while in form the contract required the plaintiffs to convey the whole of the land to Horton, who was to erect certain houses upon the two lots and reconvey them to the plaintiffs free and clear of encumbrances, the real purpose and effect of the agreement was that Horton was to have title to the remainder of the land in consideration of his erecting these two houses for the plaintiffs; and that, notwithstanding the form of the contract, its essence was such that if the McKimmies had conveyed the whole plot to Horton, they would nevertheless have remained in equity the owners of the two lots. For a court of equity looks to substance rather than to form.

It is hardly necessary to say that the question whether *the contract of the[593 principal has been altered so as to discharge the surety is to be decided according to the essentials, in whatever jurisdiction it may be raised. And so we think the court correctly held that the arrangement that was made between the McKimmies and Horton, of reserving the two lots from the conveyance in order to save the expense of a reconveyance, was not a material change in the contract; that it did not alter the position of either Horton or his sureties; and therefore did not discharge the latter. Read v. Bowman, 2 Wall. 591, 603, 17 L. ed. 812, 816; Reese v. United States, 9 Wall. 13, 21, 19 L. ed. 541, 544; Cross v. Allen, 141 U. S. 528, 537, 35 L. ed. 843, 849, 12 Sup. Ct. Rep. 67.

Judgment affirmed.

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DISTRICT OF COLUMBIA, Plff. in Err.,
v.
JAMES T. PETTY, Charles W. Church et al., Executors of Charles B. Church, Deceased, Jesse B. Wilson, and George T. Deering.

(See S. C. Reporter's ed. 593-599.)

**Bond — of auditor — liability of surety — accounting for permit work deposits.**

1. The sureties on the official bond of the auditor of the District of Columbia could not be made accountable for moneys deposited by citizens with the collector of taxes for street improvements under the permit system by any rules of the commissioners of the District relative to the disposition of such moneys, since, there being no statute authorizing the commissioners to receive or expend such deposits, they were not public moneys in any legal sense, but funds of private citizens, held extra-officially by the public officers.

[For other cases, see Bonds, II. b, in Digest Sup. Ct. 1908.]

NOTE.—On liability of sureties on official bonds, generally—see notes to United States v. Giles, 3 L. ed. U. S. 709, and Postmaster General v. Early, 6 L. ed. U. S. 618.

**District of Columbia — liability of auditor — faults of clerk.**

2. Responsibility for the faults of the disbursing clerk was not imposed upon the auditor of the District of Columbia by the act of March 3, 1891 (26 Stat. at L. 1064, chap. 546), providing for such clerk to be subordinate to the commissioners of the District, who were to be held responsible for his acts and defaults, and authorizing him to pay laborers and employees "with moneys advanced to him by the commissioners in their discretion, upon pay rolls or other vouchers audited and approved by the auditor of the District of Columbia, and certified by the commissioners, as now required by law," nor by the rules promulgated by an order of the commissioners under date of June 13, 1888, relating to the disposition of moneys deposited by citizens with the collector of taxes for street improvements under the permit system.

[For other cases, see District of Columbia, VI., in Digest Sup. Ct. 1908.]

[No. 316.]

Argued May 8, 1913. Decided June 9, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, sustaining a demurrer to the declaration in an action upon an official bond. Affirmed.

See same case below, 37 App. D. C. 156.

The facts are stated in the opinion.

Mr. Edward H. Thomas argued the cause and filed a brief for plaintiff in error:

The bond covers the breaches assigned.

Moses v. United States, 166 U. S. 571, 575, 588, 41 L. ed. 1119, 1121, 1125, 17 Sup. Ct. Rep. 682; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543.

The bond covers duties imposed on the auditor subsequent to the date of the bond.

Minor v. Mechanics' Bank, 1 Pet. 46, 72, 73, 7 L. ed. 47, 58, 59; United States v. Powell, 14 Wall. 493, 501, 502, 20 L. ed. 726, 728.

The obligation is good as a voluntary bond.

Brandt, Suretyship & Guaranty, §§ 618, 621; Tyler v. Hand, 7 How. 573, 12 L. ed. 824; United States v. Pumphrey, 11 App. D. C. 44; District of Columbia v. Ball, 22 App. D. C. 553.

The principal and sureties on the bond are estopped to deny its validity, in whole or in part, because the principal has enjoyed the benefits arising from the giving of the bond.

United States v. Hodson, 10 Wall. 409, 19 L. ed. 940; Daniels v. Tearney, 102 U. S. 420, 26 L. ed. 188; Grady v. United States, 39 C. C. A. 42, 98 Fed. 238; Jessup v. United States, 106 U. S. 147, 27 L. ed. 85, 1 Sup. Ct. Rep. 74.

The demurrer admits that the bond was taken with authority, and that it was given for a consideration.

Tyler v. Hand, 7 How. 573, 583, 12 L. ed. 824, 828.

Mr. J. J. Darlington argued the cause and filed a brief for defendants in error Charles W. Church and George T. Deering:

While duties of a like character may be devolved upon a bonded officer after his bond is given, with the effect of charging his sureties, duties of a wholly different character cannot be imposed with that effect.

2 Brandt, Suretyship & Guaranty, § 660; Gaussen v. United States, 97 U. S. 584, 24 L. ed. 1009; United States v. McCartney, 1 Fed. 104; People v. Tompkins, 74 Ill. 482; Skillett v. Fletcher, L. R. 2 C. P. 469, 36 L. J. C. P. N. S. 206, 16 L. T. N. S. 426, 15 Week. Rep. 876; Home Sav. Bank v. Traube, 75 Mo. 199, 42 Am. Rep. 402; People v. Edwards, 9 Cal. 286; State v. Thomas, 88 Tenn. 491, 12 S. W. 1034; Territory v. Ritter, 1 Wyo. 318; Postmaster-General v. Munger, 2 Paine, 189, Fed. Cas. No. 11,309; White v. East Saginaw, 43 Mich. 569, 6 N. W. 86; Lafayette v. James, 92 Ind. 240, 47 Am. Rep. 140.

This is a case of voluntary sureties, to whom the rule *strictissimi juris* applies, and in whose favor doubtful questions of construction are to be resolved.

United States v. Hough, 103 U. S. 73, 26 L. ed. 306; United States v. Boecker, 21 Wall. 652, 22 L. ed. 472.

Messrs. Jackson H. Ralston, Frederick L. Siddons, and William E. Richardson filed a brief for defendant in error Jesse B. Wilson:

From the general meaning of the word "auditor," the sureties upon the bond of Mr. Petty believed that they were protecting against loss at the hands of one whose duty it was to examine and verify accounts.

State ex rel. Crawford v. Hastings, 10 Wis. 530; State v. Brown, 10 Or. 222.

Mr. W. C. Sullivan filed a brief for defendant in error James T. Petty:

No breach of the condition of the bond is alleged in the declaration.

Smith v. District of Columbia, 25 App. D. C. 375; McGraw v. District of Columbia, 3 App. D. C. 408, 25 L.R.A. 691.

The principal is no more liable under the present declaration than are the sureties.

Gaussen v. United States, 97 U. S. 584, 591, 24 L. ed. 1009, 1010; State ex rel. Columbus v. Hauser, 63 Ind. 155; Boston v. Moore, 3 Allen, 126; Eaton v. Kelly, 72

N. C. 110; People v. Tompkins, 74 Ill. 482; Turner v. Collier, 4 Heisk. 89; McLendon v. State, 92 Tenn. 520, 21 L.R.A. 738, 22 S. W. 200; Clark v. Logan County, 138 Ky. 676, 128 S. W. 1079; Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157; State ex rel. Wyatt v. Bagdy, 160 Ind. 669, 67 N. E. 519.

Mr. Justice Pitney delivered the opinion of the court:

This action was founded upon the official bond of James T. Petty, auditor of the District of Columbia, given by him and his sureties, bearing date May 1st, 1888, and conditioned as follows:

"Whereas, the above bounden James T. Petty has been appointed to the office of auditor in and for the District of Columbia, now, therefore, the condition of said obligation is such that if the said James T. Petty shall faithfully and efficiently perform all the duties of his said office, as provided for by law, and the rules and regulations from time to time duly prescribed for the government of the civil service of said District, and shall well and truly pay over, disburse, and account for all moneys that shall come to his hands, as the law and orders governing said service shall require, then said obligation to be void; otherwise to remain in full force."

595] *The supreme court of the District sustained a general demurrer to the original declaration, and to several successive amended ones. Upon the last occasion an appeal was taken from the judgment of that court to the court of appeals, resulting in an affirmance (37 App. D. C. 156), and the present writ of error was then sued out.

The declaration, in its final form, sets forth the several acts of Congress under which it was sought to charge the defendant Petty, as auditor, with the custody of or responsibility for certain moneys mentioned in the several breaches assigned; and also sets forth certain rules and regulations prescribed by the commissioners of the district concerning the office of auditor, that are said to impose such responsibility.

If the averments do not show a liability on the part of the auditor and his sureties, it is no fault of the pleader. The fact is, as was frankly avowed at the Bar, that it was not intended to charge that any of the moneys in question came into the hands of Mr. Petty personally, or were by him misappropriated; that in fact it was the disbursing clerk in the auditor's office who cashed certain checks and embezzled the proceeds. The theory of the declaration is that Petty, as auditor, is responsible for the moneys represented by the checks, and bound to make good the defalcation of the disbursing officer; and this because of the character of the duties imposed upon the auditor in respect of certain funds known as the "Permit Fund," or the "Deposit and Assessment Fund, Whole-Cost Work," etc.

The history of the legislation under which the government of the District was organized and its affairs conducted, down to and during the period covered by this action, is rehearsed in the opinion of the court of appeals, and it would serve no useful purpose to repeat it here. The history of the office of auditor, and the peculiar statutes under which it is sought to hold him responsible for *the custody and disbursement of [596 moneys, and other duties aside from those that belong to the office *ex vi termini*, are rehearsed. Certain rules promulgated by an order of the District commissioners, under date June 13, 1888, are likewise set forth. They have to do with the disposition of moneys deposited with the collector of taxes of the District by citizens of the District for (*inter alia*) "permit work." Certain duties akin to the normal functions of an auditor are by these rules imposed upon that officer, among which are the examination of vouchers and pay rolls prepared by the superintendents of streets and of sewers, respectively, for services rendered or material furnished, payable from the permit fund; approval of such pay rolls and vouchers if found correct; and the making of requisitions upon the collector of taxes for the amount thereof. A separate section provides that "once a month, upon a day regularly set apart for the purpose, the pay clerk of the auditor's office shall take the rolls thus prepared, with the money necessary to meet the same, repair to the places where the work is being done, and, after proper identifications, and receipts given, pay in cash to each claimant the amount found to be due. He shall give bond with approved security in the sum of $5,000 for the faithful performance of the duties required of him." By another section the auditor is to debit the collector of taxes with deposits on account of permit and license funds, and credit him with requisitions honored by the collector. By another section the auditor is to "debit himself with the moneys received from the collector of taxes upon requisition made as provided in § 1, and credit himself with payments upon vouchers duly certified and approved, as in §§ 2 and 7." By § 7, after the work for which a deposit has been made has been completed and paid for, the auditor is to state the account with the depositor, make requisition upon the collector for any balance due the depositor, *and repay the [597

same upon presentation of the original certificate of deposit.

The meaning of the terms "permit work" and "permit fund" is explained in the declaration as follows: "That in the course of administration the commissioners found it expedient that all work done by the District of Columbia as the result of cuts made in streets, avenues, roads, and alleys in said District be paid from a fund known as the 'Deposit and Assessment Fund,' which was whole-cost work, and thereupon the said commissioners, on February 6, 1897, ordered that for convenience in keeping the accounts in cases of repairs made by the District of cuts in pavements and other work done by the District which were paid for from private deposits, a general account be opened, styled 'Deposit and Assessment Fund,' and that all material and labor for such work be charged against said account, and be paid by assessment against the deposits made for such purposes."

Until the making of the order of June 13, 1888, there was no law, rule, or regulation making the auditor of the District accountable for public moneys, and we agree with the court of appeals that since there was no statute authorizing the District commissioners to receive or expend such permit work deposits, the order imposed no liability upon the auditor's bondsmen, because the moneys received from citizens for street improvements under the permit system were not public moneys in any legal sense, but funds of private citizens, held extraofficially by the public officers.

The act of Congress of March 3, 1891 (26 Stat. at L. 1064, chap. 546), provided for a disbursing clerk, and authorized him to pay laborers and employees of the District "with moneys advanced to him by the commissioners in their discretion, upon pay rolls or other vouchers audited and approved by the auditor of the District of Columbia, and certified by the commissioners, as now re-[598]quired by *law." This clerk was made subordinate to the commissioners, and they were held responsible for his acts and defaults. The declaration avers that this disbursing clerk was the same as the "pay clerk" referred to in the order of June 13, 1888.

Be this as it may, we find nothing in the law, nor in that order, to impose responsibility for the faults of the disbursing clerk upon the auditor.

Moreover, the breaches assigned in the declaration do not appear to pertain to any of the duties imposed upon the auditor by any of the laws, or rules, or regulations to which we are referred.

Four of the assigned breaches set up that certain checks, some drawn by the disbursing officer and countersigned by the auditor, and others drawn by the auditor, all payable to his order as auditor, and indorsed by him as such, should have been deposited by him, "in accordance with law and the rules governing the conduct of his office," with the Treasurer of the United States; or should, "in accordance with law and the rules and regulations aforesaid," have been deposited in a certain bank as reimbursement of the Deposit and Assessment Fund; or should have been deposited in bank to the credit of Petty as auditor, for the benefit of the whole-cost work, etc.; that in each instance, the checks, having been indorsed, were not so deposited, but were cashed and the proceeds never paid or accounted for to the plaintiff, etc. For reasons already mentioned, the pleader has studiously refrained from averring that these checks were cashed by Petty, or that the proceeds thereof in any way came to his hands. The legitimate inference is to the contrary; and that some other official, for whose misconduct Petty was not by law responsible, took the proceeds. For in none of the breaches is the duty attributed to Petty covered by any of the laws, rules, or regulations that are cited. The fifth breach charged is that Petty, as auditor, failed to account for *moneys of the District of [599] Columbia which came to his hands, represented by certain specified checks, from funds belonging to the whole-cost work, unlawfully drawn by Petty as auditor, the checks being payable to the order of Petty "as disbursing agent, Rock Creek Park, D. C.;" that these checks and the proceeds thereof were unlawfully used by Petty in his capacity as such disbursing agent, etc., etc. Upon the argument no attempt was made to support this breach, and as it appears to charge duties that are not covered by any of the laws or rules cited, we dismiss it without further mention.

Judgment affirmed.

# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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660] *JOURNAL OF COMMERCE & COMMERCIAL BULLETIN, Appellant, v. ALBERT S. BURLESON, Postmaster General, etc., et al. [No. 818.]

Motion for a restraining order.

Mr. Robert C. Morris for appellant.

Solicitor General Bullitt for appellees.

March 17, 1913. Granted.

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668]*EDWIN J. BROWN, Plaintiff in Error, v. STATE OF WASHINGTON. (No. 189.]

Error to state court — Federal question.

In Error to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court for Thurston County, in that state, dismissing an action to vacate and enjoin the enforcement of a conviction of practising dentistry without a license.

See same case below, 59 Wash. 195, 109 Pac. 802.

Messrs. Joseph D. Sullivan and Edwin J. Brown for plaintiff in error.

Messrs. W. V. Tanner and W. P. Bell for defendant in error.

March 17, 1913. *Per Curiam:* Dismissed for the want of jurisdiction, on the authority of Kansas City Star Co. v. Julian, 215 U. S. 590, last paragraph, 54 L. ed. 340, 30 Sup. Ct. Rep. 406; Rogers v. Jones, 214 U. S. 204, 53 L. ed. 969, 29 Sup. Ct. Rep. 635.

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EX PARTE: IN THE MATTER OF CHARLES F. WILCOX, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus and for leave to proceed *in forma pauperis*.

Mr. Chas. F. Wilcox, *in propria persona*, for petitioner.

April 7, 1913. Denied.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plaintiff in Error, v. A. W. BURCKETT. [No. 234.]

Carriers — interstate freight rates — posting — erroneous quotation.

In Error to the District Court of the Parish of Caddo, State of Louisiana, to review a judgment in favor of a shipper for the difference between interstate freight rates paid by him, which were on file with the Interstate Commerce Commission, but not posted, and the lower rates previously in force.

Messrs. Taliaferro *Alexander, S. H.[604 West, C. C. Collins, and Roy F. Britton for plaintiff in error.

No appearance for defendant in error.

April 28, 1913. *Per Curiam:* Judgment reversed with costs, and case remanded for further proceedings upon the authority of Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323; Illinois C. R. Co. v. Henderson Elevator Co. 226 U. S. 441, ante, 290, 33 Sup. Ct. Rep. 176.

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UNITED STATES EX REL. SALI ZIMMERSPITZ, Appellant, v. P. L. PRENTIS et al. [No. 911.]

Appeal — from district court — Federal question.

Appeal from the District Court of the United States for the Northern District of Illinois to review a decree quashing a writ of habeas corpus to inquire into a detention under a deportation warrant.

Mr. Benjamin C. Bachrach for appellant.

The Attorney General and Assistant Attorney General Harr for appellees.

April 28, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Lampasas v. Bell, 180 U. S. 276, 282, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; American Sugar Ref. Co. v. United States, 211 U. S. 155, 161, 53 L. ed. 129, 131, 29 Sup. Ct. Rep. 59.

Marion A. Morse, Plaintiff in Error, v. Sidney A. Brown, Sheriff of New London County, Conn. [No. 223.]

Error to state court — Federal question.

In Error to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment of the Superior Court of New London County, in that state, denying relief by habeas corpus to a person convicted of keeping a house of ill fame.

See same case below, 83 Conn. 550, 78 Atl. 430.

Messrs. Donald G. Perkins and Chas. W. Comstock for plaintiff in error.

Mr. Chas. B. Whittlesey for defendant in error.

April 28, 1913. *Per Curiam:* Dismissed for want of jurisdiction. Anderson v. Connecticut, 226 U. S. 603, ante, 377, 33 Sup. Ct. Rep. 217.

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Charles Wilson, Arrested under the Name of Charles Willard, Appellant, v. United States [No. 321.]

Appeal — review in habeas corpus proceeding — changed condition.

Appeal from the District Court of the United States for the Northern District of Illinois to review an order denying a writ of habeas corpus.

Mr. Elijah N. Zoline for appellant.

The Attorney General for appellee.

605] May 5, 1913. *Per Curiam:* Appeal dismissed upon the authority of Johnson v. Hoy, 227 U. S. 245, ante, 497, 33 Sup. Ct. Rep. 240.

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Colorado & Northwestern Railroad Company, Plaintiff in Error, v. United States. [No. 2.]

Error to district court — Federal question.

In Error to the District Court of the United States for the District of Colorado to review a judgment awarding penalties for alleged violations of the safety-appliance act.

Mr. E. E. Whitted for plaintiff in error.

The Attorney General and Assistant to the Attorney General Fowler for defendant in error.

May 5, 1913. *Per Curiam:* Dismissed for the want of jurisdiction, on the authority of Union Trust Co. v. Westhus, 228 U. S. 519, ante, 947, 33 Sup. Ct. Rep. 593. (See United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893, 209 U. S. 544, 52 L. ed. 919, 28 Sup. Ct. Rep. 570.)

S. D. Harper, Plaintiff in Error, v. Grant Victor, United States Marshal, etc. [No. 238.]

Appeal — mode of review — appeal or error.

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma to review an order denying a writ of habeas corpus.

Mr. James S. Davenport for plaintiff in error.

The Attorney General and Assistant Attorney General Adkins for defendant in error.

May 5, 1913. *Per Curiam:* Dismissed for the want of jurisdiction, on the authority of Fisher v. Baker, 203 U. S. 174, 182, 51 L. ed. 142, 143, 27 Sup. Ct. Rep. 135, 7 Ann. Cas. 1018, and cases cited, and cause remanded to the District Court of the United States for the Eastern District of Oklahoma.

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United States, Plaintiff in Error, v. Atlanta Journal Company et al. [No. 253.]

Appeal — by government in criminal cases.

In Error to the Circuit Court of [606 the United States for the Northern District of Georgia to review a judgment sustaining a demurrer to and quashing an indictment charging a conspiracy to defraud the United States.

See same case below, 185 Fed. 656.

The Attorney General and Assistant Attorney General Harr for plaintiff in error.

Messrs. Charles T. Hopkins, Alex. C. King, and Jack J. Spalding for defendant in error.

May 5, 1913. *Per Curiam:* Dismissed for the want of jurisdiction, on the authority of United States v. Patten, 226 U. S. 525, 535, ante, 333, 339, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141, and cases cited, and cause remanded to the District Court of the United States for the Northern District of Georgia.

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John Ashon, Appellant, v. Conservation Commission of Louisiana et al. ‡[No 276]; and Leong Mow, Appellant, v. Conservation Commission of Louisiana et al. [No. 277.]

Appeal — dismissal — changed conditions.

Two Appeals from the Circuit Court of the United States for the Eastern District of Louisiana to review decrees upholding

‡The Conservation Commission of Louisiana and M. L. Alexander, Edgar T. Leche, and J. A. Dayries, substituted May 1, 1913, for the Board of Commissioners for the Protection of Birds, etc., et al., as the parties appellees in these cases.

state fishing laws attacked for race discriminations which have been removed pending appeal.

See same case below, No. 276, 185 Fed. 221, No. 277, 185 Fed. 223.

Mr. E. Howard McCaleb for appellant.

Messrs. R. G. Pleasant and Harry Gamble for appellees.

May 5, 1913. *Per Curiam:* Appeals dismissed without costs to either party (Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; Flour Inspectors v. Glover, 161 U. S. 101, 40 L. ed. 632, 16 Sup. Ct. Rep. 492), and cases remanded to the District Court of the United States for the Eastern District of Louisiana.

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OREGON RAILROAD & NAVIGATION COMPANY, Plaintiff in Error, v. F. V. MARTIN, as Sole Surviving Partner, etc. [No. 281.]

Commerce — conflicting state and Federal regulations — state demurrage law.

In Error to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court of Umatilla County in that state, imposing a statutory penalty upon a carrier for its failure to furnish freight cars on demand for use in interstate carriage.

See same case below, 58 Or. 198, 113 Pac. 16.

Messrs. Maxwell Evarts and W. W. Cotton for plaintiff in error.

No appearance for defendant in error.

May 5, 1913. *Per Curiam:* Judgment reversed with costs, on the authority of Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co. 226 U. S. 426, ante, 607]284, 33 Sup. Ct. Rep. 174, and *cause remanded for further proceedings.

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GEORGE HARRINGTON et al., Appellants, v. ATLANTIC & PACIFIC TELEGRAPH COMPANY et al. [No. 409.]

Appeal — from circuit court of appeals — jurisdiction below.

Appeal from the United States Circuit Court of Appeals for the Second Circuit to review a decree which directed the dismissal of the bill by the Circuit Court for the Southern District of New York, for want of jurisdiction.

See same case below, 107 C. C. A. 593, 185 Fed. 493.

Messrs. Frederick J. Stone and Alton B. Parker for appellants.

Messrs. John F. Dillon and Rush Taggart for appellees.

May 5, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. United States v. Jahn, 155 U. S. 109, 114 (3), 39 L. ed. 87, 90, 15 Sup. Ct. Rep. 39; Carter v. Roberts, 177 U. S. 496, 500, 44 L. ed. 861, 863, 20 Sup. Ct. Rep. 713; Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

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GEORGE HARRINGTON et al., Appellants, v. ATLANTIC & PACIFIC TELEGRAPH COMPANY et al. [No. 410.]

Appeal — from circuit court — jurisdiction below — prior appeal to circuit court of appeals.

Appeal from the Circuit Court of the United States for the Southern District of New York to review a decree entered pursuant to the mandate of the Circuit Court of Appeals for the Second Circuit, which directed the dismissal of the bill for want of jurisdiction.

Messrs. Frederick J. Stone and Alton B. Parker for appellants.

Messrs. John F. Dillon and Rush Taggart for appellees.

May 5, 1913. *Per Curiam:* Dismissed for the want of jurisdiction. Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Brown v. Alton Water Co. 222 U. S. 326, 56 L. ed. 222, 32 Sup. Ct. Rep. 156; Metropolitan Water Co. v. Kaw Valley Drainage Dist. 223 U. S. 519, 56 L. ed. 533, 32 Sup. Ct. Rep. 246; Union Trust Co. v. Westhus, 228 U. S. 519, ante, 947, 33 Sup. Ct. Rep. 593.

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MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY et al., Plaintiffs in Error, v. L. E. GOODRICH. [No. 1035.]

Error to state court — Federal question

*In Error to the Court of Civil Ap-[608 peals for the Fifth Supreme Judicial District of the State of Texas, to review a judgment which affirmed a judgment of the District Court of Grayson County, in that state, in favor of a nonresident plaintiff in a negligence action against a foreign railway corporation in which the validity of the service of process was attacked.

See same case below, — Tex. Civ. App —, 149 S. W. 1176.

Messrs. Joseph M. Bryson, Alex. S. Coke, and Aldis B. Browne for plaintiffs in error.

Mr. J. A. L. Wolfe for defendant in error.

May 5, 1913. *Per Curiam:* Dismissed for the want of jurisdiction, upon the authority of York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; Kauffman v. Wootters, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298.

JULIAN MUNSURI, Appellant, v. C. O. LORD, Trustee, etc. [No. 1000.]

Appeal from the District Court of the United States for Porto Rico.

Messrs. Frederic R. Coudert and Howard Thayer Kingsbury for appellant.

Messrs. N. B. K. Pettingill and William H. Hawkins for appellee.

May 12, 1913. *Per Curiam:* Appeal dismissed for the want of jurisdiction. Motion for a Writ of Certiorari to complete the record denied.

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EX PARTE: IN THE MATTER OF MRS. WILBUR R. FORCE et al., Petitioners. [No. —, Original.]

Motion for leave to file petition for Writs of Mandamus and Certiorari.

Mr. S. H. King for petitioners.

May 26, 1913. Denied.

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EX PARTE: IN THE MATTER OF EDWARD H. PATTERSON, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Mr. George Whitefield Betts, Jr., for petitioner.

June 10, 1913. Denied.

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609] CITY OF CHICAGO, Petitioner, v. WILLIAM MUNROE et al., Executors, etc., at al. [No. 726.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 114 C. C. A. 572, 194 Fed. 936, 1 N. C. C. A. 398.

Messrs. John W. Beckwith and Charles M. Haft for petitioner.

No appearance for respondents.

March 17, 1913. Denied.

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HENRY LAIR, Petitioner, v. UNITED STATES. [No. 980.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 115 C. C. A. 49, 195 Fed. 47.

Mr. Marshall B. Woodworth for petitioner.

The Attorney General and Assistant Attorney General Harr for respondent.

March 17, 1913. Denied.

SAN FRANCISCO CHEMICAL COMPANY, Petitioner, v. MORSE S. DUFFIELD et al. [No. 1001]; and SAN FRANCISCO CHEMICAL COMPANY, Petitioner, v. MORSE S DUFFIELD et al. [No. 1002].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 201 Fed. 830.

Messrs. D. Worth Clark, Aldis B. Browne, Alex. Britton, and Evans Browne for petitioner.

No appearance for respondent.

March 17, 1913. Denied.

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CITIZENS WHOLESALE SUPPLY COMPANY, Petitioner, v. D. H. SNYDER et al. [No. 1003.]

Petition for a Writ of Certiorari to the United States *Circuit Court of ap- [610 peals for the Third Circuit.

See same case below, 201 Fed. 906.

Mr. T. Walter Fowler for petitioner.

No appearance for respondents.

March 17, 1913. Denied.

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THEODORE KHARAS, Petitioner, v. UNITED STATES. [No. 838.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 113 C. C. A. 109, torney General Harr for respondent.
192 Fed. 503.

Mr. T. J. Mahoney for petitioner.

The Attorney General and Assistant Attorney General Harr for respondent.

March 24, 1913. Denied.

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J. F. ROWLEY COMPANY, Petitioner, v. E. H. ROWLEY. [No. 1009.]

Petitions for Writ of Certiorari and Cross Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, on first appeal 88 C. C. A. 258, 161 Fed. 94; second appeal 96 C. C. A. 371, 171 Fed. 415, third appeal 113 C. C. A. 386, 193 Fed. 390.

Mr. L. P. Loving for petitioner.

Mr. Lowrie C. Barton for respondent.

March 24, 1913. Denied.

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BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Petitioner, v. HOME SAVINGS BANK. [No. 1010.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Chas. S. Thomas, Wm. H. Bryant, Milton Smith, and Chas. R. Brock for petitioner.

No appearance for respondent.
March 24, 1913. Granted.

CHARLES G. DADE, Petitioner, v. UNITED STATES. [No. 1018.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of 611]*Columbia.

See same case below, 41 Wash. L. Rep. 199.

Mr. Henry E. Davis for petitioner.

The Attorney General and the Assistant Attorney General Adkins for respondent.

April 7, 1913. Denied.

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WELCH MANUFACTURING COMPANY, Petitioner, v. SAMUEL D. YOUNG, Trustee. [No. 1019.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Fred L. Chappell and Wm. S. Hodges for petitioner.

Messrs. Nathan Heard and Chas. E. Riordon for respondent.

April 7, 1913. Denied.

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PORTLAND GOLD MINING COMPANY et al., Petitioners, v. CHARLES DANIELS et al. [No. 1024.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 45 L.R.A. (N.S.) 827, 202 Fed. 637.

Messrs. Chas. S. Thomas, Wm. H. Bryant, Wm. P. Malburn, and Geo. L. Nye for petitioners.

Messrs. Edward C. Stimson and Jas. J. Banks for respondents.

April 7, 1913. Denied.

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WARNER U. GRIDER et al., Petitioners, v. MINNIE C. GROFF et al. [No. 1004.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 202 Fed. 685.

Messrs. Aldis B. Browne, Frank Doster, Hunter M. Meriweather, Alexander Britton, and Evans Browne for petitioners.

No appearance for respondents.

April 14, 1913. Denied.

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BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, Petitioner, v. 612] THOMAS *WILLIAMS. [No. 1005.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 118 C. C. A. 397, 200 Fed. 211.

Mr. Myron A. Folsom for petitioner.

Messrs. H. Lowndes Maury and B. K. Wheeler for respondent.

April 14, 1913. Denied.

WILLIAM B. STRANG, Petitioner, v. J. A. EDSON. [No. 1023.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 455, 198 Fed. 813.

Mr. Justin D. Bowersock for petitioner.

Mr. S. W. Moore for respondent.

April 14, 1913. Denied.

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JACOB SALSBURG, Petitioner, v. GEORGE A. BLACKFORD, Trustee, etc. [No. 1027.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 204 Fed. 438.

Mr. Andrew Jackson Montague for petitioner.

No appearance for respondent.

April 14, 1913. Denied.

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EMMA JANE KIRKPATRICK, Petitioner, v. HARRIETT ELIZABETH MCBRIDE. [No. 1044.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 202 Fed. 144, on rehearing 203 Fed. 449.

Mr. Chas. H. Burr for petitioner.

Messrs. Wm. B. Sanders and H. M. Russell for respondent.

April 14, 1913. Denied.

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UNITED STATES, Petitioner, v. JAMES B. REGAN. [No. 1046.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for *the Second Circuit. [613

The Attorney General and Assistant Attorney General Harr for petitioner.

Mr. Max D. Steuer for respondent.

April 21, 1913. Granted.

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JOHN B. GLEASON, Petitioner, v. HARRY K. THAW. [No. 1052.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John B. Gleason, *in propria persona*, for petitioner.

No appearance for respondent.

April 21, 1913. Granted.

William F. Kettenbach et al., Petitioners, v. United States. [No. 1011.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 202 Fed. 377.

Messrs. Aldis B. Browne, Alexander Britton, Evans Browne, and C. C. Cavanah, James E. Babb, and George W. Tannahill for petitioners.

The Attorney General, Assistant Attorney General Adkins, and Mr. Peyton Gordon for respondent.

April 21, 1913. Denied.

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Old Dominion Copper Mining & Smelting Company, Petitioner, v. Frederick Lewisohn et al., Executors, etc., [No. 987.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 202 Fed. 178.

Messrs. Louis D. Brandeis and Edward F. McClennen for petitioner.

Messrs. Eugene Treadwell and Edward Lauterbach for respondents.

April 21, 1913. Denied.

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Gay-Ola Company, Petitioner, v. Coca Cola Company. [No. 1020.]

614] Petition for a Writ of *Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 200 Fed. 720.

Mr. Frederick S. Tyler for petitioner.

Messrs. W. D. Thomson and Harold Hirsh for respondent.

April 21, 1913. Denied.

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A. M. Winters, Petitioner, v. United States. [No. 1039.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 201 Fed. 845.

Mr. Carr W. Taylor for petitioner.

The Attorney General and Assistant Attorney General Denison for respondent.

April 21, 1913. Denied.

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C. M. Summers, Petitioner, v. United States. [No. 1045.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Albert Fink, Lewis P. Shackelford, Aldis B. Browne, Alexander Britton, Evans Browne, and Kurnel R. Babbitt for petitioner.

The Attorney General and Assistant Attorney General Adkins for respondent.

*April 28, 1913.* Granted.

William McCoach, Collector, etc., Petitioner, v. D. F. Pratt et al., Executors, etc. [No. 1066.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Attorney General and Assistant Attorney General Harr for petitioner.

No appearance for respondents.

April 28, 1913. Granted.

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Frances Harvey, Petitioner, v. Fidelity & Casualty Company. [No. 972.]

Petition for a *Writ of Certiorari[615 to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 200 Fed. 925.

Messrs. John W. Shine and Wade H. Ellis for petitioner.

Mr. Edwin A. Jones for respondent.

April 28, 1913. Denied.

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Charles Nemcof et al., Petitioners, v. United States. [No. 1034.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 202 Fed. 911.

Mr. E. Clinton Rhoads for petitioners.

The Attorney General, Assistant Attorney General Denison, and Louis G. Bissell for respondent.

April 28, 1913. Denied.

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Missouri-Edison Electric Company et al., Petitioners, v. Morgan Jones et al. [No. 1059.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 442, 199 Fed. 64, on rehearing 203 Fed. 945.

Messrs. H. S. Priest, B. Schnurmacher, and Wade H. Ellis for petitioners.

Messrs. D. T. Bomar, Eleneious Smith, and Ford W. Thompson for respondents.

April 28, 1913. Denied.

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T. F. Baker et al., Petitioners, v. United States. [No. 1061.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. I. W. Stephens and Geo. R. Miller for petitioners.

The Attorney General and Assistant Attorney General Adkins for respondent.

April 28, 1913. Denied.

LEONARD A. HOCHSTADTER, Petitioner, v. ALBERT O. BROWN et al., etc. [No. 1063.]

616] Petition *for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 204 Fed. 63.

Messrs. Irving L. Ernst and Jas. L. Bishop for petitioner.

Mr. Dix W. Noel for respondents.

April 28, 1913. Denied.

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THOMAS J. LYNCH, Executor, etc., Petitioner, v. TRAVELERS' INSURANCE COMPANY. [No. 963.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 118 C. C. A. 379, 200 Fed. 193.

Mr. George W. Heselton for petitioner.

Messrs. R. Ross Perry, R. Ross Perry, Jr., and Harvey D. Eaton for respondent.

May 5, 1913. Denied.

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ELIJAH WATT SELLS, Petitioner, v. CITY OF CHICAGO. [No. 1050.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 201 Fed. 874.

Messrs. Oliver C. Carpenter, Delevan A. Holmes, and M. M. Townley for petitioner.

Messrs. William H. Sexton and Charles M. Haft for respondent.

May 5, 1913. Denied.

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NATIONAL SURETY COMPANY, Petitioner, v. WESTERN PACIFIC RAILWAY COMPANY. [No. 1065.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 200 Fed. 675.

Messrs. Frederic R. Coudert, William J. Griffin, E. S. Heller, and G. W. McEnerney for petitioner.

Mr. F. W. M. Cutcheon for respondent.

May 5, 1913. Denied.

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JACOB DOLL & SONS (Incorporated), Petitioner, v. GIOVANNI TOMASO RIBETTI. [No. 1075.]

617] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, — L.R.A.(N.S.) —, 203 Fed. 593.

Mr. W. S. Dalzell for petitioner.

No appearance for respondent.

May 5, 1913. Denied.

RITTER-CONLEY MFG. CO., Petitioner, v. NELLIE C. AIKEN and Nellie C. Aiken, Jr. [No. 1051.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 203 Fed. 699.

Messrs. E. W. Bradford, William G. Doolittle, and Henry P. Doolittle for petitioner.

Messrs. James I. Kay and Robert D. Totten for respondents.

May 12, 1913. Denied.

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JOHN M. RHEA, Petitioner, v. UNITED STATES. [No. 1082.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 204 Fed. 55.

Mr. W. P. Bynum for petitioner.

The Attorney General and Assistant Attorney General Harr for respondent.

May 12, 1913. Denied.

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JOSEPH G. MAY et al., Petitioners, v. UNITED STATES. [No. 1084.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 431, 199 Fed. 53.

Messrs. P. H. Cullen, Thomas T. Fauntleroy, and Shepard Barclay for petitioners.

The Attorney General and Assistant Attorney General Harr for respondent.

May 12, 1913. Denied.

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CORNELIUS A. DAVIS et al., Petitioners, v. SMOKELESS FUEL COMPANY. [No. 1088.]

Petition *for a Writ of Certiorari [618 to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 116 C. C. A. 361, 196 Fed. 753.

Messrs. Charles C. Burlingham and Chauncey I. Clark for petitioners.

Mr. Louis Sturcke for respondent.

May 12, 1913. Denied.

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H. G. HASTINGS et al., Petitioners, v. W. D. MALONE. [No. 1089.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 201 Fed. 1020.

Messrs. William F. Ramsey and Samuel W. Fisher for petitioners.

Mr. Will G. Barber for respondent.

May 12, 1913. Denied.

WILLIAM A. WRIGHT, Comptroller, etc., Petitioner, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY et al. [No. 1092.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John C. Hart, Thomas S. Felder, and Samuel H. Sibley for petitioner.

Messrs. Joseph B. Cumming and Alex. C. King for respondents.

May 12, 1913. Granted.

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CUNO H. RUDOLPH et al., Petitioners, v. LYNCHBURG INVESTMENT CORPORATION et al. [No. 1093.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Edward H. Thomas for petitioners.

Messrs. Joseph W. Cox and W. C. Sullivan for respondents.

May 12, 1913. Granted.

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JULIAN MUNSURI, Petitioner, v. C. O. LORD, Trustee, etc. [No. 1000.]

619] Petition for a Writ of Certiorari to the District Court of the United States for Porto Rico.

Messrs. Frederic R. Coudert and Howard Thayer Kingsbury for appellant.

Messrs. N. B. K. Pettingill and William H. Hawkins for appellee.

May 12, 1913. Granted.

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UNITED STATES, PETITIONER, v. LEXINGTON MILL & ELEVATOR COMPANY. [No. 1107.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

The Attorney General and Assistant Attorney General Adkins for petitioner.

Mr. E. L. Scarritt for respondent.

May 26, 1913. Granted.

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EUGENE MOSIER, Petitioner, v. UNITED STATES. [No. 949.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 117 C. C. A. 162, 198 Fed. 54.

Mr. Milton Brown and Mr. Samuel Herrick for petitioner.

The Attorney General and Assistant Attorney General Denison for respondent.

May 26, 1913. Denied.

WILLIAM E. PEARSON, Petitioner, v. WILLIAM J. HARRIS. [No. 1025.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 118 C. C. A. 238, 200 Fed. 10.

Mr. John M. Gearin for petitioner.

No appearance for respondent.

May 26, 1913. Denied.

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PACIFIC CREOSOTING COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 1071.]

Petition for a Writ of Certiorari herein to the United States Circuit Court [620 of Appeals for the Ninth Circuit.

See same case below, 116 C. C. A. 50, 196 Fed. 35.

Mr. George E. de Steiguer for plaintiff in error.

The Attorney General and Assistant Attorney General Adkins for defendant in error.

May 26, 1913. Denied.

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UNION STEAMBOAT COMPANY, Petitioner, v. ADMINISTRATORS OF THE ESTATE OF WALTER CHAFIN, Deceased, et al. [No. 1104.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 204 Fed. 412.

Messrs. Aldis B. Browne, Frank H. Scott, Edgar A. Bancroft, John E. MacLeish, and W. O. Johnson for petitioner.

Mr. Samuel B. King for respondents.

May 26, 1913. Denied.

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DETROIT FIRE & MARINE INSURANCE COMPANY et al., Petitioners, v. FEDERAL INSURANCE COMPANY et al. [No. 1108.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 202 Fed. 648.

Messrs. Frank S. Masten, F. H. Canfield, Harvey D. Goulder, and G. L. Canfield for petitioners.

Mr. Hermon A. Kelley for respondents.

May 26, 1913. Denied.

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UNITED STATES TELEPHONE COMPANY, Petitioner, v. CENTRAL UNION TELEPHONE COMPANY et al. [No. 990.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 202 Fed. 66.

Messrs. D. J. Cable and H. M. Daugherty for petitioner.

Messrs. John H. Doyle and Murray Seasongood for respondents.

June 10, 1913. Denied.

621] *AMERICAN STREET FLUSHING MACHINE COMPANY, Petitioner, v. ST. LOUIS STREET FLUSHING MACHINE COMPANY et al. [No. 1090.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 112 C. C. A. 582, 192 Fed. 121.

Mr. Clifton V. Edwards for petitioner.

Messrs. J. D. Johnson and James A. Carr for respondents.

June 10, 1913. Denied.

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JULIUS MARQUSEE, Petitioner, v. HARTFORD FIRE INSURANCE COMPANY. [No. 1106.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 42 L.R.A.(N.S.) 1025, 198 Fed. 475, on rehearing 42 L.R.A. (N.S.) 1031, 198 Fed. 1023.

Mr. Frederick M. Czaki for petitioner.

Mr. Wm. M. Ivins for respondent.

June 10, 1913. Denied.

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C. E. DOLBEAR, Petitioner, v. FOREIGN MINES DEVELOPMENT COMPANY. [No. 1111.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 116 C. C. A. 338, 196 Fed. 646.

Messrs. Simon Lyon and R. B. H. Lyon for petitioner.

Messrs. Charles W. Slack and Conrad H. Syme for respondent.

June 10, 1913. Denied.

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WILLIAM D. HOLDEN, Trustee, etc., Petitioner, v. J. A. HARING, Bankrupt. [No. 1112.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 203 Fed. 229.

Mr. Benn M. Corwin for petitioner.

Mr. H. M. Dunham for respondent.

June 10, 1913. Denied.

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622] *SUSAN HIGGINS, Petitioner, v. HERVEY E. EATON, Executor, etc. [No. 1114.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 202 Fed. 75.

Mr. A. F. Freeman for petitioner.

Mr. Edwin H. Risley for respondent.

June 10, 1913. Denied.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Petitioner, v. UNITED STATES. [No. 1121.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 117 C. C. A. 666, 199 Fed. 990.

Messrs. E. B. Perkins and Edward A. Haid for petitioner.

The Attorney General and Assistant to the Attorney General Fowler for respondent.

June 10, 1913. Denied.

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NORTH GERMAN LLOYD, Claimant, etc., Petitioner, v. HAMBURG-AMERICAN LINE et al. [No. 1122.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 204 Fed. 252.

Mr. Joseph Larocque for petitioner.

Mr. C. C. Burlingham for respondents.

June 10, 1913. Denied.

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JULIUS H. BLACKBURN, Petitioner, v. ELLSWORTH C. IRVINE, Receiver, etc. [No. 1123.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 205 Fed. 217.

Messrs. Daniel B. Henderson and Edwin W. Smith for petitioner.

Messrs. Thomas Patterson and M. W. Acheson, Jr., for respondent.

June 10, 1913. Denied.

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*NEWPORT NEWS SHIP BUILDING &[623 DRY DOCK COMPANY, Petitioner, v. THE STEAMBOAT "SARATOGA," etc. [No. 1136.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 204 Fed. 952.

Messrs. Samuel Park, H. E. Mattison, and J. E. Carpenter for petitioner.

Mr. C. C. Burlingham for respondent.

June 10, 1913. Denied.

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MARIAN COAL COMPANY, Petitioner, v. JOHN W. PEALE. [No. 1141.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 204 Fed. 161.

Mr. Henry H. Glassie for petitioner.

No appearance for respondent.

June 10, 1913. Denied.

WIDOW W. W. SHIPP, Petitioner, v. TEXAS & PACIFIC RAILWAY COMPANY. [No. 1110.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 201 Fed. 1023.

Mr. Charles Lougue for petitioner.

No appearance for respondent.

June 10, 1913. *Per Curiam:* Petition denied. Re Tampa Suburban R. Co. 168 U. S. 583, 587, 588, 42 L. ed. 589-591, 18 Sup. Ct. Rep. 177; Texas & P. R. Co. v. Bourman, 212 U. S. 538, 53 L. ed. 641, 29 Sup. Ct. Rep. 319.

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LAURA R. CRAMER, Petitioner, v. LEE M. HURD, Executor, etc. [No. 1134.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 41 Wash. L. Rep. 318.

Messrs. Arthur A. Birney and Wharton E. Lester for petitioner.

Mr. Richard A. Ford for respondent.

June 16, 1913. Denied.

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624] *FARMERS' LOAN & TRUST COMPANY, Trustee, Petitioner, v. FRANK W. BLAIR et al., Receivers, et al. [No. 1135.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 205 Fed. 14.

Messrs. Frederick Geller, Hinton E. Spalding, and Edward H. Blanc for petitioner.

Messrs. Henry M. Campbell, Hal H. Smith, Henry E. Bodman, and Roberts Walker for respondents.

June 16, 1913. Denied.

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SILVER KING COALITION MINES COMPANY, Petitioner, v. SILVER KING CONSOLIDATED MINING COMPANY. [No. 1148.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 204 Fed. 166.

Mr. William H. Dickson for petitioner.

No appearance for respondent.

June 16, 1913. Denied.

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MARGARET ALICE THROCKMORTON et al., Petitioners, v. SAMUEL T. RUGGLES, Trustee, et al. [No. 1151.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 116 C. C. A. 348, 196 Fed. 656.

*Mr. David* K. Watson for petitioners.

*Mr. Francis B.* James for respondents.

*June 16, 1913.* Denied.

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STAR RUBBER COMPANY, Petitioner, v. FAULTLESS RUBBER COMPANY. [No. 1155.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 202 Fed. 927.

Mr. George W. Rea for petitioner.

No appearance for respondent.

June 16, 1913. Denied.

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*THOMAS A. FIELDS, Appellant, v.[625 GEORGE F. WHITE, United States Marshal, etc. [No. 186.]

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Messrs. J. R. Saussy, Frederick Tupper Saussy, and A. S. Bradley for appellant.

The Attorney General for appellee.

March 11, 1913. Dismissed with costs on motion of counsel for the appellant, and cause remanded to the District Court of the United States for the Southern District of Georgia.

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JUAN Z. RODRIGUEZ, Appellant v. PEOPLE OF PORTO RICO. [No. 185.]

Appeal from the Supreme Court of Porto Rico.

See same case below, 16 P. R. R. 537.

Mr. Leonard J. Mather for appellant.

Mr. Felix Frankfurter for appellee.

March 12, 1913. Dismissed with costs on motion of counsel for the appellant.

---

CHARLES F. NEWCOMB, Plaintiff in Error, v. STATE OF WASHINGTON. [No. 196.]

In Error to the Supreme Court of the State of Washington.

Mr. Conrad H. Syme for plaintiff in error.

Mr. W. V. Tanner for defendant in error.

March 14, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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DAKOTA CATTLE COMPANY, Appellant, v. UNITED STATES and Sioux Indians [No. 214]; *CATHERINE HOWARD, Appel-[626 lant, v. UNITED STATES and Sioux Indians [No. 215]; and KEYSTONE LAND & CATTLE COMPANY, Appellant, v. UNITED STATES and Sioux Indians [No. 216].

Appeals from the Court of Claims.

Messrs. Wm. B. King and Wm. E. Harvey for appellants.

The Attorney General and the Solicitor General for appellees.

March 20, 1913. Dismissed, on motion of counsel for the appellants.

OSCAR W. WHITE, Plaintiff, v. DON ENRIQUE BORJA. [No. —, Original.]

Motion for leave to withdraw motion for leave to file declaration.

Mr. John Ridout for the motion.

April 7, 1913. Granted.

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GUARDIAN ASSURANCE COMPANY OF LONDON, LIMITED, Plaintiff in Error, v. DOMINGO QUINTANA. [No. 280.]

In Error to the District Court of the United States for Porto Rico.

Messrs. Frederic D. McKenney, Francis H. Dexter, J. Spalding Flannery, and Wm. Hitz for plaintiff in error.

Messrs. Clement L. Bouvé and H. H. Scoville for defendant in error.

April 7, 1913. Dismissed with costs, per stipulation.

---

BUNYAN LUCAS, Appellant, v. ROBERT LEE LUCAS et al., Executors, etc., et al. [No. 1007.]

Appeal from the District Court of the United States for the Southern District of California.

Messrs. F. M. Etheridge and J. M. McCormick for appellant.

No appearance for appellees.

627] April 7, 1913. Dismissed with *costs on motion of counsel for appellant.

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CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error, v. HUGH ROWLANDS. [No. 655.]

In Error to the Supreme Court of the State of Wisconsin.

See same case below, 149 Wis. 51, 135 N. W. 156.

Messrs. Wm. G. Wheeler and Edward M. Smart for plaintiff in error.

Mr. John J. Cook for defendant in error.

April 7, 1913. Dismissed without costs to either party, per stipulation.

---

JOHN FLETCHER, Appellant, v. C. T. ELLIOTT, as United States Marshal, etc. [No. 597.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. Arthur A. Birney and Henry F. Woodard for appellant.

The Attorney General for appellee.

April 14, 1913. Dismissed with costs, on motion of counsel for the appellant, and cause remanded to the District Court of the United States for the Northern District of California.

AUSTRO-AMERICAN STEAMSHIP COMPANY, LIMITED, Petitioner, v. PETER RAMJAK. [No. 298.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 108 C. C. A. 339, 186 Fed. 417.

Mr. Edgar H. Farrar for petitioner.

Mr. John D. Grace for respondent.

April 14, 1913. Dismissed, on motion of counsel for the petitioner.

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ADAMS EXPRESS COMPANY, Plaintiff in Error, v. HECTOR VERVAEKE. [No. 308.]

In Error to the Supreme *Court[628 of the State of Pennsylvania.

Messrs. Chas. F. Patterson, Jno. Lewis Evans, and Thos. DeWitt Cuyler for plaintiff in error.

Mr. Geo. Clinton for defendant in error.

April 21, 1913. Judgment reversed with costs, per stipulation of counsel, and cause remanded for further proceedings.

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JOHN MEEKER et al., Plaintiffs in Error, v. MARTIN KAELIN, Mary Kaelin, His Wife, et al. [No. 258.]

In Error to the Circuit Court of the United States for the Western District of Washington.

Mr. Benjamin S. Grosscup for plaintiffs in error.

Mr. S. Warburton for defendants in error.

April 22, 1913. Dismissed with costs, pursuant to the Tenth Rule, and cause remanded to the District Court of the United States for the Western District of Washington.

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JOSÉ AVALO SANCHEZ, Appellant, v. CONCEPCIÓN VEVE Y DIAZ and Her Husband, José Sastrano. [No. 262.]

Appeal from the District Court of the United States for Porto Rico.

Mr. Hector H. Scoville for appellant.

Mr. N. B. K. Pettingill for appellees.

April 22, 1913. Dismissed with costs, pursuant to the Tenth Rule.

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TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. JOHN LACEY. [No. 260.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 107 C. C. A. 331, 185 Fed. 225.

Mr. Chas. Payne Fenner for plaintiff in error.

No appearance for defendant in error.

April 25, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

629] *SAMUEL O'BRIEN, Plaintiff in Error, v. RUDOLPH B. SCHNEIDER et al. [No. 288.]

In Error to the Supreme Court of the State of Nebraska.

Mr. I. L. Albert for plaintiff in error.

Mr. William J. Courtright for defendants in error.

May 2, 1913. Dismissed with costs, pursuant to the Tenth Rule.

---

ERNEST M. COLLINS, Plaintiff in Error, v. JOHN W. DANFORTH COMPANY OF BUFFALO, NEW YORK. [No. 294.]

In Error to the Court of Appeals of the District of Columbia.

Mr. Wilton J. Lambert for plaintiff in error.

No appearance for respondent.

May 5, 1913. Dismissed with costs on motion of counsel for the plaintiff in error.

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ADAMS EXPRESS COMPANY, Plaintiff in Error, v. ABE DAVIDSON, Trading as Davidson & Son. [No. 306.]

In Error to the Supreme Court of the State of Pennsylvania.

See same case below, 230 Pa. 635, 79 Atl. 760.

Messrs. John Lewis Evans and Thomas DeWitt Cuyler for plaintiff in error.

Mr. J. Percy Keating for defendant in error.

May 6, 1913. Judgment reversed with costs, per stipulation of counsel, and cause remanded for further proceedings.

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ADAMS EXPRESS COMPANY, Plaintiff in Error, v. DAISY WRIGHT. [No. 307.]

In Error to the Supreme Court of the State of Pennsylvania.

Messrs. John Lewis Evans and Thomas DeWitt Cuyler for plaintiff in error.

Mr. G. W. Pepper for defendant in error.

May 6, 1913. Judgment reversed with costs, per stipulation of counsel, and cause remanded for further proceedings.

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630] *HENRY D. PHILLIPS, Appellant, v. WALTER L. FISHER, Secretary of the Interior. [No. 318.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Charles Cowles Tucker and J. Miller Kenyon for appellant.

No appearance for appellee.

May 7, 1913. Dismissed with costs, pursuant to the Tenth Rule.

LOUISE SAVART, Appellant, v. SAMUEL BACKUS, Commissioner of Immigration, etc. [No. 869.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. Corry M. Stadden for appellant.

No appearance for appellee.

May 12, 1913. Dismissed with costs, on motion of counsel for the appellant.

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CLARENCE W. BARRON, Plaintiff in Error, v. JOHN W. MCKINNON, Shareholders' Agent, etc. [No. 724.]

In Error to the United States Circuit Court of Appeals for the First Circuit.

Mr. William R. Sears for plaintiff in error.

Mr. Chester M. Pratt for defendant in error.

May 12, 1913. Dismissed without costs to either party, per stipulation of counsel, on motion of Mr. Evans Browne in behalf of counsel.

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GEORGE W. CURETON, Plaintiff in Error, v. STATE OF GEORGIA. [No. 270.]

In Error to the Court of Appeals of the State of Georgia.

See same case below, in Georgia supreme court, 135 Ga. 660, — L.R.A.(N.S.) —, 70 S. E. 332; in court of appeals, 9 Ga. App. 129, 70 S. E. 690.

Messrs. J. J. Lynch, S. P. Maddox, and George D. Lancaster for plaintiff in error.

Mr. Thomas S. Felder for defendant in error.

May 12, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

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*GEORGE W. CURETON, Plaintiff in [631 Error, v. STATE OF GEORGIA. [No. 279.]

In Error to the Court of Appeals of the State of Georgia.

See same case below, in Georgia supreme court, 136 Ga. 91, 70 S. E. 786; in court of appeals, 9 Ga. App. 146, 70 S. E. 964.

Messrs. J. J. Lynch, S. P. Maddox, and George D. Lancaster for plaintiff in error.

Mr. Thomas S. Felder for defendant in error.

May 12, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

BONITA DIAZ DE NOYA, Appellant, v. SAMUEL W. BACKUS, Commissioner of Immigration. [No. 989.]

Appeal from the District Court of the United States for the Northern District of California.

Messrs. Marshall B. Woodworth and Corry M. Stadden for appellant.

No appearance for appellee.

May 26, 1913. Dismissed with costs, on motion of counsel for the appellant.

---

WILLIAM BLACKWELL v. SOUTHERN PACIFIC COMPANY. [No. 665.]

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Edward M. Cleary for Blackwell.

No appearance for the Southern Pacific Company.

May 26, 1913. Stricken from the docket on motion of Mr. Edward M. Cleary for William Blackwell.

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ADAMS EXPRESS COMPANY, Plaintiff in Error, v. CHAMBERLIN-JOHNSON-DUBOSE COMPANY. [No. 826.]

In Error to the Supreme Court of the State of Georgia.

Mr. Robert C. Alston for plaintiff in error.

No appearance for defendant in error.

May 26, 1913. Dismissed with costs, on 632] motion of counsel *for the plaintiff in error.

---

ADAMS EXPRESS COMPANY, Plaintiff in Error, v. CHAMBERLIN-JOHNSON-DUBOSE COMPANY. [No. 827.]

In Error to the Supreme Court of the State of Georgia.

Mr. Robert C. Alston for plaintiff in error.

No appearance for defendant in error.

May 26, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error.

---

WILSON COAL COMPANY, Appellant, v. UNITED STATES et al. [No. 1166]; AND WILSON COAL COMPANY, Appellant, v. UNITED STATES et al. [No. 1167].

Appeals from the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General for appellees.

June 9, 1913. Docketed and dismissed on motion of counsel for appellees.

ADOLPH SUESSKIND, Appellant, v. WILLIAM J. GAYNOR, Mayor of the City of New York, et al. [No. 411.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. Julius M. Mayer and A. S. Gilbert for appellant.

Mr. Terence Farley for appellees.

June 10, 1913. Dismissed per stipulation, and cause remanded to the District Court of the United States for the Southern District of New York.

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*JOHN V. DOBSON et al., Plaintiffs in[632 Error, v. VIRGINIA-CAROLINA CHEMICAL COMPANY. [No. 509.]

In Error to the Supreme Court of the State of Tennessee.

Mr. John V. Dobson, *in propria persona*, for plaintiffs in error.

Mr. W. A. Henderson for defendant in error.

June 10, 1913. Dismissed with costs on authority of counsel for the plaintiff in error.

---

W. S. WRIGHT et al., Plaintiffs in Error, v. MERCHANTS' TRUST COMPANY, Executor, etc. [No. 673.]

In Error to the Supreme Court of the State of California.

Mr. Ernest E. Wood for plaintiffs in error.

No appearance for defendant in error.

June 10, 1913. Dismissed on authority of counsel for plaintiffs in error.

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COL. CHARLES G. TREAT, Appellant, v. PASCUAL OROZCO, Sr. [No. 993]; AND COL. CHARLES G. TREAT, Appellant, v. DAVID DE LA FUENTE. [No. 994.]

Appeals from the District Court of the United States for the Western District of Texas.

The Attorney General for appellant.

No appearance for appellees.

June 16, 1913. Dismissed with costs, on motion of counsel for the appellant.

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1912.

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| 525 | Oregon R. & Nav. Co. v. Campbell | 1604 |
| 534–535 | " " | 1609 |
| 535–536 | " " | 1610 |

| Off. Rep. 250 U. S. | Title. | Here in. |
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| 537 | Southern P. Co. v. Campbell | 1610 |
| 547 | " " | 1622 |
| 547–550 | " " | 1623 |
| 550–552 | " " | 1624 |
| 552–553 | " " | 1625 |
| 553 | Allen v. St. Louis, I. M. & S. R. Co. | 1625 |
| 554–555 | " " | 1627 |
| 555–557 | " " | 1628 |
| 557–560 | " " | 1628 |
| | Bradford v. United States | 1630 |

57 L. ed.

# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1912.

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1] *MATTIE W. JACKSON et al., Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 1-23.)

**Waters — rights as between state and United States — Mississippi levees.**

1. Nothing in the congressional legislation creating the Mississippi river commission, with power to improve the navigation of the river and to build levees for that purpose, justifies the conclusion that, irrespective of navigation, Congress assumed the control of the entire work of protection from overflow by levees, to the displacement of the state or local authorities.

[For other cases, see Waters, I. b, in Digest Sup. Ct. 1908.]

**Eminent domain — what constitutes taking — overflow.**

2. The building of levees along the bank of the Mississippi river, or the closing of breaks therein for the purpose of retaining the water in the river, whereby the levee of riparian owners, built to protect their lands, became ineffective because of the resulting increase of the volume of water in the river, and the raising of the flood level, would not give a right of action as against an individual for the resulting injury to the lands and crops, and much less will support a claim against he United States, where the acts are those of the government, on the theory of a taking of property for which compensation must be made.

[For other cases, see Eminent Domain, V.; Waters, II. b, in Digest Sup. Ct. 1908.]

**Eminent domain — what constitutes taking — overflow.**

3. Raising, strengthening and extending the line of levees at certain points along the Mississippi river, and thus, temporarily, at least, increasing the flood level in times of high water without building a line of levees along minor basins on the east bank, to afford means of protection from the increased danger of overflow, would not render even an individual liable for the resulting injury to lands and crops, and, when the acts are those of the Federal government, do not amount to a taking of property for which compensation must be made.

[For other cases, see Eminent Domain, V.; Waters, II. b, in Digest Sup. Ct. 1908.]

**Eminent domain — consequential damages — improving navigation.**

4. The damage to the lands and crops of riparian owners on the Mississippi river from the increase in the volume of water resulting from the prevention of the outflow by work done by the Federal government in its tributaries in order to deepen the channel and improve the navigable capacity of the river is too remote and consequential to require compensation.

[For other cases, see Eminent Domain, V., in Digest Sup. Ct. 1908.]

[No. 720.]

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NOTE.—As to what constitutes a taking of property by eminent domain—see note to Memphis & C. R. Co. v. Birmingham, S. & T. R. Co. 18 L.R.A. 166.

As to right of riparian owner to compensation for injuries in improving navigation—see note to Gibson v. United States, 41 L. ed. U. S. 997.

On the right to improve navigability of stream—see note to Beidler v. Sanitary Dist. 67 L.R.A. 821.

On the right to divert water in aid of navigation—see note to Smith v. Deniff, 50 L.R.A. 740.

On injury to riparian property by deflecting water by structure erected under statutory authority as a taking—see note to White v. Pennsylvania R. Co. 38 L.R.A. (N.S.) 1041.

On consequential damages—see notes to Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; and A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 42 L. ed. U. S. 852.

Submitted January 10, 1913. Decided June 16, 1913.

APPEAL from the Court of Claims to review a judgment dismissing the petition in a suit to recover from the United States the value of property asserted to have been taken in the course of improving the Mississippi river. Affirmed.

See same case below, 47 Ct. Cl. 579.

The facts are stated in the opinion.

Mr. Waitman H. Conaway submitted the cause for appellants:

The right of the United States, along the Mississippi river, a navigable fresh-water stream, to construct levees or to make a new bank for the river, or to build artificial structures, which have the effect of turning the water upon the land of a riparian owner on the opposite side of the river, is not a local question, but one depending for its determination on the general principles of law, on which decisions of the state courts are not binding on the Federal courts.

Cairo, V. & C. R. Co. v. Brevoort, 25 L.R.A. 527, 62 Fed. 129.

"The bed," which is a definite, and commonly a permanent, channel, is the characteristic which distinguishes the water of a river from mere surface drainage flowing without definite course or certain limits, and from water percolating through the *strata* of the earth, both of which are not subject to riparian rights, but form part of the realty, and belong exclusively to the owner of the realty.

Paine Lumber Co. v. United States, 55 Fed. 864; Carpenter v. Hennepin County, 56 Minn. 513, 58 N. W. 295.

The right of the Federal government in property is either proprietary or governmental. In the first instance it can sell and alienate like the individual; in the second instance it can neither sell nor alienate; it can only control the flowage of navigable streams, and the like, in the interest of all the people. Its right to control a flowing navigable stream is one of passage only.

Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 782; Lewis, Em. Dom. 3d ed. §§ 80, 85.

The banks of a navigable stream, and the land adjoining, being private property, cannot be occupied without compensation. If the public works cause private property to be overflowed, compensation must be made.

Lewis, Em. Dom. 3d ed. §§ 80, 85; The Magnolia v. Marshall, 39 Miss. 110.

It is no defense to an action for flowing of land, that the dams and levees of defendant and others jointly caused the flowing.

Arimond v. Green Bay & M. Canal Co. 35 Wis. 41; Addison, Torts, §§ 82–84, pp. 119, 120; Boyd v. Watt, 27 Ohio St. 259; Jack v. Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298; Pollett v. Long, 56 N. Y. 205; Arctic F. Ins. Co. v. Austin, 69 N. Y. 483, 25 Am. Rep. 221; Chipman v. Palmer, 77 N. Y. 56, 33 Am. Rep. 566; Woods, Nuisances, §§ 821, 822, 862, pp. 868, 869, 893; Lull v. Fox & W. Improv. Co. 19 Wis. 102; 6 Am. & Eng. Enc. Law, p. 434; Strickland v. Barrett, 20 Pick. 417; Bard v. Yohn, 26 Pa. 489; 13 Am. & Eng. Enc. Law, p. 75.

The United States having assumed permanent control of, and adopted to their use, making them larger and stronger, the levees built by state and local authorities, knowing that the right to use them could only be obtained by payment of just compensation to the landowners who had and would suffer injury by overflows as the result of their act, in legal effect assented to the performance of this obligation; and suit on an implied promise to make just compensation can be maintained against the United States.

Broom, Legal Maxims, p. 79; Lewis, Em. Dom. §§ 887, 888, pp. 1543, 1544; Organ v. Memphis & L. R. R. Co. 51 Ark. 235, 11 S. W. 96; New York, C. & St. L. R. Co. v. Hammond, 132 Ind. 475, 32 N. E. 83; Rio Grande & E. P. R. Co. v. Ortiz, 75 Tex. 602, 12 S. W. 1129.

Under acts of Congress the United States has given its consent to be sued on all contracts, express or implied and on all claims founded upon the Constitution of the United States or any law of Congress.

Belknap v. Schild, 161 U. S. 17, 40 L. ed. 17, 16 Sup. Ct. Rep. 443; United States v. Lynah, 188 U. S. 475, 47 L. ed 550, 23 Sup. Ct. Rep. 349.

A riparian owner of land on one side of a stream has no right to build levees upon his side which will prevent the escape of flood waters, in times of ordinary flood, over his side, and cast them upon the owner of the opposite side.

Rex v. Trafford, 1 Barn. & Ad. 874; Cairo, V. & C. R. Co. v. Brevoort, 25 L.R.A. 527, 62 Fed. 129; Paine Lumber Co. v. United States, 55 Fed. 864; Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 782; Jones v. United States, 48 Wis. 385, 4 N. W. 519; Velte v. United States, 76 Wis. 278, 45 N. W. 119; Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; O'Connell v. East Tennessee, V. & G. R. Co. 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; Gerrish v. Clough, 48 N. H. 9, 2 Am. Rep. 165, 97 Am. Dec. 561;

Parker v. Atchison, 58 Kan. 29, 48 Pac. 631; Shane v. Kansas City, St. J. & C. B. R. Co. 71 Mo. 237, 36 Am. Rep. 480; Gulf, C. & S. F. R. Co. v. Clark, 2 Ind. Terr. 319, 51 S. W. 962; Barden v. Portage, 79 Wis. 126, 48 N. W. 210; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Sullivan v. Dooley, 32 Tex. Civ. App. 589, 73 S. W. 82; Byrd v. Blessing, 11 Ohio St. 362; Meyers v. St. Louis, 8 Mo. App. 266; Menzies v. Breadalbane, 3 Bligh, N. R. 423; Rix v. Johnson, 5 N. H. 520, 22 Am. Dec. 472; Jones v. Soulard, 24 How. 41, 16 L. ed. 604; Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Rex v. Yarborough, 3 Barn. & C. 91, 2 Bligh, N. R. 147, 1 Dow & C. 178, 5 Bing, 163, 4 Dowl. & R. 790, 27 Revised Rep. 292, 1 Eng. Rul. Cas. 458; Scranton v. Brown, 4 Barn. & C. 485, 6 Dowl. & R. 536, 28 Revised Rep. 344; Tillotson v. Smith, 32 N. H. 95, 64 Am. Dec. 355; Carlson v. St. Louis River Dam & Improv. Co. 73 Minn. 128, 41 L.R.A. 371, 72 Am. St. Rep. 610, 75 N. W. 1044.

Closing up natural outlets for waters, so that in flood time the force of the current is directed to the channel on the opposite side, resulting in a destruction of private property which would not have occurred had the water been left to flow in its natural course, gives a good cause of action.

Barden v. Portage, 79 Wis. 126, 48 N. W. 210; Hotard v. Texas & P. R. Co. 36 La. Ann. 450; Hartshorn v. Chaddock, 61 Hun, 623, 40 N. Y. S. R. 953, 16 N. Y. Supp. 747; Railroad Co. v. Carr, 38 Ohio St. 448, 43 Am. Rep. 428; Wallace v. Drew, 59 Barb. 413; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Tuthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301.

If the United States had constructed levees on the east bank of the river from Vicksburg to Baton Rouge, to obstruct and thereby confine the flood waters on that side, instead of using the base of the hills for that purpose, and had located those levees where the base of the hills now is, or near the banks of the river, there would have been a taking both of the right of way on which the levees would have stood, and of the land between the line of levees and the river.

Inge v. Police Jury, 14 La. Ann. 117; Penrice v. Wallis, 37 Miss. 172; United States v. Hughes, 230 U. S. 24, post, 1374, 33 Sup. Ct. Rep. 1019.

Now, if the United States, instead of constructing levees on the east bank to confine the flood waters, finds it cheaper to use the base of the hills, to which the levees have been connected, skirting the river for that purpose, and thereby place the lands of appellants within the adopted artificial channel, how can it be said that there is any the less a taking of the lands as a part of the high-water bed of the river?

Penrice v. Wallis, 37 Miss. 172.

When the Jackson suit was begun, in 1894, the Congress of the United States had adopted the Eads plan, and recognized and taken charge of the public work. The Mississippi River Commission had accepted charge of the work, had annually expended the appropriations made by Congress, and had for several years made the same regular estimates for this work that it did for other work under its control and management. These acts on the part of Congress, the Executive Departments of the government, and the Mississippi River Commission, constitute an adoption of the levee system, and the taking of exclusive control of it. They amount to a declaration of the Federal government that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and hereafter this work for the public good is in our hands and subject to our control.

Wisconsin v. Duluth, 96 U. S. 386, 24 L. ed. 671; Overton v. United States, 45 Ct. Cl. 17.

There was a taking, demanding payment of compensation.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Scranton v. Wheeler, 179 U. S. 141, 153, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48; Manigault v. Springs, 199 U. S. 485, 50 L. ed. 280, 26 Sup. Ct. Rep. 127; Gould, Waters, § 209 and notes; King v. United States, 59 Fed. 9; Lowndes v. United States, 105 Fed. 838; High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 326; Paine Lumber Co. v. United States, 55 Fed. 854; Jones v. United States, 48 Wis. 385, 4 N. W. 519; Velte v. United States, 76 Wis. 278, 45 N. W. 119; United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162.

The taking is not a question of tort, but one of implied promise within the meaning of the statute which confers jurisdiction on the court of claims of actions "founded upon any contract, expressed or implied, with the government of the United States."

United States v. Lynah, 188 U. S. 459-465, 47 L. ed. 544-546, 23 Sup. Ct. Rep. 349;

Merriam v. United States, 29 Ct. Cl. 250; Johnson v. United States, 31 Ct. Cl. 262.

Mr. Holmes Conrad also submitted the cause for appellants. Mr. Waitman H. Conaway was on the brief:

The permanent control of the levee system, and the adoption and use of the levees built by state and local authorities, by the United States, have been judicially determined.

Overton v. United States, 45 Ct. Cl. 17.

It is not necessary that the overflow be continuous and permanent to constitute a taking of the lands and crops. It is sufficient if, in times of high water, the overflow occur at intervals of a few years, or during cropping season, should they be of such a damaging character as to disturb riparian landowners in the profitable use, possession, and enjoyment of their property.

United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; McKenzie v. Mississippi & R. River Boom Co. 29 Minn. 394, 13 N. W. 123; Weaver v. Mississippi & R. River Boom Co. 28 Minn. 534, 11 N. W. 114; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308; Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147; United States v. Sewell, 217 U. S. 601, 54 L. ed. 897, 30 Sup. Ct. Rep. 691.

The closing of natural outlets for the flow of water, so as to raise the water above its natural level, resulting in the overflow of riparian lands, constitutes a taking for which compensation must be made.

Troe v. Larson, 84 Iowa, 649, 35 Am. St. Rep. 336, 51 N. W. 179; Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199; Little v. Stanback, 63 N. C. 285; Rankin v. Harrisburg, 104 Va. 524, 3 L.R.A. (N.S.) 919, 113 Am. St. Rep. 1050, 52 S. E. 555; Roberts v. Rust, 104 Wis. 619, 80 N. W. 914; Barden v. Portage, 79 Wis. 126, 48 N. W. 210.

Assistant Attorney General Thompson submitted the cause for appellee. Mr. J. Harwood Graves was on the brief:

The implied contract on the part of the general government to pay for private property taken for public purposes is always based upon a taking by the general government.

United States v. Lynah, 188 U. S. 445, 472, 47 L. ed. 539, 549, 23 Sup. Ct. Rep. 349.

The government, for the purpose of improving navigation, had the right to close the Bougere Crevasse.

Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238.

The damages are consequential, and do not constitute a taking of the lands flooded.

Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320; Meyer v. Richmond, 172 U. S. 83, 96, 43 L. ed. 374, 379, 19 Sup. Ct. Rep. 106; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Mills v. United States, 12 L.R.A. 673, 46 Fed. 738; Manigault v. United States, 199 U. S. 473-477, 50 L. ed. 274-277, 26 Sup. Ct. Rep. 127.

Mr. Chief Justice White delivered the opinion of the court:

This suit was brought to recover from the United States the value of property asserted to have been totally destroyed or rendered completely valueless as the result of *certain public work "done in pursuance[3 of the acts of Congress authorizing it, for the public benefit, under the direction of the Mississippi River Commission and the Secretary of War and the United States engineers." And it was charged that under the circumstances stated and the facts alleged, the property had been taken by the United States for public use "within the meaning of the constitutional provision," and it was averred that there was consequently imposed "on the United States an implied obligation to make compensation for the property so taken and destroyed."

It becomes necessary to give a brief description of the topography of the country in which the property in question is situated, in order to make clear its relation to the public work which it is asserted constituted a taking within the meaning of the Constitution.

The valley of the Mississippi river may in a broad sense be said to commence at Cape Girardeau, Missouri, and to extend from there to the mouth of the river at the Gulf of Mexico. The river, however, in its course to the ocean, does not run through the center of the vast fertile and alluvial plains which, in a comprehensive and generic sense, constitute the delta of the Mississippi. On the contrary, the situation of the river in this respect varies, occasioned by the fact that, at divers places, the upland or hill country approaches to or constitutes the bank of the river. The difference in this regard is marked between the west and the east banks. The west bank is divided into four great basins,—the St. Francis basin, which extends from Cape Girardeau to Helena; the White River basin, which extends from Helena to the mouth of the Arkansas; the Tensas basin, which extends from the mouth of the Arkansas to the mouth of the Red river; and

the Atchafalaya basin, extending from the mouth of the Red river to the Gulf. Practically in the long sweep from Helena, where St. Francis basin ends and the White 4]River basin *begins, to the ending of the Atchafalaya basin at the Gulf, there is no real topographical distinction between the basins, the west bank of the river in that great distance consisting of alluvial country having generally a very wide though varying expanse. The division into basins, putting out of view the St. Francis basin, is therefore merely the result of a consideration of the watershed of each basin, all the water, however, from each ultimately finding its way to the Gulf of Mexico, either through the Mississippi river, or in the lower basins in part, at least, by the means of streams flowing independently of the Mississippi river to the Gulf of Mexico. On the east bank the situation is different. In the long stretch from Cairo, Illinois, to a point a short distance below Memphis, generally speaking, the hills and uplands border the river and constitute its bank. From the point below Memphis to which we have referred, to Vicksburg, Mississippi, this is not the case, and there is a great basin known as the Yazoo basin, which, aside from peculiarities of its own, may be said to possess the same general characteristics as the basins on the west bank of the river. From Vicksburg where the uplands come to the river and constitute its bank, down to Baton Rouge, Louisiana, where the hills or uplands permanently recede from the river, a different condition from that which exists on the west bank obtains. As we are concerned only with the situation below Natchez, we put out of view any statement concerning the east bank between Vicksburg and Natchez, and refer only to the conditions existing on the east bank between Natchez and Baton Rouge.

From Natchez, where the hills or uplands constitute the bank of the river, to Baton Rouge, the line of hill or upland does not follow the course of the river, but recedes therefrom for a certain distance and then again abuts on the river, this process being repeated from point to point until Baton Rouge is reached. Of necessity, therefore, be-5]tween *the point of each departure of the uplands from the river to the point of reapproach, there is an area of alluvial country bounded on the west by the river and constituting its bank, on the east by the hills, which, as it were, like a festoon or semicircle inclose the alluvial area between the river, the base of the uplands or hills, and the points of departure from and approach to the river, as above stated.

These various areas constitute, in the nature of things, minor basins having their own watershed. And between Natchez and Baton Rouge there are five of these minor basins, one between Natchez and Ellis Cliffs, 16 miles below Natchez, another between Ellis Cliffs and Fort Adams, 39 miles below Ellis Cliffs, a third between Fort Adams and Tunica, 17 miles below Fort Adams, and two others between Tunica and Bayou Sara, 23 miles below Tunica, and from Bayou Sara to Baton Rouge, a distance of 35 miles. These subordinate basins are included in a general local levee district known as the Homochitto district. A full and accurate statement concerning these basins, of their relation to levee building, and overflow, will be found in Document No. 1010, House of Representatives, 63d Congress, third session, being a letter of the Secretary of War transmitting to the House of Representatives a full report of a survey made by direction of Congress, by the Mississippi River Commission, of these basins. Of the basin between Ellis Cliff and Fort Adams, the report of the commission makes the following statement:

"Between Ellis Cliffs and Fort Adams, a distance of 39 miles by river, lies a basin whose protection from floods is greatly complicated by the presence of lakes, streams, and swamps.

"It has a total area of 59,412 acres, including 9,781 acres of cleared and 49,631 acres of wooded land, the assessed value of which is $204,739.

"The systematic protection of the basin as a whole is *impracticable without in-[6 cluding drainage work of large proportions.

"It will be observed that there is a large amount of cleared land which is now being cultivated, although meagerly protected from floods by small private levees.

"Owing to the extent of swamp lands the cultivated area could not be greatly extended by the construction of a levee along the river front.

"The benefits to be derived from the construction of a levee are relatively small as compared with the cost, and the work cannot be recommended."

In February, 1894, the appellants or their predecessors in title, for whom they have been substituted on the record, filed their petition in the court of claims against the United States, alleging themselves to be the owners of various tracts of land in Adams county, Mississippi, composing three plantations. It was alleged as follows:

"2. That before and prior to the year 1890, said plantation, from its natural situation, was comparatively high and exempt from overflow from the waters of the Mississ-

sippi river, except at long intervals, and the occurrence of such overflows did not materially affect its productive capacity or its value.

"That said plantation was highly improved, well stocked with laborers and tenants, yielded yearly large crops of cotton, corn, and other products, and was worth the sum of $50,000.

"3. That about the year 1883 the officers and agents of the United States, in pursuance of the act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi river, adopting the so-called Eads' plan, projected, and have constructed, and are constructing, a system of public works for the purpose of so confining the waters of the river between lines of embankment, or levees, as to give increased elevation and 7]velocity *and force to the current in order to scour and deepen the channel, and have thus caused an increased and abnormal elevation of at least 4 feet to the waters of the river at the high water or flood stage; and for said purposes have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red river, and from the mouth of the Red river to the Passes, and on the east bank from the highlands of Tennessee to the mouth of the Yazoo river, and from Baton Rouge to the Passes; but from the mouth of the Yazoo river to Baton Rouge, instead of adopting and constructing levees, have made use of the highlands skirting the river for said purpose, and have thus placed the plantations of petitioners, and others similarly situated, between the lines of embankment, and exposed to the full force of the currents of the river, with such increased and abnormal flood level.

"And are so raising, enlarging, strengthening, adding to, and constructing such levees, as to cause the plantations of petitioners, and others so situated, to be flooded annually by the waters of the river, and to destroy the crops growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences, and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.

"4. That in pursuance of the said plan for the improvement of the navigation of the river, the said officers and agents of the United States have undertaken to close the Atchafalaya river, a natural outlet carrying off near one-third of the surplus waters of the Mississippi, and to force the waters of the Red river and its tributaries from their natural course through the Atchafalaya river to the Gulf of Mexico, into the channel of the Mississippi river, *and have[8 so obstructed, and are so obstructing, the passage of the surplus waters through the Atchafalaya, as to cause the waters of the rivers at the flood stage to annually back up and overflow the lands of petitioners, and to destroy the crops growing and grown thereon, and to deposit thereon superinduced additions of water, earth, sand, and gravel, so as to render them unfit for cultivation, and to entirely destroy their value.

"5. That by reason of the premises aforesaid, the lands of petitioners, which before, from their natural situation, were comparatively high and secure from overflow, have been flooded annually by the waters of the rivers thus confined in the years 1890, 1891, 1892, and 1893, and the crops growing and grown thereon have been each year destroyed by said overflows, so caused, and the live stock drowned, and buildings and fences and other improvements undermined and washed away, and the ditches and drains filled up and the soil washed off, and covered with sand, and earth and gravel, so as to render them unfit for cultivation, and to entirely destroy their value, to the injury and damage of petitioners, as follows, to wit: . . ."

Following an enumeration of loss of crops and personal property in the years 1890, 1891, 1892, and 1893, and the fixing of the value of the land at $50,000, recovery was prayed of $107,257.50, asserted to be due because, under the facts alleged, there had been a taking of the property by the United States for public use.

A demurrer to this petition was overruled on June 1, 1896. The nature of the ruling is indicated by the following excerpt from the opinion, reported in 31 Ct. Cl. 318:

"The petition undoubtedly sets up losses which are in the nature of consequential damages, of which the court has not jurisdiction. The government may have increased the effect of the flood wrongfully or rightfully by the erection of its levees; but it did not in the constitutional *sense of[9 the term take the claimant's cotton, mules, corn, cattle, and sheep for public use. Such a claim is not founded on an implied contract, and of it the court has not jurisdiction. But the petition does allege that 'the value of the land and the improvements destroyed was $50,000;' and that taking is presenting by allegations so closely resembling those in the Pumpelly v. Green Bay & M. Canal Co. Case (13 Wall. 166, 20 L.

ed. 557), that this court does not feel at liberty to say that they present no valid cause of action."

It is stated in the record that during the year 1908, first, second, and third supplemental petitions were filed, although they are not reproduced, but the court below in its opinion declares the aggregate damages claimed was $569,702.50. To these petitions a demurrer seems to have been filed by the United States, which was passed upon in 1910, the order on the subject reading as follows:

"Within the former ruling in this case (31 Ct. Cl. 318), the demurrer to the original and supplemental petitions, in so far as they or either of them aver a taking of real estate—within six years from the date of filing of said petitions—by overflow proximately caused by the construction of levees or other public works in the improvement of the navigation of the Mississippi river pursuant to acts of Congress and within the ruling of the cases of Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557, and United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349, is overruled.

"But as to the alleged annual destruction of crops and personal property on said land so taken by overflow, the demurrer is sustained."

Besides the supplemental petitions just referred to and the action of the court thereon in the period of sixteen years which elapsed between the entry of the order overruling the first demurrer in 1896 and January 5, 1912, when what is styled a fourth supplemental petition was filed, many proceedings were had, such as a hearing, the making of findings of fact and conclusions 10]of law, *filing of motions to set aside the same, to amend the findings, etc., etc., none of which we need particularly refer to because in the first place, although mentioned, they are not reproduced in the record, and in the second place, because we take it that the filing of the fourth supplemental petition was by permission of the court and with the consent of the United States, permitted for the purpose of restating the case of the claimants in its best possible aspect, so that, in the light of what had transpired, a final disposition of the controversy might be had. We so conclude because there is not the slightest indication in the record of any objection having been made to the filing of the fourth amended petition, and because obviously it had the significance which we attribute to it since the findings of fact which the court made the basis of the decree which is here under review in most important particulars, but copies and reproduces the allegations in the fourth supplemental petition. It becomes important, therefore, to exactly understand the issues presented by this petition before coming to consider and dispose of the case. And to this end, omitting all reference to averments relating to the mere description of the property involved or its value, we shall endeavor, not following the order of statement in the pleading, to accurately summarize its contents.

First. As to the situation of the lands, it was averred that said "lands are situated at Jackson Point, in the Alluvial valley of the Mississippi, on the left bank of the river, 40 miles below Natchez and 25 miles above the mouth of Red river. That the basin in which the Jackson lands are situated commences at Ellis Cliffs, about 20 miles below Natchez, and extends to Fort Adams, about 50 miles below, with an average width of 2 miles and a maximum width of 6 miles, and is one of six (6) small basins of the Homochitto basin,"—a description which, beyond doubt, fixes the location of the lands as within *the minor[11 basin lying between Ellis Cliffs and Fort Adams, the area and description of which, as given in the recent report of the Mississippi River Commission, we have before reproduced.

Second. As to the condition of the property prior to the doing of the acts complained of, it suffices to say that it was alleged that by means of levee protection resulting from work done by the owners of the property along the river bank, the property had been protected, that crops of large value had been raised thereon, and that improvements had been put thereon, and that, as a result of this protection by the levees built by the owners, although the property was occasionally overflowed by breaks in the levee, the overflow when it came was not destructive or of such long duration as to prevent the making of a crop, and that the property was highly improved, stocked with implements, etc., as alleged in the original petition, and was of great productive capacity and of large value to the owners.

Third. The facts from which it was alleged the property had been so injured or destroyed by work done by officers of the United States, as to constitute a taking of the property by the United States, for which adequate compensation was due, are stated under the following headings:

a. That about the year 1883 the officers and agents of the United States, "in pursuance of the act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi river, adopted the so-called Eads plan, by act of Congress approved March 3, 1881, [21 Stat. 1200

at L. 468, chap. 136] in consequence whereof have projected, and have constructed, and are constructing, a continuous system of public works, for the purpose of so confining the flood waters of the river between lines of embankment, or levees, as to give increased elevation and velocity and force to the currents, in order to scour and deepen 12]the channel, *and have thus caused an increased and abnormal elevation of at least 9 feet to the waters of the river at the high water or flood stage; and for said purpose have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank, from the highlands of Arkansas to the mouth of the Red river, and from the mouth of the Red river to the Passes . . ."

b. That for time beyond the memory of man the flood waters of the Mississippi river, passing Helena, Arkansas, where the highlands abut on the river, had escaped into the White river and Upper Tensas Basins, and passed in part through various designated bayous, rivers, or streams which, as we have previously said in describing the White river and Tensas basins on the west bank, carried to the Gulf, independently of the Mississippi, waters which enter into or overflow these great watersheds. It being moreover, however, alleged that if they—that is, the waters passing Helena, and which did not escape into the White River and Tensas basins—"ever reached the lands of claimants in sufficient volume to flow them were speedily reduced by crevasses on the west bank, which allowed them to escape into the Atchafalaya basin, and thus relieved the lands of claimants."

That in executing their plans as above described, the officers of the United States had by the levees which they had constructed or maintained along the front of the White river and Tensas basins, prevented the flow of a large volume of water into those basins, which would have found its way to the Gulf without returning to the Mississippi, as above stated, and had thus increased largely the volume of water flowing past the claimants' land, and which therefore, in time of flood, would rest against the levee which protected their lands from overflow.

c. That for the purpose of carrying out their plans, the officers had built a levee to 13]close a very extensive *break or crevasse in the levees on the west bank, opposite to, or nearly so, to the lands of the claimant on the east bank, known as the Bougere crevasse, which carried off a great volume of water and relieved the pressure on the *claimants'* levee, and thus additionally, by *retaining* such water in the river, augmenting the risk of overflow by increasing the danger of a break in the levees of claimants.

d. Because yet further to give effect to their plans, the officers of the United States had prevented large quantities of water which otherwise would have reached the Gulf through the Atchafalaya river, from taking that course, by works designed to retain water in the Mississippi, thus causing the water to back up against claimants' levee, and greatly increasing the danger of overflow.

e. That the plantations of petitioners are located within the limits of a narrow strip of land lying between the low water bank of the Mississippi river and the highlands east of it, between Vicksburg and Baton Rouge, where the highlands skirt very closely to the river bank, and are not protected by levee construction other than that built by the claimants, which has been destroyed and washed away by the recent flood waters of said river after the levee system had practically reached a state of completion, and the United States had closed the Bougere crevasse, as hereinafter alleged.

"That the United States has not attempted to connect the levee line on the east side of said river by the construction of levees on said irregular and narrow strip of land lying between Vicksburg and Baton Rouge, for the reason that the cost of said levee construction, as shown by the Mississippi River Commission's Report for 1896, and the report and survey of the small basins in the Homochitto levee district between Ellis Cliff and Fort Adams, made in 1895 by Col. Geo. B. McC. Derby, the engineer officer in charge of said district, would exceed the value of the land lying between the river and the foothills (of which *petitioners' lands are a part), to the[14 amount of $206,500, it being more economical to use the foothills as levees, as now being done, and pay for the land destroyed, than to build levees on the east bank of said river between said city of Vicksburg and the city of Baton Rouge. That the Mississippi River Commission, in its report for the year 1910, in part says that the lands of petitioners are now subject to perpetual inundation."

The court below made elaborate findings of fact, contained in twenty-five numbered paragraphs. The first four relate to the title of the claimants to the land and we need not review them. Findings 5, 6, 7, 8, and 9 relate to the condition of the river prior to the work done by the government, to the escaping of water into the White river and Tensas basins, as alleged, and to the increased pressure brought upon the

levees protecting the lands of the claimants, to the greater frequency of overflow of such lands, etc., etc.; some of these findings, as we have said, being in the very words of the allegations of the supplemental and amended petition of 1912. Concerning the work done by the officers of the United States, findings numbered 10, 11, and 15 contain the following:

"X.

"Prior to the year 1883, the states and local authorities had constructed unconnected lines of levees for the protection and reclamation of lands subject to overflow from the mouth of Red river to the mouth of Arkansas, and from the mouth of the Yazoo to the highlands below Memphis. The flood waters of 1882 destroyed miles of these levees.

"Beginning about the year 1883, and continuing to the present time, the officers and agents of the United States, pursuant to an act of Congress creating the Mississippi River Commission and the other acts amendatory thereof, and for the improvement of the Mississippi river for navigation, adopted a plan, the so-called Eads plan, 15] *and in consequence thereof have projected and constructed and maintained, and are now engaged in constructing and maintaining, certain lines of levees on both sides of the river at various places for various distances from Cairo, Illinois, to near the Head of the Passes, a distance of 1,050 miles by river from Cairo, and the local authorities or organizations of the states bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths, for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water.

"The levee lines so constructed by the United States and local authorities have been joined, thus giving a continuous line of levees, as contemplated by the Eads plan, with the result that the flood waters of the Mississippi river to a great extent are confined within and between said levee lines, and encompassed within a narrower scope than heretofore, acquired an increased velocity and higher elevation, and the current thereof has become stronger and more forceful.

"The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water, and to scour and deepen the channel of the Mississippi river, and thereby improve it for navigation, and the purpose of the officers and agents of the state and local authorities constructing lines of levees at various points along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing, the waters, being thus confined within a narrower compass, as above indicated, have attained a higher elevation of approximately 6 feet in times of high water.

"XI.

"From Cairo, Illinois, to near the mouth of the Yazoo river, just north of Vicksburg, the Mississippi river is practically *leveed on both sides, except on the east[16 side, where the highlands abut on or near the river in Kentucky and Tennessee (from Port Jefferson, Kentucky, to a short distance south of Memphis, Tennessee), and thence on the west side to near the Head of the Passes, or to a point 1,050 miles by the river from Cairo, and on the east side from Baton Rogue to the same point near the Head of the Passes, leaving a gap in the line of levees of 234 miles in length, from the mouth of the Yazoo river to Baton Rouge, unleveed, where the foothills in some places hug closely to the east bank of the river, and at other points are from 2 to 6 miles from the river, in which strip of territory the lands of claimants are located between the highlands and the river, as before stated.

"The extension of the general levee system by the United States and the local authorities since the United States adopted to its use and assumed 'permanent control' of the levees theretofore constructed by state and local authorities, has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly, or would be subject to now, if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908. The immediate cause of the deeper overflow of claimants' land is the increased elevation of flood heights, which is the result of the general confinement of the flood discharge by the levee system as a whole.

"Before the creation of the Mississippi River Commission by act of Congress, and the adoption of the Eads plan, as aforesaid, the levee lines along the Mississippi river theretofore constructed by state and local authorities consisted of a broken chain of levees of insufficient height and strength to confine the flood waters, and had *been[17 built without regard to a uniform grade line. The United States then caused a survey and report to be made by its officers and agents showing the condition and location of levee lines theretofore constructed

by state and local authorities as they then existed. This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes. In many instances it was a blanket survey which encompassed and took in the lines of levees theretofore constructed by state and local authorities, as above stated. The project recommended by the Mississippi River Commission adopting the Eads plan for the systematic improvement of the river from Cairo to the Head of the Passes, was practically adopted by act of Congress approved March 3, 1881. The United States then undertook the projection and completion of a continuous line of levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan, and as recommended by the Mississippi River Commission, and, in furtherance of that plan, and as part of and supplementary thereto, adopted to its use, and is now using, the levees theretofore constructed by state and local authorities, thereafter making them much larger and stronger. Since that time, levee construction, whether done by the United States or state and local authorities, has been in conformity with the grades and methods of construction adopted by the Mississippi River Commission, and the efficiency of the levee system has been largely due to this fact.

"The extension of this levee system by the United States from Cape Girardeau, Missouri, to the Head of the Passes, was authorized by act of Congress in 1906." 34 Stat. at L. p. 208, chap. 2572, U. S. Comp. Stat. Supp. 1911, p. 1550.

The remainder of the findings are but cumulative, and we do not pause to state them.

The court concluded, in view of the authority of the United States over navigation, and its right to construct works for that purpose, that there was no liability on 18]the *part of the United States, basing its views on this subject upon Bedford v. United States, 192 U. S. 225, 48 L. ed. 417, 24 Sup. Ct. Rep. 238. The petition was therefore dismissed.

Before we take up the contentions advanced by the appellants to establish that the court below was wrong in deciding that there was no liability on the part of the United States, we consider it necessary, lest misconception otherwise might result, to refer to what we deem to be grave errors committed by the court in certain particulars, even although, in passing upon the merits, we shall consider the case in such an aspect as to cause it to be unnecessary to review the errors in question for the purpose of passing on the merits. In the *first place, it is* apparent that in many important respects matters which the court below has stated as findings of fact are mere conclusions of law. This is true, for instance, of the broad conclusion embodied in the findings of fact as to the relation of the United States to levee work, and the power of the Mississippi River Commission over all such work, by whomsoever performed. In the second place, treating it as a question of law, we think the error is apparent from a consideration of the statutes and the official reports relating to the subject, which we may judicially notice. It is true indeed, that when the Eads theory, illustrated by the successful jettying of the mouth of the river under a contract made with Captain Eads, came to be understood, and it also came to be appreciated that the most efficient way to improve the navigation of the river was to utilize the vast power of the river, by confining its waters within its banks, thus directing its energies to cutting out a deeper channel, Congress legislated to the accomplishment of such result by the creation of the Mississippi River Commission, and by conferring the power upon that body to improve the navigation of the river, and to build levees for that purpose with the appropriations which were made from time to time to carry out these great purposes. But nothing in *that legislation justifies the conclusion[19 that, irrespective of navigation, Congress assumed control of the entire work of protection from overflow by levees, to the displacement of the state or local authorities. On the contrary, the reports of the Commission and the public documents and history connected with the same leave no room to doubt that, as necessarily the levees built by the United States in aid of navigation at the same time afforded protection from overflow, and thus served a twofold purpose, that thereby renewed energy was stimulated in state and local authorities to undertake the work of building levees for protection, so that one continuous and complete system of protection would be evolved. It is of course true, also, that the intelligent work of the Mississippi River Commission furnished a standard which served in a sense to control and direct the co-operating energies of others. The gravity of the error, as expressed in the findings of the court below, is illustrated by the fact that it treated the injury alleged to have been suffered as arising alone from the acts of the United States, when in truth, if there was such injury, it could only have resulted from the concurrent action of the United States, the states and their subordinate agencies, including individuals, all acting to the realization of a common end, that is, an efficient and continuous line of levees, although action was impelled by

different considerations. This is illustrated by the statement made by the Mississippi River Commission in its annual report for 1894, pp. 2713-2715, where, in referring either to the claim of damage made in this case or to one like it, it was said:

"The injury will not be traceable to levees built by the United States any more than to those built by the states and local organizations. Neither can it be attributed to the levees on any particular or limited portions of the river. It will be a result of the system as a whole."

But passing, for the sake of argument, 20]these considerations, *let us look at the case in the light of the findings as made.

It is apparent, taking the broadest possible view in favor of the claimants, that the grievance which they allege they have suffered can only rest upon three grounds:

1st. The building by the officers of the United States of lines of levees along the bank of the river for the purpose of retaining the water in the river, treating, for the sake of the argument, all acts done by the local authorities in building levees or closing breaks as acts of the United States.

2d. The failure of the United States to build on the east bank of the river along the minor basins which we have fully described, a line of levees so as to afford means of protection from the increased danger of overflow arising from the fact that the lines of levees along the river on the west bank and elsewhere had been raised and strengthened and extended, thus, at least, beyond doubt, temporarily increasing the level of the flood in times of high water.

3d. The performance of work by the United States tending to diminish the outflow of water from the river through streams which flowed from it, to the end that a more efficient body of water might remain in the stream for the purpose of accomplishing the deepening of the channel, and thus more effectively improving the navigable capacity of the river.

Let us primarily test the merits of the first ground of complaint,—that is, the building of levees. It is not averred that the land of the claimants bordering on the east bank of the river, in the absence of all levees, and in a state of nature, would not, in seasons of high water, be overflowed; and if it had been so alleged, it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain, and thus all progress and development be rendered impossible. 21]When accurately *fixed, the complaint is but this: that because the claimants had built a levee for the purpose of protecting their lands, and which answered that purpose, if levees were not built by others to protect their lands, actionable injury would be occasioned claimants when anybody else sought to protect his land from overflow, since to so do would increase the volume of water in the river and raise the flood level, to the detriment of claimants. In its essence, however, this but amounts to saying that because the claimants have built a levee along their property for the purpose of protecting it from overflow in times of high water, they have acquired the right to stereotype the conditions existing at the time they built their levee, even to the extent of preventing anyone from subsequently exerting his right to build a levee to protect his land. Nothing could more completely illustrate the accuracy of this statement than the averments in the supplemental petition concerning the closing of the Bougere crevasse, since those averments in their last analysis but charge that there was a right on the part of the claimants to subject a vast area of country on the west bank to the devastation resulting from the existence of so extensive a crevasse, simply because to close it would subject the levee of claimants across the river, to a greater pressure, consequent on the retaining of the flood water of the river within its banks. And indeed a like illustration is afforded by the averments as to the escape of water from the river on the west bank, and the spread of that water through the White river and Tensas basins until it ultimately reached the Gulf, by emptying into remote streams. To make the demonstration, if possible, clearer, let us suppose that by the acts of individuals for their own protection, sanctioned by the local laws, a complete line of levees had been built, accomplishing the very result which it is insisted brought about the injury here complained of. Would it be said that the claimants would have a resulting right of action in damages because *other owners had[22 exerted the very right which the claimants had previously resorted to for the purpose of protecting their own land? If not, upon what imaginary ground can it be said that because a work which was lawful in and of itself, was done by the United States, therefore responsibility in favor of the claimants was entailed?

Coming to the second contention, we think it is disposed of by the following considerations:

In the first place, by the report of the commission to which we have referred, the impossibility was pointed out of building a levee along the line of the minor basin in which the land of claimants is situated, without destroying said land, because of the

peculiar situation, unless a permanent system of pumping to take out the water which would gather in the watershed. In the second place, looked at from the point of individual right and corresponding responsibility, it is impossible to conceive by what principle it can be said that because an individual having a right to do so has built a levee to protect his land from overflow, and because his levee has accomplished that result by retaining the water in the river, that thereby there arose a duty on his part to build a levee to protect the land of another, or, in the alternative, to pay for such land.

Indeed, the propositions but assert, on the one hand, that the United States is liable because it did that which it had a right to do, and, on the other, that it is liable because it abstained from doing that which it was under no duty to do. Both the fundamental errors which the contentions involve are exemplified in the arguments used to sustain them, since it is urged that because the levees constructed on the bank of the river operated to keep the water in the river from flowing out, that thereby they served to bring water into the river from without, and that the mere abstention from building levees at a particular place or on a particular line operated to transfer the bank 28]of the river *over to the foot of the hills, or to move the hills over to the river, so as to cause them to become its banks.

The third consideration, that is, the preventing of the outflow of water by work done in the tributaries, and the consequent increase in the volume of water in the river, cannot be tested from the point of view of individual authority, as the power to so do involves necessarily the exercise of governmental power. We therefore come to consider the proposition in that aspect. In doing so, however, it is to be observed that even if all the previous considerations which we have stated, concerning the nonliability to result from building levees, measured by the right of an individual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, and the case therefore in all its aspects be tested by the scope of the governmental authority possessed by the United States, the absence of merit in all the claims is too clear to require anything but statement. We say this because the plenary power of the United States to legislate for the benefit of navigation, and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open. It was directly ruled as to work done by the Mississippi River Commission in Bedford v. United States, 192 U. S. 225, 48 L. ed. 417, 24 Sup. Ct. Rep. 238, upon the authority of which case, as we have said, the court below placed its ruling, and as the underlying principles which controlled the decision in the Bedford Case, and which govern the subject, were again at this term, with much elaboration, stated and applied, we think it unnecessary to do more than refer to that ruling (United States v. Chandler-Dunbar Water Power Co. decided May 26, 1913, [229 U. S. 53, ante, 1063, 33 Sup. Ct. Rep. 667], and to direct that the judgment below be affirmed.

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*MARY E. HUGHES, Appt., [24
v.
UNITED STATES. (No. 718.)

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UNITED STATES, Appt.,
v.
MARY E. HUGHES. (No. 719.)

(See S. C. Reporter's ed. 24-35.)

**Eminent domain — taking property — improving navigation.**

1. The building by the Federal government, when improving the navigation of the Mississippi river, of a levee behind a plantation which was thereby placed between the old and the new levee, is not a taking of property for which compensation must be made.

[For other cases, see Eminent Domain, V., in Digest Sup. Ct. 1908.]

**Eminent domain — taking of property — wrongful official act.**

2. The use of dynamite by a Federal officer in an emergency, in order to enlarge an opening in a levee along the Mississippi river after the levee had given way, if wrongful, cannot be held to be the act of the United States, and therefore affords no ground for holding that the United States had thereby taken for public use the property of a riparian owner damaged by such act.

[For other cases, see Eminent Domain, V., in Digest Sup. Ct. 1908.]

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NOTE.—As to what constitutes a taking of property by eminent domain—see note to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166.

As to right of riparian owner to compensation for injuries in improving navigation—see note to Gibson v. United States, 41 L. ed. U. S. 997.

On the right to improve navigability of stream—see note to Beidler v. Sanitary Dist. 67 L.R.A. 821.

On consequential damages—see notes to D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156, and A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 42 L. ed. U. S. 852.

[Nos. 718 and 719.]

Submitted January 10, 1913. Decided June 16, 1913.

APPEAL from the Court of Claims to review a judgment rejecting a claim against the United States for an alleged taking of property in the course of improving the Mississippi river. Affirmed. Also an

APPEAL from the Court of Claims to review a judgment awarding damages for an alleged taking of property in the course of such improvement. Reversed.

See same case below, 47 Ct. Cl. 663.

The facts are stated in the opinion.

Messrs. Holmes Conrad and Waitman H. Conaway submitted the cause for Mary E. Hughes.

Assistant Attorney General Thompson submitted the cause for the United States. Mr. J. Harwood Graves was on the brief.

For contentions of counsel, see their briefs as reported in Jackson v. United States, ante, 1363.

Mr. Chief Justice White delivered the opinion of the court:

This suit was commenced to recover from the United States the sum of $200,560, subse-
25 quently reduced by an *amended petition to $165,000, and $12,000 per annum until the principal sum was paid, on the ground that the United States had, as the result of work done by it in relation to the Mississippi river, taken, in the constitutional sense, two certain plantations belonging to the claimant, one the Wigwam plantation, situated on the east bank of the Mississippi, and the other a plantation known as the Timberlake plantation, also lying on the east bank, but higher up the river; that is, in Bolivar county, Mississippi and opposite Arkansas City on the west bank. As to the first, the Wigwam plantation, there was judgment below in favor of the United States, rejecting the claim, and No. 718 is an appeal by the claimant from that judgment. As to the Timberlake plantation, there was a judgment against the United States for what was deemed to be the value of the plantation, and No. 719 is an appeal by the United States from that judgment. The court made a series of general findings stating what was considered to be the facts concerning the situation upon which the right to recover in a general sense as to both plantations was based. It then made particular findings as to the Wigwam plantation and like findings as to the Timberlake plantation. Although the general findings are in some respects amenable to the criticism that they draw erroneous conclusions of law concerning the legislation of Congress, with regard to the improvement of the Mississippi river, and the action of the officers under such legislation, as was done in the Jackson Case, [230 U. S. 1, ante, 1363, 33 Sup. Ct. Rep. 1011), and also treat such mistaken conclusions as findings of fact, such errors are not as apparent as they were in the Jackson Case. This results from the fact that the general expressions in the findings manifesting the error which we pointed out in the Jackson Case are, as a rule, in this case qualified by statements incompatible with the general expressions, and which therefore serve to correct the error which otherwise would exist. Thus, in finding 1, after referring to the St. *Francis and other basins[26 on the west bank and the outflow of water into these basins, ultimately reaching the Gulf of Mexico, as described in the findings in the Jackson Case, and the stoppage of such outflow and consequent increase of the volume of water in the river, which, in the Jackson Case, was virtually attributed exclusively to work done by the United States or under its control, the finding in this case accurately states the relation of the United States and the local authorities to the work as follows:

"The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of claimant were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river navigation, and by the state and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows."

So, again, in No. 2, although the finding refers to the adoption of the Eads plan almost in the same all-embracing words used in the Jackson Case, it yet states in explicit terms that the acts of Congress but authorized an improvement of navigation, and empowered expenditures for that purpose, and in referring to levee construction done pursuant to such Congressional action, it is declared in the finding that the United States "for the improvement of the Mississippi river for navigation . . . and the local authorities or organizations of the states bordering along the river on both sides, from Cairo to the Gulf, have before and since 1883, constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water." Again, in the concluding part of the fourth

finding, a statement in accord with that made in the Jackson Case is found concerning the co-operation of the United States 27]and local authorities in *levee building, which is qualified, however, by subsequent statements, which, with reasonable accuracy, displays the real situation, that is, the unifying of the energies of the United States and the local authorities to a common end, levee construction, although the purpose on the one hand was the improvement of navigation, and on the other, the protection of land from overflow. And this also is further illustrated by finding 3, which points out the scope and character of the authority delegated by Congress to build levees; that is, the improvement of the navigation of the river.

The special findings relating to the Wigwam plantation but established that that plantation was situated in one of the minor basins below Vicksburg, like those between Natchez and Baton Rouge, which were described in the Jackson Case. Indeed, the court, in express terms, found there was identity between that case and this, and placed its conclusion against the right to recover upon its ruling in the Jackson Case; and in so doing, in view of our affirmance of the judgment in the Jackson Case, it follows that, in our opinion, no error was committed.

As to the Timberlake plantation, special findings were made, and omitting those which relate to the title of the claimant and to the loss suffered by the overflow of the property in the years following the special action by the government, which it was considered gave rise to the right to relief, the findings are as follows:

"IX.

"Timberlake Plantation.

"Prior to the construction of the Huntington Short Line levee by the United States, the waters of the Mississippi river did not overflow and submerge the Timberlake plantation hereinafter described at such frequent intervals and for such duration as to disturb the claimant in the profitable use, enjoyment, and possession thereof, or so as to materially affect its cul-28]tivation, productive *capacity, or market value. It was then suitable for the purpose of raising thereon, and there was profitably raised thereon, crops of cotton, cotton seed, corn, hay, and other products. Since the completion of said Huntington Short Line levee by the United States, placing the plantation of claimant between the old and new levee, in the restricted and narrower high-water channel of the river, the rises in the water of said river, by reason of the water being thus confined and restricted in its flow, have been, and are now, occurring at such frequent intervals and for such duration as to prevent the claimant from raising any kind of a crop thereon; the buildings have become untenantable and uninhabitable; the fencing washed away; the land covered with superinduced additions of water, earth, sand, and gravel to a depth of from 3 to 12 feet; said land has since grown up in willows, cottonwood, underbrush, and weeds, so as to render it valueless to her; to destroy its market value; and to compel its abandonment.

"X.

"Prior to 1898 said lands( Timberlake plantation) were comparatively high and secure from overflow by the flood waters of the Mississippi river, except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or market value. Said lands were highly improved, well stocked with tenants and laborers, yielded large crops of cotton, cotton seed, corn, hay, and other products, were located adjacent to what was formerly the town of Huntington, located between the Huntington Short Line levee and the river, since washed away by the flood waters of the Mississippi river, and deserted as a place of residence by the inhabitants some years after the building of the Huntington Short Line levee,—1898-1900,—was very valuable as plantation property, and was worth the sum of ninety thousand dollars ($90,000).

"The claimant, Mary E. Hughes, obtained $12,000 from *the Board of Mississippi[29 Levee Commissioners, by judgment, for damages to the drainage of the Timberlake plantation into Black Bayou when it was thrown out by the construction of the Huntington Short Line levee in 1898-1900. This plantation is located in the vicinity of and opposite the Arkansas City gauge, and was protected from overflow up until the time of the construction of the Huntington Short Line levee.

"XI.

"Prior to the year 1898, said Timberlake plantation was protected from overflow by the flood waters of the Mississippi river by a continuous levee line located in front of said lands, along, by, and close to the river bank for its entire frontage, built by state and local authorities, and said plantations still remained valuable for plantation purposes, and up to that time had not been seriously injured in its use and enjoyment by the flood waters of said river.

"About the year 1898, the United States surveyed and thereafter began to construct what was known as and now called the Huntington Short Line levee, a new levee, about 15 feet high, located some distance

back from the old levee, behind the land of claimant, thus placing and permanently locating said Timberlake plantation between the Huntington Short Line levee and the old levee in the narrower high-water channel and bed of the river, placing an additional burden and servitude thereon, and subjecting said property to more frequent and destructive overflows and the force and scouring power of the high-water current of said river. After the completion of the Huntington Short Line levee a high water came in the river during the year 1903, and because of a break in said old levee, the water of said river began to flow onto and over the plantation of claimant, then located between the old levee and the Huntington Short Line levee, and remained standing on and over said land 30]to a great depth after the *high waters receded, and because of the great pressure of the water thus confined, standing against said Huntington Short Line levee, threatening its destruction by breaking through, the United States then caused the old levee to be blown up by dynamite in many places, so as to relieve the pressure of the water standing against the Huntington Short Line levee, and to save it, thus causing the water to rush over and across said land, injuring it for agricultural as well as all other purposes, greatly reducing its value.

"XIV.

"Upon the foregoing facts the court finds as an ultimate fact, so far as it is a question of fact, that the effect of placing and permanently locating the Timberlake plantation of claimant between the Huntington Short Line levee and the old levee, and the river bank, was and is an act on the part of the United States intending to place, and which finally resulted in placing, the lands of claimant in the narrower high-water channel of the Mississippi river, subjecting it to more frequent and destructive overflows, and the forceful and destructive action of the current, placing an additional burden and servitude thereon, which has finally resulted, since the years 1907, 1908, and 1909, in such serious and continuous interruption to the common and necessary use and enjoyment of said property, as to amount to a taking thereof by the United States under the fifth Amendment to the Constitution."

It will be observed that finding 9, although special to the Timberlake plantation, contains statements concerning the general raising of the flood level in the river as the result of levee work done by the United States and the state and local authorities, followed by a description of the injury by overflow to the Timberlake plantation, which would give rise to the inference that the judgment which was rendered against the United States as to that plantation was based upon a consideration of that subject. If *that view were taken,[31 the case would be controlled by our decision just rendered in the Jackson Case; but we cannot adopt that view of the court's action, as the court in the Jackson Case decided that like facts did not justify recovery against the United States, and reiterated in this case its conclusion in that respect by rejecting the claim as to the Wigwam plantation. Under this view we assume that finding 9 was a mere inadvertence, or, at all events, if not so, may be now put out of view. This leaves only for consideration the special facts concerning the Timberlake plantation.

The plantation bordered on the river, and was protected by a levee. Whether that levee was built by the private efforts of the owner of the land or by state or local authority does not appear. The officers of the United States, deeming it advisable, in aid of the improvement of navigation, to construct a new levee, did not locate it along the river, in front of the plantation, but joining the existing line of levee, somewhere above the projecting point on which Timberlake plantation was situated, built a direct line of levees which passed across the point several miles back of the Timberlake plantation, and joined the line of levees on the river bank below the plantation. This levee, known as the Huntington Short Line, is thus described in the report of the Mississippi River Commission for 1898, at page 3390:

"Huntington Short Line.—This is a new levee under construction from Mound Landing to a point about 1½ miles below Offutts Landing. The new levee here is 4.4 miles in length, and will shorten the levee line 7 miles over its present length."

The findings exclude the conception that this new and more direct levee was built upon land belonging to the owner of the Timberlake plantation. They show that the location and construction of this new line of levee was approved by the local levee authorities, since they establish *that those[32 authorities paid to the owner of the Timberlake plantation a sum of money for the incidental damage occasioned to that plantation by the fact that the levee, in passing in the rear of the plantation, obstructed drains or means of drainage by which the surface water of the plantation was carried off to the rear. The report of the Mississippi River Commission for 1900, page 4849, shows that before this payment was made by the local authorities there was a suit brought by owners of the plantation,

and that that suit culminated in a recognition by the local courts of the right to build the levee on payment of the sum stated, which was but a part of a much larger claim made, which was disallowed. The facts just stated serve to demonstrate the error which was committed in deciding that the exertion of national power to build levees for improving navigation had effaced the exercise of state power to construct levees for protection from overflow, since they manifest the harmonious co-operation of the two powers, the United States bearing the burden of building a great levee in the interest of navigation, and the local authorities, in view of the protection from overflow which necessarily resulted from the construction of the levee for navigation purposes, contributing the amount essential to pay an award of a local character.

Upon all these facts we are unable to perceive any ground for distinguishing the claim as to the Timberlake from that as to the Wigwam plantation or from the claims which were held to be without merit in the Jackson Case. We say this because the claims in the Jackson Case as well as the claim in this case, made as to the Wigwam plantation, in their last analysis but involve the assertion of a right of recovery against the United States for failing to build a levee in front of the plantations in question for the purpose of affording them protection from the increased stage of high-water which it was asserted had been created by the act of the United States in build-[33]ing levees elsewhere along *the river. This being so, as it is not pretended that the building of the new line of levee here considered trespassed upon the property rights of the owners of the Timberlake plantation by an actual taking of land, the asserted claim but comes to this: that the owner of the Timberlake plantation, abutting on the river, is entitled to hold the United States responsible, because in improving the navigation of the river the officers of the United States, in selecting the place where the levee should be built, did not select the front of the plantation, that is, did not construct the levee along the river bank of the plantation. Thus accurately fixing the contention, it is patent that we cannot affirm the judgment of the court below against the United States as to the Timberlake plantation without reversing its judgment in favor of the United States as to the Wigwam plantation, and without disregarding the decision which we have just announced in the Jackson Case. In saying this we are not unmindful of expressions in the findings, and which indeed the court below declared in express terms *were the basis* of its legal conclusion in respect to the liability of the United States, to the effect that the building of the new levee operated to change the situation of the claimant's property by putting it in the bed of the river. But the substance of things may not be changed by mere figures of speech. The plantation was situated on the bank of the river. It was protected from overflow by the levee on that bank. Whether that levee was private or public, as we have said, does not appear, but nothing in the fact that a new levee was built far in the rear of the plantation changed the physical situation, or had the magical effect of transporting the property from one place to another. Where it was before the location of the new levee, it remained after the new levee was completed. True it is that if, from caving banks or other natural causes, it became impossible to protect the property by means of a levee along its front, that fact was in *no way caused[34] by the building of the new levee, and if high water and disastrous overflow subsequently came from the inherent weakness of the existing levee along the front on the river bank, the consequent loss may not be attributed to the fact that a new and stronger levee was constructed along shorter and safer lines. There is no pretense of any intention to injure the claimant by the building of the new levee; and on the contrary, light is reflexly thrown upon the conditions which led to the exercise of judgment on the part of the officers of the United States in building the new levee on the much shorter and more direct line by the report of the commission for 1899, at page 3555, where the caving condition of the bank of the river in and about the place where the plantation was situated is stated.

As to the statement in one of the findings concerning the act of an officer of the United States after the old levee had given way, in using dynamite to enlarge the opening, we find it difficult to understand the finding. Of course it can be easily appreciated that when a break occurred in the old levee along the bank, that impelled by the great force of the current of the river and the volume of its water, there rushed through the opening or crevasse with great momentum, a body of water which might, before its force was spent, strike the new levee, although it was far in the rear, and endanger its safety,—a danger which is aptly portrayed as to a relatively similar situation elsewhere in the report of the chief of engineers for 1903 at p. 260. But the finding does not seem to refer to such a danger nor to assume that the dynamite was used to guard against it, that is, to expand the opening

in the old levee to such a degree that, although increasing the quantity of the flow of water, it would diminish its momentum, and thus prevent the danger of striking against the new levee and sweeping it away. We say this since, taking the finding literally, it gives rise to the convic-
35]tion that the old levee *was dynamited after the river had subsided, for the purpose of allowing the water to flow off, which had accumulated in the basin created by the remaining line of old levee along the river front and the line of the new levee. We do not stop, however, to further consider the subject, since whatever view be taken of the finding, the fact as to the use of dynamite would not in law amount to a taking by the United States, because in any event the mere act, to meet an emergency, of the officer, conceding, under the circumstances stated, that it was a wrongful act, cannot be held to be the act of the United States, and therefore affords no ground in any event for holding that the United States had taken the property for public use.

It follows from what we have said that the judgment below in favor of the United States in No. 718 must be affirmed, and the judgment against the United States in No. 719 must be and it is reversed.

And it is so ordered.

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## EX PARTE AMERICAN STEEL BARREL COMPANY and Elizabeth C. Seaman.

(See S. C. Reporter's ed. 35–46.)

**Mandamus — to review judicial discretion — other remedy.**

Mandamus will not lie to review the ruling of a Federal circuit judge designating, in the exercise of his jurisdiction under the Federal Judicial Code, § 14, another judge in the room and place of a district judge who had certified his withdrawal from bankruptcy proceedings upon the filing of an affidavit under § 21 charging him with personal bias and prejudice,—especially where there has been long delay in asking such extraordinary remedy.

[For other cases, see Mandamus, II. b; II. c, 3, in Digest Sup. Ct. 1908.]

[No. 14, Original.]

Argued April 21, 1913. Decided June 16, 1913.

PETITION for a writ of mandamus and rule to review an order of the Senior Circuit Judge for the Second Judicial Circuit designating another judge in the place of a District Judge who had certified his withdrawal upon the filing of an affidavit charging him with personal bias and prejudice. Rule discharged.

The facts are stated in the opinion.

Mr. John C Spooner argued the cause, and, with Mr. Aldis B. Browne, filed a brief for petitioners:

Mandamus is, under the facts presented in this petition, the proper and only remedy.

Re Hohorst, 150 U. S. 653, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Re Grossmayer, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; Re Pollitz, 206 U. S. 331, 51 L. ed. 1083, 27 Sup. Ct. 729; Re Metropolitan Trust Co. 218 U. S. 312, 54 L. ed. 1051, 31 Sup. Ct. Rep. 13; Ex parte Newman, 14 Wall. 152, 165, 166, 20 L. ed. 877, 879.

Messrs. John C. Spooner, Aldis B. Browne, Louis O. Van Doren, and G. Murray Hulbert also filed a brief for petitioners:

Petitioners had no right to relief in the circuit court of appeals by way of mandamus.

United States ex rel. Harless v. United States Ct. App. Judges, 29 C. C. A. 78, 56 U. S. App. 33, 85 Fed. 177; Rosenbaum v. Bauer, 120 U. S. 450, 30 L. ed. 743, 7 Sup. Ct. Rep. 633; McClellan v. Carland, 217 U. S. 268, 279, 280, 54 L. ed. 762, 766, 767, 30 Sup. Ct. Rep. 501.

Petitioners are not attempting to control judicial discretion by mandamus.

Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324; Ex parte State Bar Asso. 92 Ala. 113, 8 So. 768; State ex rel. Spence v. Dick, 103 Wis. 407, 79 N. W. 421; State ex rel. Smith v. Pitts, 139 Ala. 152, 36 So. 20.

Petitioners are not guilty of laches.

Wetzel v. Minnesota R. Transfer Co. 169 U. S. 237, 241, 42 L. ed. 730, 732, 18 Sup. Ct. Rep. 307; United States v. Moore, 12 How. 209, 222, 223, 13 L. ed. 958, 963, 964; Landsdale v. Smith, 106 U. S. 391, 394, 27 L. ed. 219, 220, 1 Sup. Ct. Rep. 350; Ex parte

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NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

As to control of inferior tribunal by mandamus—see note to Ex parte Morgan, 29 L. ed. U. S. 135.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

v. United States, 189 U. S. 233, 241, 47 L. ed. 787, 791, 23 Sup. Ct. Rep. 596; Burke v. Smith (Putnam v. New Albany & S. C. Junction R. Co.) 16 Wall. 390, 401, 21 L. ed. 361, 365; Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 89, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; Johnston v. Standard Min. Co. 148 U. S. 360, 370, 37 L. ed. 480, 485, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554; Halstead v. Grinnan, 152 U. S. 412, 417, 38 L. ed. 495, 497, 14 Sup. Ct. Rep. 641; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Abraham v. Ordway, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; Gildersleeve v. New Mexico Min. Co. 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; O'Brien v. Wheelock, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354; Duke v. Turner, 204 U. S. 623, 51 L. ed. 652, 27 Sup. Ct. Rep. 316, 9 Ann. Cas. 842; Re Eastern Cherokees, 220 U. S. 83, 55 L. ed. 379, 31 Sup. Ct. Rep. 373.

Mr. John A Garver argued the cause, and, with Messrs. Edwin T. Rice and Charles A. Riegelman, filed a brief for respondents:

The power to issue writs of mandamus is exercised by this court only in cases where it has original or appellate jurisdiction.

Re Massachusetts, 197 U. S. 482, 49 L. ed. 845, 25 Sup. Ct. Rep. 512; Re Glaser, 198 U. S. 171, 49 L. ed. 1000, 25 Sup. Ct. Rep. 653.

An application for a mandamus is addressed to the sound discretion of the court.

Rex v. London, 1 T. R. 423; Re Key, 189 U. S. 84, 85, 47 L. ed. 720, 721, 23 Sup. Ct. Rep. 624.

The petitioner must come into court with clean hands. He cannot acquiesce in an act, and subsequently complain of it. He must assert his rights promptly, especially where the rights of third persons are concerned; and the writ will not be issued if its effect might be to cause confusion or disorder or substantial injustice to others.

Spelling, Inj. & Extr. Rem. 2d ed. §§ 138, 1371, 1382; 26 Cyc. 150, 157; People ex rel. Gaslight Co. v. Syracuse, 78 N. Y. 56; People ex rel. Wood v. Board of Assessors, 137 N. Y. 201, 33 N. E. 145; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; Duke v. Turner, 204 U. S. 623, 629, 631, 632, 51 L. ed. 652, 654, 655, 27 Sup. Ct. Rep. 316, 9 Ann. Cas. 842.

And the writ will not ordinarily be issued if it can be issued only by declaring a statute unconstitutional.

26 Cyc. 156.

The writ will not be issued where there is another remedy by appeal, writ of error, or otherwise.

26 Cyc. 173; 2 Spelling, Inj. & Extr. Rem. §§ 1369, 1374, 1390, 1392; United States ex rel. Crawford v. Addison, 22 How. 174, 16 L. ed. 304; Marbury v. Madison, 1 Cranch, 137, 169, 2 L. ed. 60, 71; Re Connecticut Mut. L. Ins. Co. 131 U. S. CLXXX Appx. and 26 L. ed. 561; Re Pennsylvania Co. 137 U. S. 451, 453, 34 L. ed. 738, 739, 11 Sup. Ct. Rep. 141; Re Morrison, 147 U. S. 14, 26, 37 L. ed. 60, 65, 13 Sup. Ct. Rep. 246, Re Atlantic City R. Co. 164 U. S. 633, 635, 41 L. ed. 579, 580, 17 Sup. Ct. Rep. 208; Re Key, 189 U. S. 84, 85, 47 L. ed. 720, 721, 23 Sup. Ct. Rep. 624.

The writ will not be used to perform the office of an appeal or writ of error, even though no right to review is given.

2 Spelling, Inj. & Extr. Rem. §§ 1373, 1390; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149.

It necessarily follows that the writ will not issue to correct or review interlocutory proceedings.

Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Re Huguley Mfg. Co. 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455.

The sole function of the writ is to compel affirmative action by one who has refused to perform his legal duty. Mandamus cannot be resorted to, to restrain action or to undo an act. Persons who are not required to perform the act are therefore not proper parties.

Farrell v. King, 41 Conn. 448; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; Brooks v. State, 162 Ind. 568, 70 N. E. 980.

The relator's right to the writ must be clear and absolute. He must show a duty imposed by law upon the respondent, which the respondent has refused to perform, in violation of some legal right of the relator.

2 Spelling, Inj. & Extr. Rem. §§ 1368–1370; United States ex rel. Boynton v. Blaine, 139 U. S. 306, 318, 35 L. ed. 183, 187, 11 Sup. Ct. Rep. 607; United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 308, 39 L. ed. 160, 163, 15 Sup. Ct. Rep. 97; Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 78, 95, 42 L. ed. 955, 962, 18 Sup. Ct. Rep. 505; Re Key, 189 U. S. 84, 85, 47 L. ed. 720, 721, 23 Sup. Ct. Rep. 624.

The writ issues to a judge, to compel

judicial action, only when he has wrongfully refused to act.

Ex parte Crane, 5 Pet. 190, 211, 8 L. ed. 92, 100.

It follows that the writ can issue only to the person who had failed in his duty; and that person must, of course, have the power to perform the act.

Taxing Dist. v. Loague, 129 U. S. 493, 501, 32 L. ed. 780, 783, 9 Sup. Ct. Rep. 327.

A judge would not be bound to perform an act, if by so doing he would violate an order in the matter made by another judge of the same court.

2 Spelling, Inj. & Extr. Rem. § 1378.

While this court may, by mandamus, direct the performance of a judicial duty, it cannot direct or control the exercise of judicial discretion.

Ex parte Crane, supra; Ex parte Morgan, 114 U. S. 174, 29 L. ed. 135, 5 Sup. Ct. Rep. 825; Re Hawkins, 147 U. S. 486, 490, 37 L. ed. 251, 252, 13 Sup. Ct. Rep. 512; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 379, 37 L. ed. 486, 488, 13 Sup. Ct. Rep. 758; Re Rice, 155 U. S. 396, 403, 39 L. ed. 198, 201, 15 Sup. Ct. Rep. 149; Hudson v. Parker, 156 U. S. 277, 288, 39 L. ed. 424, 428, 15 Sup. Ct. Rep. 450, 9 Am. Crim. Rep. 91.

The petitioners will have an absolute right to review, in the circuit court of appeals, any order that may be made in the pending proceeding, upon the coming in of the report of the special master; and possibly they have the right to review directly the order appointing the special master.

Loveland, App. Jur. § 58; Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

Mr. Justice **Lurton** delivered the opinion of the court:

This is a proceeding for a rule on the Honorable Thos. I. Chatfield, district judge of the United States for the eastern district of New York, the Honorable Julius Mayer, district judge for the southern district of New York, and the Honorable E. Henry Lacombe, senior circuit judge for the second judicial circuit of the United States, to show cause why a writ of mandamus shall not be issued commanding the Honorable Thos. I. Chatfield to resume jurisdiction 37 ]and *proceed to hear and determine all matters which may arise or have arisen in a certain proceeding pending in the said district court for the eastern district of New York, wherein the Iron Clad Manufacturing Company has been adjudicated a bankrupt; and directing the vacation of an order made in said case by the Honorable E. Henry Lacombe, as senior circuit judge, on April 2, 1912, designating and appointing the said Judge Mayer district judge to hear and exercise in the eastern district of New York, the same powers that are now vested in the district judges of said district, or either of them, "*and quashing and setting aside all proceedings in said matter of Iron Clad Manufacturing Co., Bankrupt*, had before said Honorable Julius M. Mayer . . . subsequent to the said order of Judge Lacombe . . . , and especially commanding the said Judge Chatfield to exercise the jurisdiction thereof which he had and was exercising on and prior to the 29th of March, 1912."

A rule to show cause issued, and a return has been made.

The question now is whether a writ of mandamus shall issue.

Shortly stated, the facts necessary to be understood are these:

1. Creditors of the Iron Clad Manufacturing Company filed on May 23, 1911, a petition in the district court of the United States for the eastern district of New York, praying its adjudication as a bankrupt. The proceeding was long contested, but on December 2, 1911, the company was adjudged a bankrupt by Judge Chatfield.

2. In the meantime, controversies had arisen as to what constituted the assets of that company. On June 20, 1911, certain of the creditors filed a petition in the case, charging that the corporate capital, property, and assets of another corporation, the American Steel Barrel Company, belonged to the Iron Clad Manufacturing Company, and had been controlled and managed in the interest of the *latter, and praying that[38 the receivership under the proceeding against the Iron Clad Manufacturing Company should be extended to the American Steel Barrel Company.

3. This was bitterly resisted, and the independent ownership of the Steel Barrel Company asserted. Elizabeth C. Seaman was the president and manager of both companies, and the nominal owner of all of the shares in each, save a few qualifying shares in the hands of directors. Mrs. Seaman seems to have been not only active in resisting the proceedings against the Iron Clad Company, but also in resisting every claim to the property of the Steel Barrel Company made by the creditors of the Iron Clad Company.

4. The hearing of this application was postponed from time to time, and there

was disagreement as to whether it should be heard upon affidavits before Judge Chatfield, or referred to a commissioner to take proof and report. Finally, on March 15, 1912, Judge Chatfield filed an opinion refusing to extend the receivership to the property of the American Steel Barrel Company, or to take summary possession of its assets, as he had been asked to do. The ground upon which he acted, as shown by his opinion (194 Fed. 906), was that the claim to the assets of the Steel Barrel Company was one which should be asserted in a plenary suit. An order in accordance with this opinion was not entered, because counsel for the creditors asked for time to make a new application, and such application was made on March 29, 1912, followed, however, on the same day, by the filing of an affidavit under § 21 of the Judicial Code [36 Stat. at L. 1090, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 133] to prevent further hearing of the case by Judge Chatfield. That affidavit, in substance, alleged that throughout the proceedings in the case Judge Chatfield had manifested "a strong bias and prejudice against the petitioning creditors and against their counsel, and has shown a strong bias toward Mrs. Elizabeth 39]C. Seaman, *who was and is the sole person interested in the subject-matter of the bankrupt corporation's property other than the creditors."

The motion to rehear the application to extend the receivership was made when District Judge Veeder was holding the bankrupt court, and was by him at once referred to Judge Chatfield. In view of the filing of the disqualifying affidavit, Judge Chatfield declined to hear the motion and application to reopen and rehear the motion which had been decided by the opinion handed down on March 15th, and made a certificate in these words:

United States District Court,
Eastern District of New York.

In the Matter of Iron Clad Manufacturing Company, Bankrupt. } March 29, 1912.

In the Matter of a Motion to Reopen the Application to Extend Receivership, for a Direction That the Petitioners be Afforded an Opportunity to Take Testimony, etc., and for Postponement of the Entry of any Order or Decree upon the Application Decided March 15, 1912, and for Other Relief.

*Before Veeder, J.*

*Appearances:* Whitridge, Butler & Rice, for petitioning creditors, in support of motion, James A. Allen, specially for Elizabeth C. Seaman and the American Steel Barrel *Co., Emanuel Hertz, specially[40 for George A. Wheelock, in opposition.

Motion respectfully referred to Judge Chatfield.

Van Vechten Veeder, U. S. J.

The within application having been referred upon the return day to me, Judge Veeder, who called the motion calendar, and the motion papers having been presented by the clerk, in the presence of James A. Allen, appearing specially, and desiring to be heard in opposition, as attorney for certain parties, Emanuel Hertz, appearing specially for George A. Wheelock, and also desiring to be heard in opposition, and Erskine B. Essig, representing certain creditors, but not taking part in said motion, and no one appearing before me on behalf of the petitioners, but a certain affidavit, by Thatcher M. Brown, having been brought to the attention of the court, which affidavit was filed after the motion was referred to me by Judge Veeder and before any of the parties appeared before me, in which said Thatcher M. Brown, as a party to the proceeding, makes an affidavit that I have a personal bias either against the creditors or in favor of the opposite party to the proceeding, and asking that another judge be designated in the matter prescribed in section 20, to hear this motion,—

I do hereby, in accordance with the provisions of section 21 of the law known as the Judicial Code, and now in effect, proceed no further in this motion, and order that an authenticated copy of this statement be forthwith certified to the Honorable E. Henry Lacombe, senior circuit judge now present in this circuit in order that proceedings may be had under section 14 of said act, it being apparent that this motion cannot proceed under section 23, which is prescribed as an alternative method in said section 21 of said law.

The court further certifies that it does not make an entry *upon the records of[41 the court (nor does it admit) that it has any personal bias or prejudice, but on the contrary might call in question many of the statements or controvert many of the allegations contained in said papers. And this court feels that if any disqualification exists it was also present when this court directed a verdict of adjudication and made other decisions in favor of said creditors, and when the judge now holding the court upheld the findings of the special commissioner as to charges of contempt against Mrs. Seaman.

The court however feels that the intent of section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such judge as may be designated.

Thomas I. Chatfield, U. S. D. J.

Thereupon, Circuit Judge Lacombe made the order which it is now sought to have set aside, in these words:

UNITED STATES DISTRICT COURT,

IN THE MATTER OF IRON CLAD MANUFACTURING COMPANY, BANKRUPT.

Upon the affidavit of Thatcher M. Brown, the certificate of Charles A. Riegelman, Ed-
42 win T. Rice, and John *M. Garver, counsel for petitioning creditors, and certificate of the senior district judge of this district, all filed in this court on March 29, 1912, and which have been examined by me;

I, E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, under the authority conferred by section Twenty-one of the Judicial Code of the United States, do hereby designate and appoint the Honorable Julius M. Mayer, District Judge of the Southern District of New York, to have and exercise, in the above-entitled proceeding within the eastern district of New York, the same powers that are now vested in the district judges of said eastern district or either of them.

April 2, 1912.

E. Henry Lacombe,
Senior Circuit Judge,
Second Circuit.

Counsel for the respective parties may communicate with Judge Mayer, who will inform them at what time or times it may be convenient for him to hold court in the eastern district.

E. Henry Lacombe,
Senior Circuit Judge.

Thereupon Judge Mayer assumed jurisdiction and has since made many interlocutory orders and rulings in the case, to all of which the opposite parties in the proceeding objected and excepted upon the ground that his designation was null and void. Nevertheless, Judge Mayer continued to exercise jurisdiction from the time of his designation, in April, 1912, down to the filing of this petition in February, 1913.

The fundamental proposition maintained by the petitioners is that all of the proceedings before Judge Mayer are null and void for the lack of jurisdiction, and that Judge Chatfield still retains jurisdiction, and that all of the interlocutory orders made by Judge Mayer should be vacated, *and [43 Judge Chatfield commanded to proceed with the hearing of the matters pending before him when he refused to proceed further with the case upon the filing of the affidavit objecting to his further exercise of jurisdiction.

The proceeding to retire a trial judge of a United States court from further hearing a case of which he has jurisdiction had its origin in the new Judicial Code, effective January 1, 1912, and constitutes § 21 of that Code. It is as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge, shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality, in the pending suit or action."

The basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts *which tend to show not merely adverse[44 rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented

litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.

The case of Re Iron Clad Mfg. Co. had been pending since May, 1911. This affidavit was not filed until March 29, 1912, less than ten days before the April term of the court. In the meantime that company had been adjudged a bankrupt against much opposition and as the result of a jury trial, and Judge Chatfield had made many interlocutory orders in reference to the bankrupt estate. The principal matter which was then pending before him was the petition of certain creditors of the Iron Clad Manufacturing Company to have the receivership for the property of that company extended so as to include the corporate property of the Steel Barrel Company. This was very earnestly contested. On March 15, 1912, Judge Chatfield handed down the opinion reported in 194 Fed. 906, denying the application upon the ground that the matter was one which should be asserted by a plenary suit. The order denying that application did not go down, because of the interposition of the motion for a rehearing or to file a new application, on March 29, 1912, while Judge Veeder, another of the judges of the eastern district, was presiding, which was immediately referred by Judge Veeder to Judge Chatfield. Thereupon and before the latter could 45]act upon it, and on the same *day, the disqualifying affidavit was filed. The action of Judge Chatfield is fully shown by the order and certificate set out heretofore.

We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the avermcnt that "personal bias or prejudice" existed. If Judge Chatfield had ruled that the affidavit had not been filed in time or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. Henry v. Speer, 201 Fed. 869; Ex parte M. K. Fairbank Co. 194 Fed. 978; Ex *parte* Glasgow, 195 Fed. 780, affirmed by *this court in* 225 U. S. 420, 56 L. ed. 1147, *32 Sup. Ct. Rep.* 753. But this is not what happened. Judge Chatfield held that the affidavit was sufficient in law to make it his duty to proceed no further. Acting upon that determination he certified his withdrawal and the affidavit to the senior circuit judge that he might, in the exercise of his jurisdiction under § 14 of the new Judicial Code, designate another judge to proceed with the hearing of the case. It is obvious that if the designation of Judge Mayer under these conditions was wholly beyond the judicial power of the senior circuit judge, his authority to make any order or decree acting thereunder might have been excepted to, and thus made the subject of review in due course of law.

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. Ex parte Newman, 14 Wall. 152, 165, 20 L. ed. 877, 879; Bayard v. United States, 127 U. S. 246, 32 L. ed. 116, 8 Sup. Ct. Rep. 1223; Re Morrison, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

Judge Lacombe was clearly called upon to determine, in the exercise of his jurisdiction as the senior circuit judge, whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If *in this[46 he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under § 14 of the new Judicial Code, and we cannot compel him, through a writ of mandamus, to undo what has thus been done. Ex parte Burtis, 103 U. S. 238, 26 L. ed. 392; Re Parsons, 150 U. S. 150, 37 L. ed. 1034, 14 Sup. Ct. Rep. 50.

Aside from what has been said, the long delay in asking the extraordinary remedy of mandamus would fully justify this court in the exercise of a sound discretion in denying relief.

The rule must be discharged.

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ARIZONA COPPER COMPANY, Limited, Appt.,
v.
WILLIAM ALLEN GILLESPIE.

(See S. C. Reporter's ed. 46–58.)

**Waters — prior appropriation — pollution.**

1. The right under the Arizona statutes

NOTE.—On pollution of stream by mining operations—see notes to Drake v. Lady Ensley Coal, Iron & R. Co. 24 L.R.A. 64; Straight v. Hover, 22 L.R.A.(N.S.) 276; and Arminius Chemical Co. v. Landrum, 33 L.R.A.(N.S.) 272.

to use the water of the public streams for mining purposes does not give such user any right to send the tailings and waste material from his reduction works down the stream to the destruction or substantial injury of the riparian rights of a prior user below for irrigation purposes.

[For other cases, see Waters, II. c, in Digest Sup. Ct. 1908.]

**Injunction — against pollution of stream — private relief.**

2. The special injury resulting to a lower riparian appropriator of water for irrigation purposes from the pollution of the stream by an upper appropriator gives him the right to sue in equity for injunctive relief, although the contamination of the water may constitute a public nuisance for the abatement of which a public prosecution may be maintained.

[For other cases, see Injunction, I. f; I. d, in Digest Sup. Ct. 1908.]

**Injunction — against pollution of stream — form of decree.**

3. Every reasonable equity of the user of the water of a public stream for mining purposes is met by an injunction decree in a suit by a lower appropriator to restrain the pollution of the stream by tailings and waste material, which leaves it open to modification to permit of reasonable experiments to ascertain the probability of successfully erecting and maintaining settling basins to dispose effectually of such tailings and waste material without detriment to the lower lands, and permits the court to enforce or modify the injunction in accordance with future conditions.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 106.]

Argued January 27 and 28, 1913. Decided June 16, 1913.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which modified, and affirmed as modified, a decree of the District Court for Graham County in that Territory enjoining the pollution of a public stream. Affirmed.

See same case below, 12 Ariz. 190, 100 Pac. 465.

The facts are stated in the opinion.

Messrs. John A. Garver and Walter Bennett argued the cause and filed a brief for appellant:

Even if the acts complained of constituted a public nuisance, the injury to plaintiff, as clearly appears from the averments of the complaint, did not differ in kind from that sustained by other members of the community in which the plaintiff's farm was situated, and consequently the plaintiff could not maintain the action.

Joyce, Inj. § 1081; Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 3 L.R.A.(N.S.) 733, 83 Pac. 364; Donahue v. Stockton Gas & Electric Co. 6 Cal. App. 280, 92 Pac. 196; Kuehn v. Milwaukee, 83 Wis. 583, 18 L.R.A. 553, 53 N. W. 912; Jarvis v. Santa Clara Valley R. Co. 52 Cal. 438.

If a mining company may lawfully use the streams for the purposes of its business, such use cannot be unlawful or constitute a public nuisance, unless the company wilfully or carelessly so uses the water as to infringe upon the rights of others.

Kinney, Irrigation, §§ 250, 251; 40 Cyc. 708, 713; Hill v. Standard Min. Co. 12 Idaho, 236, 85 Pac. 907; Barnard v. Sherley, 135 Ind. 555, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117.

The public convenience will always be considered in determining whether certain acts constitute a nuisance.

Pom. Eq. Jur. § 529.

The common-law doctrine of riparian rights has not obtained in Arizona since 1887; and it probably has never been recognized there.

Bouquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. ed. 822, 29 Sup. Ct. Rep. 493.

At common law, all riparian proprietors had precisely the same rights to flowing waters, and no one could so use the stream as to interfere with its reasonable use by those above and below him. The right was in the current (*aqua currit, et debet currere ut currere solebat*), which no one was at liberty to impair, either in quantity or quality. There was, consequently, no right to divert it for purposes of irrigation,—especially in favor of one who was not a riparian proprietor.

3 Kent, Com. 439; 40 Cyc. 559; New York v. Pine, 185 U. S. 93, 96, 97, 46 L. ed. 820–822, 22 Sup. Ct. Rep. 592.

All that a prior appropriator is entitled to, as against others, is a sufficient quantity of water to satisfy his appropriation, while its quality cannot be impaired so as to interfere seriously with the use to which it has been apppropriated.

Kinney, Irrigation, §§ 250, 251; 40 Cyc. 708, 713.

This is not essentially different from the principle recognized under the common-law doctrine of riparian rights. A lower riparian owner cannot complain of the reasonable use of the stream, even if he is injured thereby.

Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Strobel v. Kerr Salt Co. 164 N. Y. 320, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, 21 Mor. Min.

Rep. 38; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 146, 57 Am. Rep. 445, 6 Atl. 453.

Under the policy of the law prevailing in Arizona, the appellee has no greater right to stop the operation of the appellant's works than he would have to enjoin the construction of a railroad, where the railroad company possessed the power of eminent domain. When that power exists, even though it has not been exercised, the courts will not grant an injunction, if the railroad company pays the damages assessed by the court.

Story v. New York Elev. R. Co. 90 N. Y. 179, 43 Am. Rep. 146; American Bank Note Co. v. New York Elev. R. Co. 129 N. Y. 270, 29 N. E. 302.

Indeed, even where the power of eminent domain does not exist, a court of equity has undoubted authority to take full possession of the controversy, and end it by requiring the payment of adequate compensation in lieu of the cessation of the trespass.

New York v. Pine, 185 U. S. 93, 104, 46 L. ed. 820, 825, 22 Sup. Ct. Rep. 592.

The mere fact that it might be difficult to assess the exact damages is no reason for granting an injunction. That is a difficulty inherent in the conditions existing in all cases where an action at law is brought to recover damages for an injury to property or for a breach of contract; but the mere existence of the difficulty is of no consequence.

Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 209, 54 Am. Rep. 676, 4 N. E. 264.

In a suit in equity, the conditions existing at the time of the trial control.

Haffey v. Lynch, 143 N. Y. 248, 38 N. E. 298; Dieterich v. Fargo, 194 N. Y. 363, 22 L.R.A.(N.S.) 696, 87 N. E. 518; United States v. Trans Missouri Freight Asso. 166 U. S. 290, 342, 41 L. ed. 1007, 1028, 17 Sup. Ct. Rep. 548.

A permanent injunction will not be granted unless the evidence clearly establishes the invasion of the plaintiff's rights by the defendant, with a resulting substantial injury.

Wood v. Sutcliffe, 2 Sim. N. S. 163, 21 L. J. Ch. N. S. 253, 16 Jur. N. S. 75.

An injunction will not be granted where the injuries to the plaintiff are slight, and where the consequences of the injunctions to the defendant and others may be very injurious.

1 Spelling, Inj. § 417; Powell v. Bentley & G. Furniture Co. 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192; Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 331, 83 S. W. 658; McClure v. Leaycraft, 183 N. Y. 44, 75 N. E. 961, 5 Ann. Cas. 45.

Equity regards relative values. The sense of proportion and relativity is uppermost in the application of equitable principles.

Bates v. Holbrook, 171 N. Y. 475, 64 N. E. 181.

In the contemplation of personal rights, equity will not lose sight of the public interest. A court of equity is never active in granting relief against public convenience, merely for the purpose of protecting a technical legal right.

Smith v. Clay, 3 Bro. Ch. 639, note; Knoth v. Manhattan R. Co. 187 N. Y. 243, 79 N. E. 1015; New York v. Pine, 185 U. S. 93, 99, 46 L. ed. 820, 823, 22 Sup. Ct. Rep. 592

To permit the plaintiff to refuse to accept a sum representing the damages actually sustained or likely to be sustained by him, and insist upon an unconditional injunction which will result in obstructing and possibly terminating a great industry, would be to furnish him, in the language of the court, with "a club to compel payment of the sum he deems the measure of his damages."

New York v. Pine, 185 U. S. 93, 97, 46 L. ed. 820, 822, 22 Sup. Ct. Rep. 592.

Mr. **Ernest W. Lewis** argued the cause, and, with Mr. Thomas Armstrong, Jr., filed a brief for appellee:

The plaintiff shows a special injury differing in kind from that suffered by the general public.

Wood, Nuisances, § 689.

Pollution of an irrigation stream by mining tailings is a nuisance, and becomes a public nuisance when the injury and inconvenience therefrom becomes general in its effect upon a community.

Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 753; McCarthy v. Gaston Ridge Mill & Min. Co. 144 Cal. 542, 78 Pac. 7; Chessman v. Hale, 31 Mont. 577, 68 L.R.A. 410, 79 Pac. 254, 3 Ann. Cas. 1038; Weil, Water Rights, §§ 524–528; Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 161; Hill v. Smith, 27 Cal. 476, 4 Mor. Min. Rep. 597; Hobbs v. Amador & S. Canal Co. 66 Cal. 161, 4 Pac. 1147; Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416.

The doctrine of riparian rights does not prevail in Arizona. Nevertheless, the rule, as adopted in arid regions of the United States, against the pollution of waters of irrigation streams, is even more strict than that of the eastern portion of the United States where mining is practised and riparian rights obtain.

Suffolk Gold Min. & Mill. Co. v. San Miguel Consol. Min. & Mill. Co. 9 Colo. App. 407, 48 Pac. 828; Humphreys Tunnel &

Min. Co. v. Frank, 46 Colo. 524, 105 Pac. 1093.

Each user of water is entitled to such use thereof as is indispensable for the purpose for which he has appropriated the water; but in making such use he may not pollute or deteriorate that which he does not use, to the injury of prior appropriators.

Weil, Water Rights, ¶ 524; Junkans v. Bergin, 67 Cal. 267, 7 Pac. 684; Atchison v. Peterson, 20 Wall. 507, 514, 22 L. ed. 414, 417, 1 Mor. Min. Rep. 583; Crane v. Winsor, 2 Utah, 248, 11 Mor. Min. Rep. 69.

The doctrine of comparative hardship has been applied by those courts which accept it, only where the granting of the injunction would result in the destruction of a lawful business and great injury to the public.

Wees v. Coal & I. R. Co. 54 W. Va. 421, 46 S. E. 166; Mountain Copper Co. v. United States, 73 C. C. A. 621, 142 Fed. 625; McCarthy v. Bunker Hill & S. Min. & Coal Co. 147 Fed. 981, 92 C. C. A. 259, 164 Fed. 927; Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 335, 83 S. W. 658; Bliss v. Anaconda Copper Min. Co. 167 Fed. 342.

52] *Mr. Justice **Lurton** delivered the opinion of the court:

This is a bill for an injunction to restrain the appellant from polluting a public stream, whereby the appellee has sustained a special injury as a lower proprietor.

The Arizona Copper Company, Limited, is engaged in mining and reducing copper ore near the town of Clifton, Arizona. Its concentration and reduction works, in which ores are treated, are situated upon or adjacent to small streams tributary to the Gila river. Much of the tailings and waste material from the reduction work is carried by the water used in the reducing process into the streams adjacent, or is deposited nearby and is later carried by the rains into the streams, and thence into the Gila river. The appellee, William Allen Gillespie, is the owner of 276 acres of arid land on the Gila river and some 25 miles below the point where the water polluted above finds its way into the river. He has reclaimed this land and brought it into a high state of cultivation, through irrigation, by means of water drawn from the river into the Montezuma canal, and thence, by ditches, spread upon his cultivated land. In the dry seasons, particularly, this water so used for irrigating purposes deposits upon his land the tailings and waste material so suffered to get into the tributaries of the Gila river from the reduction works of the appellant above.

Gillespie and those preceding him in title began the irrigation and cultivation of this tract of land in or about 1872, and have continuously appropriated a sufficiency of water necessary for irrigating purposes from the river. A large body of like land situated in the same valley has been irrigated in the same way by waters drawn from the Gila river by the Montezuma and other like canals constructed and maintained for irrigating purposes, and a large agricultural community has grown up dependent upon irrigation.

*In the mountains through which the[53 streams tributary to the Gila river pass are great deposits of rock containing copper ore, and since 1872 many mines have been operated. Later the ore was treated in reduction and concentration works, which have increased in extent of operations from time to time, until at the time this suit was begun the capital engaged aggregated several millions of dollars and 3,000 men were employed in and about the mining and reduction operations. Prior to 1885 the operations carried on by the mining companies do not appear to have polluted the tributaries of the Gila to any serious extent. Later the operations were enlarged and methods adopted which began to more and more seriously pollute the water used for irrigating purposes by the proprietors below. Thus both courts below found,—"That in or about 1885 the first concentrator was erected for the reduction of ores in connection with the mining enterprise herein mentioned; that, . . . some six to eight years before the institution of this action, the waters of the Gila river, at other than flood periods, theretofore clear, became discolored by slimes, slickens, and tailings, and began to deposit such slimes, slickens, and tailings, through the irrigating ditches herein mentioned, in the normal and necessary course of irrigation, upon the lands of the plaintiff and other lands herein mentioned." [12 Ariz. 196, 100 Pac. 465]. The court below further found that the quantity of such waste material carried by the river and deposited upon the lands of the appellee "continuously increased until after the institution of this suit." The harmful and damaging character of these deposits was found in most explicit terms by the court below, and the character of the injury elaborately explained. The appellee's bill alleged that the injury to his crops and to his land was continuous, and that his remedy at law was inadequate, and his prayer was that the appellant be perpetually enjoined from polluting the streams to his injury.

*Originally there were two other cor-[54 porate defendants, and like relief was sought.

against them. One was found to be improperly a party, and the bill was dismissed as to it. The other defendant was the Shannon Copper Company. As to that company the court below found:

"That after the commencement of this action and before the hearing of this cause the Shannon Copper Company, in consideration of the dismissal of this action as to it, agreed to spare no reasonable effort or expense to minimize the amount of said tailings and waste material from its said works which may find their way into said river, and, if possible to do so by any reasonable effort and expense, that it would prevent the flow of any of said tailings and waste material from its said works from flowing into said river, and that said efforts should be made at once, and continued without interruption until the object thereof should be accomplished."

The district court made a full finding of facts, and enjoined the appellant from "in any manner depositing or suffering or permitting to be deposited, or suffering or permitting to flow into the waters of the said Gila river, or into the San Francisco river or said Chase creek in such manner that they may be carried into the waters of said Gila river, any slimes, slickens, or tailings."

This judgment was to go into effect January 1, 1908. But when the record was filed, upon appeal, in the supreme court of the territory, that court, upon a bond being executed, suspended its operation until the case should be determined by it. Upon a final hearing that court confirmed the findings of fact by the court below, but modified its judgment by permitting the appellant, at its own expense, "to construct settling basins at or near the heads of the canals, or elsewhere along the river, by means of which the tailings and slimes carried by the Gila river from appellant's concentrators may be arrested and prevented from being deposited upon the farming 55]lands." *"This suggestion," said the court in its opinion made part of the judgment, "does not appear to have been presented to the trial court, and its decree is so drawn that such means of relief may not be availed of, since appellant is enjoined from permitting any of the tailings or slimes to reach the waters of Gila river. We think, to enable the mining company to take advantage of any efforts it may make in this direction, it should be left to the discretion of the trial court hereafter, upon a proper showing made to it, temporarily to modify the injunction so as to permit of reasonable experiments being made to ascertain the probability of successfully erecting and maintaining settling basins to effectually dispose of the tailings and slimes without detriment to the lands lying under the canals, and with authority in the district court likewise permanently to enforce or modify the injunction in accordance with the conditions as they shall be found to be." Thus modified, the judgment was affirmed. Later, it being made to appear that the appellant had designed and put into operation large settling basins, and otherwise attempted to arrest, settle, and dispose of the slimes, slickens, and tailings from its works, and had succeeded in arresting much of the waste material, and was in good faith operating and maintaining such works, the court suspended the operation of the judgment pending an appeal to this court.

In Arizona, by statute, all rivers, streams, and running waters are declared public, and may be used for purposes of milling, mining, and irrigation. The first appropriator is first in right to the extent necessary for his purposes.

Whatever advantage there may be in a first appropriation of water is with the appellee. There is no question about the quantity of water appropriated by the upper user, the objection being that the quality of the water which comes down to the lower proprietor after it is used by the copper company is no longer fit for irrigating purposes. Whatever the relative importance of the great *mining and re-[56 duction works using the water on the upper reaches of the Gila river and its tributary streams, and of the agriculturists using the same water below, from either a public or private point of view, the right of the lesser interest is not thereby subordinated to the greater. That is sometimes a consideration when a plaintiff seeks relief by injunction rather than by an action at law for damages. The wrong and injury, whether it results from pollution of a stream or otherwise, is not condoned because of the importance of the operations conducted by the defendant to either the public or the wrongdoer, and for that wrong there must be a remedy. Whether upon a bill such as this a court of equity will restrain the acts of the party complained of, or leave the plaintiff to his action at law for damages, must depend upon the nature of the injury alleged, whether it be irremediable in its nature, or whether an action at law will afford an adequate remedy, and upon a variety of circumstances, including the comparative injury by granting or refusing the injunction. Atchison v. Peterson, 20 Wall. 507, 22 L. ed. 414.

The court below found that but one of

three concentrators operated by the appellant would be affected by an injunction, and that the extent of the hardship from closing that concentrator had not been shown. On the other hand, the court found that the agricultural interests of a large and prosperous community would suffer great injury and possible ruin, if the pollution should go on.

The Arizona statute places a water user for mining purposes upon no higher plane than a user for irrigation. The suggestion that the right to use for mining and reduction purposes cannot be exercised without polluting the streams with waste material, tailings, etc., and that the lower user cannot, therefore, complain of the necessary consequences of the legal right conferred by statute, is without force. The only subordination of one water user to another is the right of the first appropriator to a 57]sufficiency *of water for his necessary uses. That includes the quality as well as the quantity. What deterioration in the quality of the water will constitute an invasion of the rights of the lower appropriator will depend upon the facts and circumstances of each case, with reference to the use to which the water is applied. Atchison v. Peterson, supra. In giving a right to use the waters of the public streams for mining purposes, the statute does not provide that such a user may send his waste material or débris down the stream to the destruction or substantial injury of the riparian rights of users of water below, and no such invasion of private property rights should be inferred or implied from the right to use water for mining purposes. Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 753. The maxim, *Sic utere tuo ut alienum non lædas*, is as fully recognized in the jurisprudence of Arizona as it is elsewhere, and that was the maxim which governed the decision of this case in the courts of Arizona.

That the contamination of the waters of the Gila river constituted a public nuisance which affected a large community of riparian owners and users of the waters for purposes of irrigation may be true. That as a public nuisance a public prosecution for its abatement might have been maintained may be also conceded for the purposes of this case. But it is equally true that the appellee had and would continue to suffer a special injury not borne by the public.

Here the appellee alleged a special grievance to himself affecting the enjoyment and value of his property rights as a riparian owner, and as an individual user of the water for purposes of irrigation. This gives him a clear right to apply for preventive relief. Georgetown v. Alexandria Canal Co. 12 Pet. 91, 98, 9 L. ed. 1012, 1015; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.

The modification of the decree of the trial court so as to enable the appellant to complete the construction of the *remedial[58 works specified and heretofore mentioned met every reasonable equity which was asserted by it. It is in substantial accord with the decree of this court in a somewhat similar case: Georgia v. Tennessee Copper Co. 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488.

We find no error in the decree of the court below, and it is accordingly affirmed.

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CITY OF OWENSBORO, Appt.,
v.
CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 58-83.)

**Telephone franchise — nature — license or property right.**

1. A municipal ordinance granting the right to place and maintain upon the city streets the poles and wires of an incorporated telephone company is not a mere license, but is the grant of a property right, which is assignable, taxable, and alienable. [Franchise generally, see Franchise, in Digest Sup. Ct. 1908.]

**Telephone franchise — duration — grant in perpetuity.**

2. The grant by municipal ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the city streets and alleys with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited

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NOTE.—On the right generally of telegraph and telephone companies to use public street—see note to St. Louis v. Western U. Teleg. Co. 37 L. ed. U. S. 810.

On privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts—see note to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142.

As to the power of a municipality in the absence of express legislative authority to grant street franchises—see note to Elizabeth City v. Banks, 22 L.R.A.(N.S.) 925.

On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state or by the corporate powers of the city making the grant.

[Franchise generally, see Franchise, in Digest Sup. Ct. 1908.]

**Municipal corporations — powers — grant of telephone franchise.**

3. Charter authority of a municipality "to regulate its streets and alleys" gives it power in Kentucky to grant a franchise to an incorporated telephone company to place and maintain its poles and wires upon the city streets.

[For other cases, see Municipal Corporations, II. c, in Digest Sup. Ct. 1908.]

**Telephone franchise — duration — corporate life.**

4. A municipal grant to an incorporated telephone company, its successors and assigns, of the right to place and maintain its poles and wires in the city streets, is not limited in duration to the corporate life of the grantee.

[Franchise generally, see Franchise, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — reserved right to repeal.**

5. The general authority given by a city charter to "make, publish, and repeal all ordinances for the following purposes," including, *inter alia*, the power "to regulate the streets, alleys, and sidewalks," cannot be construed as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance granting to an incorporated telephone company, its successors and assigns, the right to place and maintain its poles and wires in the city streets.

[For other cases, see Constitutional Law, 1177–1197; 1386–1412, in Digest Sup. Ct. 1908.]

**Corporations — consolidation — effect on telephone franchise.**

6. The street rights of the constituent telephone companies consolidated under the authority of Ky. act April 5, 1893, passed to the consolidated company by virtue of the express provisions of that act vesting such company with all the property, business, credits, assets, and effects of the constituent corporations, without deed or transfer, and binding it for all their contracts and liabilities.

[For other cases, see Corporations, 107–124, in Digest Sup. Ct. 1908.]

**Judgment — conclusiveness — matters pleaded or involved.**

7. A decree dismissing a suit by a telephone company to restrain the municipality from placing the poles and wires of a municipal electric lighting system in such close proximity to the poles and wires of the telephone company as to interfere with its current, in which one of the defenses was that the city had exceeded its charter authority in assuming to grant the telephone franchise, cannot be regarded, in another suit by the same parties upon an entirely different cause of action, as an adjudication upon the question of the validity of the telephone franchise, where the opinion, made by the judgment a part of the record, shows that the court dismissed the bill in the prior suit because its object had failed, the city having actually constructed its lines before final decree.

[For other cases, see Judgment, III. j, 2, in Digest Sup. Ct. 1908.]

[No. 244.]

Argued April 22, 1913. Decided June 16, 1913.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree enjoining the enforcement of a municipal ordinance repealing a telephone franchise. Affirmed.

Statement by Mr. Justice **Lurton**:

This case involves the nature and duration of the right of the telephone company to maintain its poles and wires upon the streets of the city of Owensboro. The ordinance under which it, or its predecessors in right, title, and property, have maintained a telephone system in the city of Owensboro, was passed on December 4, 1889. Inasmuch as it contains several provisions which require consideration, it is set out in full in the margin.†

*The grantee under that ordinance at[60 once proceeded to erect its plant and to place its poles and wires upon the streets,

†Council Proceedings Dec. 4th, 1889.
Minute Book "F," Page 157.

The following ordinance, after being twice read, was enacted by the following vote, to wit.: Ayes, Mes. Borer, Brotherton, Vargeson, Cullon, Higdon, Decker, Noes, None. *Viz.:*

Be it ordained by the Mayor and Common Council of Owensboro, Ky.:

That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city any number of telephone poles of proper size, straight and shaved, smooth, set plumb and set erect, and any number of wires thereon with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

Sec. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street, except for the length of one block upon the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such street, and the lowest wire of said telephone company shall

and it and its successors and assigns have ever since maintained and operated a tele-
61 ]phone system. The city *has used the company's poles for the maintenance of its fire alarm service, and has had the benefit of a free public telephone service for municipal purposes.

In January, 1909, the city council passed an ordinance requiring the telephone company to remove from its streets and alleys all of the poles and wires "within a reasonable time after the passage of the ordinance," and, upon failure to so remove, the mayor was directed to have them removed. This was, however, subject to a provision "that said company shall have the right to purchase from the said city a franchise authorizing it to maintain said poles and wires and use same as provided under the laws of the state, upon proper conditions, to be prescribed by an ordinance, to be passed upon request of said company to the common council of said city."

This bill was filed for the purpose of enjoining the enforcement of this ordinance, the contention being that it was an impairment of the company's contractual property rights in the streets, and, as such, in contravention of the contract and due-process clauses of the Constitution of the United States. Upon a final hearing the court below sustained the bill, and permanently enjoined the enforcement of the repealing ordinance.

Messrs. R. S. Todd and George W. Jolly argued the cause and filed a brief for appellant:

A grant by a municipality to a telephone company of a right to occupy the streets, alleys, etc., of the city, for putting up poles and wires and conducting a telephone business, made under a power to "regulate the streets, alleys, and sidewalks, and all repairs thereof," is limited in its duration to the corporate life of the company, under its charter at the time of the grant, where no time is fixed for its duration in the ordinance making the grant.

Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co. 79 Ala. 465, 58 Am. Rep. 615; Boisé City Artesian Hot & Cold Water Co. v. Boisé City, 59 C. C. A. 236, 123 Fed. 232; Owensboro v. Cumberland Teleph. & Teleg. Co. 99 C. C. A. 1, 174 Fed. 752; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Logansport R. Co. v. Logansport, 114 Fed. 688; Mercantile Trust Co. v. Denver, 161 Fed. 771; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 26, 32 L. ed. 842, 9 Sup. Ct. Rep. 409; Rock Island v. Central U. Teleph. Co. 132 Ill. App. 248; Rockwith ex rel. Kerns v. State Road Bridge Co. 145 Mich. 455, 108 N. W. 785; Snell v. Chicago, 133 Ill. 432, 8 L.R.A. 858, 24 N. E. 532; State ex rel. Hines v. Cape Girardeau & J. Gravel Road Co. 207 Mo. 85, 105 S. W. 761; State ex rel. Hines v. Scott County Macadamized Road Co. 207

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not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain said poles upon the streets and alleys of said city, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common with all other persons or companies to whom said city may see proper to extend the same right.

Sec. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or been made unsafe.

All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city, if paid by her.

Sec. 4. The rights and privileges herein granted to said telephone company are upon the terms and conditions following, *viz:* That said company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police headquarters, and one for the mayor's office, making at this time only two such telephones to be furnished by said company for the use of the city,—shall be kept in good order for constant use by said company.

Said company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph. The fire alarm telegraph poles of the city may be used by said company for its wires, provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by said telephone company shall be replaced by it when needed.

Sec. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

Sec. 6. This ordinance may be altered or amended as the necessities of the city may demand.

This ordinance shall be in force from and after its passage.

Mo. 54, 105 S. W. 752, 13 Ann. Cas. 656; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Virginia Canon Toll Road Co. v. People, 22 Colo. 429, 37 L.R.A. 711, 45 Pac. 398; Wyandotte Electric Light & P. Co. v. Wyandotte, 124 Mich. 47, 82 N. W. 821.

Under the provisions of the act of the legislature of the state of Kentucky creating a new charter for the city of Owensboro, in 1882, and in force when the grant in question was made, the power of amendment and repeal was given and reserved to the city; and the grant to the appellee was necessarily made subject to this power.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 508, 24 Am. Rep. 756; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Griffin v. Kentucky Ins. Co. 3 Bush, 592, 96 Am. Dec. 259; Hager v. Walker, 128 Ky. 1, 15 L.R.A.(N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254; Hopkins v. Swansea, 4 Mees. & W. 621; Louisville City R. Co. v. Louisville, 8 Bush, 420; Presbyterian Church v. New York, 5 Cow. 538; Southern Bell Teleph. & Teleg. Co. v. Richmond, 98 Fed. 672; Vanderbilt v. Adams, 7 Cow. 349; Cooley, Const. Lim. 196, 5th ed. 240, 241; Dill. Mun. Corp. §§ 245–573; 23 Cyc. 1142, and cases cited in note 57.

In the absence of express legislative authorization a municipality cannot make a perpetual grant of the use of the streets and thoroughfares of the city.

Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co. 79 Ala. 465, 58 Am. Rep. 615; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Logansport R. Co. v. Logansport, 114 Fed. 688.

Public grants should be construed liberally in favor of the public, and strictly against the grantee; nothing passes by implication.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Knoxville Water Co. v. Knoxville, 200 U. S. 33, 50 L. ed. 359, 26 Sup. Ct. Rep. 224; Minturn v. Larue, 23 How. 435, 16 L. ed. 574; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666, 24 L. ed. 1036, 1038; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 26, 30, 32 L. ed. 842, 843, 9 Sup. Ct. Rep. 409; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651.

Where there has been a previous litigation between the same parties relative to the same cause of action, the judgment of the court therein places the matter at rest forever between the parties thereto and their privies.

Bigelow, Estoppel, 72, 73, 152; Black, Judgm. §§ 720, 731; Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Davis v. McCorkle, 14 Bush, 754; Francis v. Wood, 81 Ky. 22; Freeman, Judgm. §§ 249, 270; Hanley v. Donoghue, 116 U. S. 6, 29 L. ed. 537, 6 Sup. Ct. Rep. 242; Hardwicke v. Young, 110 Ky. 504, 62 S. W. 10; Henderson v. Henderson, 3 Hare, 115; Knoxville Water Co. v. Knoxville, 200 U. S. 33, 50 L. ed. 359, 26 Sup. Ct. Rep. 224; Lyon v. Perin & G. Mfg. Co. 125 U. S. 700, 31 L. ed. 840, 8 Sup. Ct. Rep. 1024; Martin v. Evans, 85 Md. 8, 36 L.R.A. 220, 60 Am. St. Rep. 297, 36 Atl. 258; Rex v. Duchess of Kingston, 20 How. St. Tr. 355; Van Fleet, Former Adjudication, §§ 37, 40; Baker v. Cummings, 181 U. S. 117, 124, 125, 45 L. ed. 776, 779, 780, 21 Sup. Ct. Rep. 578; Southern P. R. Co. v. United States, 168 U. S. 48–50, 42 L. ed. 376, 377, 18 Sup. Ct. Rep. 18.

It is the judgment or decree of the court that settles the matters in controversy and conclusively fixes the rights of the parties. The opinion of the judge or chancellor, giving his reasons therefor, is no part of the judgment itself.

Durant v. Essex Co. 7 Wall. 107, 110, 19 L. ed. 154, 156; Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 692, 25 L. ed. 1005; Freeman, Judgm. § 249, and cases cited.

Mr. **William L. Granbery** argued the cause, and, with Messrs. Clarence M. Finn and Hunt Chipley, filed a brief for appellee:

The bar of a judgment in another action between the same parties, but upon a different claim or demand, is limited to that which was actually litigated and determined.

Virginia Carolina Chemical Co. v. Kirven, 215 U. S. 257, 54 L. ed. 184, 30 Sup. Ct. Rep. 78.

The party setting up the judicial estoppel in the subsequent suit must affirmatively show that the particular point was adjudicated and concluded in the former suit.

DeSollar v. Hanscome, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. ed. 650; Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. ed. 550; United States v. Green, 185 U. S. 256, 46 L. ed. 898, 22 Sup. Ct. Rep. 640; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762.

Under the Kentucky statutes, while the separate existence of the constituent cor-

porations ceases, the consolidated corporation becomes at once, without deed or transfer, the owner of all of the property of the constituent corporations; and therefore whatever rights either of the constituent companies possess becomes at once the property of the consolidated corporation.

Louisville v. Cumberland Teleph & Teleg. Co. 224 U. S. 661, 56 L. ed. 939, 32 Sup. Ct. Rep. 572.

The city had the power to make the grant of 1889.

Owensboro v. Cumberland Telepn. & Teleg. Co. 96 C. C. A. 1, 174 Fed. 739; American Car & Foundry Co. v. Johnson County, 147 Ky. 71, 143 S. W. 773; Jackson-Hazard Teleph. Co. v. Holliday, 143 Ky. 150, 136 S. W. 135.

This grant was to run to the telephone company, "its successors and assigns," in perpetuity.

Detroit v. Detroit Citizens' Street R. Co. 84 U. S. 395, 46 L. ed. 610, 22 Sup. Ct. Rep. 410; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Walla Walla v. Walla Walla Water Co. 172 U. S. 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538; Arcata v. Arcata & M. River R. Co. 92 Cal. 639, 28 Pac. 676; People ex rel. Pontiac v. Central U. Teleph. Co. 192 Ill. 307, 85 Am. St. Rep. 338, 61 N. E. 428; State, Hudson Teleph. Co., Prosecutor, v. Jersey City, 49 N. J. L. 304, 60 Am. Rep. 619, 8 Atl. 123; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787.

Mr. Justice **Lurton**, after making the foregoing statement, delivered the opinion of the court:

1. That the right conferred by the ordinance involved is something more than a mere license is plain. A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the 65]licensor when the license was given *have been made. See Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co. 134 N. Y. 435, 440, 31 N. E. 874; Southampton v. Jessup, 162 N. Y. 122, 126, 56 N. E. 538.

That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal nor for a temporary purpose. The right conferred came from the state through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law, and it was subject to all of the police power of the city.

That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases: Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 395, 46 L. ed. 592, 610, 22 Sup. Ct. Rep. 410; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 56 L. ed. 934, 939, 32 Sup. Ct. Rep. 572; Boisé Artesian Hot & Cold Water Co. v. Boisé City, opinion just handed down. [230 U. S. 84, post, 1400, 33 Sup. Ct. Rep. 997.] As a property right it was assignable, taxable, and alienable. Generally it is an asset of great value to such utility companies, and a principal basis for credit.

2. The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant. Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 395, 46 L. ed 592, 610, 22 Sup. Ct. Rep. 410; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 56 L. ed. 934, 939, 32 Sup. Ct. Rep. 572; People v. O'Brien, 111 N. Y. 1, 42, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Mobile v. Louisville & N. *R. Co. 84 Ala.[66 115, 5 Am. St. Rep. 342, 4 So. 106; Arcata v. Arcata & M. River R. Co. 92 Cal. 639, 28 Pac. 676; State, Hudson Teleph. Co. Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; Dill. Mun. Corp. 5th ed. § 1265; Nebraska Teleph. Co. v. Fremont, 72 Neb. 25, 29, 99 N. W. 811; Plattsmouth v. Nebraska Teleph. Co. 80 Neb. 460, 466, 14 L.R.A.(N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588. If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut

down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment, or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in People v. O'Brien, 111 N. Y. 1, 42, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692,—a decision accepted and approved by this court in Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 395, 46 L. ed. 592, 610, 22 Sup. Ct. Rep. 410—"The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made, and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchisee was perpetual, and not for a limited term only." Dill Mun. Corp. 5th ed. § 1265.

67] *3. There seems to have been no general law in Kentucky under which a telephone company could acquire the necessary street easement; nor, until the enactment of § 4679b of the Kentucky Statutes, was there any provision in the general law in regard to the acquisition of such rights in or upon the public roads outside of municipal corporations. In both cases the right to place and maintain poles and wires upon either streets or roads was dependent in the one case upon the municipal power of control over its streets, and in the other upon the power of the county fiscal courts by virtue of their control over county roads.

The original source of power over both streets and highways is the state. But this power of control is generally delegated in some form to the municipalities and county authorities of the state. Thus, the county fiscal courts, by § 4306, Kentucky Statutes, are given "general charge and supervision of the public roads," etc. Concerning the power resulting from the grant by the state to control streets or public highways, the Kentucky court, in American Car & Foundry Co. v. Johnson County, 147 Ky. 69, 71, 143 S. W. 773, said: "The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so municipal corporations may grant franchises to use the streets and public ways of a city." Again, in Jackson-Hazard Teleph. Co. v. Holliday, 143 Ky. 150, 136 S. W. 135, the court said: "That the fiscal court, having, as it did under § 4306 of the Kentucky Statutes, the control and supervision of the public roads of the county, had authority before the enactment of § 4679b of the Kentucky Statutes, to grant the company the right to erect its poles along this road, in the absence of a statute expressly giving the court such authority, is we think settled by the case of Cumber-[68 land Teleph. & Teleg. Co. v. Avritt, 120 Ky. 34," 85 S. W. 204, 8 Ann. Cas. 955. Sec. 4679b, referred to, gives to telephone companies the right to place their poles along such roads, subject to regulation by the fiscal courts, but it does not deal with the streets of municipal corporations. The right of such companies to occupy the streets of villages and cities was, therefore, dependent upon the charter powers, express or implied, under which they were organized.

Owensboro was granted a special charter in 1882, by which, among other things, it is given power "to regulate the streets, alleys, and sidewalks, and all improvements and repairs thereof." If the county fiscal courts had power to grant to such companies a franchise to place their poles and wires along the public roads of a county under the statute giving them "general charge" and right to "supervise" such roads, it logically follows, as stated in American Car & Foundry Co. v. Johnson County, supra, that the city of Owensboro, under the power "to regulate" its streets and alleys, had ample authority to grant a franchise to the telephone company to place and maintain its poles and wires upon the streets.

The character of the business of such companies was well known. Access with their lines to the houses of their customers in the city absolutely required the right to use the public streets, either longitudinally or to cross them. By such an exertion of its power to control and regulate the use of the streets it did not authorize a new

public use. Such a use was a legitimate street use, and did not impose upon the owner of the fee in the street an additional burden. Cumberland Teleph. & Teleg. Co. v. Avritt, supra. Neither was the city thereby stripped of its police power over the streets. Louisville City R. Co. v. Louisville, 8 Bush, 420. Nor did it undertake to grant an exclusive right. Express power to grant an exclusive street fran-[69]chise has generally *been held essential. Dill. Mun. Corp. 5th ed. §§ 1215, 1218, 1234. The grant in this case was not exclusive, and we are not called upon to deal with that question, since the ordinance here involved expressly reserves the right to make similar grants to other companies.

The great power of Congress over interstate commerce is wrapped up in the power to "regulate" such commerce. The authority of the city of St. Louis to compel the Western Union Telegraph Company to pay a rental for the maintenance of its poles and wires upon the streets of the city grew out of a charter power to "regulate" its streets and alleys. In this case (149 U. S. 465, 469, 37 L. ed. 810, 813, 13 Sup. Ct. Rep. 990) the court said:

"The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

In Owensboro v. Cumberland Teleph. & Teleg. Co. 99 C. C. A. 1, 174 Fed. 739, a case involving the regulation of the rates and charges of the present appellee, the power of the city of Owensboro under its charter power to "regulate" was held by the circuit court of appeals of the sixth circuit to amply justify the grant here involved, though its duration was not involved or considered.

That the power to "regulate" embraces power to grant to such companies the right to place and maintain their poles upon the streets has been generally held. Pikes Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 1, C. C. A. 8th Circuit; Detroit Citizen's R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, 636, C. C. A. 6th Circuit. In the [70]latter case *it was held that a charter power to "open, close, and widen streets, and to prescribe, control, and regulate the manner in which the highways, streets, and avenues shall be used and enjoyed," was a power broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchise of a street railway company. To the same effect see Dill. Mun. Corp. 2d ed. § 575; Atchison Street R. Co. v. Missouri, P. R. Co. 31 Kan. 661, 3 Pac. 284; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523, 526; State ex rel. St. Louis Underground Service Co. v. Murphy, 134 Mo. 562, 34 L.R.A. 369, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132; Brown v. Duplessis, 14 La. Ann. 854; Chicago, B. & Q. R. Co. v. Quincy, 136 Ill. 489, 27 N. E. 232; New Castle v. Lake Erie & W. R. Co. 155 Ind. 18, 57 N. E. 516.

4. It is next insisted that the grant is limited to the life of the corporation that accepted it. The assumption that this life was limited to twenty-five years from the date of the organization of the grantee corporation is erroneous. The articles of agreement did provide that the company should terminate in twenty-five years, but as this was an agreement of the stockholders *inter sese*, it was competent for them, if the general incorporating act under which the company was organized permitted, to extend its life. This is precisely what the Kentucky act under which the company was organized permitted. Thus it provided that corporations organized for any work of internal improvement could be formed to endure for fifty years, and those formed for other purposes, for twenty-five years. Gen. Stat. (Ky.) 1883, chap. 56, § 7. But the same act provided that in either case the term might be extended by action of three fourths of the stockholders. Thus, if it be assumed that the grant was limited to the life of the grantee, that life was capable of extension at the will of the stockholders, and an extension did occur as contemplated. But this ordinance was to the Cumberland Telephone Company and its assigns. It vested a *property right, capable of[71 passing to an assignee, and did in fact pass to the present consolidated company, whose life, by express action of its entire body of stockholders, is for 200 years. That a corporation is capable of taking a grant of street rights of longer duration than its own corporate existence is the settled law of this court. Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 395, 46 L. ed. 592, 610, 22 Sup. Ct. Rep. 410; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 56 L. ed. 934, 939, 32 Sup. Ct. Rep. 572.

The case of St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651, has been cited and relied upon as deciding that a grant to a corporation is limited in dura-

tion to the life of the grantee. If the case is to be regarded as holding the wide doctrine for which it has been cited, it is in conflict with the cases cited above. But it does not go so far as claimed. The grant there involved was of the right to extend an existing turnpike over a certain dike and county bridge, and to maintain to tollgate upon the extension. The company to which this additional right was given had been incorporated for a term of twenty-five years. The grant was to the particular company by name, and was not to its assigns or successors. This court likened such a grant to a grant at common law to a natural person without words of restriction, which, said the court, "creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists." The grant here involved was to the corporate grantee, its assigns and successors, and falls under the principle of the cases cited above.

5. It is next said that the power to grant, found in the city charter, is coupled with the power to amend or repeal. The 10th section of the city charter provides that "the common council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, and repeal all ordinances for the following purposes." Then follow fifty-seven subsections relating 72]to the legislative power *of the council. The 27th section gives the council the power "to regulate the streets, alleys, and sidewalks, and all repairs thereof."

The power to be a corporation and to conduct a telephone business did not come from the city, nor could it. The only thing which the ordinance pretends to do is to grant an easement in the streets, which, as we have already shown, was an unlimited right to place and maintain poles and wires upon the streets, subject, however, to the police power of the city. This repealing ordinance, though it purports to be an exercise of the police power in the "whereas" clause, proceeds immediately to contradict the assertion that the poles and wires are a "nuisance" by the proviso giving the company an opportunity to purchase the right to continue the use of the streets under conditions "to be prescribed by ordinance," upon request of said company. It is a plain attempt to destroy the vested property right under which a great plant had been installed and operated for more than twenty-five years. When that grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company, which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved.

The 6th section of the granting ordinance provides that "this ordinance may be altered or amended as the necessities of the city may demand." This is no more than a reservation of the police control of the streets, and of the mode and manner of placing and maintaining the poles and wires, incident to the unabridgeable police power of the city. See Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, ante, 633, 33 Sup. Ct. Rep. 303. It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted. Nor does the city attempt to justify its action in requiring the poles and wires to be removed from the streets under that section, but solely upon the general *power in the[73 city charter "to make, publish, and repeal ordinances." This general power to repeal ordinances obviously refers to ordinances which are legislative in character and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Grand Trunk Western R. Co. v. South Bend, supra. The power to repeal, alter, and amend such ordinances is one which inheres in the power to legislate, and its mention is pure surplusage.

To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the mercy of changeable city councils. In the absence of an express reservation in the contractual ordinance, or an express delegation of power to revoke contracts under such ordinances, we think no such extraordinary power is to be implied. Ashland v. Wheeler, 88 Wis. 607, 616, 60 N. W. 818.

Much the same question arose in State, Hudson Teleph. Co. Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123, where the right granted was held to be irrevocable under a similar power. Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961, is not in point. That case involved the repeal by the Massachusetts legislature of a legislative charter, under a reserved power, by general law of the state making "every act of incorporation (after a certain date) subject to amendment, alteration, or repeal, at the pleasure of the legislature." That was a plain, unmistakable reservation of the right to repeal at the pleasure of the state. This clause of the charter in the instant case reserves no more than the power to repeal, as well as to

make and amend, ordinances, but by no means operates to convey the power to "repeal" a grant of street rights which had 74]been accepted, and had *thereby become a contract under the protection of the contract clause of the Constitution. That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for if it has application to this ordinance, it would equally apply to every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made.

In Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510, an ordinance consenting to the laying of a double track over designated streets was involved. This ordinance could not become effective until confirmed by the legislature. The confirming act contained these words: "The said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general power." Later this ordinance was in part repealed, and the repeal was held valid upon the ground that the control of the city over its streets was a legislative power, and that the council could not consent to any rights therein which were not revocable, although the city might be liable for damages. The opinion does not rest upon the theory that any right of repeal was specially reserved in the ordinance or by the confirmatory act. The validity of the repeal was put upon the right to repeal every ordinance legislative in character. The case is out of line with the great weight of authority in respect to the irrevocable character of property rights vested under an ordinance, when the right to revoke is not expressly reserved.

In Baltimore Trust & G. Co. v. Baltimore, 64 Fed. 153, Circuit Judge Goff refused to follow the case, holding that the question of contract or no contract under such an ordinance was a Federal question, and that the confirmatory legislation reserved no 75]right of repeal, and that *none existed under the general right to repeal ordinances. In the same case (166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696) the decree of Judge Goff was reversed upon the sole ground that the requirement of the so-called repealing ordinance that the railway company should maintain but one track on one of the designated streets was a legitimate exercise of the police power, and not a substantial change of the contract. The case is so explained and distinguished in Grand Trunk Western R. Co. v. South Bend, supra.

6. In June, 1900, the Cumberland Telephone & Telegraph Company consolidated with the Ohio Valley Telephone Company, likewise a Kentucky corporation, under authority of the Kentucky act of April 5, 1893. Although the separate existence of the constituent corporations was terminated, and they became a single corporation, the consolidated company was, by express provision of the act referred to, "vested with all the property, business, credits, assets, and effects of the constituent corporations, without deed or transfer, and bound for all their contracts and liabilities." Being property, alienable and assignable, the street rights of the constituent companies passed to the consolidated company. The same question arose and was expressly decided in Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 56 L. ed. 934, 939, 32 Sup. Ct. Rep. 572.

7. Finally, it was claimed that in a prior litigation in a state court, between the same parties, the ordinance of 1889 had been held to be in excess of the power of the city as nothing more than a revocable license. The suit referred to had been brought by the telephone company to restrain the city from placing poles and wires of an electric light system, in course of construction by the city, in such close proximity to the poles and wires of the telephone company as to interfere with its current. One of the defenses was that the city had no power under its charter to make the grant which it had assumed to *make by the ordinance of[76 1889, and that the telephone company was therefore a trespasser upon the streets. Upon a final hearing the bill was dismissed. This decree was pleaded as an adjudication of the question of the validity of the ordinance under which the telephone company now claims. But the judgment makes the opinion of the court filed at the time "a part of the record." That opinion shows that the court dismissed the bill because its object had failed, the city having actually constructed its lines before final decree. In reference to the issue as to the validity of the telephone company's street rights, the Kentucky court said: "In passing upon the question of granting or refusing the injunction, I deem it wholly unnecessary to pass upon the validity or invalidity of the ordinance discussed." The litigation, though between the same parties, is upon an entirely different cause of action. The bar of the former judgment is therefore confined to the questions which were actually litigated and decided in the former case, and it devolved upon the city to show in support

of its plea, the cause of action being different in the present case, that the point here in issue was adjudged in the former case. DeSollar v. Hanscome, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78.

We find no error in the decree of the court below and it is therefore affirmed.

Mr. Justice Day, dissenting:

I am unable to concur in the judgment and opinion announced in this case. In my opinion the ordinance of December 4, 1889, granting to the Cumberland Telephone & Telegraph Company, its successors and as-77]signs, the *right to use the streets and alleys of the city of Owensboro for the purpose of erecting poles and stringing wires thereon to maintain a telephone system, did not grant a perpetual franchise, because of the limitation upon the authority of the city of Owensboro to grant a perpetual franchise.

The case is not controlled by the previous cases in this court, such as the late case of Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572, which had to do with the construction of a legislative grant to a corporation having perpetual succession, and did not involve the construction of the charter of a Kentucky city, such as is here under consideration.

The power to grant a perpetual franchise to telephone and similar companies desiring to use the streets and alleys of the city of Owensboro is said to be derived under § 10 of the charter, conferring upon the common council, in its 27th subsection, the right to regulate streets, alleys, and sidewalks, and all repairs thereof, in the city. Conceding that if this power were conferred without limitation it might authorize a grant in perpetuity of the character herein involved, the authority found in the 27th subsection, as well as other municipal powers, are all granted to the common council by the legislature of the state upon the following terms, preceding the grant of authority: "§ 10. The common council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, amend, and repeal all ordinances for the following purposes, to wit." In other words the authority granted to regulate the streets is limited by the express reservation that it shall be exercised subject to the power of the city to amend and repeal any ordinance so enacted.

In Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961, wherein this court held that a grant to a street railway company subject to the limitation of the right to amend, alter, or repeal was *subject[78 to future legislation ending the right of the street railway company to operate in the streets of the city, Mr. Justice Miller, who delivered the opinion of the court, stated the origin of statutory and legislative reservations of this character enacted since the decision of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629, construing corporate charters as contracts between the public authorities and the grantees, beyond legislative control and within the protection of the contract clause of the Federal Constitution. The learned justice said (p. 20):

"It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."

In view of that policy this court held that, whatever rights remained to its other property, the authority to run cars upon the streets of the city of Boston, being subject to the reservation, terminated upon the repeal of the ordinance.

If there is such right to repeal, the authorities are conclusive *that it may be[79 exercised so as to terminate the rights of the company to further use the streets. In a recent case (Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122), this court approved and reaffirmed this principle. In that case the Grand Rapids Hydraulic Company had been incorporated by the legislature of Michigan, and had constructed, and was then maintaining, an elaborate water system. The legislature repealed the charter, reservation to amend or repeal having been made in the original act. In aid of the contention that the re-

pealing act was void under the 14th Amendment to the Constitution, it was alleged that there were outstanding bonds and a mortgage on the company's plant, including its franchise to own and operate its system; also that, the city being a competitor of the company, the city authorities had secured the passage of the repealing statute by unfair means. This court said (pp. 598 et seq.):

"The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations. But we do not inquire into the knowledge, negligence, methods, or motives of the legislature, if, as in this case, the repeal was passed in due form. United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308. The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

" . . . By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases. Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Monongahela Nav. Co. v. United States, 148 U. S. 313, 338, 340, 37 L. ed. 463, 472, 473, 13 Sup. Ct. Rep. 622; 80]New Orleans Waterworks Co. v. *Louisiana, 185 U. S. 336, 353, 354, 46 L. ed. 936, 944, 945, 22 Sup. Ct. Rep. 691; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 438, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; Manigault v. Springs, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127. It would be a waste of words to try to make clearer than it is on its face, the meaning and effect of this reservation of the power to repeal.

" . . . The only question before us now is the validity of the judgment ousting the defendants from 'assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company.' This really is too plain to require the argument that we have spent upon it. We may add that it is a matter upon which the bondholders have nothing to say."

See also Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

It is said, however, and that seems to be the ground which the decision of the court upon this point rests, at last, that the reservation of the right to repeal does not clearly appear in the charter of Owensboro, as it did in the Massachusetts legislation considered in Greenwood v. Union Freight R. Co. supra, and it is said that such right, when it is claimed, must be clear and explicit. To my mind the purpose of the Kentucky legislature was evidenced with perfect clearness, for I think that the same law which gave the city the right, which otherwise would have rested with the legislature alone, of exercising authority over the streets, which in this case, it is held, authorized their use for telephone purposes, in unmistakable terms made such authority subject to the clearly stated and definite limitation named. Furthermore, the doctrine is well settled that legislative grants of municipal authority shall be construed most favorably to the public and against persons claiming thereunder,—a doctrine sanctioned by decisions of this court. Moran v. Miami County, 2 Black, 722, 17 L. ed. 342; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736. Surely, if the intention of the *Kentucky legislature[81 to reserve in the municipality the authority to repeal such grants as the one here involved is not clearly manifested, at least there is reasonable room for doubt, and such doubt must be resolved in favor of the public. If the doubt be determined in favor of the company, and a grant which is not clearly in perpetuity is held to be such, the effect is to tie the hands of the municipality from obtaining revenue from the use of property held by it in trust for all its people.

It is also said that the exercise of the reserved right to repeal in cases like this will have the effect to destroy contract rights, upon the strength of which large investments may have been made. But this argument overlooks the proposition that, if the grant was made subject to the right to revoke by subsequent action of the authority which made the grant, then no contract was entered into between the parties beyond the control of the reserved power of the municipality; for, as Mr. Justice Miller said in the Greenwood v. Union Freight R. Co. Case, under such "a provision . . . reserving to the legislature the right to amend or repeal, it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation." So, if this limitation in fact existed, the right to repeal was inherent in the authority which made the

grant, and the grantee is conclusively presumed to be aware of this limitation, and to make his investments subject to the exercise of the reserved right. Calder v. Michigan, supra. Moreover, if limited grants are to be construed into perpetuities, then the control over streets for railway, telephone, and other kindred enterprises of enormous value are granted to private corporations without compensation for the use of such valuable rights which belong to the municipality. Recent cases in this court have shown the great value of such privileges, and that investors are found who 82]are willing to pay for *the privilege of using the public streets for these purposes.

A single case is cited in the opinion of the court to sustain the conclusion reached upon this branch of the case, and that is State, Hudson Teleph. Co. Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123. An examination of that case shows that it did not involve the question now under consideration. There the telephone company was organized as such under the prevailing statutes of the state, and had obtained on certain conditions the permission of the municipality to use the streets in accordance with a provision in the statute that the designation of the streets to be used and manner of placing poles should first be secured. An ordinance was passed, revoking the permission, although the company had complied with the conditions, and the court held that the revoking ordinance was invalid. The court noticed the power reserved in the corporation act to repeal, suspend, and alter charters, and the power of the city council to repeal ordinances. The former was held to run to the legislature solely, and it was said that there was no provision in the act authorizing the municipality to revoke its permission. Of the latter the court said that the power to repeal was a general power arising from the power to pass ordinances, and existed without the express charter powers, and that such general power would not sustain the rescission of an act authorized by other legislation.

A somewhat diligent search has failed to discover cases exactly in point, construing a reservation of the character herein involved. The case of Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510, followed and approved in United R. & Electric Co. v. Hayes, 92 Md. 490, 48 Atl. 364, is, however, closely analogous. In that case the city granted a franchise to the railway company, permitting it to lay tracks in the streets of the city, and also to erect an elevated railway in a certain street. A statute passed to confirm 83] *the action of the city with respect to that part of the ordinance granting a franchise which related to the elevated railway contained a reservation to the city of "the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance [granting the franchise] as it has or would have in respect to any ordinance passed under its general powers." This reservation was held to authorize the repeal of the grant in question. The case upon this point meets the argument made in the opinion in this case, that the right to amend, alter, or repeal would have existed without the statute, and cannot be held to cover the grant of franchise privileges to use the streets. Undoubtedly this right of repeal would have existed, and hence its insertion was unnecessary, unless it was to have some further purpose than that the law already gave,—the general power of a municipality to repeal ordinances of a legislative character. We think the intention in this case was the same as in the Maryland case, to preserve in the municipality authority over the streets in the interests of the public.

In my view the case in its present attitude comes to this: The permission to place poles and string wires in the city of Owensboro was granted under a charter which expressly reserved the right to repeal by subsequent act of the municipal legislature. In the face of this authority, and presumably with knowledge of it, the company has entered upon the streets and made use of them for the purposes intended. Holding its grant subject to this superior right in the city to end it, I think the subsequent repealing ordinance was within the power of the municipality.

Mr. Justice McKenna, Mr. Justice Hughes, and Mr. Justice Pitney concur in this dissent.

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*BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited, Plff. in Err., [83

v.

BOISE CITY. (No. 573.)

BOISE CITY, Plff. in Err.,

v.

BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited. (No. 639.)

(See S. C. Reporter's ed. 84-98.)

Error to district court — Federal question.

1. A decree of a Federal district court

NOTE.—On direct review in Federal Supreme Court of judgments of district or

in a suit in which it was claimed that a municipal ordinance imposing license fees, as a law of the state, for the use and occupation of the city streets by the pipes of a water distributing system, is in contravention of the Federal Constitution, is one which, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, may be directly reviewed by writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

**Error to district court — extending review beyond Federal question.**

2. The jurisdiction of the Federal Supreme court on writ of error to review a decision of a Federal district court in a case in which a constitutional question is involved extends to a determination not only of such question, but of every other question properly arising in the case.

[For other cases, see Appeal and Error, 4297-4300, in Digest Sup. Ct. 1908.]

**Error to district court — constitutional question — cross appeal on non-Federal question.**

3. A ruling against the defendant below upon a non-Federal question may be brought up for review by a cross writ of error, where the plaintiff below has sued out upon constitutional grounds a direct writ of error from the Federal Supreme Court to a district court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

**Water supply — franchise — property right.**

4. A municipal grant of the right to occupy the city streets with the pipes of a water-distributing system is, when accepted by the grantee, not a mere revocable license, but is a substantial property right.

[For other cases, see Franchise; Municipal Corporations, II. f; Waters, III. a, in Digest Sup. Ct. 1908.]

**Water supply — franchise — duration.**

5. A municipal grant to individuals for an indefinite term, of the right to lay in the city streets and to repair the pipes of a water-distributing system, if affected at all by Idaho Rev. Stat. § 2710, which, after prohibiting corporations from supplying a municipality with water without municipal assent, provides that "no contract or grant must be made for a term exceeding fifty years," is not rendered thereby ineffective, but, at most, is limited to a term of fifty years.

[For other cases, see Franchise; Municipal Corporations, II. f; Waters, III. a, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — water supply — franchise.**

6. The obligation of a municipal ordinance granting an irrevocable easement to lay in the city streets and repair the pipes of a water-distributing system is unconstitutionally impaired by a subsequent ordinance requiring the payment to the city of a monthly rental for such use and occupation of the streets.

[For other cases, see Constitutional Law, IV. g, 4, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — free water for fire purposes.**

7. The burden of furnishing free water for fire purposes, imposed by Idaho Rev. Stat. § 2711, upon all corporations formed to supply water to cities and towns, could be removed, as was done by the amendment of March, 1905, without unconstitutionally impairing the obligation of any contract.

[For other cases, see Constitutional Law, 1314-1324, in Digest Sup. Ct. 1908.]

**Water supply — free water for fire purposes.**

8. A municipality cannot successfully claim that a water company is under obligation to furnish free water for fire purposes, where a charge for water furnished for such purposes is included in the schedule of water rates established by water commissioners conformably to Idaho Rev. Code, § 2839, providing that the decision of such commissioners must fix and determine water rates, which shall continue in force until new rates shall be established.

[For other cases, see Municipal Corporations, II. f; Waters, III. a, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — implied contract.**

9. A finding of the existence of a contract between a municipality and a water company, with reference to the supply of water for fire purposes, is sustained by evidence that a schedule of water rates, including a charge for water for such purpose, adopted conformably to and made effective by Idaho Rev. Code, § 2839, had been reported to the city by the commissioners appointed under that section, and that the city for some months paid the rate so fixed, and continued to use the water for fire purposes after it had notified the water company that it would pay no further bills for such service, and the water company, disregarding such notice, had continued to maintain its service for fire purposes.

[For other cases, see Evidence, XII. i, in Digest Sup. Ct. 1908.]

[Nos. 573 and 630.]

Argued May 7 and 8, 1913. Decided June 16, 1913.

IN ERROR and on Cross Writ of Error to the District Court of the United States for the District of Idaho to review a decree allowing a counterclaim for monthly license fees or rentals against the liability of a municipality to pay a water company for water furnished for fire purposes. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

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circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L ed. U. S. 894, 57 L. ed.

On the establishment and regulation of municipal water supply—see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 33.

Mr. Richard H. Johnson argued the cause, and, with Mr. Richard Z. Johnson, filed a brief for the Boisé Artesian Hot & Cold Water Company:

The grant of a right to supply water or gas to a municipality and its inhabitants through pipes laid in the streets, upon condition of the performance of such service, is the grant of a franchise, and after performance by the grantee is protected by the Constitution of the United States against impairment.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 266, 36 L. ed. 963, 967, 13 Sup. Ct. Rep. 90; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 577, 578, 44 L. ed. 886, 895, 20 Sup. Ct. Rep. 736; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 80, 82, 46 L. ed. 808, 815, 22 Sup. Ct. Rep. 585; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253.

The fact that the grant is indefinite as to time does not make it a license revocable at the will of the city.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Boisé City Artesian Hot & Cold Water Co. v. Boisé City, 59 C. C. A. 236, 123 Fed. 232.

The right to use the streets for laying pipes was granted directly by the state by Rev. Codes, § 2840, supplemented by the ordinances of July 10, 1890, to the Artesian Water & Land Improvement Company, and was limited in its duration only by § 2838, and cannot be impaired by the city.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 663, 56 L. ed. 940, 32 Sup. Ct. Rep. 572; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 393, 46 L. ed. 609, 22 Sup. Ct. Rep. 410; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 418; Suburban Electric Light & P. Co. v. East Orange Twp. — N. J. Eq. —, 41 Atl. 865; Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 43, 82 N. W. 821; Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 47 L.R.A. 87, 80 Am. St. Rep. 520, 80 N. W. 383; People ex rel. Flatbush Gas Co. v. Coler, 54 Misc. 21, 103 N. Y. Supp. 590; New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; Morristown v. East Tennessee Teleph. Co. 53 C. C. A. 132, 115 Fed. 304; Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Old Colony Trust Co. v. Wichita, 123 Fed. 762; Los Angeles v. Los Angeles City Water Co. 61 Cal. 65; Los Angeles v. Los Angeles City Water Co. 177 U. S. 577, 578, 44 L. ed. 895, 20 Sup. Ct. Rep. 736; Stein v. Mobile, 49 Ala. 362, 20 Am. Rep. 283; People ex rel. Davis v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; New York v. Second Ave. R. Co. 32 N. Y. 261; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Re Brooklyn, 143 N. Y. 596, 26 L.R.A. 270, 38 N. E. 983; National Waterworks Co. v. Kansas City, 65 Fed. 691; Baltimore Trust Co. v. Baltimore, 64 Fed. 153; Govin v. Chicago, 132 Fed. 848; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Rutland Electric Light Co. v. Marble City Electric Light Co. 65 Vt. 377, 20 L.R.A. 821, 36 Am. St. Rep. 868, 26 Atl. 635; Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616; Gregsten v. Chicago, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426; Arcata v. Arcata & M. River R. Co. 92 Cal. 644, 28 Pac. 676; Savage v. Salem, 23 Or. 381, 24 L.R.A. 787, 37 Am. St. Rep. 688, 31 Pac. 832; Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; Indianapolis v. Consumers' Gas Trust Co. 140 Ind. 107, 27 L.R.A. 514, 49 Am. St. Rep. 183, 39 N. E. 433; Shamokin v. Shamokin Street R. Co. 178 Pa. 128, 35 Atl. 862; Providence Gas Co. v. Thurber, 2 R. I. 15, 55 Am. Dec. 621.

The city is estopped from claiming that the water company is operating only under licenses revocable at the will of the city.

National Waterworks Co. v. Kansas City, 65 Fed. 691; Union Depot Co. v. St. Louis, 76 Mo. 393; Omaha Water Co. v. Omaha, 85 C. C. A. 54, 156 Fed. 922; Omaha & C. B. Street R. Co. v. Omaha, 90 Neb. 6, 132 N. W. 733; People ex rel. Fitz Henry v. Union Gas & Electric Co. 254 Ill. 395, 98 N. E. 768; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

Section 2838, limiting grants to fifty years, was in force July 10, 1890, when the Artesian Water & Land Improvement Company became authorized under § 2840, supplemented by the city ordinance of that date, to use the streets, and both sections were a part of same statute and chapter; and under the settled doctrine of this court, § 2838 enters into and forms a part of the contract, and is part of the obligation protected by the Federal Constitution.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; Von Hoffman v. Quincy, 4 Wall. 550, 18 L. ed. 403; Tomlinson v. Jessup, 15

Wall. 457, 21 L. ed. 205; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 634, 637, 24 L. ed. 858, 861, 862; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102.

The city's contention that § 2838 does not apply to Boisé City, because the city was operating under special charter, is without merit.

Boisé City Nat. Bank v. Boisé City, 15 Idaho, 792, 100 Pac. 93; Boisé City v Artesian Hot & Cold Water Co. 4 Idaho, 351, 39 Pac. 562.

The city ordinances under which the present company is operating were transferable.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Evans v. Kroutinger, 9 Idaho, 153, 72 Pac. 882, 2 Ann. Cas. 691.

The act of March 9, 1905, operated to repeal the free-water provision in § 2711, and relieved the water company from that obligation.

Spring Valley Waterworks v. San Francisco, 61 Cal. 18.

Messrs. Charles C. Cavanah and Charles F. Reddoch argued the cause, and, with Messrs. John J. Blake and John F. Maclane, filed a brief for Boisé City:

The plaintiff in error has no franchise or contract right to the use of the streets and alleys of Boisé City as the city only granted by the ordinances of October 3, 1889, and July 10, 1890, a mere license, and can require, as a further continuance of said license, the payment of the license fee for the use of its streets and alleys.

Colby University v. Canandaigua, 96 Fed. 449; 3 Page, Contr. p. 2110; Western U. Teleg. Co. v. Pennsylvania Co. 125 Fed. 67; Jones v. Newport News & M. Valley Co. 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736.

Unless the plaintiff in error has a franchise or contract right with the city, or is given an absolute right under the statute for the use of the streets and alleys, and is occupying the same for an indefinite period under an ordinance that is a mere license, the city can require, as a further continuation of said license and use, the payment of compensation.

Boisé City Artesian Hot & Cold Water Co. v. Boisé City, 59 C. C. A. 236, 123 Fed. 232; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332; New Orleans v. New Orleans City & Lake R. Co. 40 La. Ann. 587, 4 So. 512.

Before a person or corporation can acquire the right to occupy and use the highways of a city for any length of time, such right must be granted either by an act of the legislature or by the mayor and council of the city. Whatever rights the water company has to the use of the streets and alleys of the city must come from the ordinances of October 3, 1889, and July 10, 1890.

The water company, under the ordinances of October 3, 1889, and July 10, 1890, takes nothing in the way of a grant, franchise, or contract by intent or implication.

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Slidell v. Grandjean, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Hoge v. Richmond & D. R. Co. 99 U. S. 348, 25 L. ed. 303; Bank of Commerce v. Tennessee, 104 U. S. 493, 26 L. ed. 810; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; Birmingham v. Birmingham Waterworks Co. 139 Ala. 531, 101 Am. St. Rep. 49, 36 So. 614.

Section 2710 of the Revised Statutes of Idaho 1887, now embraced in § 2838 of the Idaho Revised Codes, relied upon by the water company, does not operate to extend the privilege and license referred to in the ordinances of October 3, 1889, and July 10, 1890, for fifty years, or any definite period, as said statute is merely a limitation upon the power to contract, and not a provision of the contract.

Cleveland Electric R. Co. v. Cleveland, 137 Fed. 111.

Under the charter of Boisé City the legislature of Idaho has granted to it full control and authority over the use of its streets and alleys; and where such authority is given to the city, it has power to give or refuse consent to the occupation of its streets, and may impose terms and conditions.

Chicago Terminal Transfer R. Co. v. Chicago, 203 Ill. 576, 68 N. E. 99; Detroit v. Ft. Wayne & B. I. R. Co. 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411, 28 Atl. 202; Indianapolis v. Consumers' Gas Trust Co. 140 Ind. 27 L.R.A. 514, 49 Am. St. Rep. 193, 39 N. E. 14

tion to the life of the grantee. If the case is to be regarded as holding the wide doctrine for which it has been cited, it is in conflict with the cases cited above. But it does not go so far as claimed. The grant there involved was of the right to extend an existing turnpike over a certain dike and county bridge, and to maintain to tollgate upon the extension. The company to which this additional right was given had been incorporated for a term of twenty-five years. The grant was to the particular company by name, and was not to its assigns or successors. This court likened such a grant to a grant at common law to a natural person without words of restriction, which, said the court, "creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists." The grant here involved was to the corporate grantee, its assigns and successors, and falls under the principle of the cases cited above.

5. It is next said that the power to grant, found in the city charter, is coupled with the power to amend or repeal. The 10th section of the city charter provides that "the common council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, and repeal all ordinances for the following purposes." Then follow fifty-seven subsections relating 72]to the legislative power *of the council. The 27th section gives the council the power "to regulate the streets, alleys, and sidewalks, and all repairs thereof."

The power to be a corporation and to conduct a telephone business did not come from the city, nor could it. The only thing which the ordinance pretends to do is to grant an easement in the streets, which, as we have already shown, was an unlimited right to place and maintain poles and wires upon the streets, subject, however, to the police power of the city. This repealing ordinance, though it purports to be an exercise of the police power in the "whereas" clause, proceeds immediately to contradict the assertion that the poles and wires are a "nuisance" by the proviso giving the company an opportunity to purchase the right to continue the use of the streets under conditions "to be prescribed by ordinance," upon request of said company. It is a plain attempt to destroy the vested property right under which a great plant had been installed and operated for more than twenty-five years. When that grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company, which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved.

The 6th section of the granting ordinance provides that "this ordinance may be altered or amended as the necessities of the city may demand." This is no more than a reservation of the police control of the streets, and of the mode and manner of placing and maintaining the poles and wires, incident to the unabridgeable police power of the city. See Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, ante, 633, 33 Sup. Ct. Rep. 303. It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted. Nor does the city attempt to justify its action in requiring the poles and wires to be removed from the streets under that section, but solely upon the general *power in the[73 city charter "to make, publish, and repeal ordinances." This general power to repeal ordinances obviously refers to ordinances which are legislative in character and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Grand Trunk Western R. Co. v. South Bend, supra. The power to repeal, alter, and amend such ordinances is one which inheres in the power to legislate, and its mention is pure surplusage.

To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the mercy of changeable city councils. In the absence of an express reservation in the contractual ordinance, or an express delegation of power to revoke contracts under such ordinances, we think no such extraordinary power is to be implied. Ashland v. Wheeler, 88 Wis. 607, 616, 60 N. W. 818.

Much the same question arose in State, Hudson Teleph. Co. Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123, where the right granted was held to be irrevocable under a similar power. Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961, is not in point. That case involved the repeal by the Massachusetts legislature of a legislative charter, under a reserved power, by general law of the state making "every act of incorporation (after a certain date) subject to amendment, alteration, or repeal, at the pleasure of the legislature." That was a plain, unmistakable reservation of the right to repeal at the pleasure of the state. This clause of the charter in the instant case reserves no more than the power to repeal, as well as to

make and amend, ordinances, but by no means operates to convey the power to "repeal" a grant of street rights which had 74]been accepted, and had *thereby become a contract under the protection of the contract clause of the Constitution. That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for if it has application to this ordinance, it would equally apply to every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made.

In Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510, an ordinance consenting to the laying of a double track over designated streets was involved. This ordinance could not become effective until confirmed by the legislature. The confirming act contained these words: "The said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general power." Later this ordinance was in part repealed, and the repeal was held valid upon the ground that the control of the city over its streets was a legislative power, and that the council could not consent to any rights therein which were not revocable, although the city might be liable for damages. The opinion does not rest upon the theory that any right of repeal was specially reserved in the ordinance or by the confirmatory act. The validity of the repeal was put upon the right to repeal every ordinance legislative in character. The case is out of line with the great weight of authority in respect to the irrevocable character of property rights vested under an ordinance, when the right to revoke is not expressly reserved.

In Baltimore Trust & G. Co. v. Baltimore, 64 Fed. 153, Circuit Judge Goff refused to follow the case, holding that the question of contract or no contract under such an ordinance was a Federal question, and that the confirmatory legislation reserved no 75]right of repeal, and that *none existed under the general right to repeal ordinances. In the same case (166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696) the decree of Judge Goff was reversed upon the sole ground that the requirement of the so-called repealing ordinance that the railway company should maintain but one track on one of the designated streets was a legitimate exercise of the police power, and not a substantial change of the contract. The case is so explained and distinguished in Grand Trunk Western R. Co. v. South Bend, supra.

6. In June, 1900, the Cumberland Telephone & Telegraph Company consolidated with the Ohio Valley Telephone Company, likewise a Kentucky corporation, under authority of the Kentucky act of April 5, 1893. Although the separate existence of the constituent corporations was terminated, and they became a single corporation, the consolidated company was, by express provision of the act referred to, "vested with all the property, business, credits, assets, and effects of the constituent corporations, without deed or transfer, and bound for all their contracts and liabilities." Being property, alienable and assignable, the street rights of the constituent companies passed to the consolidated company. The same question arose and was expressly decided in Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 661, 56 L. ed. 934, 939, 32 Sup. Ct. Rep. 572.

7. Finally, it was claimed that in a prior litigation in a state court, between the same parties, the ordinance of 1889 had been held to be in excess of the power of the city as nothing more than a revocable license. The suit referred to had been brought by the telephone company to restrain the city from placing poles and wires of an electric light system, in course of construction by the city, in such close proximity to the poles and wires of the telephone company as to interfere with its current. One of the defenses was that the city had no power under its charter to make the grant which it had assumed to *make by the ordinance of[76 1889, and that the telephone company was therefore a trespasser upon the streets. Upon a final hearing the bill was dismissed. This decree was pleaded as an adjudication of the question of the validity of the ordinance under which the telephone company now claims. But the judgment makes the opinion of the court filed at the time "a part of the record." That opinion shows that the court dismissed the bill because its object had failed, the city having actually constructed its lines before final decree. In reference to the issue as to the validity of the telephone company's street rights, the Kentucky court said: "In passing upon the question of granting or refusing the injunction, I deem it wholly unnecessary to pass upon the validity or invalidity of the ordinance discussed." The litigation, though between the same parties, is upon an entirely different cause of action. The bar of the former judgment is therefore confined to the questions which were actually litigated and decided in the former case, and devolved upon the city to show in

of its plea, the cause of action being different in the present case, that the point here in issue was adjudged in the former case. DeSollar v. Hanscome, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78.

We find no error in the decree of the court below and it is therefore affirmed.

Mr. Justice Day, dissenting:

I am unable to concur in the judgment and opinion announced in this case. In my opinion the ordinance of December 4, 1889, granting to the Cumberland Telephone & Telegraph Company, its successors and as-77]signs, the *right to use the streets and alleys of the city of Owensboro for the purpose of erecting poles and stringing wires thereon to maintain a telephone system, did not grant a perpetual franchise, because of the limitation upon the authority of the city of Owensboro to grant a perpetual franchise.

The case is not controlled by the previous cases in this court, such as the late case of Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572, which had to do with the construction of a legislative grant to a corporation having perpetual succession, and did not involve the construction of the charter of a Kentucky city, such as is here under consideration.

The power to grant a perpetual franchise to telephone and similar companies desiring to use the streets and alleys of the city of Owensboro is said to be derived under § 10 of the charter, conferring upon the common council, in its 27th subsection, the right to regulate streets, alleys, and sidewalks, and all repairs thereof, in the city. Conceding that if this power were conferred without limitation it might authorize a grant in perpetuity of the character herein involved, the authority found in the 27th subsection, as well as other municipal powers, are all granted to the common council by the legislature of the state upon the following terms, preceding the grant of authority: "§ 10. The common council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, amend, and repeal all ordinances for the following purposes, to wit." In other words the authority granted to regulate the streets is limited by the express reservation that it shall be exercised subject to the power of the city to amend and repeal any ordinance so enacted.

In Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961, wherein this court held that a grant to a street railway company subject to the limitation of the right to amend, alter, or repeal was *subject[78 to future legislation ending the right of the street railway company to operate in the streets of the city, Mr. Justice Miller, who delivered the opinion of the court, stated the origin of statutory and legislative reservations of this character enacted since the decision of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629, construing corporate charters as contracts between the public authorities and the grantees, beyond legislative control and within the protection of the contract clause of the Federal Constitution. The learned justice said (p. 20):

"It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."

In view of that policy this court held that, whatever rights remained to its other property, the authority to run cars upon the streets of the city of Boston, being subject to the reservation, terminated upon the repeal of the ordinance.

If there is such right to repeal, the authorities are conclusive *that it may be[79 exercised so as to terminate the rights of the company to further use the streets. In a recent case (Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122), this court approved and reaffirmed this principle. In that case the Grand Rapids Hydraulic Company had been incorporated by the legislature of Michigan, and had constructed, and was then maintaining, an elaborate water system. The legislature repealed the charter, reservation to amend or repeal having been made in the original act. In aid of the contention that the re-

pealing act was void under the 14th Amendment to the Constitution, it was alleged that there were outstanding bonds and a mortgage on the company's plant, including its franchise to own and operate its system; also that, the city being a competitor of the company, the city authorities had secured the passage of the repealing statute by unfair means. This court said (pp. 598 et seq.):

"The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations. But we do not inquire into the knowledge, negligence, methods, or motives of the legislature, if, as in this case, the repeal was passed in due form. United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308. The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

" . . . By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases. Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Monongahela Nav. Co. v. United States, 148 U. S. 313, 338, 340, 37 L. ed. 463, 472, 473, 13 Sup. Ct. Rep. 622; 80]New Orleans Waterworks Co. v. *Louisiana, 185 U. S. 336, 353, 354, 46 L. ed. 936, 944, 945, 22 Sup. Ct. Rep. 691; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 438, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; Manigault v. Springs, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127. It would be a waste of words to try to make clearer than it is on its face, the meaning and effect of this reservation of the power to repeal.

" . . . The only question before us now is the validity of the judgment ousting the defendants from 'assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company.' This really is too plain to require the argument that we have spent upon it. We may add that it is a matter upon which the bondholders have nothing to say."

See also Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

It is said, however, and that seems to be the ground which the decision of the court upon this point rests, at last, that the reservation of the right to repeal does not clearly appear in the charter of Owensboro, as it did in the Massachusetts legislation considered in Greenwood v. Union Freight R. Co. supra, and it is said that such right, when it is claimed, must be clear and explicit. To my mind the purpose of the Kentucky legislature was evidenced with perfect clearness, for I think that the same law which gave the city the right, which otherwise would have rested with the legislature alone, of exercising authority over the streets, which in this case, it is held, authorized their use for telephone purposes, in unmistakable terms made such authority subject to the clearly stated and definite limitation named. Furthermore, the doctrine is well settled that legislative grants of municipal authority shall be construed most favorably to the public and against persons claiming thereunder,—a doctrine sanctioned by decisions of this court. Moran v. Miami County, 2 Black, 722, 17 L. ed. 342; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736. Surely, if the intention of the *Kentucky legislature[81 to reserve in the municipality the authority to repeal such grants as the one here involved is not clearly manifested, at least there is reasonable room for doubt, and such doubt must be resolved in favor of the public. If the doubt be determined in favor of the company, and a grant which is not clearly in perpetuity is held to be such, the effect is to tie the hands of the municipality from obtaining revenue from the use of property held by it in trust for all its people.

It is also said that the exercise of the reserved right to repeal in cases like this will have the effect to destroy contract rights, upon the strength of which large investments may have been made. But this argument overlooks the proposition that, if the grant was made subject to the right to revoke by subsequent action of the authority which made the grant, then no contract was entered into between the parties beyond the control of the reserved power of the municipality; for, as Mr. Justice Miller said in the Greenwood v. Union Freight R. Co. Case, under such "a provision . . . reserving to the legislature the right to amend or repeal, it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation." So, if this limitation in fact existed, the right to repeal was inherent in the authority which made the

grant, and the grantee is conclusively presumed to be aware of this limitation, and to make his investments subject to the exercise of the reserved right. Calder v. Michigan, supra. Moreover, if limited grants are to be construed into perpetuities, then the control over streets for railway, telephone, and other kindred enterprises of enormous value are granted to private corporations without compensation for the use of such valuable rights which belong to the municipality. Recent cases in this court have shown the great value of such privileges, and that investors are found who 82]are willing to pay for *the privilege of using the public streets for these purposes.

A single case is cited in the opinion of the court to sustain the conclusion reached upon this branch of the case, and that is State, Hudson Teleph. Co. Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123. An examination of that case shows that it did not involve the question now under consideration. There the telephone company was organized as such under the prevailing statutes of the state, and had obtained on certain conditions the permission of the municipality to use the streets in accordance with a provision in the statute that the designation of the streets to be used and manner of placing poles should first be secured. An ordinance was passed, revoking the permission, although the company had complied with the conditions, and the court held that the revoking ordinance was invalid. The court noticed the power reserved in the corporation act to repeal, suspend, and alter charters, and the power of the city council to repeal ordinances. The former was held to run to the legislature solely, and it was said that there was no provision in the act authorizing the municipality to revoke its permission. Of the latter the court said that the power to repeal was a general power arising from the power to pass ordinances, and existed without the express charter powers, and that such general power would not sustain the rescission of an act authorized by other legislation.

A somewhat diligent search has failed to discover cases exactly in point, construing a reservation of the character herein involved. The case of Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510, followed and approved in United R. & Electric Co. v. Hayes, 92 Md. 490, 48 Atl. 364, is, however, closely analogous. In that case the city granted a franchise to the railway company, permitting it to lay tracks in the streets of the city, and also to erect an elevated railway in a certain street. A statute passed to confirm 83] *the action of the city with respect to that part of the ordinance granting a franchise which related to the elevated railway contained a reservation to the city of "the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance [granting the franchise] as it has or would have in respect to any ordinance passed under its general powers." This reservation was held to authorize the repeal of the grant in question. The case upon this point meets the argument made in the opinion in this case, that the right to amend, alter, or repeal would have existed without the statute, and cannot be held to cover the grant of franchise privileges to use the streets. Undoubtedly this right of repeal would have existed, and hence its insertion was unnecessary, unless it was to have some further purpose than that the law already gave,—the general power of a municipality to repeal ordinances of a legislative character. We think the intention in this case was the same as in the Maryland case, to preserve in the municipality authority over the streets in the interests of the public.

In my view the case in its present attitude comes to this: The permission to place poles and string wires in the city of Owensboro was granted under a charter which expressly reserved the right to repeal by subsequent act of the municipal legislature. In the face of this authority, and presumably with knowledge of it, the company has entered upon the streets and made use of them for the purposes intended. Holding its grant subject to this superior right in the city to end it, I think the subsequent repealing ordinance was within the power of the municipality.

Mr. Justice McKenna, Mr. Justice Hughes, and Mr. Justice Pitney concur in this dissent.

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*BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited, Plff. in Err., [84

v.

BOISE CITY. (No. 573.)

BOISE CITY, Plff. in Err.,

v.

BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited. (No. 639.)

(See S. C. Reporter's ed. 84-98.)

Error to district court — Federal question.

1. A decree of a Federal district court

NOTE.—On direct review in Federal Supreme Court of judgments of district or

in a suit in which it was claimed that a municipal ordinance imposing license fees, as a law of the state, for the use and occupation of the city streets by the pipes of a water distributing system, is in contravention of the Federal Constitution, is one which, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, may be directly reviewed by writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

**Error to district court — extending review beyond Federal question.**

2. The jurisdiction of the Federal Supreme court on writ of error to review a decision of a Federal district court in a case in which a constitutional question is involved extends to a determination not only of such question, but of every other question properly arising in the case.

[For other cases, see Appeal and Error, 4297-4300, in Digest Sup. Ct. 1908.]

**Error to district court — constitutional question — cross appeal on non-Federal question.**

3. A ruling against the defendant below upon a non-Federal question may be brought up for review by a cross writ of error, where the plaintiff below has sued out upon constitutional grounds a direct writ of error from the Federal Supreme Court to a district court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

**Water supply — franchise — property right.**

4. A municipal grant of the right to occupy the city streets with the pipes of a water-distributing system is, when accepted by the grantee, not a mere revocable license, but is a substantial property right.

[For other cases, see Franchise; Municipal Corporations, II. f; Waters, III. a, in Digest Sup. Ct. 1908.]

**Water supply — franchise — duration.**

5. A municipal grant to individuals for an indefinite term, of the right to lay in the city streets and to repair the pipes of a water-distributing system, if affected at all by Idaho Rev. Stat. § 2710, which, after prohibiting corporations from supplying a municipality with water without municipal assent, provides that "no contract or grant must be made for a term exceeding fifty years," is not rendered thereby ineffective, but, at most, is limited to a term of fifty years.

[For other cases, see Franchise; Municipal Corporations, II. f; Waters, III. a, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — water supply — franchise.**

6. The obligation of a municipal ordinance granting an irrevocable easement to lay in the city streets and repair the pipes of a water-distributing system is unconstitutionally impaired by a subsequent ordinance requiring the payment to the city of a monthly rental for such use and occupation of the streets.

[For other cases, see Constitutional Law, IV. g, 4, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — free water for fire purposes.**

7. The burden of furnishing free water for fire purposes, imposed by Idaho Rev. Stat. § 2711, upon all corporations formed to supply water to cities and towns, could be removed, as was done by the amendment of March, 1905, without unconstitutionally impairing the obligation of any contract.

[For other cases, see Constitutional Law, 1314-1324, in Digest Sup. Ct. 1908.]

**Water supply — free water for fire purposes.**

8. A municipality cannot successfully claim that a water company is under obligation to furnish free water for fire purposes, where a charge for water furnished for such purposes is included in the schedule of water rates established by water commissioners conformably to Idaho Rev. Code, § 2839, providing that the decision of such commissioners must fix and determine water rates, which shall continue in force until new rates shall be established.

[For other cases, see Municipal Corporations, II. f; Waters, III. a, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — implied contract.**

9. A finding of the existence of a contract between a municipality and a water company, with reference to the supply of water for fire purposes, is sustained by evidence that a schedule of water rates, including a charge for water for such purpose, adopted conformably to and made effective by Idaho Rev. Code, § 2839, had been reported to the city by the commissioners appointed under that section, and that the city for some months paid the rate so fixed, and continued to use the water for fire purposes after it had notified the water company that it would pay no further bills for such service, and the water company, disregarding such notice, had continued to maintain its service for fire purposes.

[For other cases, see Evidence, XII. 1, in Digest Sup. Ct. 1908.]

[Nos. 573 and 630.]

Argued May 7 and 8, 1913. Decided June 16, 1913.

IN ERROR and on Cross Writ of Error to the District Court of the United States for the District of Idaho to review a decree allowing a counterclaim for monthly license fees or rentals against the liability of a municipality to pay a water company for water furnished for fire purposes. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

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circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894, 57 L. ed.

On the establishment and regulation of municipal water supply—see note to State ex rel. Hallanan v. Gossell, 61 L.R.A. 33

upon diversity of citizenship, and upon that ground the water company removed the action from the state court to the circuit court of the United States. One of the defenses of the water company, asserted in its answer, was that it had by purchase and agreement succeeded to grants to street easements which had not expired, and that ordinance No. 678 of June 7, 1906, imposing upon it a license fee or rental for the use and occupation of the streets of the city with its pipes and appliances for the distribution of water, was in derogation of the street rights theretofore granted, and void as in contravention of article 1, § 10 of the Constitution of the United States, and in violation of the 14th Amendment thereto. This claim was denied and the ordinance held valid. Upon that and other issues in the case the circuit judge found for the plaintiff, the facts being stipulated and a jury waived. The case was therefore one 100] *in which jurisdiction had been invoked wholly upon diversity of citizenship, but in the course of the case there arose a question as to the constitutionality of the ordinance which was the foundation of the plaintiff's right. The unsuccessful party had, therefore, a right to bring the case direct to this court, or, at its election, carry it to the circuit court of appeals. It elected the latter course. The circuit court of appeals might have certified the question to this court, or it might decided it along with the other questions in the case. But from its judgment no writ of error will lie to this court, as the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488] does not contemplate two reviews, one by the circuit court of appeals and another by this court in such cases. For this reason the writ of error must be dismissed. Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

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OLD COLONY TRUST COMPANY, Appt.,
v.
CITY OF OMAHA.

(See S. C. Reporter's ed. 100–122.)

**Federal courts — following decisions of state courts — local law.**

1. Decisions of the state courts relating to matters of local law, such as the construction of the state Constitution and statutes, and the powers of local municipal corporations, must be regarded by the Federal courts as controlling when their application involves no infraction of any right granted or secured by the Constitution of the United States.

[For other cases, see Courts, VII. c, in Digest Sup. Ct. 1908.]

**Franchise — term — reservation in grant.**

2. A reservation in the municipal grant of a franchise for the distribution of electric current that, whenever the city council shall by ordinance declare the necessity of removing the poles or wires from the public highways, the grantee shall, within sixty days, remove the same, does not indicate that the franchise was not in perpetuity, but only for the corporate life of the grantee.

[Franchises generally, see Franchise, in Digest Sup. Ct. 1908.]

**Franchise — construction — practical interpretation.**

3. A municipal grant of a franchise to do a general electric light business must be deemed in Nebraska to include the distribution of electric current for power and heating as well as for lighting, where such has been the practical interpretation of the franchise by both the city and the grantee, in view of the decisions of the Nebraska courts that the doctrine of practical interpretation of contracts is applicable to public-service franchises.

[For other cases, see Contracts, 258–263; Franchise, in Digest Sup. Ct. 1908.]

**Judgment — conclusiveness — mortgagee.**

4. A decree against an electric light and power company in a controversy with a municipality over its franchise does not prevent the trustee in a mortgage given by such company from maintaining a similar suit against the municipality, where the trustee's rights and those of the bondholders whom it represents were acquired long prior to the first suit, and the trustee was not a party to that suit.

[For other cases, see Judgment, III. k, 6, in Digest Sup. Ct. 1908.]

[No. 754.]

Argued February 27 and 28, 1913. Ordered for reargument March 17, 1913. Reargued April 10 and 11, 1913. Decided June 16, 1913.

APPEAL from the District Court of the United States for the District of Nebraska to review a decree dismissing for want of equity a suit by a trustee in a mort-

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NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; and United States

gage of a public-service corporation to enjoin a municipality from interfering with its franchise. Reversed and remanded with a direction to enter a decree for complainant.

The facts are stated in the opinion.

Mr. William D. McHugh argued the cause and filed a brief for appellant:

While we contend that the grant of the right of way by the ordinance in question was of such right "in perpetuity," we do not claim that the right vested in the New Omaha Thomson-Houston Electric Light Company or its assigns was perpetual under all conditions and circumstances. The grant was not a gratuity, but, as a consideration therefor, carried an obligation on the part of the company acting under the same to render to the public the service to secure which the grant was made.

American Waterworks Co. v. State, 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; Potwin Place v. Topeka R. Co. 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; Nebraska Teleph. Co. v. Fremont, 72 Neb. 25, 99 N. W. 811; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; State v. Sioux City & P. R. Co. 7 Neb. 374.

The provision in the ordinance in question, to the effect that whenever the city council shall, by ordinance, declare the necessity of removing from the public streets of the city of Omaha the telegraph, telephone, or electric poles, the grantee company shall, within sixty days from the passage of the ordinance, remove its poles from such streets and alleys, was not a reservation of a power to terminate at will the grant of the right of way.

New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69.

A public-service corporation may accept a grant of a right of way for a period longer than its corporate existence.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

As the ordinance in question granted a right of way in terms which expressly recognized the right of assignment, and without limitation as to time, and with no reservation of power in the city to alter or revoke the same, under general principles of law the grant of the right of way to the company or assigns was in perpetuity.

Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Morristown v. East Tennessee Teleph. Co. 53 C. C. A. 132, 115 Fed. 304; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572.

It is the settled law of Nebraska, evidenced by a series of decisions by the supreme court of that state, (1) that an ordinance such as the one in question grants to the company named, on acceptance, a right of way in perpetuity, and (2) that cities in Nebraska have power to make such grants in perpetuity.

Plattsmouth v. Nebraska Teleph. Co. 80 Neb. 460, 14 L.R.A.(N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588; Nebraska Teleph. Co. v. Fremont, 72 Neb. 25, 99 N. W. 811; Sharp v. South Omaha, 53 Neb. 700, 74 N. W. 76; State ex rel. Caldwell v. Citizens' Street R. Co. 80 Neb. 357, 114 N. W. 429; State ex rel. Caldwell v. Lincoln Street R. Co. 80 Neb. 333, 14 L.R.A.(N.S.) 336, 114 N. W. 422, 118 N. W. 326.

The law of the state of Nebraska as declared by its supreme court construing the powers of cities under the statutes of that state, and construing the effect of ordinances passed by such cities pursuant to such charter authority, entered into and became part of the contract evidenced by the ordinance in question and its acceptance.

Brine v. Hartford F. Ins. Co. 96, U. S. 634, 24 L. ed. 861; Edwards v. Kearsey, 96 U. S. 595, 24 L. ed. 793; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 71, 46 L. ed. 89, 22 Sup. Ct. Rep. 26.

Where, upon the faith of a state decision affirming the validity of contracts made or bonds issued under a statute, other contracts have been made or bonds issued under similar statutes, neither the legislature nor the judiciary of a state can modify the law so as to impair the obligation of the contract previously made.

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ex rel. Buts v. Muscatine, 19 L. ed. U. S. 490.

On questions of state law, as to which the decisions of the highest state court must be followed in actions originating in, or removed to, the Federal courts, see note to Snare & T. Co. v. Friedman, 40 L.R.A. (N.S.) 380.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Taylor v. Ypsilanti, 105 U. S. 71, 26 L. ed. 1012; Wade v. Travis County, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458.

The city of Omaha and the company operating the plant under the ordinance in question have, for more than twenty years, in carrying out the provisions of the ordinance, uniformly placed a practical construction upon the ordinance, interpreting the same to mean that the company had the right thereunder to distribute electric energy for power and heat purposes.

Atty. Gen. v. Drummond, 1 Drury & W. 353; Brown v. United States, 113 U. S. 570, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Clark's Run & S. River Turnp. Road Co. v. Com. 96 Ky. 525, 29 S. W. 360; District of Columbia v. Gallaher, 124 U. S. 510, 31 L. ed. 527, 8 Sup. Ct. Rep. 585; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; New York v. Starin, 106 N. Y. 1, 12 N. E. 631; Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 40 So. 106; St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121; Dodge County School Dist. v. Estes, 13 Neb. 53, 13 N. W. 16; State ex rel. Seth Thomas Clock Co. v. Cass County, 60 Neb. 566, 83 N. W. 733; United States v. Hill, 120 U. S. 180, 30 L. ed. 631, 7 Sup. Ct. Rep. 510; United States v. Moore, 95 U. S. 763, 24 L. ed. 589; United States v. Burlington & M. River R. Co. 98 U. S. 341, 25 L. ed. 200.

The city of Omaha, by its legislation and acts during twenty years, has become and is estopped to deny the right of the company operating the plant to distribute through its system electric current for power and heat purposes, as and to the extent it was doing when the resolution complained of was passed.

Omaha & C. B. Street R. Co. v. Omaha, 90 Neb. 6, 132 N. W. 731; State ex rel. Caldwell v. Citizens' Street R. Co. 80 Neb. 357, 114 N. W. 429; State ex rel. Caldwell v. Lincoln Street R. Co. 80 Neb. 333, 14 L.R.A.(N.S.) 336, 114 N. W. 422, 118 N. W. 326.

The decision in the case brought by the Omaha Electric Light & Power Company cannot affect the decision in this cause, since neither the bondholders nor their trustee were parties to that litigation.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296.

*Messrs. Benjamin S. Baker and William O. Lambert* argued the cause, and, with Messrs. John A. Rine and L. J. Te-Poel, filed a brief for appellee:

No necessity existed for a perpetual grant.

Blair v. Chicago, 201 U. S. 400–505, 50 L. ed. 801–845, 26 Sup. Ct. Rep. 427; Logansport R. Co. v. Logansport, 114 Fed. 688; Omaha Electric Light & P. Co. v. Omaha, 102 C. C. A. 601, 179 Fed. 455; Pennsylvania R. Co. v. Canal Comrs. 21 Pa. 22; Rock Island v. Central U. Teleph. Co. 132 Ill. App. 248; People ex rel. Shallberg v. Central U. Teleph. Co. 232 Ill. 260, 83 N. E. 829; People ex rel. Chicago v. Chicago Teleph. Co. 220 Ill. 238, 77 N. E. 245; Snell v. Chicago, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532; Campbellsville Teleph. Co. v. Lebanon, L. & L. Teleph. Co. 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296.

The municipal authorities were without power to make a perpetual grant.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co. 79 Ala. 465, 58 Am. Rep. 615; Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 40 So. 106; McQuillin, Mun. Ord. § 200; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261.

The legislature of the state had not authorized the municipal authorities to make a perpetual grant.

Omaha Electric Light & P. Co. v. Omaha, 102 C. C. A. 601, 179 Fed. 455; Ottawa v. Carey, 108 U. S. 112, 27 L. ed. 669, 2 Sup. Ct. Rep. 361; Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. Supp. 789; Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co. 24 Fed. 306; Barnett v. Denison, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819; Logansport R. Co. v. Logansport, 114 Fed. 688; Boise City Artesian Hot & Cold Water Co. v. Boise City, 59 C. C. A. 236, 123 Fed. 232; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135; People Pass. R. Co. v. Memphis City R. Co. 10 Wall. 38, 19 L. ed. 844; Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. Supp. 789; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Danville Water Co. v. Danville, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; State ex rel. Marshall v. Wyandotte County Gas Co. 88 Kan.

165, 127 Pac. 639; Woodland v. Leech, — Cal. —, 127 Pac. 1040.

The supreme court of Nebraska has not decided that city authorities with charter powers similar to those of Omaha at the time are vested with authority to make a perpetual grant.

Holliday v. Brown, 34 Neb. 232, 51 N. W. 839; Nebraska Teleph. Co. v. Fremont, 72 Neb. 25, 99 N. W. 811; Plattsmouth v. Nebraska Teleph. Co. 80 Neb. 460, 14 L.R.A. (N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588; Sharp v. South Omaha, 53 Neb. 700, 74 N. W. 76; State ex rel. Caldwell v. Lincoln Street R. Co. 80 Neb. 333, 14 L.R.A. (N.S.) 336, 114 N. W. 422, 118 N. W. 326; State ex rel. Caldwell v. Citizens' Street R. Co. 80 Neb. 357, 114 N. W. 429; Omaha Electric Light & P. Co. v. Omaha 102 C. C. A. 601, 179 Fed. 455.

The life of the grant was limited by the life of the grantee.

Omaha Electric Light & P. Co. v. Omaha, supra; Blair v. Chicago, 201 U. S. 400–505, 50 L. ed. 801–845, 26 Sup. Ct. Rep. 427; Detroit v. Detroit Citizens' R. Co. 184 U. S. 368, 388–395, 46 L. ed. 592, 603–611, 22 Sup. Ct. Rep. 410; State ex rel. St. Louis v. Laclede Gaslight Co. 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Wyandotte Electric Light Co. v. Wyandotte, 126 Mich. 43, 82 N. W. 821; Rock Island v. Central U. Teleph. Co. 132 Ill. App. 248; Virginia Canon Toll Road Co. v. People, 22 Colo. 429, 37 L.R.A. 711, 45 Pac. 398; People ex rel. Shallberg v. Central U. Teleph. Co. 232 Ill. 260, 83 N. E. 829; People ex rel. Chicago v. Chicago Teleph. Co. 220 Ill. 238, 77 N. E. 245; Snell v. Chicago, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532; Venner v. Chicago City R. Co. 236 Ill. 349, 86 N. E. 266; Campbellsville Teleph. Co. v. Lebanon, L. & L. Teleph. Co. 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572.

The reservation in the grant should control against the claim of perpetuity.

Omaha Electric Light & P. Co. v. Omaha, 102 C. C. A. 601, 179 Fed. 455; Southern Bell Teleph. & Teleg. Co. v. Richmond, 44 C. C. A. 147, 103 Fed. 31; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Stein v. Bienville Water Supply Co. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143.

The city of Omaha has never practically or otherwise construed the grant to mean or to authorize the distribution of current for power.

Omaha Electric Light & P. Co. v. Omaha, 172 Fed. 494; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202; Charles River Bridge Co. v. Warren Bridge Co. 11 Pet. 496, 9 L. ed. 803; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787; Citizens' F. Ins. Secur. & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948; Morris v. Thomas, 57 Ind. 316; State ex rel. Seth Thomas Clock Co. v. Cass County, 60 Neb. 566, 83 N. W. 733; Dodge County School Dist. v. Estes, 13 Neb. 52, 13 N. W. 16; Hale v. Sheehan, 52 Neb. 184, 71 N. W. 1019; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135; Abbott, Mun. Crop. § 907; Chicago General Street R. Co. v. Ellicott, 88 Fed. 941; Scranton Electric Light & Heat Co.'s Appeal, 122 Pa. 154, 1 L.R.A. 285, 9 Am. St. Rep. 79, 15 Atl. 446.

The city of Omaha has never estopped itself to deny the company the right to distribute current for power.

Omaha Electric Light & P. Co. v. Omaha, 172 Fed. 494; Crary v. Dye, 208 U. S. 515, 52 L. ed. 595, 28 Sup. Ct. Rep. 360; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Detroit v. Detroit City R. Co. 56 Fed. 867; Mobile v. Sullivan Timber Co. 63 C. C. A. 412, 129 Fed. 298; Philadelphia Mortg. & T. Co. v. Omaha, 63 Neb. 280, 57 L.R.A. 150, 89 Am. St. Rep. 442, 88 N. W. 523; Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; Story, Eq. 391; State ex rel. Caldwell v. Lincoln Street R. Co. 80 Neb. 333, 14 L.R.A.(N.S.) 336, 114 N. W. 422, 118 N. W. 326; State ex rel. Caldwell v. Citizens' Street R. Co. 80 Neb. 358, 114 N. W. 429; Omaha & C. B. Street R. Co. v. Omaha, 90 Neb. 6, 132 N. W. 731.

The appellant is concluded by the adjudication in the case of Omaha Electric Light & P. Co. v. Omaha.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 313, 38 L. ed. 455, 14 Sup. Ct. Rep. 592; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Mumma v. Potomac Co. 8 Pet. 281, 8 L. ed. 945; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Duluth v. Duluth Gas & Water Co. 45 Minn. 210, 47 N. W. 781; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Calder v. Michigan, 218 U. S. 591, 54 L. ed.

1163, 31 Sup. Ct. Rep. 122, 153 Mich. 724, 126 Am. St. Rep. 550, 117 N. W. 314.

Mr. Justice Van Devanter delivered the opinion of the court:

The principal questions presented by this suit are, first whether the Omaha Electric Light & Power Company, which will be spoken of as the electric company, has a subsisting franchise to occupy and use the streets, alleys, and public grounds of the city of Omaha, Nebraska, in the distribution of electric current, and, second, whether, if so, the franchise is limited to the distribution of such current for lighting purposes, or includes its distribution for power and heating purposes. If there [109] be a franchise, it rests *primarily upon the following ordinance adopted by the council of the city in December, 1884:

"The New Omaha Thompson-Houston Electric Light Company, or assigns, is hereby granted the right of way for the erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general electric light business through, upon, and over the streets, alleys, and public grounds of the city of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance: Provided, That said company shall at all times, when so requested by the city authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires that may be necessary for the use of the police or fire department of the city; and further provided, such poles and wires shall be erected so as not to interfere with ordinary travel through such streets and alleys; and provided, that whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any poles or wires so erected, the company using and operating such poles and wires shall, upon receiving twelve hours' notice thereof, temporarily remove such poles and wires from such place as must necessarily be crossed by such vehicle or structure; and provided further that whenever the city council shall by ordinance declare the necessity of removing from the public streets or alleys of the city of Omaha the telegraph, telephone, or electric poles or wires thereon constructed or existing, said company shall, within sixty days from the passage of such ordinance, remove all poles and wires from said streets and alleys by it constructed, used, or operated."

The Thompson Company, to which the grant was made, was not then incorporated, but was subsequently incorporated under the laws of Nebraska for a term which was to expire September 26, 1905. It accepted the grant, *constructed and put into [110] operation a central generating station and an extensive distributing system, and therebe placed itself in a position to supply electric current to those desiring to use it. At first the current was used almost exclusively for lighting purposes, but it came gradually to be used for power and heat, and in a few years the Thompson Company held itself out as distributing current for all three purposes. The generating plant was enlarged and improved from time to time, and the distributing system extended and adjusted, to meet the increasing demand for current for power and heat as well as for light. In 1903 the entire plant and all rights under the ordinance were transferred by the Thompson Company to the electric company, and the business established by the former has since been conducted in increasing volume by the latter. In 1891 the gross earnings from current for lighting purposes was $104,646.63, and for power and heat, $4,237.67. In 1903 these figures had increased to $261,421.89 and $50,390.11, respectively, and in 1908 to $563,447.57 and $130,537.72. By a series of ordinances, beginning in 1892, the city regulated in material ways the business of the two companies, each in turn, in distributing current for the three purposes, and by ordinances adopted in 1902 and 1904 the city required all their wires within designated districts, whether the current was used for light or for power or heat, to be placed in underground conduits, the ordinances being duly obeyed at a cost of $479,215. After March 4, 1902, the two companies, each in turn, were required to pay, and did pay, to the city, 3 per cent of the gross earnings from their business, including the receipts from the use of current for power and heat. The city also became and remained a purchaser of current in substantial quantities, to be used for power purposes.

In these and various other ways disclosed by the record the city acquiesced in, encouraged, and directly sanctioned *the ac- [111] tion of the two companies in successively equipping and adjusting the electric plant, at great expense, for the distribution of current for power and heat, knowing that they were engaging therein under a claim of right under the ordinance of 1884. Fifteen circuits were established to supply the current for those purposes exclusively. Prior to May 26, 1908, no objection whatever was made by the city to the use of the streets, alleys, and public grounds for those purposes, but, on the contrary, it was satisfied and content therewith. On that day

the city council, to use the words of the city's answer, "elected to terminate" that use, and passed the following resolution, which was approved by the mayor:

"Resolved, by the city council of the city of Omaha, the mayor concurring, that the city electrician be and he is hereby ordered and directed to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light & Power Company, transmitting electricity to private persons or premises, to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light & Power Company from furnishing or transmitting from the conduits or wires electricity to private houses or premises for heat or power purposes."

This suit is prosecuted by the Old Colony Trust Company, a Massachusetts corporation, against the city of Omaha, to enjoin the enforcement of that resolution. The trust company is the trustee in a mortgage executed in 1903 by the electric company upon all of its property, including its rights under the ordinance of 1884, to secure the payment of upwards of $2,000,000 of bonds issued by it in 1903 and 1904. The claim of the trust company, as set forth in the bill, is that the resolution of 1908 is a law of the state impairing the obligation of the contract resulting from the ordinance of 1884 and the action of the 112] *parties in interest thereunder, on the faith of which contract the bonds were purchased by their several holders, and that the resolution is therefore void, because repugnant to § 10 of article 1 of the Constitution of the United States.

The first question to be considered is whether the privilege or franchise granted by the ordinance of 1884 is still subsisting; because if it has expired, it will not be necessary to inquire whether it and the action of the parties thereunder resulted in any contractual rights respecting the use of the streets of the city in the distribution of current for power and heating purposes.

What was the life or duration of the privilege granted by the ordinance? Was it in perpetuity or for the corporate existence of the grantee? There is no claim, nor could there reasonably be, that it was during the pleasure of the city, or revocable at will. The trust company contends that it was a grant in perpetuity, and the city that it was for the corporate existence of the grantee. While the arguments have taken a wide range, it is of first importance to give attention to the statutes and decisions of Nebraska, because the city, being a creature of that state, derives its powers from the laws thereof and is necessarily within the influence of the decisions of the state's court of last resort.

By the charter of the city in force at the time, the city council was charged with "the care, management, and control of the city," and was given power "to provide for the lighting of streets," and "to care for and control . . . streets, avenues, parks, and squares within the city." Laws 1883, p. 89, chap. 10, § 15, subdivs. 8, 24.

In Sharp v. South Omaha, 53 Neb. 700, 705, 74 N. W. 76, the supreme court of the state had occasion to consider similar charter provisions and to determine whether and for what time they authorized the city council to grant *a franchise[113 to use the streets for supplying gas to the people of the city. It was held that there was "an ample grant of power, unqualified as to persons, method, or time, to regulate the laying down of mains, the sale and use of gas, and the rate to be charged therefor."

In Nebraska Teleph. Co. v. Fremont, 72 Neb. 25, 29, 92 N. W. 811, there was involved a grant by the city council, under like charter provisions, to the Fremont Telephone Company, an unincorporated association, of the right to erect and maintain telephone poles and wires in the streets of the city, the ordinance being silent as to the life of the grant. The court said: "By the terms of the ordinance, there was a grant to the association, in perpetuity, of a right of way or easement over all its public ways, without restriction or limitation."

State ex rel. Caldwell v. Lincoln Street R. Co. 80 Neb. 333, 343, 14 L.R.A.(N.S.) 336, 114 N. W. 422, involved the construction of an act (Laws 1877, p. 134), relating to the acquisition of a street franchise for a street railroad company. The act provided for the submission to the electors of the simple question whether the grant should be made through particular streets, which were required to be designated in the articles of incorporation and in the notice of the election, and also provided that if the consent of the electors was given, the railroad company could proceed with the construction and operation, "subject to such rules and regulations as may be prescribed by ordinance of such city." The act said nothing about the duration of the right. The court said: "This consent of the electors, when legally given, to a legal proposition submitted to them, constitutes, in our view, a grant of a right of way on and over the streets named in the articles of incorporation and in the notice for the election, and confers upon the railway company an easement in the streets which is irrevocable after the company has, within

a reasonable time, acted upon the per-
114]mission given, and constructed *its lines of road." To the same effect is State ex rel. Caldwell v. Citizens' Street R. Co. 80 Neb. 357, 360, 114 N. W. 429.

In Plattsmouth v. Nebraska Teleph. Co. 80 Neb. 460, 466, 14 L.R.A.(N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588, there was brought in question the right of a telephone company under an ordinance granting to it, its successors and assigns, the right of way for the erection and maintenance of poles and wires through the streets, alleys, and public grounds of the city. The provisions of the city charter were substantially like those here. The power of the city to grant the right, or to make it more than a right revocable at will, was challenged, but the court denied both branches of the contention, saying: "Under the general power given to the plaintiff [the city] by its charter and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds cannot be questioned," citing Nebraska Teleph. Co. v. Fremont, supra. The city had passed an ordinance, not grounded upon any matter of necessity, requiring the poles and wires to be removed from some of the streets, and the court pronounced that ordinance invalid.

But while these decisions take a uniform view of the power of the cities of the state and of the effect of their action in cases such as this, and show that the grant made by the ordinance of 1884 must be regarded as in perpetuity, they also show that such grants are deemed and held by that court to be ever subject to the full exertion of the police power of the state in respect of the rates to be charged, the mode of conducting the business, and the character and quality of the service rendered. And it is further held that the public nature of the grant explains and justifies it, and that it is forfeitable for acts of abuse, abandonment, or nonuser, but cannot be taken away or impaired arbitrarily.

But it is said that this grant cannot be
115]held to be in *perpetuity, because to do so is to bring it in conflict with § 16 of article 1 of the state Constitution, which declares that "no law making any irrevocable grant of special privileges or immunities shall be passed;" and this contention is made although it is conceded, as it must be, that the grant is not exclusive, and does not prevent the city from making like grants to others, or from establishing and operating a competing municipal plant. The contention is answered and shown to *be untenable* by the decision of the supreme court of the state in Plattsmouth v. Nebraska Teleph. Co. supra, from which we excerpt the following (p. 464):

"The argument upon which it attempts to maintain the invalidity of the statute [ordinance] is as follows: Section 15, art. 3 of our Constitution, prohibits the legislature from passing local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever; and it is said that the legislature cannot delegate to a municipality a power which it cannot itself exercise. It is claimed that the ordinance in question is an attempt to grant to the defendant a special privilege or franchise, and that this is beyond the power of the municipal authorities. If we should concede (which we do not) that a general law, granting to cities and towns the powers which are usually found in their charters, did not confer upon such municipalities the power to pass and enforce special ordinances suited to their local conditions, still the ordinance in question is not subject to the criticism made upon it. A special privilege in constitutional law is a right, power, franchise, immunity, or privilege granted to, or vested in, a person or class of persons to the exclusion of others, and in derogation of common right. . . . Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corporations the same privileges awarded to the defendant. The contention, *therefore, that ordinance[116
No. 91 is void and confers no right upon the defendant, cannot be sustained."

To the state decisions here cited, counsel for the city interposes the objection that they are not well grounded, and that some of them go beyond what is expressed in the syllabus. We need not say more of the first branch of the objection than that, as the decisions relate to matters of local law, namely, the construction of the state Constitution and statutes and the powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States. Such an infraction is not suggested, nor could it reasonably be. The other branch of the objection is not based upon any statute or rule of court in Nebraska, giving controlling effect to the syllabus. At most it rests upon a statement in Holliday v. Brown, 34 Neb. 232, 51 N. W. 839, respecting "an unwritten rule" to that effect, but what was said upon the subject in that case has been so pointedly criticized and so far re-

strained in Williams v. Miles, 68 Neb. 479, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306, that it is not controlling. Of course, it ought not to be given greater effect here than in the courts of the state.

We have seen that the ordinance of 1884 contained the following reservation or qualification: "That whenever the city council shall by ordinance declare the necessity of removing from the public streets or alleys of the city of Omaha the telegraph, telephone, or electric poles, or wires thereon constructed or existing, said company shall, within sixty days from the passage of such ordinance, remove all poles and wires from said streets and alleys by it constructed, used, or operated." It is claimed that this militates against the theory that the grant was in perpetuity, and indicates, notwithstanding the state decisions before cited, that it was intended to endure only during the corporate existence of the 117]grantee. We think the *suggestion is without force, and that the reservation or qualification has no bearing upon the question whether the franchise was perpetual or for the life of the grantee. The term for which it was granted depends upon other considerations, for the reservation or qualification applies with equal force whether the term be one or the other. What is meant undoubtedly is that, whenever there is public necessity for removing the poles and wires from the streets and alleys, the council shall have power by ordinance to require that that be done. It is not claimed that the ordinance of 1908 was grounded upon any such necessity. The existence of one is not recited in the ordinance, is not alleged in the city's answer, and is not shown by the evidence. In this aspect, then, the case is like that in Plattsmouth v. Nebraska Teleph. Co. supra, where the supreme court of the state said (p. 466): "That the rights of the defendant in the streets of the city must yield to public necessity . . . is beyond question or dispute; but, having acquired a right in the streets, and having made expenditures on the strength of the grant extended by the city, the authorities are quite uniform that this right cannot be taken away in an arbitrary manner and without reasonable cause."

Concluding, as we do, that the franchise has not expired, but is still subsisting, we come to the question whether it is limited to the distribution of electric current for lighting purposes, or includes its distribution for power and heat.

This question has been elaborately discussed at the bar and in the briefs, and the record contains a large volume of evidence taken for the purpose of shedding light, as is said, upon what commonly was understood, when the ordinance was adopted, as "a general electric light business,"—that being the phrase used to designate the purpose for which the street franchise was granted. We do not find it necessary to enter upon an original consideration *of[118 the meaning of that phrase or of the rules which ordinarily would be applicable in interpreting it.

Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence. Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. ed. 594, 596; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 273, 24 L. ed. 410, 411; District of Columbia v. Gallaher, 124 U. S. 505, 510, 31 L. ed. 526, 527, 8 Sup. Ct. Rep. 585; School District v. Estes, 13 Neb. 52, 13 N. W. 16; State ex rel. Seth Thomas Clock Co. v. Cass County, 60 Neb. 566, 572, 83 N. W. 733. Although not strictly such, this rule is sometimes treated as a branch of the law of estoppel. Whether in a case permitting the exercise of an independent judgment we should apply it to franchise contracts such as the one here, we need not consider. In Nebraska, according to the settled course of decision in that jurisdiction, the rule is applicable to them.

In State ex rel. Caldwell v. Lincoln Street R. Co. supra, there was involved the right of a street car company to use the streets of the city under a franchise irregularly obtained twenty years before. The irregularity consisted in the submission to the electors, under the statute before mentioned, of a blanket proposition covering all the streets, instead of one specifying particular streets and the termini of the proposed lines. But, notwithstanding the irregularity, the railroad company, after a favorable vote upon the blanket proposition, proceeded at great expense, and with the acquiescence of all concerned, to the construction and operation of the road through several streets of the city, and continued thereafter in its operation without objection until the commencement of the suit, which was a proceeding in quo warranto in the name of the state, brought on the relation of a local officer. Although pronouncing the election irregular, and holding that no right would have been required had the objection been seasonably made, the court said:

*(P. 346.) "So far as these lines have[119 been constructed, we think the defendant may claim an easement over the streets occupied, but the blanket license under which

the defendant claims the right to extend its lines or to go upon other streets must be denied.

"As to the constructed lines, it would be manifestly unjust not only to the defendant, but to the holders of its securities, to now oust it of rights and privileges which it and those through whom it takes title have been claiming and exercising for years, with knowledge and acquiescence on the part of the state. The state, like individuals, may be estopped by its act, conduct, silence, and acquiescence."

(P. 351.) "Our conclusion is that the Lincoln Traction Company is the owner of the constructed lines of street railway of which it is now in possession, and that it has right and authority to maintain and operate the same, that its purchase of the lines formerly owned by the Lincoln Street Railway Company does not invest it with right or power to extend its lines, or to take possession of streets, or parts of streets, not now occupied by its completed lines, and that such extensions cannot be made, except by proceeding, as required by law, to obtain an additional franchise for that purpose, and the consent of the electors of the city to such extensions as it may desire to make, and such new lines as it may propose to construct."

State ex rel. Caldwell v. Citizens' Street R. Co. supra, was a similar case, in which the court said:

(P. 361.) "The manner in which the question of the consent of the electors of the city was submitted was clearly irregular, and the affirmative vote cast thereon just as clearly conferred no power upon the railway companies to use the streets of the city beyond the time when that right should be questioned by some proper authority. But we are not prepared to say that, where the companies acted in good faith and ex-[120]pended their *money in the construction of lines under a supposed right to occupy the streets, and this right was not questioned until the bringing of the present action, they or those claiming under them should be ousted from the possession of such streets as are now occupied by their lines, and their property rendered worthless. Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect.

(P. 362.) "Upon the record before us, we are of opinion that the Citizens' Street Railway Company is entitled to the use of the streets now occupied by it for street railway purposes so far as its lines are completed and in operation, that it has no right to extend its lines without further authority from the electors of the city."

The case of Omaha & C. B. Street R. Co. v. Omaha, 90 Neb. 6, 132 N. W. 731, decided in 1911, before the commencement of the present suit, is directly in point. It was a suit by the street railway company to enjoin the city from the enforcement of a paragraph or part of the resolution of 1908 which is here in controversy, the difference between the two paragraphs being that the first was directed against the electric company, and required it to cease using the streets of the city in the transmission of electricity for power and heat, while the second paragraph was directed against the street railway company, and required it to cease using the streets in the transmission of current for light, power, and heat. The two cases are alike in all material respects, save that the street railway company had been for years and was furnishing electric current for light, power, and heat as an incident to the use of electrical energy as a motive power in propelling its cars, and also that that company's incidental business had not been and was not as *ex-[121]tensive as that of the electric company. The suit was begun in a local court, which, on final hearing, granted a perpetual injunction against the enforcement of the resolution. The supreme court affirmed the decision below, subject only to a modification whereby the injunction would expire on the termination of the street railway company's street franchise, which was for a limited term of years. After reciting the facts, the supreme court said (p. 13):

"We are therefore of opinion that the general finding of the district court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy plaintiff's property and business which it has thus fostered and encouraged, without compensation,

and also deprive the interveners of their contractual rights therein."

Then, after referring to and citing several cases, the court further said: "This is a well-recognized rule of equity. . . . We are of opinion that the facts of this case bring the defendants within the rule of State ex rel. Caldwell v. Lincoln Street R. Co. supra."

In view of the facts in the present case, as before recited, these decisions of the supreme court of the state are conclusive upon the question of the right of the trust company to have the distribution of elec- 122 ]tric current for *power and heat treated as included within the franchise contract of 1884 while it continues in force. In other words, the trust company is entitled to insist upon a recognition and continuation, subject to all the qualifications inhering in the franchise, of all the rights conferred by the franchise ordinance as the same was interpreted in actual practice by the electric company and the city prior to the resolution of 1908. But neither the trust company nor the electric company is entitled to make that construction a basis for enlarging or extending those rights, against the will of the city, or for enlarging or extending the purposes for which electric current may, through the use of the streets, be transmitted and supplied under the protection of the franchise.

A prior suit by the electric company against the city, largely but not entirely like the present, resulted in a decree against the electric company. The city now takes the position that that decree is conclusive upon the trust company as mortgagee. But the law is otherwise. The trust company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit, but long prior thereto and the trust company was not a party to it. This being so, the trust company is free to maintain the present suit, unembarrassed by the decree in the other. Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 313, 38 L. ed. 450, 455, 14 Sup. Ct. Rep. 592; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296.

The decree is reversed, and the cause is remanded to the District Court with a direction to enter a decree against the enforcement of the resolution of 1908, in accordance with this opinion.

Reversed.

Mr. Justice Holmes took no part in the consideration and decision of this case.

*OMAHA ELECTRIC LIGHT & POWER COMPANY, Appt., [123
v.
CITY OF OMAHA and Waldemar Michaelson.

(See S. C. Reporter's ed. 123-126.)

**Appeal — from circuit court of appeals — diverse citizenship case.**

The jurisdiction of the Federal circuit court of a suit by an electric light and power company to enjoin the threatened disconnection, pursuant to a resolution of the municipal common council, of the wires used by the company in supplying its patrons with electric current for power and heating purposes, must be deemed to have been invoked solely on the ground of diverse citizenship, so as to make the decision of the circuit court of appeals final, where the bill did not show, either in terms or by necessary intendment, that complainant was asserting a right, privilege, or immunity under the Federal Constitution, or was in anywise invoking its protection, but, for anything that appears, it was planting its right to relief solely upon the doctrine of estoppel.

[For other cases, see Appeal and Error, 768-784, in Digest Sup. Ct. 1908.]

[No. 162.]

Argued February 27 and 28, 1913. Ordered for reargument March 17, 1913. Reargued April 10 and 11, 1913. Decided June 16, 1913.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska in favor of defendants in a suit to enjoin the threatened disconnection, pursuant to a resolution of a municipal common council, of the wires of an electric light and power company, used in supplying its patrons with electric current. Dismissed for want of jurisdiction.

See same case below, 102 C. C. A. 601, 179 Fed. 455.

The facts are stated in the opinion.

Mr. Edgar H. Scott argued the cause, and, with Mr. Lodowick F. Crofoot, filed a brief for appellant:

The Constitution is "involved" if the averments of the bill present an issue which requires for its determination the construction or application of any provision of that instrument. If the facts alleged are of such a character that the application thereto of any provision of the Constitution

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 606.

would affect the correct determination of the case, then it is necessarily one arising under the Constitution. The question must be, Is the application or construction of any provision of the Constitution involved in the determination of any issue presented by the averments of the bill?

Bridge Proprietors v. Hoboken Land & Improv. Co. 1 Wall. 116, 142, 17 L. ed. 571, 575; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Cooley, Const. Law, 2d ed. 113; Starin v. New York, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28; Southern P. R. Co. v. California, 118 U. S. 109, 112, 30 L. ed. 103, 104, 6 Sup. Ct. Rep. 993; Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; Crystal Springs Land & Water Co. v. Los Angeles, 76 Fed. 148; 1 Rose, Fed. Proc. p. 324; Ozark Bell Teleph. Co. v. Springfield, 140 Fed. 669; Des Moines City R. Co. v. Des Moines, 151 Fed. 860; San Francisco Gas & Electric Co. v. San Francisco, 189 Fed. 943; Hall v. Chicago, R. I. & P. R. Co. 149 Fed. 564.

It is admitted by appellee that the resolution of the city council requiring the removal of complainant's wires and poles is a law of the state within the definition of that term as used in the Constitution, prohibiting the passage of a state law impairing the obligation of a contract.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 563, 41 L. ed. 1114, 1116, 17 Sup. Ct. Rep. 653; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 694, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; Davis and F. Mfg. Co. v. Los Angeles, 189 U. S. 216, 217, 47 L. ed. 780, 23 Sup. Ct. Rep. 498; Iron Mountain R. Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 113; American Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 171.

This court has had frequent occasion to announce the rule that where under the facts stated the relief prayed is dependent upon the application of some provision of the Constitution, the Federal court thereby obtains jurisdiction.

Smith v. Greenhow, 109 U. S. 669, 670, 671, 27 L. ed. 1080, 1081, 3 Sup. Ct. Rep. 421; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79

It has been the uniform holding of this court that the question as to the existence of a constitutional question in a record on error from a state court is to be determined from an investigation of the issues presented; and where such a question is thus shown to be necessarily involved, it is not necessary that it should be specifically stated, or even referred to, either in the pleadings or in the opinion of the court.

Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 250, 7 L. ed. 412, 414; Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Murray v. Charleston, 96 U. S. 432, 441, 24 L. ed. 760, 761; Chicago L. Ins. Co. v. Needles, 113 U. S. 579, 28 L. ed. 1086, 5 Sup. Ct. Rep. 681; Eureka Lake & Y. Canal Co. v. Superior Ct. 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 269, 35 L. ed. 1004, 1009, 12 Sup. Ct. Rep. 173; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 485, 487, 43 L. ed. 521, 524, 525, 19 Sup. Ct. Rep. 247; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 15, 45 L. ed. 395, 404, 21 Sup. Ct. Rep. 240.

Federal courts of original jurisdiction have had frequent occasion to consider the question as to what averments of a bill are essential to confer jurisdiction on the ground of the existence of a Federal question.

Moyes v. Stirling Co. 71 Fed. 433; Iron Mountain R. Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 122; American Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 177; Des Moines City R. Co. v. Des Moines, 151 Fed. 854.

In cases where the sole basis for the original jurisdiction of the Federal court under the allegations of the bill is the diversity of citizenship of the parties, the decision of a court of appeals is final. Where, however, as in the present case, under the allegations of the bill, a Federal question is presented and the diversity of citizenship of the parties also appears, the decision of a court of appeals is not final, but there is, of right, an appeal or writ of error or review of the case by the Supreme Court of the United States, provided the matter in controversy shall exceed $1,000 besides costs. In harmony with the plainly expressed intendment of the statute, this has been the uniform holding of this court.

Howard v. United States, 184 U. S. 676, 680, 46 L. ed. 754, 757, 22 Sup. Ct. Rep. 543; Northern P. Railway Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Mississippi R. Com-

mission v. Illinois C. R. Co. 203 U. S. 335, 341, 51 L. ed. 209, 213, 27 Sup. Ct. Rep. 90; Warner v. Searle & H. Co. 191 U. S. 195, 205, 48 L. ed. 145, 147, 24 Sup. Ct. Rep. 79; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Loveland, App. Jur. §§ 137, 275.

Whatever uncertainties as to rights of appeal appear in some of the earlier cases arising under the Evarts act, the principles governing appeals to this court of cases which originate in the United States circuit court are now well settled by decisions of this court, and the following is a correct summary of the principles as so established:

1. If a case presents (whether originally or after the jurisdiction of the circuit court has attached) only a Federal question, it must, if carried to the Supreme Court, be taken there direct from the circuit court. It cannot go *via* the circuit court of appeals.

Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. ed. 546, 548, 22 Sup. Ct. Rep. 452.

2. If a case presents originally both diverse citizenship and a Federal question, it may be taken first to the circuit court of appeals and afterwards to the Supreme Court, or it may be carried to the latter court direct from the circuit court.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 407, 409, 48 L. ed. 496, 499, 500, 24 Sup. Ct. Rep. 376; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 341, 342, 51 L. ed. 209, 213, 214, 27 Sup. Ct. Rep. 90.

3. If a case presents originally only diverse citizenship, there may be an appeal to the circuit court of appeals, even if a constitutional question develops and is decided after the jurisdiction of the circuit court attaches; but if the defeated party carries the case to the circuit court of appeals, the judgment of that court is final, save as it may, in the discretion of the Supreme Court, be reviewed on certiorari.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

Messrs. William C. Lambert and Benjamin S. Baker argued the cause, and, with Messrs. John A. Rine and L. J. TePoel, filed a brief for appellees:

It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill. Jurisdiction cannot rest on any ground which is not affirmatively and distinctly set forth.

Shulthis v. McDougal, 225 U. S. 565–572, 56 L. ed. 1209–1212, 32 Sup. Ct. Rep. 704.

Messrs. Frank Crawford, John A. Rine, and I. J. Dunn also filed a brief for appellees:

The question of jurisdiction must be determined from appellant's bill of complaint, and said bill invoked jurisdiction solely upon the ground of diverse citizenship.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Carey v. Houston & T. C. R. Co. 150 U. S. 179, 37 L. ed 1043, 14 Sup. Ct. Rep. 63; Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; First Nat. Bank v. Estherville, 215 U. S. 341, 54 L. ed. 223, 30 Sup. Ct. Rep. 152; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418.

If the litigant invokes the jurisdiction of the circuit court of appeals, and submits his case upon the merits, he cannot have an appeal to this court from the decree of the court of appeals.

Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

Mr. Justice Van Devanter delivered the opinion of the court:

The facts out of which this suit arose are fully set forth in Old Colony Trust Co. v. Omaha, 230 U. S. 100, ante, 1410, 33 Sup. Ct. Rep. 967, and need *not be repeated[124 here. The electric company brought the suit in the circuit court, against the city and its electrician, to enjoin the threatened disconnection, pursuant to the resolution of 1908, of the company's wires used in supplying its patrons with electric current for power and heating purposes. There was a decree for the defendants (172 Fed. 494), which was affirmed by the circuit court of appeals (102 C. C. A. 601, 179 Fed. 455), and a further appeal brought the case here.

Our jurisdiction is challenged, by a motion to dismiss, on the ground that the

decision of the circuit court of appeals is final. The motion is well taken if the jurisdiction of the circuit court was invoked solely on the ground of diverse citizenship. Act of March 3, 1891 (26 Stat. at L. 826, chap. 517, § 6, U. S. Comp. Stat. 1901, p. 488); Judicial Code, § 128 [36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193]. That it was invoked on that ground is conceded, so it is necessary to inquire whether, as is asserted in opposition to the motion, it was also invoked upon the ground that the suit was one arising under the Constitution of the United States. This must be determined from the plaintiff's statement of its own cause of action as set forth in the bill, regardless of questions that may have been subsequently brought into the suit. Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704; Denver v. New York Trust Co. 229 U. S. 123, ante, 1101, 33 Sup. Ct. Rep. 657.

Briefly described, the bill set forth the adoption by the city council of the franchise ordinance of 1884, its acceptance by the Thompson Company, the construction and installation of the electric plant, the transfer of the plant and franchise to the electric company in 1903, the business done by the two companies in supplying current for power and heating, as well as for lighting, purposes, the enlargement and improvement of the plant from time to time to meet the increasing demand for current for those purposes, the city's acquiescence in and encouragement and sanction of all 125]this with knowledge *that it was done under a claim of right under the franchise ordinance, the exaction by the city of 3 per cent of the gross earnings, including those from current supplied for power and heat, the adoption of the resolution of 1908, and the threatened disconnection thereunder of all wires used for transmitting current for power and heating purposes. The bill further charged that in what was done prior to the resolution the city and the two companies had treated the franchise as including the right to use the streets in transmitting current for power and heat; that upon the faith of this practical construction the plaintiff had expended large sums of money in developing and equipping its plant according to approved modern standards; and that the interference with its wires and business which was threatened by reason of the changed attitude of the city would result in great and irreparable loss and damage to the plaintiff.

The relief sought was a perpetual injunction restraining the defendants from disconnecting the plaintiff's wires or interfering with or impeding its business as theretofore conducted. There was no prayer that the resolution be pronounced void, nor any allegation that it impaired the franchise contract, or would operate to deprive the plaintiff of its property without due process of law, nor any reference to the Constitution of the United States, or any of its provisions, nor even a general statement that a constitutional right was being or about to be infringed.

Tested by the recognized standard, we think the bill did not state a case arising under the Constitution. It did not show, either in terms or by necessary intendment, that the plaintiff was asserting a right, privilege, or immunity under the Constitution, or was in anywise invoking its protection. For anything that appeared, the plaintiff was planting its right to relief entirely upon the doctrine of estoppel. As a basis of jurisdiction, it is not enough that recovery might be sought upon a constitutional *ground, for it must clearly[126 appear that it is actually so sought. Crowell v. Randell, 10 Pet. 368, 392, 9 L. ed. 458, 467; Hanford v. Davies, 163 U. S. 273, 280, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 1051.

It being thus apparent that diverse citizenship was the sole ground upon which the jurisdiction of the circuit court was invoked, it follows that the decision of the circuit court of appeals was final. Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 48 L. ed. 484, 24 Sup. Ct. Rep. 325; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704; Lovell v. Newman, 227 U. S. 412, ante, 577, 33 Sup. Ct. Rep. 375; Denver v. New York Trust Co. 229 U. S. 123, ante, 1101, 33 Sup. Ct. Rep. 657.

Appeal dismissed.

Mr. Justice Holmes took no part in the consideration and decision of this case.

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MARY F. BUTTS, Plff. in Err.,
v.
MERCHANTS & MINERS TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 126-138.)

**Statutes — invalid in part — civil rights act.**

The invalidity, as applied to the states, of the provisions of the civil rights act of

March 1, 1875 (18 Stat. at L. 335, chap. 114, U. S. Comp. Stat. 1901, p. 1260), §§ 1, 2, intended to secure equal accommodations to "all persons within the jurisdiction of the United States," and to subject any person guilty of any forbidden discrimination to liability to a penalty and to criminal prosecution, invalidates the law as applied to other places within the jurisdiction of the United States, such as an American vessel upon the high seas, more than a marine league from land, and the District of Columbia and the territories.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[No. 131.]

Argued January 21, 1913. Decided June 16, 1913.

IN ERROR to the District Court of the United States for the District of Massachusetts to review a judgment sustaining a demurrer to an action to recover penalties under the civil rights act. Affirmed.

The facts are stated in the opinion.

Mr. Albin L. Richards argued the cause, and filed a brief for plaintiff in error:

The admiralty and maritime jurisdiction of Congress is not dependent solely upon the power of regulating commerce.

United States v. Burlington & H. County Ferry Co. 21 Fed. 341; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133.

Fixing the limits of the admiralty and maritime jurisdiction is a matter of establishing a physical boundary.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Waring v. Clarke, 5 How. 441, 465, 12 L. ed. 226, 237; The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; Gilman v. Philadelphia, 3 Wall. 724, 18 L. ed. 99; The Belfast, 7 Wall. 624, 19 L. ed. 266; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Ex parte Easton, 95 U. S. 68, 24 L. ed. 373; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8.

The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, did not in any way impugn the jurisdiction of Congress, but merely decided that under the act of Congress providing proceedings for the limitation of liability of shipowners, claims which a state had created against a corporation existing by the laws of that state should be recognized in the distribution of the fund. The authority of the state to create the claim was based upon the personal allegiance to the state of the corporation against which the claim had been created, and not upon any territorial jurisdiction of the state over the high seas.

22 Harvard L. Rev. 403.

The admiralty does not recognize any right of a state or sovereignty to legislate for the vessels of its citizens as if they were its own territory.

La Bourgogne (Deslions v. La Compagnie Generale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664.

If the admiralty recognized that each state had jurisdiction over the vessels of its own citizens as parts of its own territory, then it is apparent that in the case of a collision between vessels of different nationalities every person responsible for the collision would be answerable for its effects according to the law of one or the other of the two ships in collision, depending upon whether the events raising liability were considered to take place upon one vessel or the other.

United States v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; Reg. v. Keyn, L. R. 2 Exch. Div. 66, 46 L. J. Mag. Cas. 17, 13 Cox, C. C. 403, 5 Eng. Rul. Cas. 946.

The jurisdiction of Congress over the high seas, and the jurisdiction of Congress over the territory of the United States, are essentially similar.

United States v. Press Pub. Co. 219 U. S. 1, 12, 55 L. ed. 65, 68, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942.

It is under this grant alone (the extension of the judicial power to all cases of admiralty and maritime jurisdiction) that the Federal government has the right to punish a large class of offenses whose punishment was provided for in the acts of Congress in relation to crimes and offenses on the high seas.

Benedict, Admiralty, 4th ed. § 599; United States v. Wilson, 3 Blatchf. 435, Fed. Cas. No. 16,731.

The application of the statute to enrolled vessels of the United States upon the high seas, to the District of Columbia, and to the territories, is separable from the other applications of the statute.

El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21.

Congress intended the civil rights act to have a partial application so far as it was constitutional.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547.

Mr. A. Nathan Williams argued the cause and filed a brief for defendant in error:

The plaintiff in the case at bar is met at the very beginning of her case with the

principle of *stare decisis*, from which there appears to be no escape.

Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18.

Where a statute contains both constitutional and unconstitutional provisions, in order to give effect to the constitutional provisions it is necessary not only that the constitutional provisions be separable from and not dependent upon the unconstitutional provisions, but it must also be plain that the legislative body would have enacted the statute with the unconstitutional provisions eliminated.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

130] *Mr. Justice Van Devanter delivered the opinion of the court:

This is an action to recover twelve penalties of $500 each under §§ 1 and 2 of the act of March 1, 1875 (18 Stat. at L. 335, chap. 114, U. S. Comp. Stat. 1901, p. 1260), known as the civil rights act. According to the declaration the facts are these: The plaintiff is a colored woman and a citizen of the United States, and the defendant is a Maryland corporation engaged in the transportation of passengers and freight by vessels plying between Boston, Massachusetts, and Norfolk, Virginia. Upon tickets purchased for the purpose, and entitling her to the accommodations and privileges of a first-class passenger, the plaintiff was carried by the defendant on one of its steamships from Boston to Norfolk, and on another back to Boston. Both vessels were engaged in the coastwise trade as public conveyances, and were duly enrolled under the laws of the United States. During both voyages the plaintiff was denied, because of her color, the full and equal enjoyment of the accommodations and privileges of a first-class passenger, the denials consisting in requiring her to take her meals at a second table, instead of at the first, with the white passengers having tickets like her own, and in giving her a stateroom on the lower deck, instead of on the upper one, where the white passengers possessing like tickets were given rooms. The acts of discrimination were twelve in number. Eleven were charged as occurring upon the high seas, more than a marine league from any land, and the other as occurring merely upon the high seas. There was no attempt to set up a common-law right of recovery, the sole reliance being upon §§ 1 and 2 of the *act of 1875, supra*. The defendant demurred, claiming that those sections are unconstitutional and void, and the demurrer was sustained, judgment being given for the defendant. The plaintiff then sued out this direct writ of error.

*The preamble of the act and the[131 sections under which the penalties are claimed are as follows:

"Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: Provided, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and having so elected to proceed *in the[132 one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any state: And provided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

The question of the constitutional validity of those sections came before this court in Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18, and upon full consideration it was held (a) that they receive no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power, and (b) that, as applied to the states, they are unconstitutional and void because in excess of the power conferred upon Congress, and an encroachment upon the powers reserved to the states respectively. That decision has stood unchallenged for almost thirty years, and counsel for the plaintiff does not question it now. But he does contend that, although unconstitutional and void in their application to the states, the sections are valid and effective in all other places within the jurisdiction of the United States, such as upon an American vessel upon the high seas, more than a marine league from land, and in the District of Columbia and the territories. And in this connection our attention is directed to that part of the opinion in Civil Rights Cases which says (p. 19):

"We have also discussed the validity of the law in reference to cases arising in the states only; and not in reference to cases arising in the territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a 133]question for consideration *in the cases before us; they all being cases arising within the limits of states."

The real question is whether the sections in question, being in part—by far the greater part—in excess of the power of Congress, are invalid in their entirety. Their words, as also those of the preamble, show that Congress proceeded upon the assumption that it could legislate, and was legislating, in respect of all persons and all places "within the jurisdiction of the United States." It recognized no occasion for any exception and made none. Its manifest purpose was to enact a law which would have a uniform operation wherever the jurisdiction of the United States extended. But the assumption was erroneous, and for that reason the purpose failed. Only by reason of the general words indicative of the intended uniformity can it be said that there was a purpose to embrace American vessels upon the high seas, the District of Columbia, and the territories. But how can the manifest purpose to establish a uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction? How can the use of general terms denoting an intention to enact a law which should be applicable alike in all places within that jurisdiction be said to indicate a purpose to make a law which should be applicable to a minor part of that jurisdiction and inapplicable to the major part? Besides, it is not to be forgotten that the intended law is both penal and criminal. Every act of discrimination within its terms is made an offense and misdemeanor, and for every such offense it gives to the aggrieved party a right to a penalty of $500, and subjects the offender to a fine of not less than $500 nor more than $1,000, or to imprisonment for not less than thirty days nor more than one year.

The decision of this court in United States v. Reese, 92 U. S. 214, 23 L. ed. 563, is well in point. That was a prosecution *under a congressional enactment pun-[134 ishing election officers for refusing to any person entitled to do so the right to cast his vote. The statute was expressed in general terms, embracing some acts which Congress could condemn and others which it could not. As to the latter, it was, of course, invalid, and the claim was made that, as the act charged was not of the latter class, but of the former, the statute should be sustained as to acts like the one charged, notwithstanding the general terms were in excess of the power of Congress. But the court held otherwise, saying:

(P. 219). "This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. United States v. Wiltberger, 5 Wheat. 85, 5 L. ed. 40. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect.

(P. 221.) "We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or the-

regarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be deter-135]mined, *is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts [to do] that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments upon the reserved power of the states and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

So here, to give to the sections in question the effect suggested, it would be necessary to reject or strike out the general words "within the jurisdiction of the United States," whereby Congress intended to declare and define in what places the sections should be operative, and to insert other and new words, restricting their operation to American vessels upon the high seas and to the District of Columbia and the territories. To do this would be to introduce a limitation where Congress intended none, and thereby to make a new penal statute, which, of course, we may not do.

Another decision no less in point is Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550, which related to an act of Congress providing generally for punishing the fraudulent use of registered trademarks, although the power of Congress in that regard extended only to trademarks used in 136]commerce *with foreign nations, or among the several states, or with the Indian tribes. In pronouncing the statute invalid in its entirety the court said:

(P. 96.) "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress.

(P. 98.) "It has been suggested that if Congress has power to regulate trademarks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: . . . Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

(P. 99.) "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trademark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances, under the act of Congress, and in others under state law."

The two cases from which we have quoted have been often followed and applied. United States v. Harris, 106 U. S. 629, 641, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; Baldwin v. Franks, 120 U. S. 678, 685, 30 L. ed. 766, 768, 7 Sup. Ct. Rep. 656, 763; *James[137 v. Bowman, 190 U. S. 127, 140, 47 L. ed. 979, 983, 23 Sup. Ct. Rep. 678; United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 530, 51 L. ed. 298, 304, 305, 27 Sup. St. Rep. 153; Karem v. United States, 61 L.R.A. 437, 57 C. C. A. 486, 121 Fed. 250, 259.

Counsel for the plaintiff cites El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, as an authority for holding the sections in question valid as applied to American vessels upon the high seas and to the District of Columbia and the territories, notwithstanding their invalidity as applied to the states. The matter involved in that case was whether the provision in the employers' liability act of 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316), relating to the District of Columbia and the territories, could be sustained, considering that the provision relating to in-

terstate commerce had been adjudged invalid in Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. That act was quite unlike the sections now before us in two important particulars: 1. It was not a penal or criminal statute, to be strictly construed, but was a civil and purely remedial one, to be construed liberally. 2. Its applicability to the District of Columbia and the territories did not depend upon the same words which made it appliable to interstate commerce. On the contrary, it dealt expressly, first, with common carriers "in the District of Columbia, or in any territory of the United States," and, second, with common carriers "between the several states." The latter provision had been adjudged invalid because too broad in some of its features, and the Gutierrez Case involved the other provision. In that case the court, considering the terms of the statute, held that the provision relating to interstate commerce was "entirely separable from" the one relating to the District of Columbia and the territories, and that Congress manifestly had proceeded "with the intention to regulate the matter in the District and the territories, irrespective of the interstate commerce feature 138]of the act." With the *invalid and separable provision eliminated, there still remained a complete and operative statute in terms applying to the District of Columbia and the territories. The differences between that act and the sections now before us are so pronounced and so obvious that the Gutierrez Case is not an authority for the plaintiff. On the contrary, it is in entire harmony with the other cases before cited, as is shown throughout the opinion and by the following excerpt (p. 97):

"It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce within the District of Columbia and the territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done, omitting the unconstitutional feature, then the statute must fall. Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Employers' Liability Cases, supra."

Here it is not possible to separate that which is constitutional from that which is not. Both are dependent upon the same general words, "within the jurisdiction of the United States," while alone indicate where the sections are to be operative. Those words, as the context and the preamble show, were purposely used. They express the legislative will, and cannot be limited in the manner suggested without altering the purpose with which the two sections were enacted. They must therefore be adjudged altogether invalid. James v. Bowman, 190 U. S. 127, 140, 47 L. ed. 979, 983, 23 Sup. Ct. Rep. 678, and United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644; Poindexter v. Greenhow, 114 U. S. 270, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962.

Judgment affirmed.

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*SEVERO OCHOA, Victor Ochoa,[139 José Ochoa, and Angel Gonzales, Partners, Doing Business under the Firm Name and Style of J. Ochoa y Hermano, Appts.,

v.

ANA MARIA HERNANDEZ Y MORALES and Eufemio Hernandez y Morales.

(See S. C. Reporter's ed. 139-165.)

**Appeal — from Porto Rico Federal court — scope of review.**

1. The jurisdiction of the Federal Supreme Court, on an appeal taken from the district court of the United States for Porto Rico under the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 35, which subjected such appeals to the regulations applicable to appeals from the territorial supreme courts, is confined, in the absence of error assigned upon question of evidence, to determining whether the facts found support the judgment.

[For other cases, see Appeal and Error, III. d, 5; VIII. e, in Digest Sup. Ct. 1908.]

**Adverse possession — prescription — good faith and proper title.**

2. A person procuring a fraudulent entry, in the registry, of a possessory title, cannot avail himself of the provision of the Porto Rico Civil Code, art. 1957, declaring a prescription by possession for ten years as to persons present, and for twenty years with regard to those absent, because this is confined to possession with good faith and proper title.

[For other cases, see Adverse Possession, I. a; I. 1, in Digest Sup. Ct. 1908.]

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NOTE.—On the appellate jurisdiction of Federal Supreme Court over Porto Rican courts—see notes to Garrozi v. Dastas, 51 L. ed. U. S. 369.

On requisites of adverse possession—see notes to United States v. Chaves, 40 L. ed. U. S. 215, and Ricard v. Williams, 5 L. ed. U. S. 398.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

**Real property — registration of land title — entry of possession.**

3. The entry of possessory title in the registry in Porto Rico, is, in effect, a judicial certificate declaring that the person procuring such entry is entitled to the possession without prejudice to third parties who may show a better right, and gives him no title as against them, but confers a prima facie legitimacy upon his possession, being provisional and presumptive evidence of ownership, and fixing a date from which his possession is to be treated as originating.

[Records of title, see Real Property, II., in Digest Sup. Ct. 1908.]

**War — authority of military commander — taking property without due process of law.**

4. The military governor of Porto Rico cannot be deemed to have been authorized by the President to make any order, judicial in its nature, that would have the effect of depriving any person of his property without due process of law, in view of the instructions from the President with reference to Cuba, looking to the safeguarding of the property and personal rights of the inhabitants, which were published by the War Department as a general order, and were recognized as a declaration of the principles by which the military government of Porto Rico was limited.

[For other cases, see War, VII., in Digest Sup. Ct. 1908.]

**War — authority of military commander — ratification.**

5. No legislative purpose to validate any order of the military governor of Porto Rico that was in excess of the authority conferred upon him by the President can be gathered from the declaration in the act of April 12, 1900 (31 Stat. at L. 79, chap. 191), § 8, that "The laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect."

[For other cases, see War, VII., in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — definition.**

6. The guaranty of due process of law inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing.

[For other cases, see Constitutional Law, IV. b, 1, in Digest Sup. Ct. 1908.]

**War — order of military commander — retroactive effect.**

7. The retroactive clause in the order of the military governor of Porto Rico reducing from twenty years to six years the period during which the possession of real estate must continue in order to permit the *ex parte* conversion, upon the public records, of an *ex parte* entry of possessory title into a record of ownership conferring an apparent title upon such possessor, which could be maintained as against the true owners by his bona fide grantees without notice of the infirmity in such title, must be construed as if expressly limited to cases where there still remained a reasonable opportunity for the true owners to contest the pretensions of the possessor, since, construed otherwise, property would be taken without due process of law, in excess of the military governor's authority.

[For other cases, see War, VII., in Digest Sup. Ct. 1908.]

**Real property — registration of title — reliance on record.**

8. The protection of bona fide purchasers and mortgagees under the Porto Rico mortgage law, arts. 33, 34, 36, 37, against defects or infirmities in their grantor's title, which are not clearly apparent or plainly expressed on the registry, extends to matters of fact, and not of law; and if the registry gives notice of a state of facts that renders the title invalid or subject to question in law, the purchaser who relies upon the record takes his title subject to whatever consequences may flow in law from the facts of which he is thus notified.

[For other cases, see Real Property, II. e, in Digest Sup. Ct. 1908.]

**Real property — registration of title — reliance on record.**

9. Persons accepting a deed and mortgage from one whose entry of possessory title "without prejudice to third parties who might show a better right to such possession" has been converted on the public records into a record of ownership without notice or hearing, under a retroactive clause in an order of the military governor of Porto Rico reducing the period of continued possession necessary to permit such proceeding from twenty years to six years, are charged with notice of any want of authority in such military commander thus to cut off the claim of the true owners, where the six years had already run when such order was made.

[For other cases, see Real Property, II. e, in Digest Sup. Ct. 1908.]

[No. 92.]

Submitted December 17, 1912. Decided June 16, 1913.

APPEAL from the District Court of the United States for Porto Rico to review a decree establishing rights in real property. Affirmed.

See same case below, 5 Porto Rico Fed. Rep. 463.

The facts are stated in the opinion.

Mr. T. D. Mott, Jr., submitted the cause for appellants:

It is of the highest importance for a proper determination of the questions involved in this appeal, that the two kinds of prescription (acquisitive and extinctive) be not confounded.

García v. De Los Angeles, 13 P. R. R. 74.

The condition of good faith and proper title, required by the law of Porto Rico in order that ordinary acquisitive prescription may be effective, serves to take such prescription outside the sphere comprehended by the term "statute of limitations" as the same is understood in American jurisprudence. True it is that time is one of the elements in such prescription, but it is not the only element, as occurs in a statute of limitations.

25 Cyc. 983.

What is meant in the law of Porto Rico by the term "proper title" is the "color of title" of American jurisprudence.

Colón v. Rosario, 16 P. R. R. 736; Ex parte Wenar, 5 P. R. R. 317.

The law requires, for the purposes of ordinary prescription, that the person in possession of real property justify his possession by virtue of some title which shall have been acquired by one of the modes recognized by the law as a means or manner of acquiring title. Such title need not be efficacious, for in such a case there would be no need for prescription to validate or perfect it. But such title must have the appearance of validity, so that, if the grantor has the power to convey, the title passed would be sufficient to pass the dominion or ownership of the property.

12 Manresa, Commentaries Civil Code of Spain p. 759.

The possession of Morales having been in bad faith and fraudulent, none of the time during which it ran could be added to the term of the appellants in order to complete the six years.

Ex parte Bayamón, 7 P. R. R. 145.

The conversion of possessory into a *dominio* title, though the result of judicial proceedings, did not have the effect of *res judicata*, and did not bind anyone who did not appear in said proceedings.

Calderón v. García, 14 P. R. R. 407; González v. People, 10 P. R. R. 458.

And even as to those who had so appeared and opposed the conversion sought by such proceedings, their rights could not be adjudged, or passed upon, in those proceedings, but such rights must be decided in an ordinary action of revindication. The court is limited in such proceedings of conversion to saying whether or not the petitioner has shown a right to the conversion asked for. It cannot pass upon the rights of others.

Díaz v. Waymouth, 13 P. R. R. 317; Paris v. People, 5 P. R. 29.

Nor did the recording of the *dominio* title by Morales cut off any of the alleged rights of these appellees. If such title was fraudulent, it was liable to attack, even after registry, within any period short of thirty years after he had entered into possession of the land, and while still recorded in his name, or in that of any other person, except an innocent purchaser without notice, or, in the language of the civil law, "a third party with good faith."

Abella v. Antuñano, 14 P. R. R. 485; Paris v. People, 5 P. R. 29; Valdes v. Valle, 1 P. R. 75, González v. People, 10 P. R. R. 458

A statute of limitation which takes away no remedy which the landowner had before its passage is not unconstitutional, and is valid.

Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; Saranac Land & Timber Co. v. Comptroller (Saranac Land & Timber Co. v. Roberts) 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642.

The judicial order of April 4, 1899, has been enforced in many cases by the supreme court of Porto Rico, although in such cases its validity or constitutionality was not questioned or involved.

Ex parte Pinto, 6 P. R. 149; Ex parte Martinez, 6 P. R. 169; Ex parte Miner, 6 P. R. 261; Ex parte Sanfeliz, 6 P. R. 501; Ex parte Tarpia, 6 P. R. 509; Ex parte Colzada, 6 P. R. 531.

It is not sufficient that the reason, or cause, which serves to invalidate the contract or title appear from the registry, but it must clearly appear or be plainly expressed.

2 Galindo, Legislación Hipotecaria, 4th ed. p. 369.

Before appellants could invoke the protection of article 34 of the mortgage law, it was necessary that their title be recorded.

2 Gaindo, Legislación Hipotecaria, 4th ed. p. 367.

A late decision of the supreme court of Porto Rico involving the construction and application of articles 34 and 36 and 37 of the mortgage law, and a decision in many respects in point with the case at bar, is that of Carmona v. Cuesta, 18 P. R. R. 178.

Mr. Hector H. Scoville submitted the cause for appellees. Mr. Joseph Anderson, Jr., was on the brief:

It is the duty of one buying property in the possession of another to make inquiry as to whom the property belongs.

Phelan v. Brady, 119 N. Y. 587, 8 L.R.A. 211, 23 N. E. 1109; Green v. Slayter, 4 Johns. Ch. 38.

These defendants (appellants) took title to this property when it was in the actual physical possession of at least one of the

plaintiffs (appellees), who was notoriously the owner, and whom the whole neighborhood recognized as owner; and yet the appellants did not take the trouble to inquire, either through their agent or otherwise, what rights these plaintiffs had. He undoubtedly had knowledge, and if he did not inform his principals, he should have. Tobas was clearly the agent of the defendants of this transaction.

31 Cyc. 1216, 1217, 1227.

The mortgagee acquires his title subject to the equities against the mortgagor, and in this respect a mortgagee differs from the "innocent purchaser for value." The defendants first became mortgagees, and afterwards vendees without any further consideration passing. Were they not subject to the equities existing in favor of the mortgagor's grandchildren?

Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E. 1052.

A creditor who takes a mortgage on realty merely as security for the payment of the debt or demand already due him, and without giving any new consideration, or being induced to change his condition in any manner, is not entitled to the protection accorded to a bona fide purchaser for value as against prior liens or equities.

27 Cyc. 1191; Gest v. Packwood, 34 Fed. 374, 39 Fed. 534; Hill v. Hite, 79 Fed. 826; Napa Valley Wein Co. v. Rinehart, 42 Mo. App. 182; Manhattan Co. v. Evertson, 6 Paige, 457; 2 Pom. Eq. Jur. 208.

The defendants (appellants) were not bona fide purchasers for value without notice, because, in the first place, they were not purchasers for value at all, taking the property in payment of a past-due debt, and because they had constructive notice by the possession of at least one of the plaintiffs.

Phelan v. Brady, 8 L.R.A. 211, and note (119 N. Y. 587, 23 N. E. 1109) Green v. Slater, 4 Johns. Ch. 38.

Equity will interfere to prevent the bar of the statute of limitations where it would be inequitable to enforce it; and, conversely, a court of equity would not consider title fraudulently acquired solely under statute, good title by prescription.

Story, Eq. Jur. 1521; Booth v. Warrington, 4 Bro. P. C. 163; Bailey v. Glover, 21 Wall. 347, 22 L. ed. 638; Stearns v. Page, 47 How. 819, 12 L. ed. 928; Prevozt v. Gratz, 6 Wheat. 481, 5 L. ed. 311; Moore v. Greene, 19 How. 69, 15 L. ed. 533; Rosenthal v. Walker, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382.

The same rule applies in this case as in cases involving the limitation of actions, which was well stated in a note to McKisson v. Davenport, 83 Mich. 211, 10 L.R.A. 512, 47 N. W. 100, where it is said: "An existing right of action cannot be taken away by shortening the period of limitation to the time which has already run."

See also Chapman v. Douglas County, 107 U. S. 248, 27 L. ed. 378, 2 Sup. Ct. Rep. 62.

The theory is that a reasonable time after the passage of the limiting act must be allowed before the limitation begins to run, and this is especially true where the time under the new law has already run.

Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; Gilbert v. Ackerman, 159 N. Y. 118, 45 L.R.A. 120, 53 N. E. 753; Best v. Baumgardner, 122 Pa. 17, 1 L.R.A. 359, 15 Atl. 691; Pereles v. Watertown, 6 Biss. 79, Fed. Cas. No. 10,980; Berry v. Randall, 4 Met. (Ky.) 292; Society for Propagation of Gospel v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156; Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638; 8 Cyc. 921, 1020, 1021; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Horbach v. Miller, 4 Neb. 31; Holcombe v. Tracy, 2 Minn. 241, Gil. 201; Lockhart v. Yeiser, 2 Bush, 231; Hawkins v. Barney, 5 Pet. 464, 8 L. ed. 193; Wheeler v. Jackson, 34 L. ed. 660, 611, and note, 137 U. S. 250, 251, 11 Sup. Ct. Rep. 76; Ward v. Kilts, 12 Wend. 137; Eckstein v. Shoemaker, 3 Whart. 15; Frey v. Kirk, 4 Gill & J. 509, 23 Am. Dec. 581; Satterlee v. Matthewson, 16 Serg. & R. 169; Weister v. Hade, 52 Pa. 474; Koshkonong v. Burton, 26 L. ed. 887, note.

A state has no right to devest vested interests, whether such an attempt be made by legislative enactment or by a change in the Constitution of the state.

8 Cyc. 895, and note.

Where statutes are made restrictive by their terms they should be construed as strictly as possible.

8 Cyc. 1022, 1023.

In the present case there was no time at all. Whatever right the appellees had to attack the false and fraudulent possession of their property (at law) was taken from them at once while they were still minors.

25 Cyc. 986, 987.

Mr. Justice Pitney delivered the opinion of the court:

This was a suit in equity to establish the right of the complainants (appellees) to a parcel of land containing 106 acres, situate in the Barrio Nuevo, in the Jurisdiction of Naranjito, in the Island of Porto Rico, found to exceed in value the sum of $5,000. The district court decreed that the complainants were the legal owners of this

land by inheritance, and entitled to the possession of it as against the appellants, a firm doing business under the name of J. Ochoa y Hermano; that the firm should deliver possession to the appellees; that all entries in the registry of property, of *dominio* and *posesorio* title by or in favor of that firm, and all other entries of either kind of title as against the appellees, should be canceled, etc. 5 Porto Rico Fed. Rep. 463. Defendants appealed to this court.

At the time the appeal was taken, § 35 of the act of April 12, 1900, known as the Foraker act (31 Stat. at L. 77, 85, chap. 191), was in force,—since superseded by § 244 of the Judicial Code of March 3, 1911 (36 Stat. at L. 1087, 1157, chap. 231, U. S. Comp. Stat. Supp. 1911, pp. 128, 229),—and subjected appeals from the district court of the United States for Porto Rico to the regulations applicable to appeals from the supreme courts of the territories. These were controlled by act of 144]April 7, 1874, chap. 80, § 2 (18 *Stat. at L. 27, 28), by which it was provided that, instead of the evidence at large, a statement of the facts in the nature of a special verdict, with the rulings of the court on the admission or rejection of evidence when excepted to, should be made and certified by the court below, and transmitted to this court with the transcript of the proceedings and judgment or decree. Our jurisdiction therefore is confined to determining whether the facts found by the district court support its judgment; for no errors are assigned upon questions of evidence. Rosaly v. Graham y Frazer, 227 U. S. 584, ante, 655, 33 Sup. Ct. Rep. 333, and cases cited.

The findings are in substance as follows:

José Maria Hernandez, the paternal grandfather of complainants, was at the time of his death, in the year 1872, the owner and in possession of a tract of land in which was included the parcel of 106 acres in controversy. His title to this parcel was never recorded. Upon his death his son, Juan Hernandez, became by inheritance the owner of it, and entered into and remained in possession as owner until his death, which occurred in the year 1887; but his title was never recorded. Upon his death, Juan Hernandez left surviving him two young children, the complainants, and also a widow, their mother; she died in the year 1906, and the complainants, then still minors, became sole owners of the tract by inheritance from their father; but their title has never been recorded.

In the year 1890, the title to the land in question did not appear of record in favor of any person, either in the books of the present or modern registry, or in the books of the old registry, the ancient *anotadurias*, or *contadurias*. In that year Raimundo Morales, the maternal grandfather of the complainants, fraudulently representing himself to be the owner, appeared before the municipal court of Naranjito, an insular court, and by certain *ex parte* proceedings obtained from that court a decree declaring him to be entitled to the possession of the land, *but without prejudice to[145 third parties who might show a better right to such possession. The possessory title so obtained was duly recorded or inscribed in the proper registry of property, in the same year, and was the only title to the land that then appeared recorded or inscribed in the registry.

In the year 1899, Morales again appeared before the same insular court, and petitioned for a decree converting the possessory title, or entry of possession in the registry, into a record of ownership (*titulo de dominio*). His petition and the proceedings had thereon in the insular court were based upon the provisions of a judicial order, dated April 4, 1899, and promulgated in the Official Gazette of Porto Rico under date April 7, 1899. This order was made under authority of Major General Guy V. Henry, U. S. Volunteers, at that time military governor of Porto Rico, and by its terms reduced from twenty years to six years the period during which real estate must be held in order to permit the conversion in the registry of a *posesorio* title to a *dominio* title. Upon the application of Morales, such proceedings were had in the insular court as were provided for in the judicial order, and the court in due time made and entered its decree to the effect that the entry of possession, or possessory title, which appeared in the registry recorded in favor of Morales, be converted into a record of ownership, or *dominio* title. Thereafter, and in the same year (1899), this decree was duly recorded or inscribed by Morales in the proper registry of title, and the *dominio* title thereafter appeared in the registry recorded solely in his name.

In the year 1901, there appearing in the registry no claim or right or title in the land on the part of any other person or persons, Morales, still fraudulently representing himself to be the true owner, mortgaged the land for value to the defendants, constituting the firm of J. Ochoa y Hermano, who truly and in good faith believed him (Morales) *to be the owner of it, and[146 were entirely ignorant of the rights of the complainants therein. The mortgage was duly recorded in the proper registry of property in the same year.

Thereafter, and in the year 1903, the record still showing nothing respecting the ownership of the lands besides the dominio

title of Morales and the mortgage of the defendants, and they being still ignorant of the rights of the complainants, Morales by deed duly executed before a notary public, in which his wife joined, sold and transferred the land to defendants in full payment of the amounts due and secured by the mortgage. The defendants duly recorded the deed in the same year, and by their agent immediately took possession of the land.

The present action was commenced in 1908, shortly after the complainants arrived at full age.

Upon these facts the district court concluded as matter of law that the judicial order of General Henry, dated April 4, 1899, —so far as it operated retrospectively upon the rights of the complainants, who were minors at the time and for some time thereafter, and who owned the land during the entire period of nine years that elapsed between the fraudulent entry of possessory title in the name of their maternal grandfather, Morales, and the promulgation of General Henry's order,—was null and void because in contravention of the "due process of law" clause of the 5th Amendment to the Constitution of the United States.

For an understanding of the questions presented, it should be premised that Congress declared war to exist between this country and Spain by an act of April 25, 1898 (30 Stat. at L. 364, chap. 189); that Porto Rico, then a colony of Spain, was occupied by the military forces of the United States from and after July 25th; that a protocol was signed in Washington, August 12th (30 Stat. at L. 1742), under which hostilities between the two countries 147]were *suspended pending negotiation of a treaty for the establishment of peace, by the terms of which protocol (*inter alia*) Spain agreed to cede the Island of Porto Rico to the United States and to immediately evacuate it, and commissioners were appointed to meet at Paris and proceed to the negotiation and conclusion of the treaty; that accordingly a treaty was signed at Paris under date December 10, 1898, ratifications being exchanged at Washington, April 11, 1899 (30 Stat. at L. 1754), and by its terms Porto Rico was ceded to the United States, and (article 9, p. 1759) "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." The military occupation of Porto Rico was immediately followed by the establishment of a provisional government, as will be mentioned below, and this government continued in control of the affairs of the Island continuously until the ratification of the treaty, and thereafter until the enactment of the Foraker Act of April 12, 1900, entitled "An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes" (31 Stat. at L. 77, chap. 191).

The statement of facts is silent upon the question of the possession of the property from the death of the father of the appellees, in the year 1887, until the appellants entered into possession under the deed given to them by Morales, in the year 1903. Assuming (in favor of appellants) that Morales had possession from the time he procured the entry of a possessory title in his name, the effect of this, as between him and the true owners, was that uninterrupted possession for thirty years would ripen into a good title and confer immunity from action (former Civil Code [P. R.] arts. 1959, 1963, New Civil Code [P. R.] §§ 1860, 1864). He was not entitled to avail himself of article 1957, that declared a prescription by possession for ten years as to persons present, and for twenty *years[148 with regard to those absent, because this was confined to possession "with good faith and proper title," and Morales had neither, within the meaning of those terms as employed in the Code (former Civil Code [P. R.] arts. 1940, 1941, 1950, 1952–1954; present Civil Code, §§ 1841, 1842, 1851, 1853–1855). The entry of a possessory title in his name was in effect a judicial certificate declaring him to be entitled to the possession, but without prejudice to third parties who might show a better right to it. It gave him no title as against them, but conferred a prima facie legitimacy upon his possession, being "provisional and presumptive evidence of ownership;" and it fixed a date from which his possession should be treated as originating; and so the entry amounted (for present purposes) to no more than public notice that from that time his possession was adverse to the true owners. Soto v. Registrar of Property, 15 P. R. R. 597, 600; Morales v. Landrau, 15 P. R. R. 761, 772; Pares v. J. Reynes & Co. 2 Porto Rico Fed. Rep. 402, 428.

But appellants rest their case upon the provisions of the mortgage law as amended by the judicial order of General Henry. The mortgage law is a somewhat elaborate system of registration for instruments of conveyance, that, having been long in force in the Peninsula, was extended to Porto Rico and the Philippines in or about the year 1893. It was designed to give to purchasers and mortgagees acquiring interests in lands in reliance upon recorded titles, protection against claims and interests of which no notice was conveyed by the records. Its provisions are to be read in connection with

those of the Civil Code. By article 27 "those who have not participated in the recorded instrument or contract" are considered as third persons. By article 33 "the record of instruments or contracts which are null in accordance with the law are not validated thereby." But, notwithstanding this, by ar-[149]ticle 34 "instruments or contracts *executed or covenanted by a person who, according to the registry, has a right thereto, shall not be invalidated with regard to third persons after they have once been recorded, although later the right of a person executing them is annulled or determined by virtue of a prior deed not recorded, or for reasons which do not clearly appear from the registry. Only by virtue of a recorded instrument may another later instrument, also recorded, be invalidated to the prejudice of third persons [with exceptions not now material]. The provisions of this article [34] may at no time be applied to the instrument recorded in accordance with the provisions of article 390, unless the prescription has validated or secured the interest referred to therein." By article 36 "suits for rescission or determination of title shall not be instituted against third persons who have recorded the instruments of their respective interests in conformity with the provisions of this law." But by article 37 exceptions are made to the rule thus declared, and one of them is, "suits for rescission or determination of title which are due to the causes plainly expressed in the registry."

Subsequent sections provide for the mortgaging of different interests in real property, and for various purposes, and declare the effect that shall be given to the mortgages, provide for the manner of keeping the registries, for making and correcting entries therein, and for proceedings for clearing the title of unrecorded mortgages and other charges and interests. Art. 389 prohibits the admission in the courts, etc., of unrecorded documents or instruments if presented for the purpose of enforcing, to the prejudice of third persons, interests which should have been recorded. Articles 390 to 395 inclusive contain provisions under which owners who lack a recorded title of ownership are permitted to record their interests by previously proving their possession before the judge of first instance, or [150]the proper municipal judge, with *the consent of the Department of Public Prosecution and citation of the adjacent property owners, should they desire to record the absolute ownership of some estate, and with the citation of the owner or other participants in the ownership, should they desire to record some property right. Article 391 prescribes the form of the proceedings. Article 392 provides that the court, on approving the proceedings, shall "order that the record requested be made in the registry without prejudice to a third person having a better claim." Among the prerequisites for converting entries of possession into records of ownership under this procedure it was, by ¶ 6 of art. 393, provided that twenty years must have elapsed since the date of entry of possession. By article 394, "If the twenty years calculated from the date of the entry [of possession] have not elapsed, or the requisites mentioned in article 393 of this law have not been complied with, the entries of possession shall have the legal effect embraced in the provisions contained in the following paragraphs [*vis.*] The period of possession which appears to have elapsed at the time said entries are made shall be computed for the prescription which does not require a just title, unless a person prejudiced thereby denies it, in which case said period of possession must be proven in accordance with the common law. Entries of possession shall prejudice or favor third persons from the date of their record, but only with regard to the effects which the laws attribute to mere possession. The entry of possession shall not prejudice the person who has a better right to the ownership of the realty, although his title has not been recorded, unless the prescription has confirmed and secured the claim recorded. Between the parties the possession shall be effectual from the date prescribed by the common law. The provisions contained in the preceding articles, regarding the entries of possession, cannot be applied to mortgage rights, which cannot *be re-[151]corded unless an instrument in writing is presented."

Under the mortgage law, it seems to be settled that these proceedings for proving possession or ownership before the courts of first instance or municipal courts, although judicial in form, are intended merely as aids to the establishment of a system of authenticated instruments of title for purposes of the public records; that although under some circumstances it is required that notice be given to the owner or other persons interested adversely to the applicant, the proceedings are really *ex parte*, have not the effect of *res judicata*, and do not bind anyone who does not appear. González v. People, 10 P. R. R. 458; Calderón v. García, 14 P. R. R. 407, 416. And even with respect to a party who appears and opposes the entry of a possessory title or its conversion into a *dominio* title, his rights cannot be adjudged or passed upon in these proceedings, but must be decided in an ordinary action of revindica-

tion; the court being limited, in the proceedings under the mortgage law for a conversion of a possessory to a *dominio* title, to saying whether petitioner has shown a right to the conversion asked for; but without passing upon the rights of others. Paris v. People, 5 P. R. R. 29; Diaz v. Waymouth, 13 P. R. R. 317.

This is conceded by the appellants, who, indeed, base their argument upon it; contending, further, that, because of what has just been said, the rights of appellees in the land in question were not affected by the proceedings whereby Morales converted his possessory title into a title of ownership, and that the recording of this *dominio* title by him did not cut off any of their rights; that if such title was fraudulent it was liable to attack, even after registry, within any period short of thirty years after he had entered into possession of the land and while still recorded in his name, or in that [152]of any other person *excepting an innocent purchaser without notice; or, in the language of the civil law, "a third party with good faith." Paris v. People, 5 P. R. R. 29, 37; Gonzáles v. People, 10 P. R. R. 458, 462; Abella v. Antuñano, 14 P. R. R. 485, 494; Merchant v. Lafuente, 5 Philippine, 638, 644.

Upon the strength of this, it is ingeniously argued that under the law of Porto Rico it was not the conversion of the apparent title of Morales from a possessory to a *dominio* title that cut off the rights of the appellees; but it was the fact that the appellants, in reliance upon that apparent title, and (as is said) without notice of the rights of the appellees, purchased the land from Morales, which by virtue of the mortgage law gave to them a better right than the appellees. And from this it is contended that the judicial order, in reducing from twenty years to six years the time that must elapse between the entry of a possessory title and its conversion into a *dominio* title, did not cut off any right of appellees, and therefore was not and is not inconsistent with "due process of law."

But it seems to us that there can be no difference in principle—so far as concerns the question whether the property of the appellees was taken from them without due process—whether there were two steps or three steps in the course of procedure by which the end was accomplished. Whether the retroactive effect of the judicial order resulted in conferring upon Morales a title that he himself could maintain against the true owners, or whether it conferred upon him an apparent title that not he himself but his grantees could maintain, makes no difference in a controversy between his grantees and the true owners.

In short, the position of appellees is that by the fraudulent conduct of Morales, plus the mortgage law, plus the judicial order, plus the *dominio* title in Morales founded thereon, and the recording thereof, plus the *mortgage and deed to appellants,[153 their property has been taken from them and given to appellants, without notice to them or an opportunity for a hearing; and that the proceedings in court for converting the possessory into a dominion title, while bearing the semblance of judicial proceedings, departed therefrom in the essentials. To this, it is no answer to say that those proceedings in court did not, under the mortgage law, purport to be judicial proceedings at all; nor to say that they would have done no harm except for the subsequent conveyance by Morales to the appellants.

We proceed, therefore, to consider the fundamental question upon which the court below rested its decree.

The judicial order of General Henry, dated April 4th, and published April 7th, 1899 (Mil. Ord. Porto Rico, vol. 2, p. 71), contains seven clauses or paragraphs, of which the first amends article 1957 of the Civil Code so as to reduce the period for prescription by possession accompanied with good faith and a proper title, from ten years with respect to persons present, and twenty years with respect to persons absent, down to six years as to persons both present and absent. This has no direct bearing upon the present case, for reasons already indicated.

Other clauses of the order amend articles 391, 393, 394, and 395 of the mortgage law. The most important is that which amends paragraph 6 of article 393, so as to reduce from twenty years to six years the period during which possession must continue in order to convert an entry of possession into a record of ownership upon the public records. The final clause declares: "This order shall have retroactive effect."

The court below held (5 Porto Rico Fed. Rep. 463) that, assuming General Henry possessed all the legislative power that is possessed by Congress under the Constitution, he was still necessarily subject (as Congress would be) to the *"due proc-[154 ess of law" clause of the 5th Amendment. And since his judicial order, because of its retroactive clause, by its terms covered the present case, where the real owners of the land were infants and unable to protect themselves, and where they still had, under the mortgage law as it stood, nearly twelve years in which to attain maturity and contest the possession and right of Morales; and since the order shortened the period of limitation to six years, which period in

their case had already elapsed, the order at the same time containing no provision for saving existing rights or giving to them or to others in like situation any opportunity to assert their rights,—it was the same in effect as taking their property without due process of law.

We find it unnecessary to consider whether the authority of General Henry was subject to the same constitutional limitations as that of Congress; for we have reached a like result, so far as the present case is concerned, upon different reasoning.

Porto Rico at the time was still foreign territory, and was under a provisional military government established by President McKinley as Commander-in-Chief. In order to determine the extent of the authority of General Henry, and the limitations upon it, we must look to the orders under which the military government was established and maintained.

The Island was occupied by the forces of the United States under Major General Miles, Commanding United States Army, on July 25, 1898. He appears to have had no special instructions from the President respecting the government that should be established, but it was well understood that he and those under him were subject to the instructions communicated by President McKinley to the Secretary of War under date July 13th with reference to Cuba (10 Mess. & Pap. 214), and published by the War Department as General Orders No. 101, 155] *under date July 18, of which a copy is set forth in the margin.†

*The clauses especially pertinent to[156 the present question are the following: "The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment *of the new[157 political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. . . . Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide or the punishment of crime, are *con-[158 sidered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. . . . Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause."

General Miles was second in command only to the President, and as his representative had full control in Porto Rico. That

†[Corrected copy.—Please destroy all others.]

GENERAL ORDERS, No. 101.

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
Washington, July 18, 1898.

The following, received from the President of the United States, is published for the information and guidance of all concerned:

EXECUTIVE MANSION,
Washington, July 13, 1898.

To the Secretary of War.

Sir: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the Province of Santiago, and the occupation of the territory by the forces of the United States, render it necessary *to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.*

*The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations.* It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to anounce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, co-operate with the United States in its efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

*Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by*

he fully sympathized with the purposes of the President, and intended that all subordinate officers should govern themselves accordingly, appears from his declaration to the inhabitants under date of July 28, in which he said: "The first effect of this occupation will be the immediate release from your former political relations, and, it is hoped, a cheerful acceptance of the government of the United States. The chief object of the American military forces will be to overthrow the armed authority of Spain, and to give to the people of your beautiful island the largest measure of liberty consistent with this military occupation. We have not come to make war upon the people, . . . but, on the contrary, to bring you protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessings of the liberal institutions of our government. It is not our purpose to interfere with any existing laws and customs that are wholesome and beneficial to your people, so long as they conform to the rules of military administration, of order and justice. This is not a war of devastation, but one to give to all within the control of its military and naval forces the advantages and blessings of enlightened civilization."

*the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion.* The judges and the other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American Commander-in-Chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

While the rule of conduct of the American Commander-in-Chief will be such as has just been defined, it will be his duty to adopt measures of a different kind, if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the state he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats belonging to the state, may be appropriated to his use, but, unless *in case of military necessity, they are not to be destroyed.* All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or of works of science or art, is prohibited, save when required by urgent military necessity.

*Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause.* Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but, unless destroyed under military necessity, are not to be retained.

While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expense of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the Army.

*Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given.*

All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation.

William McKinley.

By order of the Secretary of War:

H. C. Corbin,

Adjutant General.

159] *And under date July 29, a latter of instructions was published, under the authority of General Miles, for the information and guidance of all concerned, in which the substance of General Orders No. 101, *mutatis mutandis*, was embodied, so as to be binding upon the military government of Porto Rico (Rep. War Dept. 1900, vol. 1, pt. 13, pp. 18-22).

The protocol of August 12, 1898 (30 Stat. at L. 1742), the purport of which has already been given, left our government, by its military forces, in the occupation and control of Porto Rico as a colony of Spain, and bound by the principles of international law to do whatever was necessary to secure public safety, social order, and the guaranties of private property. From this time until the interchange of the ratifications of the treaty on April 11, 1899 (30 Stat. at L. 1754), General Orders No. 101, and the instructions of General Miles to his subordinates dated July 29, 1898, continued to form the authority, and the sole authority, for the military government of Porto Rico.

This island, and the islands and keys adjacent and belonging to it, were by order of October 1, 1898 (General Orders No. 158), established as a military department, and Major General John R. Brooke was assigned to its command. He assumed the command on October 18th, and held it until December 8th. General Henry succeeded him on that date, and remained in command until after the ratification of the treaty.

The status of Porto Rico during the military occupancy, and before the exchange of ratifications, was the same as that of the Philippines during the same period, and is dependent upon principles expounded in frequent decisions of this court. Fleming v. Page, 9 How. 603, 614, 615, 13 L. ed. 276, 280, 281; Cross v. Harrison, 16 How. 164, 190, 14 L. ed. 889, 899; Dooley v. United States, 182 U. S. 222, 230, 45 L. ed. 1074, 1081, 21 Sup. Ct. Rep. 762; McLeod v. United States, 229 U. S. 416, ante, 1260, 33 Sup. Ct. Rep. 955.

From the exchange of ratifications until 160]Congress *acted by the passage of the Foraker act, the provisional government continued as before the peace. Santiago v. Nogueras, 214 U. S. 260, 265, 53 L. ed. 989, 990, 29 Sup. Ct. Rep. 608; Leitensdorfer v. Webb, 20 How. 176, 178, 15 L. ed. 891, 892. And see DeLima v. Bidwell, 182 U. S. 1, 174, etc., 45 L. ed. 1041, 1047, 21 Sup. Ct. Rep. 743.

During the entire period, General Orders No. 101, as reiterated by General Miles, continued in force as the recognized declaration of principles by which the military government was limited. References to official sources of information respecting the period of military occupancy are given in a marginal note.†

Under all the circumstances we deem it clear that the governor was without authority from the President to make any order, judicial in its nature, that would have the effect of depriving any person of his property without due process of law.

It is said that § 8 of the Foraker act (31 Stat. at L. 79, chap. 191) had the effect of ratifying the judicial order of General Henry. That section declared: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States,"—with provisos not now pertinent. We can find here no legislative purpose to validate any *order of the[161 military governor that was in excess of the authority conferred upon him by the President.

Without the guaranty of "due process" the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.

Now, the effect and operation of the retroactive clause in the judicial order of April 4, 1899, as applied to the facts of the concrete case, were such that, although Morales had until then no right, title, or interest in the land in question, and had merely established through fraudulent means and without notice to the persons concerned a foot-

†Reports Major General Commanding Army 1898, pp. 31-33; 1899, pp. 321, 325.

Reports War Department 1899, vol. 1, pt. 6, pp. 488, 491, 565; 1900, vol. 1, pt. 13, pp. 18-30.

General Orders, Department of Porto Rico, 1898, Preface (General Orders No. 101).

ing of possession, as a result of which, if they should permit his claims to remain unchallenged, and he should in fact maintain continuous possession for nearly twelve years longer, he would thereby be enabled to procure, by *ex parte* proceedings, an apparent title in himself as against them, yet the order permitted him at once, and without notice to the owners, to procure such record of ownership in his name, although they were then infants, and, so far as appears, not cognizant of his possession of the land or of any of his proceedings; and then, by virtue of other provisions of the mortgage law, he could completely deprive them of their property if he could make sale of it to a bona fide purchaser without notice of the infirmity of his apparent title.

With reference to statutes of limitations, it is well settled that they may be modified 162]by shortening the time *prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect. Terry v. Anderson, 95 U. S. 628, 632, 24 L. ed. 365, 366; Re Brown, 135 U. S. 662, 701, 705, 34 L. ed 304, 316, 317, 10 Sup. Ct. Rep. 972; Wheeler v. Jackson, 137 U. S. 245, 255, 34 L. ed. 659, 663, 11 Sup. Ct. Rep. 76; Turner v. New York, 168 U. S. 90, 94, 42 L. ed. 392, 393, 18 Sup. Ct. Rep. 38; Wilson v. Iseminger, 185 U. S. 55, 63, 46 L. ed. 804, 807, 22 Sup. Ct. Rep. 573. Many other cases might be cited. The question of what, under given circumstances, is to be deemed a reasonable time to be allowed for the bringing of an action when a change is made in a statute of limitations has sometimes given rise to discussion. In the present case there is no such embarrassment, for here no time whatever was allowed with respect to the case of these appellees and all others against whose lawful ownership an unlawful possession had been held for more than six years but less than twenty years at the time of the making of the judicial order.

Since the proceeding for converting the entry of possession into a *dominio* title, as well as the proceeding for an entry of possession itself, was taken without notice to the owners, the effect of the judicial order was precisely the same as if the military governor had declared that the property in question should be taken from the lawful owner and given to the fraudulent occupant. Certainly General Henry can have had no such purpose, and must have been wrongly advised with respect to the results that would flow from making the order retroactive. Otherwise he would have confined it to cases where there still remained a reasonable opportunity for the real owner to contest the pretensions of the possessor. And in view of the instructions under which he derived his authority, the judicial order must be construed as if expressly thus limited.

But appellants rely upon articles 33, 34, 36, and 37, already quoted; the effect of which is that the title of "a person who according to the registry has a right thereto *[*e. g.*, Morales] shall not be invali-[163 dated with regard to third persons [*e. g.*, appellants] after they have once been recorded, although later the right of the person executing them [Morales] is annulled or determined . . . for reasons which do not clearly appear from the registry;" and also, that "suits for rescission or determination of title shall not be instituted against third persons [*e. g.*, appellants] who have recorded the instruments of their respective interests in conformity with the provisions of this law," except, however, "suits for rescission or determination of title, which are due to the causes plainly expressed in the registry." It is said that since Morales secured the possessory title in 1890, and recorded it in the same year, and secured the conversion of that title into a title of ownership in the year 1899, and recorded this *dominio* title in the same year, and in the year 1901 mortgaged the lands for value to the appellants, and followed this with a conveyance in 1903, he at all times appearing in the registry as sole owner, and since, in their transactions with Morales, appellants acted in good faith and in the belief that he was the sole owner, they are protected.

But the findings show that the entry of possession in favor of Morales declared that his right was "without prejudice to third parties who might show a better right to such possession," and that the proceedings for the conversion of the entry of possession into a record of ownership showed upon their face that they were based upon the provisions of the judicial order of April 4, 1899.

In other words, when appellants took from Morales the mortgage and deed under which they now claim, they were charged with notice upon the record that his entry of possession was subject to the rights of others, and that by the law as it formerly stood, those rights could not be cut off in less than twenty years. They were also charged with notice that his *dominio* title depended upon *the validity of an or-[164 der made by the military governor purporting to have a retroactive effect, and to cut off, without notice or hearing, the claims of

the identical third parties whose rights were preserved by the entry of possession; for at the time of the making of the judicial order the six years had already run.

It is a familiar doctrine, universally recognized where laws are in force for the registry or recording of instruments of conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records. Brush v. Ware, 15 Pet. 93, 111, 10 L. ed. 672, 679; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 35 L. ed. 1062, 1071, 12 Sup. Ct. Rep. 239; Northwestern Nat. Bank v. Freeman, 171 U. S. 620, 629, 43 L. ed. 307, 311, 19 Sup. Ct. Rep. 36; Mitchell v. D'Olier, 68 N. J. 375, 384, 59 L.R.A. 949, 53 Atl. 467.

This principle is recognized in articles 34 and 37 of the mortgage law. In referring to "reasons which do not clearly appear from the registry," and "causes plainly expressed in the registry," they refer of course to matters of fact, not to matters of law. In other words, if the registry gives notice of a state of facts that renders the title invalid or subject to question in law, the purchaser who relies upon the record takes his title subject to whatever consequences may flow in law from the facts thus notified.

Appellants must be presumed, in accepting the mortgage and the conveyance from Morales, to have done so subject to whatever risk there may have been, arising from the want of authority on the part of General Henry to deprive third parties, without process of law, of those rights that were saved by the terms of the entry of possession in favor of Morales.

Nor is there any real hardship in applying this rule; for the limitations under which the military governor exercised his temporary authority in Porto Rico must be deemed to have been notorious everywhere, 165]since they *were proclaimed at the outset by General Miles, repeatedly reiterated during the military régime, and indeed were such as arise from general rules of international law, and from fundamental principles known wherever the American flag flies.

Decree affirmed.

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MARY E. NALLE, Plff. in Err.,
v.
JAMES F. OYSTER, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey, and Barton W. Evermann.

(See S. C. Reporter's ed. 165–183.)

**Appeal — necessity of exception — errors apparent on the record.**

1. An exception must be deemed unnecessary to bring up for review, in the court of appeals of the District of Columbia, a ruling sustaining a demurrer to a count in the declaration, there being nothing in the District of Columbia Code of March 3, 1901 (31 Stat. at L. 1189, chap. 854), or the rules of practice established under it, which requires an exception to an error apparent on the face of the record, contrary to the settled practice in Maryland under 13 Edw. I. chap. 31, § 1, which is recognized by the Code and by the compilation of the laws of the District made under the authority of the act of March 2, 1889 (25 Stat. at L. 872, chap. 392), as being in force therein.

[For other cases, see Appeal and Error, 3427-3433, in Digest Sup. Ct. 1908.]

**Judgment — res judicata — matters pleaded or involved.**

2. A judgment in favor of a board of education in mandamus proceedings to compel the reinstatement of a teacher whose dismissal the board attempted to justify because of her asserted incompetency is a conclusive determination, as to her, of the truth of such assertion, in a libel suit brought by her against the members of the board because of the statement in the board's answer that she was deficient in the necessary academic and pedagogic equipment of a teacher.

[For other cases, see Judgment, III. j, 2, in Digest Sup. Ct. 1908.]

**Libel — privileged communications — pleading.**

3. An averment in the answer of a board of education in mandamus proceedings to compel the reinstatement of a teacher, that upon examination they had ascertained her to be lacking in the qualifications of a teacher, and had dismissed her accordingly, is privileged when found to be true by the judgment in favor of the board.

[For other cases, see Libel and Slander, II. b, in Digest Sup. Ct. 1908.]

**Conspiracy — overt act — publication of privileged matter.**

4. Trespass on the case for a conspiracy will not lie where the only overt act charged as resulting in damage to the plaintiff is the filing of certain alleged libelous matter as a part of the answer of a board of education in mandamus proceedings to compel plaintiff's reinstatement as a teacher, which

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NOTE.—On liability by defamatory words in pleading—see notes to Randall v. Hamilton, 22 L.R.A. 649; and Kemper v. Fort, 13 L.R.A.(N.S.) 820.

On privileged communications in libel and slander—see note to White v. Nicholls, 11 L. ed. U. S. 591.

On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

matter by a judgment in favor of the board was determined to be true, and was therefore privileged.

[Matters as to Conspiracy, see Conspiracy, in Digest Sup. Ct. 1908.]

[No. 218.]

Submitted April 16, 1913. Decided June 16, 1913.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of defendants in an action for libel and conspiracy. Affirmed in part and reversed in part and remanded for further proceedings.

See same case below, 36 App. D. C. 36.

The facts are stated in the opinion.

Messrs. **John C. Gittings** and **Justin Morrill Chamberlin** submitted the cause for plaintiff in error:

The theory of absolute privilege is untenable where the libelous matter complained of was knowingly false, malicious, and wantonly made.

White v. Nicholls, 3 How. 266, 11 L. ed. 591; Masterson v. Brown, 18 C. C. A. 481, 30 U. S. App. 730, 72 Fed. 136; Merchants' Ins. Co. v. Buckner, 39 C. C. A. 19, 98 Fed. 222; McGehee v. Insurance Co. of N. A. 50 C. C. A. 551, 112 Fed. 854.

A former judgment is not binding on the parties in a subsequent action, by way of estoppel as to any question of fact, unless it appears from the judgment or by extrinsic evidence that such question was within the issues of the former action, and was actually litigated and determined therein.

Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 592, 18 L. ed. 553; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Cummings v. Baker, 16 App. D. C. 1; Augir v. Ryan, 63 Minn. 373, 65 N. W. 640; Teal v. Terrell, 48 Tex. 491; Hunter v. Davis, 19 Ga. 413; 1 Starkie, Ev. 223; Greenl. Ev. § 528; Bergeron v. Richardott, 55 Wis. 129, 12 N. W. 384; Dixon v. Merritt, 21 Minn. 196.

Where a matter is absolutely privileged in the sense that no action of libel or slander can be maintained thereon, as held by the English and certain of the American state authorities,—for instance, such as an affidavit made to secure a warrant for the arrest of another,—nevertheless, if it be conceded that the statements of fact in the warrants be untrue and maliciously made and without probable cause, the aggrieved party can maintain an action of malicious prosecution, and the false and libelous matter contained in the warrant is competent evidence of the fact.

White v. Nicholls, 3 How. 266, 11 L. ed. 591; Masterson v. Brown, 18 C. C. A. 481, 30 U. S. App. 730, 72 Fed. 136; Townsend, Slander & Libel, 3d ed. p. 380; Olmstead v. Partridge, 16 Gray, 381; Beihofer v. Loeffert, 159 Pa. 365, 28 Atl. 217; 19 Am. & Eng. Enc. Law, 2d ed. p. 694.

The second count of the declaration is not a count in libel, but a count in trespass on the case in the nature of a conspiracy. This form of action superseded the old common-law action of conspiracy, because it furnished a more adequate and more liberal remedy for malicious prosecutions, or prosecutions of every nature and description.

Savile v. Roberts, 1 Ld. Raym. 374.

Although not a common form of action, it has been recognized by nearly all the jurisdictions of this country, and can be maintained wherever the plaintiff has been aggrieved and damnified by any unlawful acts done by others in the pursuance of a combination or conspiracy entered into for that purpose.

Mott v. Danfort, 6 Watts, 304, 31 Am. Dec. 468; Wildee v. McKee, 111 Pa. 337, 55 Am. Rep. 271, 2 Atl. 108; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Verplanck v. Van Buren, 76 N. Y. 259.

In criminal prosecutions for conspiracy the statute begins to run from the last overt act (Ochs v. People, 124 Ill. 399, 16 N. E. 662), and the same principle of law has been applied to civil actions of conspiracy.

Breitenberger v. Schmidt, 38 Ill. App. 168.

Messrs. **Clarence R. Wilson** and **Reginald S. Huidekoper** submitted the cause for defendants in error:

If the contention of the plaintiff is sound, then this court has erred in its numerous decisions that an adjudication respecting prior instalments or coupons is conclusive between the parties in relation to subsequent instalments or coupons. In such cases the subsequent instalments or coupons may not have been due when the suit relating to prior instalments or coupons was adjudicated, but the binding effect of such adjudications has been repeatedly held.

Mason Lumber Co. v. Buchtel, 101 U. S. 638, 25 L. ed. 1074; Bissell v. Spring Valley Twp. 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495; Johnson Steel Street R. Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608.

A person is estopped from again setting up a claim in a subsequent suit, which was

necessarily involved in a prior suit between the same parties, and this, whether such matter was actually considered by the court or not.

Beloit v. Morgan, 7 Wall. 619, 623, 19 L. ed. 205, 206; Cromwell v. Sac County, 94 U. S. 351, 353, 24 L. ed. 195, 198; Hopkins v. Lee, 6 Wheat. 109, 113, 5 L. ed. 218, 219; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Baker v. Cummings, 181 U. S. 117, 45 L. ed. 776, 21 Sup. Ct. Rep. 578; Dickson v. Wilkinson, 3 How. 57, 61, 11 L. ed. 491, 493; Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co. 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690; Woodbury v. Portland Marine Soc. 94 Me. 122, 46 Atl. 797; North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258; Holt County v. National L. Ins. Co. 25 C. C. A. 469, 49 U. S. App. 376, 80 Fed. 686.

Matters appearing in the pleadings, or statements of counsel made in the course of judicial proceedings, which are pertinent and material to the issue, are absolutely privileged, and will not support an action for libel against the party making them.

McGehee v. Insurance Co. of N. A. 50 C. C. A. 551, 112 Fed. 853; King v. McKissick, 126 Fed. 215; Conley v. Key, 98 Ga. 115, 25 S. E. 914; Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274; Burdette v. Argile, 94 Ill. App. 171; Strauss v. Meyer, 48 Ill. 385; Gardemal v. McWilliams, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 So. 106; Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505; McLaughlin v. Cowley, 127 Mass. 316; Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Aylesworth v. St. John, 25 Hun, 156; Link v. Moor, 84 Hun, 118, 32 N. Y. Supp. 461; Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Gaines v. Ætna Ins. Co. 104 Ky. 695, 47 S. W. 884; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; Marsh v. Ellsworth, 50 N. Y. 309; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048; Gilbert v. People, 1 Denio, 41, 43 Am. Dec. 646; Cook v. Hill, 3 Sandf. 341; Warner v. Paine, 2 Sandf. 195; Perkins v. Mitchell, 31 Barb. 461; Garr v. Selden, 4 N. Y. 91; Nissen v. Cramer, 104 N. C. 574, 6 L.R.A. 780, 10 S. E. 676; Mower v. Watson, 11 Vt. 536, 34 Am. Dec. 704; Clemmons v. Danforth, 67 Vt. 617, 48 Am. St. Rep. 836, 32 Atl. 626; Abbott v. National Bank, 20 Wash. 552, 56 Pac. 376; Johnson v. Brown, 13 W. Va. 119; Jennings v. Paine, 4 Wis. 358; Astley v. Younge, 2 Burr. 807, 2 Ld. Kenyon, 536; Lea v. White, 4 Sneed, 111; Hoar v. Wood, 3 Met. 196.

Malice cannot be predicated upon matter which is pertinent and material to a case subject to inquiry before a court. No one is permitted to allege that what was rightfully done in a judicial proceeding was done with malice. Though the words used were false and malicious, the privilege is absolute.

Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Hollis v. Meux, 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. 248; Burdette v. Argile, 94 Ill. App. 171; Gaines v. Ætna Ins. Co. 104 Ky. 695, 47 S. W. 884; Gardemal v. McWilliams, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 So. 106; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; Marsh v. Ellsworth, 50 N. Y. 309; Garr v. Selden, 4 N. Y. 91; Gilbert v. People, 1 Denio, 41, 43 Am. Dec. 646; Mower v. Watson, 11 Vt. 536, 34 Am. Dec. 704; Link v. Moore, 84 Hun, 118, 32 N. Y. Supp. 461; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048; Nissen v. Cramer, 104 N. C. 574, 6 L.R.A. 780, 10 S. E. 676; Warner v. Paine, 2 Sandf. 195; Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274.

If the person charging facts in a pleading in a judicial procedure in good faith believes the words thus written to be material and pertinent to the issues presented in such proceedings, then the rule of absolute privilege extends to such person, although the matter may be found to be not strictly material and pertinent.

Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Burdette v. Argile, 94 Ill. App. 175; Aylesworth v. St. John, 25 Hun, 156; Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330; White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Warner v. Paine, 2 Sandf. 195; Lea v. White, 4 Sneed, 114; Perkins v. Mitchell, 31 Barb. 468; Gaines v. Ætna Ins. Co. 104 Ky. 695, 47 S. W. 884; Harlow v. Carroll, 6 App. D. C. 128; De Arnaud v. Ainsworth, 24 App. D. C. 167, 5 L.R.A. (N.S.) 163; Dawkins v. Paulet, L. R. 5 Q. B. 94, 9 Best & S. 768, 39 L. J. Q. B. N. S. 53, 21 L. T. N. S. 584, 18 Week. Rep. 336; Farr v. Valentine, 38 App. D. C. 412, Ann. Cas. 1913 C, 821; Johnson v. Brown, 13 W. Va. 71.

This court has in several instances recognized, adopted, and applied the principle of absolute privilege.

Randall v. Brigham, 7 Wall. 523, 535, 536, 19 L. ed. 285, 291, 292; Bradley v. Fisher, 13 Wall. 335, 351, 354, 20 L. ed. 646, 650, 651; Vogel v. Gruaz, 110 U. S. 311, 315, 28 L. ed. 158, 160, 4 Sup. Ct. Rep. 144.

12; Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631.

Conspiracy to do a lawful act by lawful means can never be made a ground of action. An act lawful in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it.

Adler v. Fenton, 24 How. 407, 16 L. ed. 696; Porter v. Mack, 50 W. Va. 581, 40 S. E. 459; Severinghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 930; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Van Horn v. Van Horn, 56 N. J. L. 323, 28 Atl. 669; O'Callaghan v. Cronan, 121 Mass. 114; Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279; United States v. Moore, 3 MacArth. 226.

Mr. Justice Pitney delivered the opinion of the court:

This is a writ of error to review a judgment affirming a judgment of the supreme court of the District in favor of the defendants in an action for libel and conspiracy.

The declaration contains two counts, the first of which avers that the plaintiff was a teacher and a member of the body of teachers in the public schools of the District of Columbia, and that the defendants, without probable cause, but contriving and maliciously intending to injure plaintiff in her character and reputation as a school teacher, wrongfully and maliciously composed and published and filed in the clerk's office of the supreme court of the District, as their answer in a legal proceeding wherein they and others composing the board of education were named as defendants, a certain false, scandalous, and defamatory libel concerning the plaintiff in respect of her profession, the purport of which was that the defendants and others composing the board of education found upon examination that the plaintiff "was not sufficiently qualified in all respects to continue to teach" in the public schools, but was "deficient in the necessary academic and pedagogic equipment of a competent teacher," so that the board of education were unable lawfully to continue her in employment.

The second count recites that the plaintiff was and for more than thirty years had been earning her livelihood as a teacher and member of the body of teachers of the public schools of the District of Columbia, and the defendants and others constituted the board 173]of education, *as provided for by the act of Congress approved June 20, 1906 [34 Stat. at L. 316, chap. 3446] by which it is, among other things, enacted that when a teacher is on trial or being investigated she *shall* have the right to be attended by counsel; that certain untrue charges concerning plaintiff's moral character and reputation were under investigation by the board; that without notice to her, or an opportunity for a hearing, the board dismissed her from the rolls as a teacher, assigning as a reason that this was done for the good of the service; that, feeling aggrieved, and having failed to secure redress by a petition direct to the board, plaintiff petitioned the supreme court of the District for a writ of mandamus to compel the board to reinstate her; that the defendants, intending to wrong and injure her in her right to employment in the line of her occupation and calling, and specifically to prevent her from securing the writ of mandamus to reinstate her to her position and to the emoluments of her office as a member of the body of teachers of the public schools, entered into an unlawful agreement and conspiracy among themselves to ruin the plaintiff, and specifically to prevent her from obtaining her proper redress as prayed for in the mandamus proceedings, and to cause it to be believed by the public in general that she was deficient in the necessary academic and pedagogic equipment of a competent teacher, and thereby prevent her from securing employment as such; that in pursuance of the conspiracy the defendants maliciously composed and published, and filed in the clerk's office of the supreme court of the District, a paper purporting to be their answer and the answer of other members of the board of education, which contained certain false and scandalous libel concerning the plaintiff in her profession as a school teacher (the alleged libelous matter being set forth and being of the same tenor and purport as that alleged in the first count), the defendants knowing at the time that the facts *alleged in the libel were false:[174 all of which was done in pursuance of the alleged unlawful agreement and conspiracy; that thereby the plaintiff was prevented from securing a fair and impartial hearing in the mandamus proceedings, was prevented from being reinstated to her office as a member of the body of teachers of the public schools and receiving the emoluments thereof, and has been greatly injured in her good name and character, etc.

To the first count defendants interposed a demurrer, upon the ground that the alleged libelous matter was privileged. The demurrer was sustained.

To the second count defendants filed two pleas. Of these, the first sets up the proceedings and judgment in the supreme court in the case of The United States of America ex rel. Mary E. Nalle, Relator, v. George W.

Baird and others, Respondents,† on plaintiff's petition for a writ of mandamus to restore her to the rolls as a teacher (being the same proceeding in which the alleged libelous matter was filed as the answer of the board of education), and avers that afterwards, by the consideration and judgment of the court, and upon an issue necessarily involved in the cause and litigated therein between the parties, and identical with the causes of action herein given, it was ordered that the writ of mandamus be and it was thereupon denied, as by the record appears, a copy of which is attached to the plea and made a part of it.

The second plea to the second count sets up the former adjudication in a different form, averring the facts more elaborately, and including a special reference to the alleged libelous matter under circumstances such as to lay the foundation for a claim that it was privileged. This plea avers that at the time alleged in the second count of the declaration, and for a long time before, the defendants constituted the board of edu-[175]cation of the District, in *which was vested the control of the public schools under the laws of the United States; that plaintiff was and for a long time had been a teacher in the public schools; that the defendants as the board of education, acting in accordance with the laws and by virtue of the authority vested in them as such board, dismissed her from the position of teacher; that afterwards she impleaded the defendants in the supreme court of the District, upon a petition for a writ of mandamus for her restoration to the rolls as a teacher in the public schools; that thereafter the defendants, as respondents in the action of mandamus, filed an answer in the supreme court in that suit, and in that answer, "and upon a matter material, relevant, pertinent, and necessarily involved in said cause and litigated therein between the said parties, set up the identical matters and writings complained of in the present suit, and thereupon set up in said answer and as a response to the allegations of said petition the following writing upon which this present suit is based, to wit" (here repeating the alleged libel); that such proceedings were thereafter had in the action of mandamus that by the consideration and judgment of the court, and upon an issue necessarily involved in the cause litigated therein between the parties, it was ordered that the writ of mandamus be and it was denied and the petition dismissed, as by the record appears, a copy of which is attached to and made a part of the plea, which judgment still remains in full force, etc., concluding with a verification.

To both pleas, the plaintiff demurred. Her demurrers were overruled, and as she elected to stand upon them, judgment final was entered against her.

The court of appeals of the District affirmed the judgment (36 App. D. C. 36), and the present writ of error was sued out.

The questions argued are: Whether the first count of the declaration was properly sustained against the demurrer *inter-[176 posed to it on the ground that the alleged libelous matter was privileged; and whether *res judicata* or privilege was well pleaded to the second count.

The court of appeals declined to go into the question of privilege, ignoring the first count because no exception was taken by the plaintiff to the ruling of the court sustaining the demurrer thereto; and ignoring the question of privileged communication raised by the second plea to the second count because the judgment against the plaintiff on that count could be sustained on the plea of former adjudication.

Respecting the necessity for an exception to the court's ruling in sustaining the demurrer to the first count, counsel for defendants in error have not attempted to uphold the position taken by the court of appeals. The court cited no statute, rule, or other authority for its position, and we have been unable to find any.

The practice of bills of exceptions is statutory. By the ancient common law, a writ of error lay only for an error in law apparent upon the judgment roll,—what is now called the "strict record,"— or for an error in fact, such as the death of a party before judgment. See Green v. Watkins, 6 Wheat. 260, 262, 5 L. ed. 256, 257. For an erroneous decision that did not appear upon the record there was no redress by writ of error. To relieve this, the statute of Westminster 2, 13 Edw. I, chap. 31 (1 Eng. Stat. at L. 99; Bacon, Abr., title "Bill of Exceptions"), was enacted more than six hundred years ago, providing that one who alleged an exception should write it out and require the justices to put their seals to it, and that if upon review "the exception be not found in the roll, and the plaintiff shew the written exception, with the seal of the justices thereto put, the justice shall be commanded to appear, etc., and if he cannot deny his seal they shall proceed to the judgment according to the exception," etc. Under this act, and state statutes modeled after it, it has always been held *that[177 error appearing upon the face of the record may be assigned as ground for reversal, al-

†See United States ex rel. Nalle v. Hoover, 31 App. D. C. 311.

though no exception be taken. Slacum v. Pomery (1810), 6 Cranch, 221, 225, 3 L. ed. 205, 206; Macker v. Thomas (1822) 7 Wheat. 530, 532, 5 L. ed. 515, 516; Woodward v. Brown (1839) 13 Pet. 1, 5, 10 L. ed. 31, 33; Bennett v. Butterworth (1850) 11 How. 669, 676, 13 L. ed. 859, 862; Suydam v. Williamson (1857) 20 How. 427, 433, 15 L. ed. 978, 980; New Orleans Ins. Asso. v. Piaggio (1872) 16 Wall. 378, 386, 21 L. ed. 358, 359; Baltimore & P. R. Co. v. Sixth Presby. Church (1875) 91 U. S. 127, 130, 23 L. ed. 260, 261. And, on the other hand, the function of an exception is not confined to rulings made upon the trial of the action. As pointed out by Lord Coke (2 Inst. 427): "This [*i. e.*, an exception taken under the statute of Westminster 2] extendeth not only to all pleas dilatory and peremptory, etc., and (as hath been said) to prayers to be received, oyer of any record or deed, and the like; but also to all challenges of any jurors, and any material evidence given to any jury, which by the court is overruled." And see Defiance Fruit Co. v. Fox, 76 N. J. L. 482, 489, 70 Atl. 460.

Except as modified by statute, the practice of the courts of the District of Columbia is modeled upon that which obtained in the courts of Maryland at the time of the cession. Act of February 27, 1801, § 1 (2 Stat. at L. 103, chap. 15). By act of March 2, 1889 (25 Stat. at L. 872, chap. 392), Congress provided for the making and publication of a compilation of the laws then in force in the District, to be made by commissioners appointed by the supreme court of the district. The result was the Abert & Lovejoy Compilation, and in it (p. 442, § 5) the statute of Westminster 2 (13 Edw. I. chap. 31, § 1) is included. Under the settled practice in Maryland (as elsewhere) under that statute, a bill of exceptions is unnecessary and inappropriate for bringing under review a ruling of the court upon a demurrer to the pleadings, since the pleadings form a part of the record, and show upon their face the facts upon which the question of law is raised. Blake v. Pitcher (1877) 46 Md. 453, 462; 178] *Wilson v. Merryman (1877) 48 Md. 328, 338; Lee v. Rutledge (1878) 51 Md. 311, 318; Davis v. Carroll (1889) 71 Md. 568, 18 Atl. 965.

By the "Act to Establish a Code of Law for the District of Columbia," approved March 3, 1901 (31 Stat. at L. 1189, chap. 854), Congress enacted that the common law, and all British statutes in force in Maryland on the 27th day of February, 1801, should remain in force, except so far as inconsistent with or replaced by some provision of the Code. We find nothing in the Code, or in the rules of practice established under it, to require an exception in order that an error apparent upon the record may be reviewed. Secs. 71 and 73 pertain to the taking of exceptions to rulings made during trial in the supreme court. There seems to be no section that in terms recognizes a right to take exceptions on rulings other than such as are made in the course of the trial, unless this right follows from the adoption of the statute of Westminster as being among the "British statutes in force in Maryland," etc.

Sec. 65 of the Code authorizes the supreme court of the District to establish rules of practice for the trial terms, not inconsistent with the laws of the United States. Sec. 225 authorizes the court of appeals to "make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court;" with the "power to prescribe what part or parts of the proceedings in the court below shall constitute the record on appeal, except as herein otherwise provided, and the forms of bills of exceptions, and to require that the original papers be sent to it instead of copies thereof, and generally to regulate all matters relating to appeals, whether in the court below or in said court of appeals."

We are referred to nothing, and have found nothing in the rules of either of the courts to require an exception *to be[179 taken in order to preserve the rights of a plaintiff against whose declaration, or a count thereof, a demurrer has been sustained. Rules 47 and 48 of the supreme court relate to bills of exceptions. And rules 4 and 5 of the court of appeals relate to the form of the bills. There is nothing in these that touches upon the present point.

Sec. 1533 of the District Code provides that in all cases where a demurrer to a declaration or other pleading shall be *overruled*, the party demurring shall have the right to plead over, without waiving his demurrer. This is obviously designed to modify the former rule that where, after demurrer overruled, leave was given to plead, and the demurring party pleaded to the pleading demurred to, he waived the demurrer, and took it out of the record, so that it did not appear in the judgment roll. Young v. Martin, 8 Wall. 354, 357, 19 L. ed. 418, 419; Stanton v. Embrey, 93 U. S. 548, 553, 23 L. ed. 983, 984; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. L. 299, 301, 23 Am. Rep. 214. The section has no bearing upon the case where a demurrer is *sustained*.

We must therefore consider the merits of

the question raised by defendants' demurrer to the first count.

Counsel for plaintiff in error rest upon the authority of the decision of this court in White v. Nicholls, 3 How. 266, 291, 11 L. ed. 591, 602, where, after a full review of the English and American authorities, the court declared that, in the ordinary case, malice is to be implied from the mere publication of a libel, and justification, excuse, or extenuation, if any, must proceed from the defendant; that with respect to privileged communications the recognized obligation or motive that may fairly be presumed to have led to the publication, and so to relieve it from the implication of malice, so far changes the rule of evidence as to require the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct; that such malice may be proved although alleged to have 180]*existed in the proceedings before a court, and although such court may have been the proper authority for redressing the grievance presented to it; that proof of express malice in a pleading filed in any such proceeding will render the pleading libelous and actionable; and that "in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause amount to proof of malice."

The defendants, having demurred to the count in question, necessarily admit the truth of the facts stated in it, so far as they are well pleaded. Among the facts so pleaded are malice, falsehood, and the want of probable cause; and the averment of these facts is not negatived or qualified by anything else that appears in the count. The count does not even show that the alleged libelous matter was pertinent or material to the issue, for it does not show the nature of the proceeding, nor what was the issue, nor that the plaintiff was a party to it.

It is unnecessary to say that the issue joined upon the demurrer to the first count is legally distinct and separate from the issue joined upon the demurrers to the pleas to the other count. Nothing in the second count or in the subsequent pleadings can be imported into the first count. And so, while we may surmise that the legal proceeding referred to in the first count is the same as that elsewhere referred to in the pleadings, we cannot base upon this surmise a judgment upon the demurrer. So far as appears from the count itself, the plaintiff may have been a stranger to the proceeding in which the alleged libelous answer was filed. Moreover, there is nothing to rebut the averment of falsehood and the absence of probable cause. And since it cannot be doubted that the matter is libelous unless protected by the privilege, it follows that the court erred in sustaining the demurrer.

The questions raised by the other demurrers need not long detain us. The established rule is that if the parties *in[181 the former action be the same as in the present, then every matter and question of fact and of law that was necessarily involved in the consideration and determination of the former issue shall be conclusive upon the present. Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18, and cases cited.

The matter alleged to be libelous was the statement made by respondents in their answer to the mandamus proceeding, that they had found on examination that the plaintiff was "not sufficiently qualified in all respects to be competent to continue to teach, but was deficient in the necessary academic and pedagogic equipment of a competent teacher," so that the respondents were unable lawfully to continue employing her.

Counsel for plaintiff in error point out that while, upon the decision of a demurrer in the mandamus case, the supreme court (by Mr. Justice Anderson) held that this was a good justification, it was afterwards traversed in fact, and it is contended that the issue thereon was determined without passing upon the precise question of plaintiff's "academic and pedagogic equipment." As evidence of this, the proceedings in the mandamus case are referred to. It appears that in giving the reason for entering final judgment in favor of the board of education, Justice Anderson said: "It was not necessary that the board should find that she was lacking in the academic and pedagogic equipment of a competent teacher, if they found generally that she was not qualified to teach in the public schools." The argument now seems to be that the "necessary academic and pedagogic equipment" is not synonymous with the "sufficient qualifications" of a teacher. This, we think, is a distinction without a difference, and the court of appeals correctly held that both pleas to the second count were good as setting up a former adjudication of the identical matters included in the second count of the declaration.

*Upon the question of privilege[182 raised by the second plea, the court of appeals thought it unnecessary to pass. Strictly, this is true, for if the alleged cause of action is concluded by a former adjudication, it is immaterial whether the cause of action is in itself well founded.

However it is not out of place to say that

it cannot be doubted that the second count of the declaration, taken in connection with the second plea thereto, shows a situation that clearly renders the subject-matter of the alleged libelous answer to have been privileged.

These pleadings show that upon the plaintiff's own application for a mandamus the defendants, being the board of education, were required to show why they had dismissed her. They showed it by averring that upon examination they had ascertained her to be lacking in the qualifications of a teacher, and had dismissed her accordingly.

The insistence is that even such a defense, if made with malice and without probable cause, may be the subject of an action of libel. The rule laid down in White v. Nicholls, 3 How. 266, 290, 11 L. ed. 591, 602, is to the effect that it is not to be deemed malicious unless found to be false, as well as without probable cause; and upon the face of the record this averment respecting the plaintiff's dismissal cannot be deemed to be false, or to have been made without probable cause, for it is shown to have been sustained as true by the judgment of the court. It will thus be seen that the admitted fact of the former adjudication carries with it an admission of the facts necessary to show the privilege likewise.

It is further insisted that the second count of the declaration is not, properly speaking, a count in libel, but is a count in trespass on the case for a conspiracy. But the well-settled rule is that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff. To this effect are the very au-183]thorities *upon which plaintiff in error relies. Mott v. Danforth, 6 Watts, 304, 31 Am. Dec. 468; Wildee v. McKee, 111 Pa. 337, 56 Am. Rep. 271, 2 Atl. 108; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Verplanck v. Van Buren, 76 N. Y. 247, 259. To which may be added Brennan v. United Hatters, 73 N. J. L. 729, 742, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698, and cases therein cited.

Now in the second count of the declaration no overt act is charged except the filing of the alleged libelous matter as a part of the defendants' answer in the mandamus action. The only damage alleged to have been suffered is that which proceeded from the publication of this libel. And since, as the record shows, the alleged libel was an essential part of a pleading filed in a former proceeding between the parties herein, which by the judgment was determined to be true, and since, therefore, the alleged libel was privileged, and thus not actionable, it follows plainly enough that a conspiracy to publish it is not actionable.

It results that, so far as the judgment of the court of appeals affirmed the judgment of the supreme court in overruling the plaintiff's demurrers to the first and second pleas filed by the defendants to the second count of the declaration, the judgment should be affirmed. But so far as the judgment sustained the defendants' demurrer to the first count of the declaration it should be reversed, and the cause remanded for further proceedings in accordance with this opinion. Under the circumstances, however, the defendants should have leave to plead to the first count, by traverse or otherwise. D. C. Code, § 1533; United States v. Boyd, 15 Pet. 187, 209, 10 L. ed. 706, 714.

Judgment reversed and cause remanded for further proceedings accordingly.

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*PENNSYLVANIA RAILROAD COM-[184
PANY, Plff. in Err.,
v.
INTERNATIONAL COAL MINING COMPANY.

(See S. C. Reporter's ed. 184-247.)

**Carriers — remedy for rebating — necessity of action by Interstate Commerce Commission.**

1. Previous action by the Interstate Commerce Commission is not a condition precedent to the maintenance of an action under the interstate commerce act of February 4, 1887 (24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159), § 8, to recover from a carrier the damage sustained by a shipper who has been charged and who has paid the lawful published freight rates on interstate shipments of "free" coal, while lower rates resulting from rebates have been allowed to other shippers of "contract" coal during the same period, and between the same termini, the published tariffs making no distinction between "contract" and "free" coal, but naming one rate for all alike.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

**Statutes — construction — legislative debates.**

2. A statement made during debate by a member of the Senate conference committee, explanatory of the changes made in the bill in conference, cannot be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

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Note.—On journals of legislature as aid to construction of statute—see note to Blake v. National City Bank, 23 L. ed. U. S. 119.

**Damages — rebating by carrier — actual pecuniary loss.**

3. The liability of a carrier to a shipper who has been charged and has paid the lawful published freight rates on interstate shipments, while lower rates resulting from rebates have been allowed other shippers over the same road, during the same period, and between the same termini, is not measured by the amount of the discrimination in the rates, but is limited to the pecuniary loss suffered and proved by the act of February 4, 1887, § 8, which provides that a carrier doing any act prohibited by the statute shall be liable "to the person . . . injured thereby for the full amount of damages sustained in consequence of such violation, . . . together with a reasonable . . . attorney's fee."

[Damages through carrier's default, see Damages, III. e, in Digest Sup. Ct. 1908.]

[No. 14.]

Argued February 27 and 28, 1912. Ordered for reargument April 1, 1912. Reargued November 4, 1912. Decided June 9, 1913.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania in favor of a shipper in an action to recover damages from a carrier because of rebates allowed to other shippers. Reversed and remanded for a new trial.

See same case below, 97 C. C. A. 383, 173 Fed. 1.

**Statement by Mr. Justice Lamar:**

The International Coal Mining Company shipped in interstate commerce 190,655 tons of coal over the Pennsylvania Railroad between April 1, 1894, and April 1, 1901. In 1904 it sued the carrier for $37,268, being the difference between the rates paid by the plaintiff and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road, from the same point, to the same destination.

Prior to 1899 the carrier collected its open or published rates from all persons shipping coal from the Clearfield district in Pennsylvania. It, however, made a practice of paying rebates, and the plaintiff admits on the face of its complaint that it received rebates of from 10 to 25 cents per ton. It alleges, however, that other consignors received from 15 to 45 cents per ton, and the claim made is "for the further rebate due by the defendant to the plaintiff in excess of the rebates heretofore paid by the defendant to the plaintiff on account of said shipments."

During the trial these claims for additional rebates on shipments prior to 1899 were eliminated by the court.

The question then left in the case involved plaintiff's right to recover on account of rebates having been allowed other companies after April 1, 1899, on what was called "contract coal." The plaintiff had no contracts which overlapped April 1, 1899, and claimed to have learned after January, 1904, of the allowances being made. It thereupon brought this suit for the rebate or difference between the low rate allowed shippers of contract coal and the lawful rate paid by plaintiff on 41,000 tons.

There was a second count in the complaint, alleging *that the plaintiff charged[186 excessive freight for the transportation of plaintiff's coal, in that it charged sums varying from 15 cents per ton to 45 cents per ton in excess of a reasonable charge, and said defendant "is liable to pay said sum of $37,268.85, with interest thereon from the time of the said overpayments, and this suit is brought to recover the said sums of money."

The plaintiff proved the number of tons in each shipment made by it between April, 1899, and April, 1901, and that it paid the full tariff rate thereon. It also proved that interstate shipments had been made by other coal companies on the same dates from and to the same points, and that such companies on their "contract coal" had been paid rebates of 5, 10, 15, 25, or 35 cents per ton, depending upon the difference between the rates when shipment was made and those in force on the dates of the various contracts of sale. It did not appear how many tons had been shipped by any of these companies, nor on how many tons they had been paid 5 cents per ton, or on how many 35 cents per ton, or the intermediate figures. There was evidence that the Berwind White Company recived no rebates on 90 per cent of its shipments, being free coal, but that it did recive rebates on the remaining 10 per cent, which was contract coal.

In addition to evidence as to the payment of such rebates, there was testimony that the railroad company had also made lateral and terminal allowances to some shippers without at the same time making lateral or terminal allowances to the plaintiff. It was claimed that these allowances were unjust discriminations and amounted to the payment of rebates, inasmuch as there was no such dissimilarity in condition between shipments by such companies and those made by the plaintiff as would justify the payment to them without making a similar payment to the plaintiff.

The defendant admitted the difference in 187 treatment, but *claimed that it was justified by the difference in condition. The railroad did not allow the plaintiff for services in hauling loaded and empty cars between the railroad and its nearby mine, but claimed that it paid the Altoona Company 18 cents per ton for services in hauling loaded and empty cars between the mine and the railroad station. The carrier offered evidence to show that the Altoona mine was 4 or 5 miles from the main line, which was reached by a spur track or road having very heavy grades, sharp curves, and three switchbacks over which it was impracticable for the Pennsylvania engines to be safely operated. There was evidence that the amount paid the Altoona Company for such hauling of cars was reasonable.

It was admitted also that the carrier paid the Berwind White Company, another shipper from the Clearfield district, a terminal charge for furnishing at the New York pier the labor, power, and machinery to unload and dump the cars. There was evidence that this was the customary charge allowed for such services in New York harbor.

There was no distinct ruling as to these allowances, but the court evidently treated these payments, not as undue preferences or rebates, but as compensation for transportation services rendered by the shipper in hauling cars to and from the mine and for service on the pier in New York. He refused to charge that the jury could treat these initial and terminal allowances as rebates or as unjust discriminations, or that they could be considered in measuring the damages to which plaintiff might be entitled.

The items prior to April 1, 1899, and these items for initial and terminal allowances having been eliminated, the case was submitted to the jury to determine the amount plaintiff was entitled to recover in consequence of the admitted payment of rebates on "contract coal," no such payments being made to the plaintiff on its shipments of 188] *"free coal." There was some evidence as to the commercial value of being able to ship contract coal at the original freight rate, and an estimate of the profits which would have been derived had the same rebates been allowed plaintiff. What, if any, verdict could have been based on this theory, was not submitted to the jury, the court charging that where rebates had been allowed other companies, the plaintiff "would be entitled to recover from the railroad the difference of the returns."

On May 23, 1908, the jury found for the plaintiff a verdict of $12,013.51. Both parties moved for a new trial, and both excepted to the court's refusal to set aside the verdict. 162 Fed. 996. The circuit court of appeals affirmed the judgment. 97 C. C. A. 383, 173 Fed. 1. The International Coal Company accepted the decision. But the Pennsylvania Railroad Company brought the case here by writ of error, in which, among many other assignments of error, it complains of the court's refusal to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying, at the same time, at lower rates, coal shipped by other shippers."

Mr. Francis I. Gowen argued the cause, and, with Mr. Frederic D. McKenney, filed a brief for plaintiff in error:

The circuit court was not possessed of the requisite jurisdiction to consider and determine the underlying and basic issue in the present case.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

It by no means follows that a condemnation by the Commission of the rate paid by the defendant in error would have necessarily resulted in an award of reparation in its favor. It would have been for the Commission to determine whether the facts warranted or required such an order. In its administration of the interstate commerce act the Commission in many instances has condemned as unlawful, because unreasonable or discriminatory, rates which have been exacted from shippers, while at the same time denying reparation to them.

Anaconda Copper Min. Co. v. Chicago & E. R. Co. 19 Inters. Com. Rep. 592; International Salt Co. v. Pennsylvania R. Co. 20 Inters. Com. Rep. 539.

If the Interstate Commerce Commission has been empowered to determine whether charges or rates of a carrier are unduly discriminatory or unduly preferential, a like power cannot be exercised by the courts.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

Does the payment by a carrier to one shipper of an unlawful rebate give to another shipper a right of action, under the interstate commerce act, to recover like rebates on his shipments?

Parsons v. Chicago & N. W. R. Co. 167

U. S. 447, 42 L. ed. 231, 17 Sup. Ct. Rep. 887; Hoover v. Pennsylvania R. Co. 156 Pa. 220, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282; Union P. R. Co. v. Goodridge, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; Anaconda Copper Min. Co. v. Chicago & E. R. Co. 19 Inters. Com. Rep. 592; International Salt Co. v. Pennsylvania R. Co. 20 Inters. Com. Rep. 539.

If the right of action asserted in the present case is maintainable, does it extend to all shipments made by the defendant in error in the period in which the unlawful rebates were paid on contract coal, without regard to the consideration that these rebates were not paid on all shipments of the shippers shipping contract coal, but only on the portion thereof which represented contract coal?

Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340, 6 Eng. Ry. & C. Cas. 133.

Is a like service, within the meaning of § 2 of the interstate commerce act, rendered by a carrier in the transportation, from the same district to a common point, of (a) shipments which move over a through joint line made up of its own line and that of another carrier, and (b) shipments which move only over the carrier's own line?

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Parsons v. Chicago & N. W. R. Co. 5 Inters. Com. Rep. 95, 11 C. C. A. 489, 27 U. S. App. 394, 63 Fed. 903; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; Loup Creek Colliery Co. v. Virginian R. Co. 12 Inters. Com. Rep. 471; Cedar Rapids & I. C. R. & Light Co. v. Chicago & N. W. R. Co. 13 Inters. Com. Rep. 250.

Even if it were inferable from the evidence that the plaintiff in error would have carried shipments of contract coal originating on the Huntington & Broad Top railroad at the lower rates which were actually applied to shipments of this coal which originated on its own lines, the right of the defendant in error to recover as to its shipments from points on the Huntington & Broad Top railroad would not be thereby established.

Drinker, Interstate Commerce Act, 1909, § 124; Judson, Interstate Commerce, 1905, § 245; Beale & W. Railroad Rate Regulation, 1906, § 943; Nelson, Interstate Commerce Commission (1908) p. 70; Barnes, Interstate Transp. 1910, § 428, ¶ D; Griffee v. Burlington & M. River R. Co. 2 Inters. Com. Rep. 194; Missouri & K. Shippers' Asso. v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 483; Taylor v. Metropolitan R. Co. [1906] 2 K. B. 55, 75 L. J. K. B. N. S. 735, 95 L. T. N. S. 149, 2 Times L. R. 479.

Mr. William A. Glasgow, Jr., argued the cause, and, with Mr. James W. M. Newlin, filed a brief for defendant in error:

If the carrier cannot in terms contract to continue a certain rate after its change by publication of a new increased rate, without being criminally liable under the act, how can it be seriously suggested that he can protect the contracts of others by a rebate from the published rate, and not be guilty of a violation of the act?

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Chicago, B. & Q. R. Co. v. United States, 85 C. C. A. 194, 157 Fed. 830.

There being no justification of the necessity for requiring the disapproval by the Commission of the act of the carrier, the Federal court retains its original jurisdiction.

Langdon v. Pennsylvania R. Co. 186 Fed. 240; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392.

The published rate (or lowest rate charged) as against the carrier, is, *ipso facto*, the reasonable rate, and any deviation therefrom is an unjust discrimination calling for damages.

Samuels v. Louisville & N. R. Co. 4 Inters. Com. Rep. 420, 31 Fed. 57; Messenger v. Pennsylvania R. Co. 36 N. J. L. 410, 13 Am. Rep. 457; Messenger v. Pennsylvania R. Co. 37 N. J. L. 534, 18 Am. Rep. 754.

The Pennsylvania cases have recognized as a sufficient defense, in a suit to recover damages for unlawful discrimination between shippers, the absence of wrongful intent on the part of the carrier, and are therefore no authority in a case for wrongful discrimination between shippers, in violation of § 2 of the interstate commerce act.

Borda v. Philadelphia & R. R. Co. 141 Pa. 484, 21 Atl. 665; Hoover v. Pennsylvania R. Co. 156 Pa. 220, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282.

The lower rates charged by the plaintiff in error on contract coal were legally injurious to the defendant in error in a way which entitled it to maintain an action under § 8 of the interstate commerce act.

Great Western R. Co. v. Sutton, L. R. 4 H. L. 238, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; London & N. W. R. Co. v. Evershed, L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 276, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; 1 Boyle & W. Traffic on Railways & Canals, p. 152; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340, 6 Eng. Ry. & C. Cas. 133 (reversing L. R. 14 Q. B. Div. 209); Union P. R. Co. v. Goodridge, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; Hays v. Pennsylvania Co. 12 Fed. 309; Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; Cook v. Chicago, R. I. & P. R. Co. 81 Iowa, 551, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080; Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 13 Am. Rep. 457, 37 N. J. L. 531, 18 Am. Rep. 754.

The ruling of the English courts in construing § 90 of the English act, prior to the passage of § 2 of the interstate commerce act, is authority in construing that section.

McDonald v. Hovey, 110 U. S. 628, 28 L. ed. 271, 4 Sup. Ct. Rep. 142; Pennock v. Dialogue, 2 Pet. 1, 18, 7 L. ed. 327, 333; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 284, 36 L. ed. 699, 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 253, 55 L. ed. 448, 457, 31 Sup. Ct. Rep. 392.

The substantial similarity of circumstances and conditions required by § 2 of the interstate commerce act was never intended to serve as a quibble under which carriers could escape the consequences of rebating and like practices. The terms of § 2 in this respect were made stronger than those of § 90 of the English act of 1845, upon which § 2 was modeled, "substantial similarity," and not identity of circumstances and conditions, being required by our act; and it has long since been decided by the courts and the Commission that the circumstances and conditions referred to are circumstances and conditions of carriage, and not any and every matter which may enter into the business of the carrier, shipper, or consignee.

*Wight* v. United States, 167 U. S. 512, *518, 42 L. ed. 258, 259, 17 Sup. Ct. Rep. *522; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 253, 55 L. ed. 448, 457, 31 Sup. Ct. Rep. 392; Philadelphia & R. R. Co. v. Interstate Commerce Commission, 174 Fed. 687; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The International Coal Company operated a mine in the Clearfield district and, with its competitors, shipped between 1890 and 1902 large quantities of coal in interstate commerce. In 1904 it sued the Pennsylvania Railroad Company, basing its action, in part, on the fact that prior to April 1, 1899, the railroad company had paid other *shippers rebates of from 15 to 45[195 cents per ton, while paying plaintiff a rebate of only 10 to 25 cents per ton. Its claim for a sum equal to the difference between the rebate paid to it and that given other shippers was eliminated by the trial judge on the ground that "courts do not sit to measure the difference in degree in violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law will not be looked into. . . . not for the purpose of relieving the defendant, but because the plaintiff is just as culpable . . . and as much a violator of the law as the defendant."

In view of this ruling, the case, as finally submitted to the jury, involved plaintiff's right to recover on account of shipments made after April 1, 1899. On that date the carrier increased the rates and discontinued the payment of rebates, except that for the purpose of saving shippers against loss, it made a difference between what is called "free coal" and "contract coal." Under this practice, where coal had been sold for future delivery, the carrier collected the published tariff rate, but rebated the difference between it and the lower rate in force when the contract of sale had been made. When, after April 1, 1899, the plaintiff applied for allowances, its demand was rejected, with the statement that all its contract coal would be protected in the same manner as others in the Clearfield district. The International Coal Company had no overlapping or unfulfilled contracts, and claimed that it did not learn of the practice to protect such contracts until, in 1904, it brought this suit. It proved that between April 1, 1899, and April 1, 1901, it had shipped about 40,000 tons on which it had paid the full tariff rate, while

other companies shipping from and to the same places at the same time had been allowed on their contract coal rebates of 5, 10, 15, 25, or 35 cents per ton. Plaintiff recovered a verdict.

196] *1. In the court below the railroad made no question of jurisdiction. But on the argument here it insisted that the case should be remanded with instructions to dismiss the complaint upon the ground that courts had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. It argued that this was a rate-making question, and that it was for the Commission, as the rate-regulating body, to determine not only whether a dissimilarity existed, but whether the rates were properly adjusted to meet that dissimilarity.

Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or 197]to *every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little, and insist upon a larger sum being paid by the shipper. 24 Stat. at L. 379, § 2; chap. 104, U. S. Comp. Stat. 1901, p. 3155; 25 Stat. at L. 855, § 6, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1289; Armour Packing Co. v. United States, 209 U. S. 56, 83, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428. The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class. This departure from the published tariff was forbidden, and § 8, (24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159) expressly provided that any carrier doing any act prohibited by the statute should be

"liable to the person . . . injured thereby for the full amount of damages sustained in consequence of any such violation . . . together with a reasonable . . . attorneys' fee."

2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact in its pleading the plaintiff *does[198 not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time, over the same route. And such a right of action was expressly given in § 2 of the original bill to regulate commerce, which, as it passed the Senate May 12, 1886, did provide that the carrier

"shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the

lowest rate charged upon like shipments during the same period; or, if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route, between the same points, who have shipped goods during the time that such contract or understanding was in operation."

The fact that this provision measuring the amount of recovery by rebate was omitted from the act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but 199]a statement,† made by a member of *the Senate conference committee, to support the present argument that § 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. United States v. Trans-Missouri Freight Asso. 166 U. S. 318, 41 L. ed. 1019, 17 Sup. Ct. Rep. 540; Maxwell v. Dow, 176 U. S. 601, 44 L. ed. 604, 20 Sup. Ct. Rep. 448, 494. Section 2 of the original Senate bill said nothing about *damages*, but in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken, and § 8 of the act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to "the person injured,"—and, of course, to the extent of the injury.

3. There were many provisions in the statute for imprisonment and *fines. On[200 the civil side the act provided for compensation, not punishment. Though the act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. R. Co. 167 U. S. 460, 42 L. ed. 236, 17 Sup. Ct. Rep. 887, construing this section (8), "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the act of 1910 provided that where a carrier misquotes a rate, it should pay a penalty of $250, not to the shipper, but to the government, recoverable by a civil action brought by the United States. 36 Stat. 539, chap. 309. Congressional Record (1910) 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the commission in Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418-421, 423; Pueblo Transp. Asso. v. Southern P. Co. 14 Inters. Com. Rep. 82.

4. It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to an-

† Mr. Cullom: Before action on my motion, I desire to make a statement of the changes in the bill. The following is a statement of the changes in the bill as passed by the Senate, which have been agreed to and are recommended by the committee of conference:

. . . . . .

"Sections 2, 3 and 4 of the Senate bill, prohibiting discriminations, contained provisions in relation to the recovery of damages. These have been stricken out of said sections, and have been grouped together in one section, which is made § 8 of the committee bill. Except as to this rearrangement, substantially the only change made has been the addition of the provision of the House bill that 'a reasonable counsel or attorney's fee' shall be allowed by the court in every case of the recovery of damages. The parts of said sections which are stricken out in consequence of the rearrangement referred to are all of § 2 after the word 'unlawful,' in line 13, all of § 3 after the word 'business,' in line 18, and lines 23 to 27, both inclusive, in § 4. No other change is made in § 2." 49 Cong. Rec. 2d Session, vol. 18, pt. 1, p. 170.

Section 7 of the House bill (H. R. 5667) provided that if any carrier should do an act forbidden, or omitted to do an act required, or should violate the statute, such carrier should be "held to pay to the person or persons injured the full amount of damages so sustained . . . with reasonable counsel or attorneys' fees. . . ." This bill was before the conference committee, and the House members, as required by the rules of the House, made a written statement of the action of the conference, in which it was said (vol. 18, pt. II., Cong. Rec. 49th Cong. 2d Sess., pp. 695, 698, 774) that "the 8th section of the substitute bill"—being the 8th section of the present act—"contains the substance of the 7th section of the House bill in regard to damages and counsel fees, but expressed in somewhat different language."

other; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy, but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate.

We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any 201]right of action for any sort *of damages in a case like this, while this statute does give a clear, definite, and positive right to recover for unjust discrimination. It thereby either first created the right, or removed the doubt as to whether such suit could be brought. The English courts had held that a shipper who paid a reasonable rate had no cause of action because the carrier had charged a lower rate to another. Great Western R. Co. v. Sutton, L. R. 4 H. L. 238, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92. The American decisions were conflicting, though "the weight of authority in this country was in favor of an equality of charge to all persons for similar services." Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 275, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844. But even in those American courts which held that the rates must not only be reasonable, but equal, the doctrine had not been so far developed as to settle what was the measure of damages. Hays v. Pennsylvania Co. 12 Fed. 309, decided at circuit, is favorable to plaintiff's contention. But Union P. R. Co. v. Goodridge, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; Louisville, E. & St. L. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 13 Am. Rep. 457, s. c. 37 N. J. L. 531, 18 Am. Rep. 754; Cook v. Chicago, R. I. & P. R. Co. 81 Iowa, 551, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080; Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; London & N. W. R. Co. v. Evershed, L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340, relied on by plaintiff, do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination.

In one of these cases the suit was brought by a shipper to recover damages because the railroad refused to carry out a contract to discriminate in his favor. In others the court treated the low rate as evidence of what was a reasonable rate, and thereupon gave judgment for damages as for an overcharge. Union P. R. Co. v. Goodridge, 149 U. S. 681, 37 L. ed. 896, 13 Sup. Ct. Rep. 970, involved the construction of the Colorado statute, which did not, as does the commerce act, compel the carrier to adhere to published rates, but required the railroad to make the same concessions and *drawbacks to all persons alike, and[202 for a failure to do so made the carrier liable for three times the actual damage sustained or overcharges paid by the party aggrieved. This distinction is also to be noted in the English cases cited. The act of Parliament did not require the carrier to maintain its published tariff, but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion, and might be recovered in an action at law as for an overcharge. Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 116, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340. But the English courts make a clear distinction between overcharge and damages, and the same is true under the commerce act. For if the plaintiff here had been required to pay more than the tariff rate, it could have recovered the excess, not as damages, but as overcharge; and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.

Having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the government, and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under § 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if, having paid a rebate of 25 cents a ton to one customer, the carrier, in order to escape this suit, had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate

paid on contract coal, but only for the dam-
203 ]ages such illegal payment *caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were, they could be recovered, because § 8 expressly declares that wherever the carrier did an act prohibited, or failed to do any act required, it should be "*liable to the person . . . injured thereby for the full amount of damages sustained in consequence of any such violation, . . . together with a reasonable . . . attorneys' fee.*" In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899.

5. On various dates between April 1, 1899, and April 1, 1901, the International Company made shipments of coal from the Clearfield district to points in New Jersey, Massachusetts, and New York, its heaviest shipments being to South Amboy, New York harbor. The aggregate was 40,000 tons, on which the lawful rate was paid. During the same period four other companies shipped to the same points, receiving rebates of from 5 to 35 cents per ton, but the amount of tonnage on which such rebates were paid does not appear. There was no proof of injury,—no proof of decrease in business, loss of profits, expense incurred, or damage of any sort suffered,—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate on all its tonnage that had been allowed on any contract coal shipped on the same dates, whether such tonnage was great or small.

Considering the multitude of instances in which discrimination has been practised by carriers, in ancient and modern times, it is remarkable how little is to be found in decisions or text-books which treat of the elements and measure of damages in such
204 ]cases. In the absence of any *settled rule on the subject, the new question must be determined on general principles.

The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be *proved*. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:—

If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute in any such case being then entitled to recover the full damages sustained;—

But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper, but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover, would mean that damages had been awarded to two where only one had suffered;—

Or, to take another example,—a favored dealer may have shipped 10,000 tons of coal to the open New York market, receiving thereon a rebate of 35 cents a ton, or $3,500. The plaintiff at the same time may have shipped 20,000 tons and sold the same at the regular market price. *Under the rule[205 contended for it would then be entitled to 35 cents a ton on 20,000 tons, or $7,000 as damages. Such a verdict, instead of compensating it for losses sustained, would have given to the plaintiff a profit on the carrier's crime in paying a rebate of $3,500, and would have made it an advantage to it instead of an injury for the carrier to violate the law.

In order to avoid this anomalous, yet logical, result, it is now suggested that, as in the overcharge cases (Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340), the plaintiff should only recover a rebate on 10,000 tons, or on the same weight upon which the carrier had allowed a drawback to the competitor. But, while less drastic, this is still an arbitrary measure and ignores the fact that the same anomalous result would follow if there had been, say, ten dealers, each shipping 10,000 tons on the same day. For each of the ten would have been as much entitled as plain-

tiff to recover $3,500 on their several shipments of 10,000 tons, and the ten verdicts would aggregate $35,000, because of the payment of $3,500 to the favored shipper.

It is said, however, that while there may be no presumption that a shipper was injured because the carrier paid a rebate on a single shipment, or on an occasional shipment, yet it could recover if rebates had been so habitually given as to establish a practice of discrimination. Proof that rebates were customarily paid would come nearer showing that injury was suffered, but would still fall short of proving the extent of the damage, and is not the theory on which the plaintiff proceeds. For it argues that whenever it showed that a lower rate had been charged on contract coal sold in 1899, it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been no competition in the two sales, and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, [206] or increase in its expenses. It *claimed that it was a mere matter of mathematics, and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

6. To adopt such a rule and arbitrarily measure damages by rebates would create a legalized but endless chain of departures from the tariff; would extend the effect of the original crime; would destroy the equality and certainty of rates; and, contrary to the statute, would make the carrier liable for damages beyond those inflicted, and to persons not injured. The limitation of liability to the persons damaged, and to an amount equal to the injury suffered, is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law, in its measure of fine and punishment, is a terror to evildoers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the government. If by the same act a private injury was inflicted, a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment, and the state of the market; so that, instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be, and whether greater or less than the rate of rebate paid.

7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the act to regulate commerce, has been construed. In *Knudsen-Ferguson Fruit Co. v. Mich- [207] igan C. R. Co. 79 C. C. A. 46, 148 Fed. 974, it was said by the circuit court of appeals for the eighth circuit that to "support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the Commission." A similar principle was applied in Meeker v. Lehigh Valley R. Co. 106 C. C. A. 94, 183 Fed. 550, and in Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96, where the suit was to recover damages caused by a violation of the anti-trust act.

Another case, on facts quite like those here involved, is that of Hoover v. Pennsylvania R. Co. 156 Pa. 220, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282, where the statute, like the commerce act, gave the party injured a right of action for damages suffered. In violation of the state law the railroad allowed a manufacturing company a rebate of 20 cents a ton on coal shipped. In a suit for the recovery of damages the trial court charged the jury that the difference between the high and low rate was the measure of recovery. This was reversed, the court saying: "The 'amount of injury suffered' is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be; but, in any event, it must be a subject of proof. . . . It does not appear that the plaintiffs sold their coal for any less than the current market price . . . except when they and the other dealers were engaged in a war of prices, and sold it far below the actual cost in a struggle to capture the market."

In view of the express provisions of § 8 of the act to regulate commerce, it was error to refuse to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact *that the defendant was [208] carrying at the same time, at lower rates

coal shipped by other shippers." The judgment of the Circuit Court of Appeals is reversed, and the case remanded to the District Court, with directions to grant a new trial.

Reversed.

Mr. Justice Pitney, dissenting:

The judgment under review sustains a recovery in behalf of a company shipping coal in interstate commerce, that was charged and paid the lawful published rates of freight, for the difference between the rates thus charged and paid and the less rates customarily allowed to other shippers of coal during the same period and between the same termini. 97 C. C. A. 383, 173 Fed. 1. The action is based upon §§ 2 and 8 of the interstate commerce act.† 209]24 Stat. 379, *chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284. The discrimination was accomplished by means of rebates allowed to the other shippers, the excuse for which, or the reason for the discrimination, as assigned by the plaintiff in error, was that the coal on which the rebates were allowed was shipped pursuant to contracts of sale made by the favored shippers prior to the putting in force of the published tariff, and made in reliance upon the lower rates then in force. It was proved that during the two years from April 1, 1899, to April 1, 1901, the plaintiff shipped about 40,000 tons, upon which it paid the full tariff rate. The verdict and judgment for $12,013.51 represent the difference between the freight charges actually paid by the plaintiff and what it would have paid if its coal had been carried on the same terms as the "contract coal."

I agree with the view of the court that the suit was maintainable without any previous action by the Interstate Commerce Commission. I agree also that "even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged."

Were the question before us, I should be inclined to say that the interstate commerce act does not admit of a difference in rate for substantially the same transportation service, at the same time and under substantially similar circumstances, based upon the mere fact that the coal of one shipper has been previously sold, under "contract" or otherwise, while the coal of the other shipper has been sold, but at a different time, or remains to be sold on its arrival at market. Such a discrimination is in effect based upon the mere ownership of the goods transported, which has recently been condemned by this court. Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 *U. S. 235, 252, 55 L. ed.[210 448, 456, 31 Sup. Ct. Rep. 392. And see New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 395, 50 L. ed. 515, 523, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 82, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428.

The court, while sustaining the right of action upon the facts presented in this record, reverses the judgment and awards a new trial, on the ground that under the statute there is no presumption of loss on the part of the shipper against whom the discrimination is made, and therefore no established measure of damages in favor of the plaintiff; that § 8 of the act, in giving a right of action for damages to the injured party, indicated the legislative intent that the responsibility of the carrier to a shipper injured by discrimination in rates should be measured not by the amount of the discrimination, but by the consequential injury accruing to the shipper because of the discrimination, and that without special

† Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons, for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

proof of resulting damage there can be no recovery.

With great respect, I feel constrained to dissent from the view thus taken of the act of Congress, and from the result to which it leads in this case.

I have not been able to bring myself to accept that view, and, on the contrary, consider that § 2 of the act deals with the prohibited discrimination in rates as a direct pecuniary injury to the disfavored shipper, precisely equivalent in amount to the discrimination; that the act looks upon the common carrier as a public servant, bound to treat all shippers alike; that it recognizes that the established and published rates, while reasonable in law, may be unreasonable in fact, and are proven to be so when the carrier customarily charges less to favored shippers; that it treats the customary allowance to favored shippers of rebates or drawbacks as an admission by the carrier that the higher rate charged to the disfavored shipper is excessive and extortionate in fact by precisely the amount of the rebate; that the disfavored shipper is the "person injured," within the meaning of 211]§ 8, and *that the "damages sustained in consequence of any such violation" are, in cases of rate discrimination, at least as great as the amount of the discrimination; that the maintaining of equality in rates being the duty of the public servant as prescribed by the act, the question whether the shipper, on paying such rates as the law prescribes, charges the freight to his consignees, directly or indirectly, or not at all, is a matter of no legitimate concern to the public servant. I am convinced further, as the result of a somewhat exhaustive examination of the question, that the view just indicated is not only consistent with the language and evident policy of the act, viewed in the light of the evils that it was designed to correct, but is consistent with its legislative history, and at the same time accords with the practical construction that has been placed upon it by the Interstate Commerce Commission, and recognized by the courts (including this court) from the time of its enactment; that no other practicable mode of determining the damages, capable of general application, has been suggested for cases of rate discrimination, than that which measures the recovery by the amount of the discrimination; and that this was the well-settled measure of damages in such cases, as administered generally in the courts of this country prior to the passage of the act, and at the same time was the established rule of damages under the act of Parliament upon which our § 2 was modeled, as already established by repeated decisions of the House of Lords when Congress passed the "act to regulate commerce;" and that the English decisions are cogent evidence of the intent and meaning of Congress, as this court has several times declared.

The precise error attributed to the trial judge is the refusal to charge, as requested, that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was *carrying at the [212 same time, at lower rates, coal shipped by other shippers."

Since the recovery was based upon a discrimination arising from the payment of rebates to the other shippers on coal shipped by them in fulfilment of contracts made long before, so that the coal upon which the rebates were allowed did not and could not come into direct competition with the plaintiff's coal in the market, it is presumable that there was no consequential injury to the plaintiff attributable to this particular series of rebates, nor any provable injury aside from the fact that more money was exacted from plaintiff than ought to have been exacted on principles of equality. A reversal of the judgment upon the ground adopted by the court is equivalent to a denial of the right of action in this case, and apparently in all cases except in the rare instance where merchandise on which rebates are allowed happens to come into direct market competition with the goods of the complaining shipper.

Not only in the present case, but in most cases, it is impossible to trace actual consequential damages to the particular discrimination, and so the view adopted virtually nullifies the right of action given by § 8 of the act, so far as concerns persons injured by the discriminations that are prohibited by § 2.

Sec. 8 says in terms that for anything done by the common carrier, contrary to the prohibition of the act, it shall be "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." Each of the preceding seven sections contains prohibitions, from the violation of which damage may result to the shipper; especially the first four, of which § 1 prohibits unjust and unreasonable charges; § 2 prohibits discriminations in charges, by whatever device accomplished; § 3 prohibits "any undue and unreasonable preference or advantage to any particular *person, etc.[213 in any respect whatsoever;" and requires that reasonably proper and equal facilities be afforded for the interchange of traffic with connecting lines; and § 4 prohibits the

charging of greater compensation under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; with a proviso not now pertinent. Certainly, the act contemplated that shippers against whom these discriminations were practised, and for whose benefit the entire act was framed, were to be treated as "persons injured" within the meaning of § 8. And by that section they are to have the "full amount of damages sustained in consequence of any such violation."

The word "damages," according to its customary usage, is at least as properly applicable to the immediate and direct result of imposing higher charges upon one shipper than are customarily charged under similar circumstances and for a like service to other shippers, as it is to the ultimate consequences of such discrimination. The purpose that runs throughout the act is to require equality of treatment. How can this be so easily accomplished as to treat the damage as being complete when the freight bill is paid, based upon rates that are higher than those charged to other shippers, and to require equality by insisting upon a return of the excess?

Courts everywhere are insistent that remote and consequential and speculative damages shall be excluded from consideration, and that only those directly and proximately resulting from the injury shall be considered. What can be more direct and proximate as damage to a shipper against whom a discrimination is practised, than the measure of the discrimination as shown by a comparison of freight bills? And what can be more remote and speculative than to enter into considerations arising out of the mode in which the shipper transacts his 214]business, *and to consider whether the particular commodities upon which the discriminatory rates have been imposed were sold under this or that arrangement as between shipper and consignee, and whether the discriminations have resulted in the loss of a particular sale, or of a particular profit, or of a particular customer? Congress, of course, recognized the notorious fact that rate discriminations often rendered it impossible for the disfavored shippers to profitably continue in business Rate discriminations were prohibited for that reason, amongst others. But Congress, I submit, never intended to impose upon the injured party the impossible task *of tracing* his ultimate losses to this or to *that shipment.*

*But it is* said that whatever view might *otherwise be entertained*, a particular (and, as I think, a very strained) meaning must be attributed to the word "damages" as used in the interstate commerce act, because of the course of proceedings in Congress that resulted in the enactment of that statute. It is pointed out that § 2 of the original bill provided in terms that in the case of a rate discrimination, the carrier should be liable to the disfavored shipper "for the difference between such higher rate and the lowest rate charged upon like shipments during the same period," with a similar provision respecting rebates and drawbacks; and it is said that because this provision was finally omitted from the act, the result is not only significant but conclusive evidence of a legislative intent that the "damages" in § 8, so far as discriminatory rates are concerned, are to be measured in some other manner. If § 8 had in terms prescribed any other measure than that which was in the original § 2, or if any other had been then known to the law, I could appreciate the force of the argument. The course of the debate in Congress, as quoted in the opinion, shows that Senator Cullom, who was the chief sponsor for the bill, and a member of the Senate conference committee, explained the change as *intended to simply group into one sec-[215 tion all the provisions respecting damages that had been contained in three sections. That this was done merely for the purpose of simplification, and with the understanding that the courts would of course apply the proper measure of damages in each case, and would not need Congress to tell them how to do this, clearly appears from Senator Cullom's remarks in explanation of the change. If any other measure of damages in rate discrimination cases had ever been successfully applied, I could concede some force to the reasoning that is based upon this change in the bill during its progress through Congress. But no other measure has been applied, nor does the opinion point out how any other can be.

As a great English judge said,† in one of the cases referred to below: "I think . . . that there would be very great difficulty, if the principle of overcharge [meaning a comparison of the rates charged] were rejected, in finding any other remedy by way of damages applicable to such a case." [Denaby Main Colliery Co. v Manchester, S. & L. R. Co. L. R. 11 App. Cas. 117.] These words were used in the House of Lords in the last of a series of notable cases that finally settled the meas-

† The Earl of Selborne, formerly Lord Chancellor Selborne, and before that, as Sir Roundell Palmer, counsel for Great Britain at the Geneva Arbitration.

ure of damages for rate discriminations, under an act of Parliament that furnished the model for § 2 of our interstate commerce act. That decision was rendered a little more than a year before the passage of our act. It was undoubtedly known to Senator Cullom (a lawyer by profession), who doubtless also knew that the English courts, in a series of decisions, had adopted the simple solution that the damage was to be measured by the amount of the discrimination. It would, I think, have surprised the learned and distinguished Senator if he had been told that in merely "simplifying" his act he had in effect deprived the disfavored 216]shipper of any and *all remedies in the ordinary case of discrimination, and that, too, in a legislative measure whose underlying purpose was to prevent such discriminations, and to add to and extend the remedies already available for securing redress against them.

Prior to the passage of the act, while the courts of England perhaps did not recognize a right to recover for unjust discriminations unless the rate charged to the complaining party was of itself excessive, the weight of authority in this country was to the contrary, as pointed out by this court in Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 275, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844. And see Hays v. Pennsylvania Co. (1882) 12 Fed. 309, and note; Samuels v. Louisville & N. R. Co. (1887) 4 Inters. Com. Rep. 420, 31 Fed. 57; Cook v. Chicago, R. I. & P. R. Co. 81 Iowa. 551, 563, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080. Louisville, E. & St. L. R. Co. v. Wilson, 132 Ind. 517, 525, 18 L.R.A. 105, 32 N. E. 311. The interstate commerce act and the reports and debates in Congress that preceded it are replete with evidence that the act was intended to give to the shipper against whom discrimination was practised at least as ample remedy as he would have against exactions that were for any other reason unjust or extortionate.

As a matter of practical construction, the course adopted by the Interstate Commerce Commission in reparation cases is most convincing, not only of what was deemed to be the intent of Congress, but of the fact that no other measure of reparation is practicable saving that which is based on the rate differential. In every case that has arisen, so far as I can discover, the difference in rate has been adopted as the basis of reparation. The cases will be referred to below.

Reference is made in the opinion to the declaration of this court (by Mr. Justice Brewer) in Parsons v. Chicago & N. W. R. Co. 167 U. S. 447, 460, 42 L. ed. 231, 236, 17 Sup. Ct. Rep. 887, that "before any party can recover under the act, he must show not merely the wrong of the carrier, but that that wrong has in fact *operated to[217 his injury." But the next succeeding words show that this had no such meaning as is now attributed to it. They are: "*If he* [the plaintiff] *had shipped to New York and had been charged local rates, he might have recovered any excess thereon over through rates.*"

In short, Parsons had made only "local" shipments (Iowa to Chicago), and had paid the regular published rates therefor. The court held that he was *not injured*, under the particular circumstances of the case, by the failure of the railway company to file and publish a certain tariff of *through* rates, applicable not to Chicago shipments, but only to those destined to New York and other points on the Atlantic seaboard. And so the decision was, that he had *no ground of action*. The case has no proper bearing, as an authority, upon the question of the *measure of damages;* but if it is to be employed as an authority at all upon that question, the declaration of the court, that if Parsons had been entitled to recover, his damages would have been measured by the rate differential, ought not to be overlooked.

The fact is that in the Parsons Case, while the plaintiff claimed that the carrier was guilty of a discrimination in rates, this court upon an analysis of his petition—upon a demurrer to which the case was determined—found there was no infraction of § 2, because the plaintiff had made no shipments that entitled him to the lower rates of which he complained; so that there was no real basis for his action except the failure of the carrier to publish or file the rates as required by § 6 of the act. The gist of the complaint was that the carrier, which operated a system of railroad from points in Nebraska, through Iowa to Chicago, for the purpose of giving unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against the plaintiffs and other Iowa shippers, put in force from Nebraska points a certain freight tariff on corn and oats in carload lots to Rochelle, Illinois, *when* *destined to New York, Boston, Phila-*[218 *delphia, or Baltimore;* that this was never circulated or published at any of the stations on defendant's road in Iowa, nor filed with the Interstate Commerce Commission, and its existence was concealed from the knowledge of plaintiff and other shippers on the line of defendant's road in Iowa; that on certain dates named, plaintiff had for shi

ment at a station in Iowa, certain quantities of corn and oats, and was prevented and deprived, by reason of the matters alleged, of the right to ship the same upon the terms and at the rate thus given to shippers in the state of Nebraska, and was obliged to and did ship his grain over defendant's road from the Iowa point *to Chicago*, at a higher rate than he could have had by taking advantage of the Nebraska schedule if that had been published in Iowa; that this constituted an unlawful preference and discrimination by defendant in favor of the shippers of grain in the state of Nebraska, and against the plaintiff as a shipper of grain in the state of Iowa, and the defendant thereby charged, demanded, and received a greater compensation for a shorter than for a longer haul (the longer including the shorter), under substantially similar circumstances. This court (by Mr. Justice Brewer), in dealing with the case, pointed out (p. 455) that the tariff complained of was a joint tariff, and not a tariff of local rates on grain to Rochelle, Illinois, or even to Chicago, which was the eastern limit of defendant's road; that (p. 457) the pleader had not made out a case on which it could be said that the so-called joint tariff was a mere device under color of which defendant was shipping grain from Nebraska points to Chicago at less rates than were being charged to the nearer points in Iowa; and proceeded to show (p. 459) that plaintiff's argument practically was "that if the tariff had been filed with the Commission, it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted, 219] *he might have examined the rates, and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff." It was this line of reasoning that led the court to the point of remarking, p. 460, that "the only right of recovery given by the interstate commerce act to the individual is to the '*person or persons injured thereby* for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the act, he must show, not merely the wrong of the carrier, *but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates, he might have recovered any excess thereon over through rates.* He did not ship to New York, and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

*The words* italicized (not so in the original) serve, I think, to show that the court was merely negativing a recovery on the part of one who might have shipped, but did not ship, and was *not negativing, but, on the contrary, affirming, arguendo, the theory that, in the event of the existence of a right of action, the measure of damages would have been the difference in rates.*

The opinion herein refers to and undertakes to distinguish the three English cases to which I have already referred,—Great Western R. Co. v. Sutton (1869) L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; London & N. W. R. Co. v. Evershed (1878) L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351; and Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. (1885) L. R. 11 App. Cas. 97, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340,—and states that they "do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination;" that "the court treated the low rate as evidence of what was a reasonable rate, and thereupon gave judgment for damages as for an overcharge;" and that "the act of *Parliament[220 . . . made the lowest rate the lawful rate." With great respect, it seems to me, the court has misapprehended the effect of these decisions; perhaps because of not distinguishing two variant statutes there under discussion. There was no act of Parliament that "made the lowest rate the lawful rate," or in terms declared that any excess over the lowest rate was extortionate, or recoverable in an action at law, as for an overcharge. The remedy that the courts of England accorded to the aggrieved shippers against whom the railway companies had discriminated was based upon an act of Parliament that, so far as concerns the measure of damages for an unlawful discrimination, is not to be distinguished from § 2 of the interstate commerce act; indeed, it furnished the model for that section. True, it was a very imperfect model in some respects, and was improved upon by Congress; but it was not departed from in any respect that pertains to the *measure of damages* for favoritism in rate-making. Whatever distinction (if any) the English courts make between "overcharge" and "damages" has arisen with respect to a different statute, and one that furnished the model for § 3 of our interstate commerce act.

Since the English decisions referred to were rendered prior to the adoption of our act, and afforded a construction of the English acts from which ours was taken, it

is of the utmost importance that the terms of the respective acts of Parliament and the precise grounds of the decisions should be clearly understood.

The first of those acts is the so-called equality clause, being § 90 of the railways clause consolidation act 1845 (8 & 9 Vict. chap. 20), enacted to consolidate in one act, certain provisions usually inserted in the "special acts" under which railway companies were incorporated. Section 90 is set forth in full in the margin.† As will 221] *be observed, while requiring equality in tolls and rates, so far as it applied, this clause was quite limited with respect to the circumstances under which it applied, being especially confined in its operation by the phrase "passing only over the same portion of the line of railway, under the same circumstances." It was in this respect, especially, that Congress improved upon the model. But, so far as this section did apply, the English courts held, in the cases cited in the opinion, and for reasons that will be set forth fully below, that where inequality in rates was shown, the shipper against whom the discrimination was made could recover from the railway company the amount of the discrimination in an action for money had and received, as so much money unlawfully exacted from him, just as by the common law he could recover the excess over a reasonable charge. In the cases cited, or in any others to which my attention has been called, no other measure of damages has been sanctioned, excepting that based upon the amount of the discrimination.

The other act, under which some controversy had arisen in the English courts about 222]the *allowance* of damages *(but none at all about the *measure* of them), is "the railway and canal traffic act 1854" (17 & 18 Vict. chap. 31), of which the 2d, 3d, and 6th sections are pertinent to the present inquiry. The 2d prescribes the duty of railway companies to furnish reasonable facilities for traffic, without giving "any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The 3d section gives to parties complaining of anything done or omitted to be done, in violation or contravention of the act, a special and extraordinary remedy, by applying "in a summary way, by motion or summons," to certain of the superior courts, or to any judge of such court, authorizing the court or judge to hear and determine the matter complained of, and to issue an injunction or interdict, restraining the company from further continuing such violation of the act, and to punish disobedience by attachment or other process; also authorizing the court or judge to impose upon the company a heavy daily fine for disobedience of the injunction or interdict; and "such monies shall be payable as the court or judge may direct, either to the party complaining, or into court, to abide the ultimate decision of the court, or to her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution," etc. By the 6th section it was enacted as follows: "6. No proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company *against any railway or[223 canal, or railway and canal company, under the existing law."

The courts of England have held that because § 2 of this act establishes rights beyond those existing at the common law, and § 3 gives an extraordinary remedy therefor, and § 6 excludes other remedies, there can be no recovery in an ordinary action for damages, based upon the mere infringement

† 90. "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties;" it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls *by the special act* authorized to be taken, *either upon the whole* or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all companies or carriages of the same description, and if conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway.

of the provisions of § 2; but it has been queried whether, for a violation of § 2, if such violation involves an unlawful extortion of money for carriage, the ordinary remedies at law for extortion may not be applicable. This question was reserved by the House of Lords in the Denaby Main Colliery Case, L. R. 11 App. Cas. 97, 112, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340. But the court of appeal having in that case declared (L. R. 14 Q. B. Div. 225) that the remedy by § 6 was exclusive, the same court three years after the enactment of our interstate commerce act (Rhymney R. Co. v. Rhymney Iron Co. L. R. 25 Q. B. Div. 146, 150, 59 L. J. Q. B. N. S. 414, 63 L. T. N. S. 407, 38 Week. Rep. 764), adhered to that view. And see, on the same subject, Lancashire & Y. R. Co. v. Greenwood (1888) L. R. 21 Q. B. Div. 215, 58 L. J. Q. B. N. S. 16, 59 L. T. N. S. 930.

So far as I have observed, the English courts have never wavered upon the question of allowing the difference in freight charges to be recovered by the disfavored shipper, for violations of the equality clause of the act of 1845; nor ever sanctioned the view that there could be any other measure of damages Nor can I find that any other measure of damages has been suggested for a violation of the act of 1854 in respect of a rate discrimination. The controversy about that act has been whether any suit could be maintained at all for a violation of it.

*But, as this court has repeatedly pointed out, the provisions of the 2d section of the interstate commerce act, respecting equality of rates, are modeled after the equality clause* (§ 90) *of the English act of* 1845; *while the 3d section of our act is modeled after the English act of* 1854.

In Interstate Commerce Commission v. 224]Baltimore & O. R. Co. 145 *U. S. 263, 277, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844, etc., the court referred to the English acts, and some decisions of the English courts thereunder, saying (p. 284): "These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. *But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute.* McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142."

*In Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 222, 40 L. ed. 940, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, the court (by Mr. Justice Shiras) said: "Similar legislation by the Parliament of England may render it profitable to examine some of the decisions of the courts of that country construing its provisions. In fact, the 2d section of our act was modeled upon § 90 of the English 'railway clauses consolidation act' of 1845, known as the 'equality clause,' and the 3d section of our act was modeled upon the 2d section of the English 'act for the better regulation of the traffic on railways and canals' of July 10, 1854, and the 11th section of the act of July 21, 1873, entitled—'An Act to Make Better Provisions for the Carrying into Effect the Railway and Canal Traffic Act 1854, and for Other Purposes Connected Therewith.'"

In Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 253, 55 L. ed. 448, 457, 31 Sup. Ct. Rep. 392, the court (by Mr. Chief Justice White) said: *"It is not open to question that the provisions of § 2 of the act to regulate commerce were substantially taken from § 90 of the English railways clauses consolidation act of* 1845, *known as the equality clause.* Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 222, 40 L. ed. 940, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666. Certain also is it that at the time of the passage of the act to regulate commerce, that clause in the English *act had been construed as only[225 embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. Great Western R. Co. v. Sutton (1869) L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; London & N. W. R. Co. v. Evershed (1878) L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351, and Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. (1885) L. R. 11 App. Cas. 97, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340. And it may not be doubted that *the settled meaning which was affixed to the English equality clause at the time of the adoption of the act to regulate commerce applies in construing the 2d section of that act;* certainly to the extent that its interpretation is in-

volved in the matter before us. Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45."

Now, what was the construction of the equality clause of the act of 1845, that had been adopted by the English courts, in the cases thus cited by this court as controlling evidence of what Congress intended in enacting the 2d section of our act?

The Great Western R. Co. v. Sutton (1869) L. R. 4 H. L. 226, was an action brought and judgment recovered for *"the amount of certain alleged overcharges."* But they were "overcharges" only in the sense that they were the differential between the rates charged to the plaintiff and those charged to others. The opinions of the judges being called for by the lords, Mr. Justice Blackburn delivered the prevailing view, expounding the subject historically, as follows (p. 237): "At common law a person holding himself out as a common 226]carrier of goods was not under *any obligation to treat all customers equally.† The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, *he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him.* But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*. All that the law required was, that he should not charge any more than was reasonable; see per Byles, J., in Baxendale v. Eastern Counties R. Co. 4 C. B. N. S. 78, 27 L. J. C. P. N. S. 137; and per Willes, J., in Branley v. Southeastern R. Co. 12 C. B. N. S. 74, 31 L. J. C. P. N. S. 286, 9 Jur. N. S. 329, 6 L. T. N. S. 458. But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers. At first the legislature in each special act inserted such clauses as seemed, to the particular committees, reasonable in each case. Very soon those came to be usual clauses which the then chairman of committees of the House of Lords used to require to be inserted in all railway bills with more *or less modification. They were[227 known by his name as 'Lord *Shaftesbury's* clauses.' Finally, in 1845, the legislature embodied in a general act (8 & 9 Vict. chap. 20) those clauses which it was thought expedient should generally be inserted in railway acts."

Mr. Justice Blackburn, after referring to the special acts that governed the case (what, in this country, would be called the "charter" of the company), by one of which the act of 1845 was incorporated into it, and saying that the rights of the parties must depend upon the effect of certain other sections in conjunction with § 90 of the act of 1845, which was, to leave the company free to charge what it thought fit for parcels not exceeding 500 pounds in weight, "subject, however, to the effect of the proviso for equality contained in the 90th section of the railways clauses consolidation act 1845, and the similar proviso for equality contained in the former special act of this company (7 & 8 Vict. chap. 3, § 50)," then proceeded to say:

*"Then comes the question, what is the legal effect of this proviso for equality?* I think it appears from the preamble of the 90th section of the railways clauses consolidation act 1845, that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And if this be borne in mind, *I think the construction of the proviso for equality is clear, and is, that the defendants may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances.* And I think it follows from this that *if the defendants do charge more to one person than they, during the same time, charge to others*, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the *limit of[228

† Note.—Otherwise in this country. Interstate Commerce Commission v. Baltimore & O. R. Co. *145 U. S. 275, 36* L. ed. 703, 4 *Inters. Com. Rep. 92, 12* Sup. Ct. Rep. 844, *and other cases cited supra.*

*equality* imposed by the statute on railway companies acting as carriers on their line must be *precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than reasonable. . . . When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.*† One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be *necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate.* But a single instance would be evidence to prove this practice; and if followed up by shewing that the smaller charge was repeatedly made at intervals over a period of time, *the jurors would, in the absence of explanation, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at the lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality.*"

He then proceeds to show that the weight of authority was very much in favor of this view, citing many previous cases; and wherever the measure of recovery is referred to it is in such terms as these: "The excess might be recovered back under a count for money had and received" (p. 240); "the plaintiff recovered the overcharge under a count for money had and received (pp. 241, 242). Referring to Garton v. Bristol & E. R. Co. (1861) 1 Best & S. 112, 30 L. J. Q. B. N. S. 273, 7 Jur. N. S. 229]1234, 9 Week. Rep. 734, *a case in which he had sat, he says (p. 243): "If, as rather appears from the report to be the case, the decision went so far as to say that an action for money had and received would not lie where the overcharge was in breach of the statutable obligation to charge equally, as much as if it had been in breach of the common-law obligation to charge reasonably, I think the decision was a mistake; and it was overruled in Baxendale v. Great Western R. Co. 16 C. B. N. S. 137, 27 L. J. C. P. N. S. 137, by the court of exchequer chamber, which comprised three out of the four judges who took part in deciding Garton v. Bristol & E. R. Co. in the Queen's bench."

He then reviews some later cases in which, from the first, a difference of opinion had arisen, with the final result of concluding that the plaintiff was entitled to recover. Four other judges present concurred. Baron Bramwell (p. 250) alone took a different view; not, however, respecting the measure of damages, but upon the question whether the equality clause had been violated.

The House of Lords followed the majirity of the judges and affirmed the judgment below, Lord Chelmsford delivering an elaborate opinion, in which, after discussing the evidence upon which the violation of the equality clause depended, he proceeded as follows (p. 262): "The last subject to be considered is the form of the action; *whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff's goods, not absolutely, but relatively to the charges made to other persons.* It was argued for the defendants that the charge upon the plaintiff's packed parcels, being warranted by the 10 and 11 Vict. chap. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that *the act *of their having been charged less*[230 *entitled him to claim the same rate of charge, and that all beyond that rate is overcharge.* The very fact of the smaller charge to others is the ground of his complaint of an overcharge to himself. Now, if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, *the case falls within the principle of several decided cases, in which it has been held that money which a party had been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition may be recovered back in an action for money had and received.* In the language of the court of common pleas, in the case of Parker v. Great Western R. Co. 7 Mann. & G. 253, "The payments made by the plaintiff were not voluntary, but were made in order to induce the company to do that which they were bound to do without them.'" Lord Chelmsford proceeds then to cite other decisions, showing that the Gar-

†*Note.*—This sentence was quoted with approval by this court, in 145 U. S. 277.

ton Case was erroneously decided, and was overruled by the Baxendale Case.

London & N. W. R. Co. v. Evershed (1878) L. R. 3 App. Cas. 1029, 5 Eng. Rul. Cas. 351, *was an action by a shipper to recover from the carrier an amount equivalent to the rebates given to another shipper in violation of the equality clause.* The House of Lords sustained the action, the lord chancellor (Ld. Cairns) saying (p. 1035): "The one right—to my mind, the clear and undoubted right—of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind, doing the same business, and supplying the same traffic. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest." Lord Hatherley said (p. 1035): "My Lords, I have come 231]to *the same conclusion. I have been unable to see, since the beginning of the argument, in a case where there was this difference in the charge against the respondent, how it could possibly be said that the case comes within *the well-established construction of the provisions of the 90th section of the railways clauses consolidation act. . . .*" (p. 1037.) "Therefore, I apprehend that your lordships cannot possibly say that the appellants are entitled to make this distinctive charge and give to other traders a rebate without giving the respondent *a return of the money which he has so paid in excess of the charge to other people.* I think the money he has so paid, and paid under protest, can now be recovered back by him." It should be noted that the "protest" was, of course, not treated as a condition precedent to the recovery. The word was used merely to point out what payments were referred to; there having been, in fact, a protest in respect to the payments in question.

Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. (H. L. 1885), L. R. 11 App. Cas. 97, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340, was an appeal from a decision of the court of appeal, reported in L. R. 14 Q. B. Div. 209; and the case came there from the Queen's bench division (Mathew and Day, JJ.), whose decision is reported L. R. 13 Q. B. Div. 674. The questions discussed in the divisional court were (a) whether certain "group rates" constituted a violation of the equality clause of the consolidation act 1845, § 90, and, if so, whether the damages for breach of that enactment were *limited* to the amount of overcharges (and what was the measure of such overcharges), or whether *general damages* could also be recovered. (b) Whether an action lay for breach of the railway and canal traffic act 1854, § 2, in view of the prohibition of § 6 of the same act; and, if so, whether the damages for breach of this act were limited to the amount of overcharges, or whether general damages could also be recovered. The "group rates" comprised the rates from *each of the collieries in a[232 certain district, to a number of towns and places in various parts of England, and the coal going from any one of the collieries comprised in the group to any one of these towns and places must pass defendant's colliery, which was on the same line of railway. The judges held (L. R. 13 Q. B. Div. 678) that the group rates were a violation of § 90 of the act of 1845, and that the overcharge could be recovered in accordance with Evershed's Case. This was on the ground that, in the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there was a case of inequality within § 90 of the act of 1845. The question whether the damages for breach of that section were limited to the amount of overcharges, or whether general damages could also be recovered, was not answered, because there was in the statement of facts no ground upon which an action for general damages would be maintainable. With respect to the act of 1854, it was held that an action did not lie for anything done in contravention of that act, and that Evershed's Case was not an authority for such action, since the point was not presented there and no opinion was expressed upon it.

In the court of appeal (L. R. 14 Q. B. Div. 209), the very special facts of the case are set forth. The court (per Lindley, L. J.) affirmed the judgment of the Queen's bench division that no action would lie in respect of any breach of the provisions of the railway and canal traffic act 1854, § 2. Next, it was held that the "grouped rates" were not a violation of the act of 1845, because the termini were not the same; the reasoning being (p. 223) that the words "passing only over the same portion of the line" meant passing between the same points of departure and arrival, and passing over no other part of the line.

But it was held that the company had violated the equality clause by charging to the defendant greater *rates than those[233 charged to one Bannister; the coal in each case going from defendants' mine to Grimsby. As to this, the court proceeded to say (p. 226): "It remains only to consider what damages, if any, the defendants have sustained by reason of the company's

reduction of their tolls, for the coal carried from the defendants' colliery for Bannister and shipped at Grimsby for the American steamers and for ports south of Harwich. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the railway company to carry coals for such shipment. If they had, there is no reason to suppose that they would have been charged more than Bannister. . . . The fact, however, remains, that at various times the railway company did carry coals to Grimsby for the defendants and Bannister under the like circumstances, as regards trouble and cost to the company, and as regards coal got from the defendants' collieries over the same portion of the line; and the company did charge Bannister for the coals so carried for him less than they charged the defendants; and if the defendants had shown that they had thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The divisional court has held the defendants entitled to recover overcharges made to the defendants on the principle laid down in Evershed's Case, *i. e.*, the charges made to them in excess of the charges made to Bannister for similar services. But the court does not say on what quantity of coal, on on how much of the defendants' coal carried to Grimsby, this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in Evershed's Case; and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all the coal sent by the defendants to Grimsby without reference to the quantity 234] *on which, or the times during which, a less rate was charged to Bannister, and, as already stated, we do not see on what principle to fix the amount of alleged overcharge. Under the peculiar circumstances of this case the defendants have not shewn any grounds which will justify the court in holding the railway company liable to them for any overcharges or damages. There is, therefore, nothing to be ascertained by the arbitrator on this head."

In the House of Lords (L. R. 11 App. Cas. 97), it was held, that where the railway company carried coal from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, the owners of the colliery nearest to the point of arrival were not entitled to maintain an action for overcharges merely on the ground that the difference in distance showed that the same rate was a discrimination against the shorter haul. The lords affirmed the decision of the court of appeal to the effect (a) that the railway had not in the above respect infringed the provisions of § 90 of the act of 1845. They affirmed the decision (b) that in this particular case an action would not lie for breach of the act of 1854, because undue or unreasonable preference or prejudice, within the meaning of that act, had not been proven. The question whether, under any circumstances, an action lies for breach of the act of 1854, was reserved. And (c) upon the question of the coal carried from the appellants' colliery to Grimsby at the same time that less rates were charged on Bannister's coal because of its ultimate destination for shipment on American steamers or for points south of Harwich, the House of Lords affirmed the judgment of the court of appeal that the allowances made to Bannister were a violation of the equality clause of the act of 1845.

*But upon the now important question of damages the House of Lords (reversing the court of appeal) held that the appellants were entitled to recover overcharges, the amount *to be ascertained by finding*[235 *what quantity of coal carried under the same circumstances and over the same portion of the line was charged at the higher rate to the appellants at the time the lower rate was charged to Bannister.*

There was a difference of opinion among the law lords as to whether the colliery company was entitled to recover the amount of the overcharge computed upon the entire tonnage transported for them, or only upon the less tonnage that had been carried at the reduced rate for Bannister during the same period. The lord chancellor (Halsbury) held to the former view; the Earl of Selborne and, apparently, Lord Blackburn, to the latter. In the end, the view of the lord chancellor prevailed. But the lords all agreed that an inequality in the rates charged to two shippers for the same service was to be treated as conclusive evidence that the disfavored shipper had been overcharged; and that the rate differential—described as "overcharge"—was to be adopted as the measure of the compensation to be awarded for a violation of the equality clause.

The lord chancellor said (p. 112): "The remaining question, namely, what the appellants are entitled to recover from the company upon the hypothesis that they have been overcharged, is one which does not seem to me to be surrounded by the difficulty that has been assumed to exist. The arbitrator, to whom this question must go back, will be able to *find on what quan-*

*tities of coal the appellants were charged, during the periods when the railway company were carrying for Bannister at a less rate; and if the principle is laid down by your lordships that the appellant's coal ought to have been carried at the same rate, I am unable to see the difficulty of ascertaining the amount of overcharge."*

The Earl of Selborne said upon this topic (p. 116): "I agree with the arbitrator in holding this to be a case of overcharge, and not a question of damages; and I should answer his question (upon the authority of [236] Sutton's Case *and Evershed's Case, and of the opinion of Lord St. Leonards in Finnie's Case, 2 Macq. H. L. Cas. 186) by saying that the proper measure of the overcharge to the appellants is the difference between the amount charged to them, and that charged (after deducting the allowance) to Bannister, for coals carried over the same part of the railway and under the same circumstances, during the same periods of time. Is there, then, any insuperable difficulty arising out of the fact that during these periods of time, not only coals on which these allowances were made, but also other coals, on which Bannister was charged the same rates with the appellants, were carried over the same distance, and under the same circumstances? I do not think so. *It being known how much coal was actually carried at the reduced rate for Bannister during these periods, it seems to me to result, from the principle established in the cases of Sutton and Evershed, that the appellants ought to have been charged at the same reduced rate up to, but not beyond, the same total quantity during the same period of time, and that this is the true measure of overcharge, for which the arbitrator ought to give them credit. . . . I think (with the court of appeal) that there would be very great difficulty, if the principle of overcharge were rejected, in finding any other remedy by way of damages applicable to such a case."*

Lord Blackburn, after quoting what was said in the court of appeal (as quoted above), upon the question of damages, said (p. 124): "I am not satisfied with the way in which Lindley, L. J., deals with Evershed's Case, and the mode in which the divisional court had applied it. I think that it cannot be right to calculate the amount of overcharge on all the coal sent by the defendants from their colliery to Grimsby for shipment, without reference to the quantity of coal on which, or the time during which, the less rate was charged to Bannister for coal carried from the defendants' colliery. The arbitrator has not found, and I do not think he was bound to find in the *special case, what part of [237] the coals carried by the railway were carried only over the same part of the railway with those carried for Bannister during the same time, so as to make this charge on these coals extortionate. I think when the case goes back he will have to find this in order to ascertain the amount, if any, which can be recovered back as overcharge."

Lord FitzGerald said simply (L. R. 11 App. Cas. 125): "My lords, I have read the two elaborate opinions which have been delivered by my noble and learned friend near me, and my noble and learned friend opposite, and I entirely concur in the order which it is proposed to make, and have nothing to add."

But the syllabus (L. R. 11 App. Cas. 98) expresses the view of the lord chancellor, and the order for judgment (p. 126) shows that this view prevailed.

The order was—"That the arbitrator must ascertain *what quantity of coal carried under the same circumstances and on the same portion only of the line was charged at the higher rate to the defendants at the time the lower rate was charged to Bannister;* the fact that the coal was shipped on the American steamboats or to the south of Harwich not being a difference in the circumstances; *and so ascertain the amount of the overcharge."*

The very clear result of these three important decisions of the House of Lords was that the amount of the difference in rates was to be treated as so much money unlawfully exacted from the disfavored shipper, and recovered accordingly.

There is not the least doubt that Congress, in passing the interstate commerce act, had in mind these then recent decisions of the English court of last resort, and intended to adopt the principle those cases had established with respect to the equality clause of the English act of 1845; *viz.*, that just as, at the common law, a shipper who had been charged an unreasonable rate could recover back *the excess, so, under the [238] statute, he could treat lower rates customarily allowed to other shippers for the like service as conclusive evidence that he had been subjected to an overcharge, and recover the difference.

To this extent, at least, I deem the question of the measure of damages for unlawful discrimination, contrary to § 2 of the interstate commerce act, to be covered by the previous decisions of this court, already cited (145 U. S. 283; 162 U. S. 222; 220 U. S. 253), which pointed out that the equality clause furnished the model for § 2 of the interstate commerce act, and that it was adopted by Congress with the commerce-

tion that had been put upon it by these same decisions of the House of Lords. Were the matter *res novo*, I should entertain no doubt of the propriety of adhering to the English rule.

Whether the House of Lords was right in the Denaby Main Colliery Case in allowing a recovery by the aggrieved shipper, based upon the rate differential as applied to his entire tonnage, or whether it should have been limited to a tonnage not exceeding the tonnage of the favored shipper on which the rebate was allowed, if that was less than the tonnage of the aggrieved shipper, may be a question of some doubt. This court in the present case is not called upon to pass upon it.

For the record before us does not present the question whether the plaintiff's recovery ought to have been measured by the tonnage of the favored shippers upon which the rebates were allowed. The plaintiff in error (defendant in the trial court) did prefer any request or take any exception that would have based the recovery upon a computation of the favored tonnage. There was no evidence, indeed, of the amount of that tonnage; it being simply made to appear that of all the coal shipped by the Berwind-White Company (one of the favored shippers) during the period of rebating, only 10 per centum was contract coal on which rebates were allowed. How 239]much *the Berwind-White Company shipped did not appear, and so it may properly be presumed that 10 per centum of its shipments would amount to more than the total of the plaintiff's shipments.

Defendant did request the trial court to instruct the jury that if the lower rate accorded to other shippers was not justified, "the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period, and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period." This, as the circuit court of appeals correctly held (97 C. C. A. 383, 173 Fed. 6), in effect requested the court to charge, as fixing the measure of recovery, not the lowest rate charged by the railroad to another shipper, but the general average paid on all shipments made by such shipper. I agree with that court in the view that Congress made no such rule. It is inconsistent with anything in the English cases, or in any case in this country to which attention is called.

The conclusion of this court that the right to recover in such a case as the present "is *limited* to the pecuniary loss suffered and proved," and that the fact the greater charges are exacted from the plaintiff than from his competitor for the like service is not evidence of such pecuniary loss, is, so far as I have been able to discover, entirely unsupported by authority. The Parsons Case (167 U. S. 447, 460, 42 L. ed. 231, 236, 17 Sup. Ct. Rep. 887) is cited as authority, but in my view is not properly to be so considered, for reasons already fully explained. The "only other case" is Knudsen-Ferguson Fruit Co. v. Michigan C. R. Co. 79 C. C. A. 46, 148 Fed. 968, 974. This was an action to recover a sum claimed to have been unlawfully exacted for the icing of a carload of fruit. At p. 974 the court said, *arguendo:* "To support a recovery under this section [§ 8] there must be a showing of some specific pecuniary injury. . . . He [the *shipper] must show[240 either that there has been some unreasonable or excessive charge imposed, *or some unlawful discrimination practised against him.*" As this court holds that in the present case an unlawful discrimination was practised against the shipper, I do not see anything in the Knudsen Case to deprive it of its right to recover, or to affect the question of damages. Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96, and Meeker v. Lehigh Valley R. Co. 106 C. C. A. 94, 183 Fed. 548, were actions to recover treble damages under the Sherman anti-trust act [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200]; in the latter case (p. 551) the court was careful to point out that the plaintiff was not seeking redress as a shipper, nor was the defendant sued as a carrier. Hoover v. Pennsylvania R. Co. 156 Pa. 220, 244, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282, was an action upon a Pennsylvania statute, not, like the interstate commerce act, giving to the party injured a right of action for "damages sustained," but making the offending carrier "liable to the party injured for damages *treble* the amount of injury suffered." The court cited no authority for its decision that the difference in the freight rates did not furnish a measure for the amount of the single damages. Evidently because of a penal character of the remedy the court shrank from adopting what otherwise would be deemed the normal rule for determining the amount of the injury.

On the other hand, Cook v. Chicago, R. I. & P. R. Co. 81 Iowa, 551, 563, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080, is a distinct authority for the proposition that in a case of discrimination in rates, accomplished by means of rebating, the amount of the re-

bates furnishes the measure of damages; the court saying: "The only finding that can in any fairness be made is that, after deducting the rebate, the rate was reasonable; and that the exaction from the plaintiffs was unreasonable and the discrimination against them unjust." To the same effect is Louisville, E. & St. L. R. Co. v. Wilson, 132 Ind. 517, 525, 18 L.R.A. 105, 32 N. E. 311, where an instruction that the 241]allowance of more favorable *rates to another shipper entitled the plaintiff to recover the difference was sustained on appeal.

The present decision ignores the practical construction that has invariably been placed upon the act by the Interstate Commerce Commission.

In Burgess v. Transcontinental Freight Bureau, 13 Inters. Com. Rep. 668, 680, the Commission ruled upon the precise question now before us, in dealing with a case of rates held excessive *per se*, but only so held as the result of a comparison between the rates under attack and other rates customarily charged. The complainants claimed reparation by reason of shipments under the old rate. Defendants denied that such reparation should be awarded, even though the Commission were of the opinion that that rate was excessive, and this "for the reason that no damage upon the part of the complainants has been established." It appeared that the market was not affected by the rate, and that the freight had been added to the price paid by the consumer; and it was insisted that the complainants who had paid this freight rate had not been actually injured. The Commission said: "Such is not, in our opinion, the proper meaning of this term [damage]. These complainants were shippers of hardwood lumber to this destination, and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right, and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they 242]should not *be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

It is upon this theory that reparation has been awarded by the Commission from the beginning. After an examination of the reports of their decisions as exhaustive as the time at my disposal would permit, I think it entirely safe to say that in the thousands of reparation cases that have been passed upon, reparation has not been refused under circumstances at all resembling those of the case at bar; and that whatever reparation has been allowed, it has been based upon the rate differential, and awarded to the shipper who paid the freight, without regard to whether or not he charged it over against his consignee. The same rule has been adopted in all cases, whether the rates charged to the complainant have been deemed unreasonable *per se* or not; indeed, where they have been thus denounced, it has ordinarily been done as the result of comparison between the rate under attack and other rates on similar traffic. Illustrative decisions are cited in the margin.†

*This court, while saying very plain-[243 ly what the word "damages" in § 8 *does not* mean, reaches its conclusion without determining what the word *does* mean. It is said that the "damages may be the same as the rebate, or less than the rebate, or many times greater than the rebate." It is said that in the case under consideration there was "no proof of injury, no proof of decrease in business, loss of profits, expense incurred, or damage of any sort suffered."

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† Reparation by reason of published rates held unreasonable because discriminatory, irrespective of whether they were otherwise extortionate.

Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418, 426; California Commercial Asso. v. Wells, F. & Co. 14 Inters. Com. Rep. 422, 434; Gamble-Robinson Commission Co. v. Northern P. R. Co. 14 Inters. Com. Rep. 523; Beekman Lumber Co. v. Chicago, R. I. & P. R. Co. 16 Inters. Com. Rep. 528; Hinton Fruit & Produce Co. v. Chesapeake & O. R. Co. 17 Inters. Com. Rep. 578; Delray Salt Co. v. Pennsylvania R. Co. 18 Inters. Com. Rep. 259; American Creosote Works v. Illinois C. R. Co. 18 Inters. Com. Rep. 212, 219; Stacy Mercantile Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 Inters. Com. Rep. 550; Texas Grain & Elevator Co. v. Chicago, R. I. & P. R. Co. 18 Inters. Com. Rep. 580.

By reason of published rates held unreasonable because in excess of rate afterwards voluntarily established by the carrier.

Frederick Brick Works v. Northern C. R. Co. 12 Inters. Com. Rep. 13; American Grass Twine Co. v. Chicago, St. P. M. & O. R. Co. 12 Inters. Com. Rep. 141; Erie Preserving Co. v. Lake Shore & M. S. R. Co. 14 Inters.

It is said that "if plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on the contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained." But as the contract coal of the favored shipper had been sold long before (prior to April 1, 1899, at latest), I am unable to see how it can reasonably be supposed that the rebate could have prevented the plaintiff from selling, or have caused it expense, or have diminished or destroyed its profits upon coal that happened to reach destination on the same day.

What, then, is to be the measure of damages? Whatever it is to be, it is apparent that we must henceforward abandon the simple and direct method of computing the 244] *rate differentials, and therefrom ascertaining the amount of the reparation, and must enter into inquiries respecting the state of the market, and ascertain whether, upon the precise date that the goods of the injured party reached the market, goods of the like character owned by the favored shipper came into direct competition with them. All of this seems to me to be utterly impracticable, and I cannot believe that Congress intended any such result to follow from the language it employed.

It is said that under the rule of the Denaby Main Colliery Case it would follow that if there were, say, five dealers, each shipping 10,000 tons, to one only of whom rebates aggregating $3,500 had been allowed, each of the five would be as much entitled as plaintiff to recover $3,500 on their several shipments of 10,000 tons each, and the five verdicts would aggregate $17,500 because of the payment of $3,500 to the favored shipper. But if § 2 of the act is to be given any vital force, it must be construed as estopping the carrier from saying that the amount actually charged, less the rebate, is less than ought to be charged on a shipment of 10,000 tons; and if he himself rebates $3,500 to one shipper, the requirement that he rebate the same to each of the four others does not penalize the carrier. It simply requires him to do service for all at the rate which he himself has fixed in dealing with the favored shipper.

Nor can I see that this would "create a legalized but endless chain of departure from the tariff." If § 2 is enforced strictly in accordance with the English rule, it will very clearly tend to prevent any departures from the lawfully established tariffs.

It seems to me a strange view of the matter to deny direct reparation *in specie* to the aggrieved shipper, by the payment to him of an amount sufficient to leave the net rate charged to him equal to the lowest rate customarily charged to a competitor; and to base this denial on the theory that

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Com. Rep. 118; Carstens Packing Co. v. Northern P. R. Co. 14 Inters. Com. Rep. 577; Diehl v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 190, 192; J. H. Allen & Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 293; Sunderland Bros. Co. v. Pere Marquette R. Co. 16 Inters. Com. Rep. 450; Parfrey v. Chicago, M. & St. P. R. Co. 20 Inters. Com. Rep. 104.

By reason of published rates held unreasonable because in excess of rate afterwards established by the commission.

American Fruit Union v. Cincinnati, N. O. & T. P. R. Co. 12 Inters. Com. Rep. 417; Nicola, S. & M. Co. v. Louisville & N. R. Co. 14 Inters. Com. Rep. 199, 205; Kindelon v. Southern P. Co. 17 Inters. Com. Rep. 251, 253; Crowell & S. Lumber Co. v. Texas & P. R. Co. 17 Inters. Com. Rep. 333; Maris v. Southern P. Co. 18 Inters. Com. Rep. 301.

By reason of rates held unreasonable because resulting from error in routing, chargeable to the carrier.

McCaull-Dinsmore Co. v. Chicago G. W. R. Co. 14 Inters. Com. Rep. 527; Fred'k. De Bary & Co. v. Louisiana Western R. Co. 18 Inters. Com. Rep. 527.

By reason of published rates held unreasonable *per se*.

Slimmer v. Chicago, St. P. M. & O. R. Co. 14 Inters. Com. Rep. 525; Carstens Packing Co. v. Northern P. R. Co. 14 Inters. Com. Rep. 577; Carstens Packing Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 469; Albert Steinfeld & Co. v. Illinois C. R. Co. 20 Inters. Com. Rep. 12; Parfrey v. Chicago, M. & St. P. R. Co. 20 Inters. Com. Rep. 104; Acme Cement Plaster Co. v. St. Louis & S. F. R. Co. 22 Inters. Com. Rep. 283.

By reason of published rates held unreasonable because higher than obtainable by another route.

American Grass Twine Co. v. Chicago, St. P. M. & O. R. Co. 12 Inters. Com. Rep. 141.

By reason of published rates held unreasonable because exceeding the sum of the locals.

Laning-Harris Coal & Grain Co. v. Missouri P. R. Co. 13 Inters. Com. Rep. 154; Flint & W. Mfg. Co. v. Lake Shore & M. S. R. Co. 14 Inters. Com. Rep. 336; Wilson v. Chicago, M. & St. P. R. Co. 14 Inters. Com. Rep. 549; Sylvester v. Pennsylvania R. Co. 14 Inters. Com. Rep. 573; Hardenberg v. Missouri P. R. Co. 14 Inters. Com. Rep. 579; J. H. Allen & Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 293; Gilchrist v. Lake Erie & W. R. Co. 16 Inters. Com. Rep. 318; Wells-Higman Co. v. Grand Rapids & I. R. Co. 16 Inters. Com. Rep. 339; St. Louis Blast Furnace Co. v. Virginian R. Co. 21 Inters. Com. Rep. 215.

reparation will do more harm than good, by 245] *creating an "endless chain of departures from the tariff." Of course, the result would be that if there were five shippers, and rebates were given to one of them unlawfully, and then by legal compulsion the carrier were required to give equivalent rebates to others, this would constitute five "departures from the tariff" instead of one. But what matters it, provided the five shippers are thereby put upon an equal footing? The prohibition against rebates and other discriminations, and also the requirement of established and published rates, are intended to compel fair and equal treatment by the carrier of all shippers. I can see nothing in the act that makes published rates so sacred that departures from them by the carrier must go unredressed, because to redress the grievance will require a further departure. Equality in the treatment of shippers is the end aimed at by the act; published rates are but a means to that end. We should not so exalt the means as to lose sight of the end and object of the act.

Besides, if the theory of the opinion is to be adhered to, there will necessarily be as many different rates as there are differences in the circumstances of the disfavored shippers who seek redress because of the rebates or other rate discriminations. One aggrieved party may receive damages far beyond the money equivalent of the discrimination; another may receive much less; still another may receive nothing at all. If we were to look to the outcome of these private actions for violation of the equality provision of § 2 of the act, and treat them as amounting in the end to a determination of the freight rate, the inevitable result (on the theory adopted by the court) would be that one violation by the carrier would result in as many different rates as they were different shippers to be discriminated against.

But, with great respect, I again ask: What, in the present case, is to be the measure of damages? The plaintiff, upon shipments aggregating 40,000 tons of coal 246]in two years, *has been charged about $12,000 more than its competitors have been charged during the same period for the same service. The plaintiff has actually paid the freight bills to the railroad company. Upon the face of the record, the plaintiff's expense account has been actually increased by the amount of $6,000 per annum, as compared with its competitors. Other things being equal, the profits of the plaintiff, upon the production and sale of the 40,000 tons of coal, were $12,000 less than otherwise they would have been. It does not appear that other things were not equal. Yet the decision is, that there is "no proof of injury, . . . expense incurred, or damage of any sort suffered." Is not the payment of a full freight bill, as compared with a reduced freight bill, an "expense incurred?" What other expense could be incurred by a shipper, attributable to a discrimination in rates?

The opinion says: "Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion. Having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was illegally undercharged." This is not only unsupported by authority, but is, I submit, inconsistent with the result reached in the present case. The court decides that the plaintiff is injured, and entitled to maintain an action against the carrier under § 8, because the carrier has collected less compensation from a favored shipper for the like service. The rebates were merely the device by which the discount from the published rates was accomplished. How can such an action lie at all, except that § 2 makes the published and otherwise lawful rates unlawful and extortionate when less rates are charged to favored shippers, through the device of rebates or otherwise? It seems a mere play upon words to say that "the favored shipper was illegally undercharged." Certainly it is not to *him* that the right of action is given by § 8. In short, the opinion treats the imposition of the "lawful *rates"—that is, the[247 published rates—as unlawful for the purpose of establishing the *injuria*, but insists that they must be treated as lawful when we come to ascertain the *damnum*.

The result is, the legal paradox: *Injuria sine damno*. The plaintiff is wronged but not harmed; it may sue, but may not recover.

If the rate differential is not a proper element of damages in actions brought in the courts, I suppose it will not be proper for the Commission to adhere to it. Yet the sheer impossibility of adopting any other measure of damages, in the multitude of reparation cases that the Commission has to deal with, is perfectly obvious.

The result, upon the whole, is a virtual denial of private remedy for the most common and harmful of those discriminations that the interstate commerce act was designed to prevent and to redress.

MITCHELL COAL & COKE COMPANY, Plff. in Err.,
v.
PENNSYLVANIA RAILROAD COMPANY

(See S. C. Reporter's ed. 247-303.)

**Error to district court — jurisdiction below.**

1. The jurisdiction of the district court as a Federal court was in issue in a suit brought by a shipper under the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), §§ 8, 9, to recover damages from a carrier on account of rebates to other shippers, so as to support a direct writ of error from the Federal Supreme Court, where the lower court granted a motion to dismiss because of the lack of any previous action by the Interstate Commerce Commission.

[For other cases, see Appeal and Error, 879-937, in Digest Sup. Ct. 1908.]

**Carriers — rebates — allowance to shippers doing their own hauling.**

2. A carrier may lawfully grant to shippers of coal and coke doing their own hauling from mine to station a reasonable trackage or lateral allowance from the published tariff, which, though naming the rate as from the station to destination, is uniformly construed to include the haul from the mine.

[For other cases, see Carriers, III. c, in Digest Sup. Ct. 1908.]

**Carriers — remedy for rebating — necessity of previous action by Interstate Commerce Commission.**

3. A shipper of coal and coke cannot maintain in advance of action by the Interstate Commerce Commission a suit against a carrier for damages resulting from rebates, past or present, given to his competitors doing their own hauling from mine to station, in the form of trackage or lateral allowances from the published tariff, which, though naming the rate as from station to destination, has been uniformly construed to include the haul from the mine, since such lateral allowances would be unlawful only when unreasonable, and this was a question in the first instance for the Commission, notwithstanding the provisions of the act of February 4, 1887, § 9, giving an individual the right to maintain actions to obtain pecuniary redress for violations of the act, and of § 22, that nothing therein shall abridge or alter existing common-law or statutory remedies.

[For other cases, see Carriers, III. c, in Digest Sup. Ct. 1908.]

**Carriers — remedy for rebating — necessity of previous action by Interstate Commerce Commission.**

4. Allowing shippers of coal and coke as a rebate from the published tariff which named the rate as from station to destination, but was uniformly construed to include the haul from the mine, a trackage or lateral allowance for the haul from mine to station, being absolutely forbidden by the act of February 4, 1887, § 2, regardless of the amount, where the carrier itself does the hauling, previous action by the Interstate Commerce Commission is not a condition precedent for the maintenance by another shipper, under §§ 8, 9, of an action against the carrier to recover the damages sustained by reason of such illegal allowances to his competitors.

[For other cases, see Carriers, III. c, in Digest Sup. Ct. 1908.]

[No. 674.]

Submitted December 4, 1912. Decided June 9, 1913.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment, dismissing for want of jurisdiction an action by a shipper against a carrier to recover the damages sustained by reason of the payment of rebates to his competitors. Affirmed and modified in part and reversed in part.

See same case below, 183 Fed. 908.

The facts are stated in the opinion.

Mr. George S. Graham submitted the cause for plaintiff in error:

It cannot seriously be contended that a shipper must go to the Interstate Commerce Commission to correct what has never been published as a rate.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Southern R. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Lyne v. Delaware, L. & W. R. Co. 170 Fed. 847; Union P. R. Co. v. Goodridge, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970.

Where a shipment, among shippers similarly situated, is made from one given point to another, the railroad cannot by any device, directly or indirectly, charge one more than another.

Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822.

The great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and pro-

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

hibiting secret departures from said tariffs, and forbidding rebates, preferences, and all forms of undue discrimination. To this extent and for these purposes the statute was remediable, and is therefore entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

Messrs. John G. Johnson and Francis I. Gowen submitted the cause for defendant in error:

Because of the controlling force and effect given to the tariff rates of a carrier by the provisions of the interstate commere act, both shipper and carrier are equally bound thereby; the one is under as great an obligation to pay as the other is to charge and collect the same, and if a shipper desires to secure relief from these rates, the procedure to be followed must be that which is prescribed by the interstate commerce act, *viz.*, a resort to the Interstate Commerce Commission for relief from the effect of the rates.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

Payment for services rendered by shippers in relief of the carrier was lawful.

Interstate Commerce Commission v. F. H. Peavey & Co. 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Tap Line Case, 23 Inters. Com. Rep. 277.

In its administration of the interstate commerce act the Commission in many instances has condemned as unlawful, because unreasonable or discriminatory, rates which have been exacted from shippers, while at the same time denying reparation to them.

Anaconda Copper Min. Co. v. Chicago & E. R. Co. 19 Inters. Com. Rep. 592; International Salt Co. v. Pennsylvania R. Co. 20 Inters. Com. Rep. 539.

The jurisdiction which the court below would have been obliged to exercise in order to enter a judgment in favor of the plaintiff was that which it possessed as a Federal court.

Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

Mr. Justice Lamar delivered the opinion of the court:

On November 20, 1905, the Mitchell Coal & Coke Company brought suit in the circuit court of the United States for the eastern 249]district of Pennsylvania against *the Pennsylvania Railroad for damages alleged to have been occasioned by the payment of rebates to the Altoona, Glen White, Millwood, Latrobe, and Bolivar Companies. The complaint alleged that between April 1, 1897, and May 1, 1901, the plaintiff, in competition with these companies, made shipments of coal and coke over the Pennsylvania road from the Clearfield district to the same general markets in other states, and that, during all that time, the carrier paid rebates to these companies, pretending that the money given them was an allowance for transportation services rendered by them, in hauling cars over spur tracks between their mines and the railroad station.

The parties stipulated that the case should be submitted to a referee, who should have the powers of a special master. His findings were in favor of the plaintiff. His report, modified as to the measure of damages, was confirmed (181 Fed. 403), but before judgment was entered thereon the carrier moved to dismiss the case because the court, as a Federal court had no jurisdiction of the cause of action until after the Interstate Commerce Commission had passed upon the legality of the allowances and the reasonableness of the amount paid to shippers for hauling cars between their mines and the station. The motion was granted (183 Fed. 908), and the case was taken by writ of error to the circuit court of appeals, which dismissed the case (112 C. C. A. 637, 192 Fed. 475) upon the ground that the question could only be reviewed by the Supreme Court of the United States. A writ of certiorari was denied (223 U. S. 733, 56 L. ed. 635, 32 Sup. Ct. Rep. 528), and the plaintiff thereupon brought the case here by direct writ of error, the judge certifying the following as the jurisdictional question:

"Has the circuit court of the United States, in advance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain an action of trespass brought by a shipper of coal *and coke, to recover[250 damages because of the alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rate, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in making the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were

interested in the question of the lawfulness thereof."

1. The plaintiff's cause of action for damages occasioned by the payment of illegal or unreasonable allowances was one which, under §§ 8 and 9 of the commerce act (24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159), could only be brought in a district or circuit court of the United States. The motion to dismiss challenged the jurisdiction of the court, as a Federal court, and its power "primarily to hear complaints concerning wrongs of the character of the one here complained of." Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 442, 51 L. ed. 559, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. R. Co. v. United States ex rel. Pitcairn Coal Co. 215 U. S. 495, 54 L. ed. 297, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114. The order of dismissal was founded on the denial of jurisdiction, and this court has power to review that ruling. The Ira M. Hedges (Lehigh Valley R. Co. v. Cornell S. B. Co.) 218 U. S. 270, 54 L. ed. 1039, 31 Sup. Ct. Rep. 17, 2 Ann. Cas. 1235; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907. The case differs from R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760. There the Commission had found that the rate was unreasonable. The demurrer, based on the failure to allege that a reparation order had been made in favor of the plaintiff, did not attack the jurisdiction of the court, as a Federal court, since the cause of action sought to be enforced was one which, if properly brought, could, under the act of 1910 (36 Stat. at. L. 554, chap. 309), have been maintained either in a state or Federal court.

251] *2. In the present case the motion to dismiss for want of jurisdiction was made at the end of the trial, and was based not upon the pleadings, but upon the evidence. It becomes necessary, therefore, to make a statement of the facts material to that issue:—The plaintiff, the Mitchell Coal & Mine Coke Company, owned six coal mines in the Clearfield district, and between 1897 and May 1, 1901, shipped its products over the Pennsylvania Railroad in state and interstate commerce. During that time the provisions of the commerce act were constantly violated, and there were many instances in which the carrier gave secret rates to shippers from whom it collected the full tariff and subsequently refunded the difference between the legal and the illegal rate. Many such rebates were paid to the plaintiff, the Mitchell Company, which in this case claimed the right to recover, as damages, the difference between these rebates paid to it and what it claimed were the additional rebates paid to the Altoona and other companies mentioned in the declaration. The referee found that, for a part of the time, 70 per cent of plaintiff's shipments had been made at secret rates, and held, citing Pennsylvania R. Co. v. International Coal Min. Co. 97 C. C. A. 383, 173 Fed. 1, 9, that, as to this tonnage, the plaintiff was as much a violator of the statute as was the carrier, and that no cause of action arising out of this illegal contract would be enforced by the courts. He therefore limited the inquiry to a consideration of the damages in respect to that part of the plaintiff's shipments on which no rebates had been paid.

From the referee's report, and the testimony returned therewith, it appears that Clearfield district is the name given to a large coal field reached by the lines of the Pennsylvania Railroad. In this district there were many mines—some near the railroad and others at considerable distances therefrom, but all reached by lateral lines or spur tracks, over which cars were carried to and from the *mines. This Clear-[252 field district was treated as a single shipping station, and the rates from all points therein were the same where the coal was transported to the same point beyond the state. The published tariff named the rate from station to destination, but it was uniformly construed to include the haul from the mine. The published rate was so applied on all shipments made by the plaintiff as well as on those made by the Altoona and other companies named in the complaint.

It further appeared that to these companies the carrier paid what is called a trackage or lateral allowance, claiming that it was compensation allowed them for hauling cars from their mines to the station. The defendant's contention that there was no concealment of these payments is controverted by the plaintiff, which insists that it had no knowledge of such payments until 1898, when its officers were informed that the railway was paying some companies 10 cents a ton for such services. The Mitchell Company, the plaintiff, thereupon bought an engine to be used for that purpose at its Gallitzin mine, and with this engine hauled cars, loaded and empty, between that mine and the station. For this work it demanded that the defendant should pay the same lateral allowance of 10 cents a ton that the railroad paid other companies for similar services. The carrier contended that it was itself prepared to do the switching at the Gallitzin mine, though, on account of dissimilarity of conditions, it

could not economically do so at the Altoona and other mines referred to in the complaint. It therefore declined to pay a lateral allowance to the plaintiff, but offered to continue to treat this haul as included in the rate, and to do that work without extra charge to the Mitchell Company. The plaintiff then offered to do the hauling for less than 10 cents, the exact amount not appearing. The proposition having been declined in 1899, the plaintiff, on November 20, 1905, brought this suit, offering evidence to show that in some 253] *cases the allowance was as high as 16 cents a ton instead of 10 cents, as it had previously understood.

In addition to the Gallitzin mine, the plaintiff owned five others in the Clearfield district. They were located at points from 1,100 to 3,000 feet from the railroad, and were reached by spur tracks belonging to the plaintiff, over which cars were hauled by the locomotives belonging to the Pennsylvania Railroad. For this service the carrier made no extra charge, treating it as included in the rate, though the tariff published the rate as from station to destination.

The mines of the Altoona, Glen White, and Millwood Companies were located in the Clearfield district, while those of the Latrobe and Bolivar Companies were near by in the Latrobe district.

The Millwood was reached by a narrow gauge track, over which cars were hauled by that coal company's narrow gauge engines. For doing that work it was paid a lateral allowance of 15 cents a ton until April, 1899, and after that date 10 cents a ton.

The Glen White mine was about 3 miles from the main road, and was reached by a spur having light rails, steep grades, and sharp curves, over which the evidence tended to show that the engines of the railroad could not be safely or economically operated. This company transported the coal cars with its own engine, and for doing that work the defendant paid it a lateral allowance of 15 cents a ton. On December 28, 1901 (subsequent to the transactions involved in this litigation), the carrier gave notice that it would discontinue lateral allowances on coke, but would allow 15 cents per ton on coal.

The Altoona mine was reached by a spur track, over which, with its own engines, the Altoona Company hauled cars and was paid a lateral allowance of 13 cents on coal and 10 cents on coke to points on the Hollidaysburg branch, and 18 cents on coal and 20 254] cents on coke to *points east of Altoona. *On December 28, 1901, this lateral allowance on coal was discontinued, and* that on coke reduced to 12 cents a ton. On January 1, 1902, all lateral allowances were discontinued.

Inasmuch as the payments to the Altoona were larger than those to any other coal company, the plaintiff claimed that they were the legal measure by which damages were to be assessed. The evidence was therefore specially directed to the situation at this mine, which was a little over three miles in an air line from the railroad, and 800 feet above the station level. The grade was not only very steep, but it was necessary to make use of three switchbacks in order to reach the elevation of the mine. The line was thus lengthened so as to be about 5 miles in length. The curves on this track were very sharp; the rails were light, and only specially constructed engines could be used. There was evidence that before the Pennsylvania's locomotives could have been operated over this spur, it would have been necessary to put in heavy rails, strengthen the culverts, and realign the track. Owing to the steep grade only four cars could be hauled at a time, and it required from three to six times as long to do the same amount of transportation work as at the Gallitzin mine.

3. The plaintiff insists that these facts demonstrate that the payments to the Altoona and other companies were not measured by the value of the track or locomotive, or by the cost of the service rendered, but were unreasonable in amount, were arbitrarily fixed, lowered, or withdrawn, and constituted a mere cover for rebating. On the other hand, the defendant insisted that, though bound to haul the cars to and from the mines, it could not economically do the work on account of the physical conditions at the Altoona, Millwood, and Glen White mines, and that it therefore employed those companies to perform that transportation service, paying them therefor an allowance *which is prima facie reasonable,[255 and must be so treated by the courts until the Commission has determined that it was excessive or constituted an unjust discrimination.

On this hearing, involving a matter of jurisdiction, we cannot pass upon these questions which go to the merits of the controversy. But these claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one, the legal quality of the practice complained of may not be definitely fixed by the statute, so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts, and

calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts, with different juries, the results would not only vary in degree, but might often be opposite in character,—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.

4. The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in Abilene, Pitcairn, and Robinson Cases, and is referred to here because this record and that in Pennsylvania R. Co. v. International Coal Min. Co., just decided [230 U. S. 184, ante, 1446, 33 Sup. Ct. Rep. 893] furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company during the same period and for identically the same reasons. In both the plaintiff insisted that the payment 256] *was a rebate, and the carrier that it was compensation for services rendered. In the International Case the judge treated the Altoona allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was conflicting, and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed, and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful, and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no primary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount.

It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answer in the Abilene Case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality canot be secured by separate suits before separate tribunals, involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary; with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness *of[257 the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. Co. v. International Coal Min. Co. There the carrier insisted that a suit for damages occasioned by rebating could not be maintained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission, and not the courts, should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable, and therefore illegal and prohibited.

*5. It is argued that under the Abi-[258 lene, Robinson, and Pitcairn Cases this may

be true as to existing rates in which the public have an interest, but it is urged that a claim based upon the unreasonableness of past rates and discontinued practices raises a judicial question, of which the courts, and not the Commission, have jurisdiction.

There are several answers to this proposition. In the first place, the plaintiff cannot claim under the act against it. To say the least, it is extremely doubtful whether, at common law, one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered to the carrier. Interstate Commerce Commission v. Baltimore & O. R. R. Co. 145 U. S. 275, 36 L. ed. 701, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844. But if any such right existed it was abrogated or forbidden by the commerce act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as unjust discrimination, or as an undue preference. Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 444, 51 L. ed. 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Southern R. Co. v. Tift, 206 U. S. 437; 51 L. ed. 1126, 27 Sup. Ct. Rep. 709; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, ante, 742, 33 Sup. Ct. Rep. 443. Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi judicial and only prima facie correct in so far as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, the carrier is, by § 16 of the act, given its day in court and the right to a judicial hearing (25 Stat. at L. 859, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1303).

In considering the administrative questions as to reasonableness, the elements of 259]the problem are the *same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion, and the same necessity for having the matter settled by a single tribunal. For if, at the suit of one shipper, a court could hold a past rate or allowance to have been unreasonable and award damages accordingly, it is manifest that such shipper would secure a belated but undue preference over others who had not sued and could not avail themselves of the verdict. But more than this,—to permit separate suits and separate findings would not only destroy the equality which the statute intended should be permanent, even after the rates had been changed, but it would bring about direct conflict in the administration of the law. Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission, the carrier and shippers are alike bound to treat them as lawful. After the rate had been abandoned, the carrier is still obliged to treat it as having been lawful, and cannot refund what had been collected under it until the Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate, past or present, which the statute had declared should be deemed lawful until it had been held to be otherwise by the Commission.

As to past and present practices or allowances, the Commission has the same power and there is the same necessity to take preliminary action. This was recognized in Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, where after considering §§ 8 and 22, relating to jurisdiction and the statutory and common-law remedy, it was said that "although a[260 railroad might alter its rates voluntarily or in obedience to an order of the Commission, yet it can "not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." A contrary ruling would upset a useful, time-saving, economical, and established practice. For in accordance with this construction of the act, the Commission, after the abandonment of a rate, has repeatedly received and heard complaints, and, upon finding that it had been unreasonable, has granted reparation accordingly. See Arkansas Fuel Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 98; Allen & Co. v. Chicago, M. & St. P. R. Co. 16 Inters. Com. Rep. 295.

The plaintiff insists, however, that all these reasons are answered by the decision in Wight v. United States, 167 U. S. 512, 42

L. ed. 258, 17 Sup. Ct. Rep. 822, where the court, without preliminary action by the Commission, held that an allowance paid a consignee for hauling his freight in wagons from depot to warehouse was a rebate, and thereupon inflicted the statutory punishment.

But that case did not involve any question of reasonableness of rate or allowance. Nor was the court there called on to indirectly exercise rate-regulating power, but only to pass upon the question of fact as to whether, as charged in the indictment, the defendant had paid a secret rebate to a favored consignee. It appeared that the carrier's published rate of 15 cents included the haul from Cincinnati to the yard in Pittsburg. Neither by its terms, nor by general practice, did the rate include delivery at warehouses in the city and distant from the railroad tracks. Not having undertaken to furnish free cartage, it was unlawful for the carrier to perform that service for one patron and not for all others. 261 ]Paying the *favored consignee for rendering a service the carrier was not bound to furnish was a gift,—a rebate,—a thing *ipso facto* illegal, and prohibited by the statute, and for which the guilty carrier was subject to criminal indictment, and for which damages could have been awarded on the civil side of the court. It was therefore not necessary to have a preliminary ruling by the Commission because the statute itself prohibited the payment of rebates, and the courts could apply the law accordingly.

6. The plaintiff thereupon insists that even on this view of the case the judgment should be reversed, claiming that the payments here were of that prohibited character, so that even if the allowance was reasonable in amount, its payment was nevertheless unlawful because (a) given for a service not included in the rate and (b) not mentioned in the tariff.

Under the Elkins act of 1903 [32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309] (United States v. Chicago & A. R. Co. 148 Fed. 646, s. c. 26 L.R.A. (N.S.) 551, 84 C. C. A. 324, 156 Fed. 558, affirmed by a divided court in 212 U. S. 563, 53 L. ed. 653, 29 Sup. Ct. Rep. 689), and under the Hepburn bill of 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. 1911, p. 1288] (Victor Fuel Co. v. Atchison, T. & S. F. R. Co. 14 Inters. Com. Rep. 120), it has been held that the carrier must give notice in the tariff of free cartage, lighterage, ferriage, or any other accessorial service that will be furnished, as well as of any allowance that will be made to shippers who furnish transportation facilities or service. But the present case is not to be governed by those statutes, but by the law of force between 1897 and 1901, when the transactions complained of took place. At that time the commerce act† required the carrier to give notice of *every charge[262 it would make against the shipper. But the statute was not construed to compel the railroad to publish what free cartage or accessorial service it would furnish (Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 986), nor what sums it would pay shippers for transportation service rendered by them to the carrier. Failure to publish these items could, however, easily lead to unjust discrimination, and the court, in the case last cited, held that the Commission might, by a general order, require such matters to be published in the rate sheet. We are not cited to any such order for the period now under investigation, and, so far as we can discover, by the general and public custom of all carriers, acquiesced in by the Commission, the tariffs at that time uniformly omitted any statement of allowances that would be paid to the shipper for the use of private cars, or

†Sec. 6. . . . The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. . . .

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party." [As amended] act of March 2, 1889, 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1289.

private tracks, or for transportation service in switching, hauling, lightering, or other work, included in the rate, but actually performed by the shipper.

But although the statute then of force was not construed to require the publica-263]tion of allowances, their payment *was lawful only when supported by a consideration. To pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine, it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot. The plaintiff insists that such is the case here, and that, as the tariff named the rate from the station, it could not lawfully include the haul from the mine, and consequently paying the shippers for doing their own hauling was a mere rebate.

Such undoubtedly it would have been if naming the rate from station to destination meant that the haul had to begin at the depot building. But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield district was treated as a single shipping point, and where the rate, though named and published as from the station, was universally applied from the mines of the Mitchell Company as well as the other companies named in the declaration and all others located in the Clearfield district.

Inasmuch as this rate included the haul, the railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose, or it could employ the coal companies to render that service, paying them proper compensation therefor. In case any question arose as to the reasonableness of the practice, the limits within which the station rates should 264] *apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body. The courts can then apply that law, and, measuring what has been charged by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful.

That station rates may be applied from mill or mine reached by spur tracks is recognized by the ruling of the Commission in the Tap Line Case, 23 Inters. Com. Rep. 277, where, in dealing with the practice of paying an allowance for hauling lumber from sawmills, the Commission said:

"In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill, and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate, and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as 3 miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as 3 miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line, and is not more than 3 miles distant, the transportation offered by the trunk line *commences at the mill. If,[265 therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill, and to deliver it when loaded to the trunk line, it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under § 15, whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge, and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under § 15, may have reasonable compensation when it relieves the trunk line of the duty. But an allowance under such circumstances is lawful only when the trunk line prefers, for reasons of its own and without discrimination,

to have the lumber company perform the service. It is not lawful when the lumber company refuses to permit the trunk line to do the work." Ibid.

In view of this ruling it is apparent that lateral allowances might have been lawfully paid. They became unlawful only when unreasonable. Whether they were so or not was a rate-making question as to which parties were directly at issue, and which the courts had no jurisdiction to determine so far as it concerned the allowance to the Altoona, Millwood, and Glen White mines. Having no jurisdiction, the parties could not by consent give it to the court, to the judge, nor to the referee. And if, as claimed, the stipulation to submit the case to the referee estops the defendant from insisting on the plea of the statute of limitations, that, with all other relevant issues, can then be determined, if the Commission 266]decides that *the allowance was unlawful, and the carrier has no other defense.

7. But the situation of the Bolivar and Latrobe Companies was very different from that at the Altoona, Glen White, and Millwood mines, and a different conclusion must therefore follow. The Latrobe and Boliver Companies' mines were located in the Latrobe district, where the rates to eastern points were about 20 cents higher than from the Clearfield district, except that for a part of the time they were the same, though the shipments were then small by comparison with those from the Clearfield district. During that period the plaintiff shipped in competition with the Latrobe and Bolivar Companies. These companies owned no engines, and they hauled no cars between mine and station. That work was included in the rate, and the Pennsylvania did the hauling with its own locomotives and crews. It therefore owed nothing to the Latrobe and Bolivar Companies for the service which the carrier itself performed, and the so-called allowance, regardless of the amount, was a mere gift,—a rebate, absolutely forbidden by the statute and *ipso facto* illegal. Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured. The decison just rendered in Pennsylvania R. Co. v. International Coal Min. Co. makes it unnecessary further to discuss this branch of the case. For the court undoubtedly had jurisdiction to proceed with this branch of the case.

The judgment, therefore, must be reversed in so far as the action is based upon payments to the Latrobe and Bolivar Companies, and affirmed in so far as based upon payments to the Altoona, Glen White, and Millwood Companies. But, owing to the peculiar facts of this case, the unsettled state of the law at the time the *suit was[267 begun, and the failure of the defendant to make the jurisdictional point *in limine*, so that the plaintiff could then have presented its claim to the Commission and obtained an order as to the reasonableness of the practice or allowance,—direction is given that the dismissal be stayed so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice and the allowance involved; and, if in favor of the plaintiff, with the right to proceed with the trial of the cause in the district court, in which the defendant shall have the right to be heard on its plea of the statute of limitations as of the time the suit was filed, and any other defense which it may have. Affirmed and modified in part, and in part reversed.

Mr. Justice Pitney, dissenting:

Since the result reached by the court in these cases has the effect of virtually eliminating the option conferred by § 9 of the interstate commerce act [24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159] upon shippers aggrieved by unjust discriminations practised by common carriers in violation of §§ 2 and 3,—the option to "either make complaint to the Commission" or to "bring suit for the recovery of the damages,"—and of conferring upon the carrier, in some cases, at least, the choice of two lines of procedure, by selecting the character of the defense to be interposed; and since in this and in other respects aggrieved shippers are to be deprived, in very large measure, of the right of redress by private action at law conferred by §§ 8 and 9 for violations of §§ 2 and 3, I deem it my duty to express, somewhat at length, the grounds of my dissent.

The case of the Mitchell Coal & Coke Company (No. 674) *presents the ques-[268 tion whether an action for a violation of § 2 of the act, based upon the ground of a discrimination accomplished by means of secret rebates to competitors of the plaintiff, where the defense is that the rebates were paid (under the name of "trackage or lateral allowances") as compensation for services rendered by the shipper in aid of the carrier, can be maintained without a prior application to the Interstate Commerce Commission, and a determination by that body as to whether the alleged "trackage or lateral allowances" were reasonable and proper. This case arose in the years 1897

to 1901. The action was commenced in 1905.

The case of the Morrisdale Coal Company (No. 207) raises the question whether an action can be maintained for a violation of § 3 of the act in respect of unfair discrimination in car distribution, without previous action by the Commission upon the question of the reasonableness of the treatment accorded by the carrier to the complaining shipper, or the propriety of the method of car distribution that was pursued. The cause of action accrued during the years 1902 to 1905, inclusive. Suit was commenced in 1908.

These questions are answered in the negative, upon the authority of Abilene Cotton Oil Co. v. Texas & P. R. Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co. 215 U. S. 495, 54 L. ed. 297, 30 Sup. Ct. Rep. 164; and Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114. I do not at all question the authority of these cases, or the propriety of the grounds upon which they were decided. But it seems to me that the Pitcairn Case, as well as the case of Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155, has no direct bearing upon the questions now presented; and that the authority of the Abilene Cotton Oil Co. Case and the case of Robinson v. Baltimore & O. R. Co., and the reasoning of the court therein, are directly opposed to the result reached in the present cases.

269] *The Abilene Case held that a carrier who *observed* the established and published schedules of rates *without preference or discrimination* could not be held liable to an action at law to recover for alleged excessive charges when the freights charged were those prescribed by the schedule; and that although § 22 of the act declared that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," this saving clause must necessarily be limited so as to exclude an action based upon common-law principles, when such action would run counter to the very means prescribed by § 6 of the same act for producing uniformity and preventing discriminations.

And in the Robinson Case it was held, upon like reasoning, that a differential in rate between coal loaded into cars from wagons and coal loaded from a tippel *embodied in the filed and published schedules*, could not be deemed unjustly discriminatory in an action at law, because the act forbade any deviation from such published schedules while they remained in effect.

In both those cases *the carriers had strictly observed the filed and published tariffs*, and were *for this reason* held exempt from action upon what would have been their common-law liability if an unqualified meaning had been attributed to the language of § 22.

The present case is the very opposite of these, and the like reasoning should, I think, lead to the opposite result. For in the Mitchell Company Case the carrier, *instead of observing the published schedules, itself departed from them*. And the alleged "trackage and lateral allowances" had *no sanction of filing or publishing, nor of any order made by the Interstate Commerce Commission*. And in the Morrisdale Company Case, the car distribution scheme pursued by the defendant *had not been sanctioned* by the Commission.

*Moreover, both of the present cases[270 relate to past transactions exclusively. And for this reason are not at all within the doctrine of the Pitcairn Case, which related wholly to matters *in futuro*.

If the discriminations attributed to "trackage and lateral allowances" in the Mitchell Case had received any previous sanction such as by § 6 of the act is given to the filed and published schedules of rates, or if in the Morrisdale Case the method of car distribution had been established or approved by an order of the Commission, made in the exercise of its administrative powers conferred by the act, I should agree that the reasoning and authority of the Abilene and Robinson and Illinois Central Cases would control. If either of the cases at bar had to do with the control of rates or of practices in the future, it would seem to me that the authority and reasoning of the Pitcairn Case would control.

But to my mind, it seems a misapplication of the Abilene, Robinson, and Pitcairn Cases, as well as a complete perversion of the act of Congress, to say that, respecting transactions in the past, which are by lapse of time put beyond the cognizance of an administrative body that normally deals only with matters *in futuro*, and respecting which the Commission has *not* acted, there shall be no right of action in the courts without previous application to such administrative body.

With great respect, it seems to me that the opinions in both the present cases err in confusing legislative and administrative functions, on the one hand, with judical functions, on the other. Thus, in the Mitchell case, after reciting the insistence of the plaintiff that the alleged "trackage and lateral allowances" were arbitrarily

fixed, and constituted a mere cover for rebating, and the contention of the defendant, on the other hand, that the allowances were made bona fide for services actually performed by the shipper in aid of the carrier, 271]and that they were *prima facie reasonable, and must be so treated by the courts until the Commission had determined otherwise, the opinion proceeds as follows: "These claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one the legal quality of the practice complained of may not be definitely fixed by the statute, so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts, and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions were committed to different courts, with different juries, the results would not only vary in degree, but might often be opposite in character,—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

This is the theory upon which both opinions proceed, the language employed in the Mitchell Company Case being: "The courts have no primary jurisdiction to fix rates." "In considering the administrative question as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices." "As to past and present practices or allowances, the Commission has the same power, and there is the same necessity to take preliminary action."

And in the opinion in the Morrisdale Company Case (No. 207), referring to the different views that have been expressed upon the question of car distribution, the opinion proceeds: "These rulings as to the validity of a particular practice, and the facts that would warrant a departure 272]*from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character, and calls for the exercise of the powers and discretions conferred by Congress upon the Commission,"—citing the Pitcairn Case, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164, and the Illinois Central Case, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

It is, of course, sufficiently obvious that where a legislative or administrative body is called upon to inquire with respect to the reasonableness of existing rates and practices and the propriety of sanctioning these or establishing others *for the future*, it is called upon to make somewhat the same kind of investigation of facts, conditions, and circumstances that a court and a jury, or a referee must make when adjudicating upon the lawfulness and reasonableness of practices *in the past* respecting which redress is sought by a suitor. Nevertheless, the function performed in the one case is legislative or administrative, as the case may be, and in the other case judicial.

Courts and juries and referees, time out of mind, have been called upon to investigate the reasonableness of the past practices of common carriers. They did it long before commissions and other administrative boards were devised, and when legislation for the future rested wholly in Parliament and Congress and state legislatures.

It seems to me erroneous to conclude that, because the things that a court must do in order to pass judgment upon a past transaction respecting the rates or practices of a carrier are *like* the things that a commission or a committee or other administrative or legislative body must do in order to perform their proper functions respecting present management and future regulation, therefore all investigations into the past practices or rates of a carrier are administrative or legislative.

Legislation consists in laying down laws or rules for *the future. Administra-[273 tion has to do with the carrying of those laws into effect,—their practical application to current affairs by way of management and oversight, including investigation, regulation, and control, in accordance with, and in execution of, the principles prescribed by the lawmaker. The judicial function is confined to injunctions, etc., preventing wrongs for the future, and judgments giving redress for those of the past.

The interstate commerce act, as I look upon it, clearly recognizes these distinctions.

In the act as originally passed and under which these cases arose (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), the duties of the company and the prohibitions of discrimination in rates and otherwise are prescribed and *the Commission is established* for the purpose, I submit, *primarily, of seeing that those duties are observed in the future.* See the proviso of § 4, permitting the Commission to relieve the carrier from the operation of the long and short haul clause; and the require-

ment in § 6 that copies of the schedules of rates, fares, and charges established and published in compliance with the same section shall be filed with the Commission, and notice given to it of all changes made in the same; that all traffic agreements or arrangements with other common carriers shall be likewise filed; that joint tariffs on through rates shall be filed, and these "shall be made public by such common carriers when directed by said Commission in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates," etc. And for a refusal by the carrier to file or publish schedules the carrier shall be subject to a writ of mandamus at the relation of the Commissioners, and the Commissioners as complainant may apply for an injunction.

But then comes § 8, declaring the common carrier to be liable to the person injured for the full amount of damages 274] *sustained in consequence of any violation of the act, with a counsel fee to be fixed *by the court*.

The next section has been so completely overlooked that it may be well to quote it:

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act *may either make complaint to the Commission, as hereinafter provided for*, or *may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act*, in any district or circuit court of the United States of competent jurisdiction; *but such person or persons shall not have the right to pursue both of said remedies*, and must in each case *elect which one of the two methods of procedure* herein provided for, he or they will adopt. In any such action brought for the recovery of damages *the court* before which the same shall be pending may compel any director, [etc.] to attend, appear, . . . [give testimony, etc.] and may compel the production of the books and papers of such corporation," etc. No similar compulsory powers are given to the Commission.

Sec. 11 authorizes the appointment of the Interstate Commerce Commission and prescribes the qualifications.

Sec. 12 prescribes the general duties of the Commission, and remains for the most part unaltered by subsequent amendments. Unimportant amendments were made by the act of March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1289), and a somewhat more important one respecting the production of evidence, and *the use of testimony* taken under depositions elsewhere, was made by the act of February 10, 1891 (26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3163). But an examination of § 12 is convincing of the purpose of Congress to establish the Commission as *an administrative body*, the language being that it "shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as *to the manner and[275 method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created;" and (amendment of 1889), *"the Commission is hereby authorized and required to execute and enforce the provisions of this act,"* etc. The remaining provisions of this section relate entirely to the machinery by which these duties are to be performed.

Sec. 13 provides for complaints or charges to be made by any person, association, municipal organization, etc., respecting anything done or omitted to be done, by a common carrier, in contravention of the provisions of the act; that a statement of the charges "shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant *only for the particular violation of law thus complained of*. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to *investigate the matters complained of* in such manner and by such means as it shall deem proper," etc.

By § 14, "whenever an investigation shall be made by said Commission, it shall be its duty to make a *report in writing in respect thereto*, which shall include the *findings of fact upon which the conclusions of the Commission are based*, together with its *recommendation* as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all *judicial proceedings, be deemed[276 *prima facie evidence* as to each and every fact found."

By § 15 it is made the duty of the Commission to deliver a copy of its report to

the common carrier, with a notice to *cease and desist from the violation of the law, or to make reparation for the injury found to have been done, or both, within a reasonable time;* and if the carrier does so, "a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be *relieved from further liability or penalty for such particular violation of law.*"

By § 16, if the carrier violates or refuses to obey a lawful order or requirement of the Commission, the latter is to *apply in a summary way by petition to the United States circuit court for an injunction, mandatory or otherwise.* The amendment of this section made by act of March 2, 1889 (25 Stat. at L. 860, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1303), expressly saves the right of trial by jury in controversies requiring such a trial under the 7th Amendment. In any such proceeding the findings of the Commission are made prima facie evidence of the matters therein stated.

The remaining provisions of the act are, as it seems to me, all in accord with the general policy indicated by those above cited. The Commission is not primarily, or in any proper sense, a judicial tribunal. It can render no judgment binding upon the parties, can hold no trial by jury, cannot enforce its awards by process against the person or against property; its awards are merely prima facie evidence, without any conclusive effect, and must be enforced through the aid of the courts of law. It is an administrative body, a branch of the executive department, charged with the duty of aiding in the enforcement of the duties imposed upon the carrier by the act; and with incidental—and only incidental—authority to award reparation, or, rather, to *recommend* reparation where it happens, 277]in the course of its investigations, *to learn that some improper practice of the carrier has produced an injury to the shipper that calls for such redress.

The Mitchell Case arose in the years 1897 to 1901; the Morrisdale Case during the period from March, 1902, to December, 1905, both inclusive. Both actions arose, therefore, prior to the Hepburn act of June 29, 1906 (34 Stat. at L. 584 chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), and the acts of April 13, 1908 (35 Stat. at L. 60, chap. 143, U. S. Comp. Stat. Supp. 1911. p. 1288), and June 18, 1910, (36 Stat. at L. 539, chap. 309).

I do not see, however, that any of the amendments makes any material change in the duties of the carriers, or the remedies for breach of them, or in the functions of the Interstate Commerce Commission, or the mode in which they are to be performed, so far as the question now under consideration is concerned. By those amendments, and by the Elkins act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1911, p. 1309), the original scheme of the interstate commerce act has been elaborated and the powers of the Commission extended, including a grant of the rate-making power, the power to prevent advances in rates, etc. But this only emphasizes that the Commission was established as a body having executive and legislative rather than judicial powers. For the rate-making power is a branch of the legislative.

There is another important distinction, very clearly recognized in the opinion of the court in the Abilene Cotton Oil Co. Case, and pretty nearly lost sight of, as it seems to me, in the present decisions; and that is, the distinction between the general rules of conduct prescribed by the act, and the standards by which obedience to those rules is to be tested. Thus, by § 1, the rates shall not be unreasonable; and by § 2, they shall not be discriminatory. They are the general rules; but the method of enforcing them in the practical operations of the carrier is by the rate sheets prescribed by § 6 and the function committed to the Commission to revise them. *Where[278 the rate sheet has been filed, etc., it, of course, becomes binding as the particular expression of the general principle. Again, in § 4, there is the general prohibition known as the "long and short haul clause;" but for a particular expression of it, as applicable to the management of a given railroad system, the Commission may act as the proviso to that section declares. Clearly, until the Commission acts, the general prohibition is unqualified; and, when the Commission has acted, its modification is as much law as the general prohibition was before. And this reasoning, I think, applies to the respective causes of action now under consideration. Section 2 says—"No unjust discrimination." If and when the rates are duly published, or the Commission has lawfully acted, the schedule or the order furnishes for the time the measure for determining what is an unjust discrimination. But, until the rates are filed or the Commission has acted, it is, like every other case of violation of law, a question for the courts, to be determined according to the terms of the law. And so with § 3, prohibiting undue and unreasonable preferences and advantages to particular shippers, of which, of course, discrimination in car distribution is an instance. When the Commission has lawfully taken action in accordance with its administrative duties, prescribed by the act,

its order or requirement becomes applicable; but until such order or requirement is made, the duty prescribed by § 3 remains unqualified. And if, under either section, the question of reasonableness arises in the course of an action in the courts, it must be determined according to the facts and the law, just as courts determine any and every other question of reasonableness in cases within their cognizance.

In the Abilene Case the court recognized that something must be taken from the force and effect of §§ 9 and 22 in order to give full effect to the context and the general scheme of the act; and therefore it 279 ]naturally (and, as *I concede, necessarily) held that the right of action conferred by § 9 "must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs *of the character of the one here complained of.*"

That is to say, complaints against a carrier who had *observed* the established schedule that was made by the act the conclusive evidence (until modified by the Commission) of what rates should be deemed reasonable in law could not be entertained by the courts (prior to action by the Commission) upon the theory that, although reasonable in law, the rates were excessive in fact.

This, however, in plain terms left open the doors of the courts to the suitor seeking pecuniary redress for other violations of the act, not sanctioned by published schedules or by any other regulation declared obligatory by the act. And within that category, as I think, are these present actions, brought against a carrier that (as we must assume in order to determine the jurisdictional question) violated the act, instead of observing it; that so far from adhering to published regulations, or mandate of the Commission, or other order rendered obligatory by the act, set up its own standard of practices and discriminations, and maintained them in defiance of the right of these plaintiffs to fair and equal treatment.

But the effect of the present decisions, if I apprehend them correctly, is to leave no force whatever remaining to § 9. The Abilene Case excluded from it wrongs of the character of the one there complained of; the present decisions exclude from it wrongs of the opposite character. That case exempted from action the carrier who had consistently *observed* the published schedules; the present (Mitchell) case shields the *carrier who systematically departs from the published schedules;* and, by a parity *of reasoning, the decision in the Mor-[280 risdale Case exempts from primary liability at law the carrier who systematically violates the rule of equality with respect to car distribution.

In the numerous amendments that have been enacted by Congress during the twenty-five years that the Interstate Commerce act has been in force, in no instance has any change been made in either of the sections (§§ 2, 3, 8 and 9) that are here important. Nor have any of the changes made in the duties of the Commission operated to deprive the aggrieved shipper of his private action at law. Indeed, in the 3d section of the Elkins act of February 19, 1903 (32 Stat. at L. 848, chap. 708, U. S. Comp. Stat. 1911, p. 1312), Congress—while authorizing the Commission to apply to the Federal court for an enforcement of the published tariffs, or a discontinuance of discrimination, and authorizing the district attorneys under the direction of the Attorney General, to institute and prosecute such proceedings—was careful to declare that the proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said act, approved February fourth, eighteen hundred and eighty-seven, entitled," etc.

But, according to the construction now for the first time adopted, in the majority of instances the right of the aggrieved shipper to resort to the ordinary courts of law for the recovery of his damages is subjected to an onerous condition precedent; or at least it may be so subjected at the option of the carrier; for, in No. 674 (the Mitchell Coal Co. Case), the shipper is driven to the Interstate Commerce Commission in respect of part of his claim because of the defense that the carrier interposed; while with respect to the residue of his claim, because the character of the defense was different, the action must proceed at law.

In short, without any legislative repeal of § 9, the option *there conferred upon[281 the shipper has been transferred to the carrier.

How serious is the difference becomes apparent upon a little reflection. The shipper must go first to the Commission. But when he gets before the Commission he may or may not succeed; and if he succeeds, he gets no adjudication that is binding upon the carrier, for by the terms of the act such findings are only prima facie correct in so far as they determine the fact and amount of damage. In order to recover them he must still resort to the courts. Thus, the shipper has a chance to lose

case before the Commission, but no chance to *win* it there. The ruling of the Commission may conclude the case *against* him, but cannot conclude it *in his favor*.

Now, let us suppose the normal case of a bona fide claim, where there is no more probability that the complaining party will succeed than that he will fail. The probability of success before the Commission is represented by the fraction ½. If successful, he must then go to the court, and the finding of the Commission being no more than evidence, and not even shifting the burden of proof, the shipper's probability of success is again represented by the fraction ½. Since he must receive two concurring awards, his probability of ultimate success in both tribunals is represented by ½ x ½—¼. In short, instead of having the option that Congress gave him, he is confined to a single line of procedure, contrary to the tenor of the act, and his probability of success is reduced from "equal chances" down to "one chance out of four."

It is said that the questions that arise about these practices of rebating and car distribution are complicated and difficult. Certainly that objection is not pertinent to the present cases. I see nothing beyond the grasp of a court of law in the Mitchell Case. The question that, as this court now holds, must await the determination of the Commission, concerns the allowance 282]*to the Altoona, Millwood and Glen White mines; and it is in substance a mere question of fact as to whether anything, and if so, how much, ought to be allowed for certain hauling services, and the like; if too much was allowed, the allowance was a cover for rebating; otherwise, not. And the Morrisdale Case reduces itself, according to the opinion, to a narrow question of law upon admitted facts. It is the old question whether, during periods of car shortage, when the carrier is unable to furnish all the cars necessary to meet the demands for transportation, shippers having cars privately owned by themselves, or railroads having cars of their own, used to transport their fuel, shall, by reason of these "private cars" or "fuel cars," have a greater share in the distribution of the gross facilities for transportation than would be the case if the carrier undertook to supply cars of its own for all shippers. It is a familiar question, that has been several times before the Interstate Commerce Commission, and decided by them as a question of law upon the authority and reasoning of the decisions of the courts of law. Railroad Commission v. Hocking Valley R. Co. 12 Inters. Com. Rep. 398; Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 451; Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. 19 Inters. Com. Rep. 356, 364. The order of the Commission in the Hocking Valley Case, 12 Inters. Com. Rep. 398, is the same that was sustained by this court in the Illinois Central Case, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

But, conceding everything that may be claimed respecting the inherent difficulty of properly passing upon such cases, they are no more difficult than many others with which courts of law and of equity have to grapple. The Interstate Commerce Commission, so far as it passes any quasi judicial judgment upon such matters, does so by pursuing methods that are modeled upon those of the courts, and which this court has recently held, cannot be departed from without rendering the proceedings void. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, ante, 431, 33 Sup. Ct. Rep. 185.

*But if all the Federal judges, in all[283 the Federal courts, and the masters and referees who are at their command, are unable as a practical matter to grapple with these questions, what shall be said of the probability that the Interstate Commerce Commission, a single body, with headquarters at Washington, with limited powers, and with enormous labors in the line of its legitimate administrative functions, will be able to properly dispose of the mass of judicial work that is now to be imposed upon it?

It is said that it is necessary to have these matters of rate discriminations and other preferential practices settled by a single tribunal. But is not this a question for Congress? And did not Congress in plain terms confer upon the aggrieved shipper the option of going to the courts rather than to the Commission? And has Congress manifested any intent to repeal the 2d, 3d, 8th, and 9th sections of the act?

The opinion in the Mitchell Case recognizes that the orders of the Commission are only "quasi-judicial and only prima facie correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act, given its day in court and the right to a judicial hearing (25 Stat. at L. 859, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1303)." But is the shipper not entitled to his day in court and to a judicial hearing? Has the Constitution any greater regard for the right of a carrier to trial by jury than it has for the right of a shipper? Conceding, as I do, that Congress could not, because of the 5th Amendment, make the finding of an administrative body, acting without jury trial, final as against the carrier, I submit, with great respect,

that it gives an unconstitutional meaning to the act if we construe it as depriving the shipper of his remedy without trial by jury.

It is said that if actions were to be brought in the courts—"to permit separate suits and separate findings would not only destroy the equality which the statute 284] *intended should be permanent, but would bring about direct conflict in the administration of the law." I confess myself unable to understand how giving redress by a private action for the consequences of past maladministration can conflict in any way with the proper administration of the law, which, if I understand the term, applies to the execution of it in the present and for the future. It is unfortunately true that, since courts and juries are human, the result in one case does not always seem to accord with the result in another. This is theoretically true of all suits at law; practically, the successful administration of justice in the courts belies the theory.

The court sees in the act a purpose to have all matters affecting rates and the regulation of practices that have to do with equality of service on the part of the carrier towards the shippers "settled by a single tribunal." I have no difficulty in finding in the act a purpose to confer the administrative power, the regulating power, upon a single tribunal, to wit, the Commission. But I find nothing, and the opinions refer to nothing, indicating a purpose that past transgressions of the act, and the cognizance of suits brought for the redress of injuries consequent upon such transgressions, shall be determined by a single tribunal. It would seem more probable that Congress considered precise uniformity with respect to administering justice for past offenses to be an unattainable dream. I repeat,—administration, management, regulation, concern themselves with the present and the future. The awarding of relief for past offenses is properly a judicial function. And, as I read the act, Congress conferred jurisdiction over such offenses upon the courts; giving at the same time an option to the shipper to resort, if he would, to the Commission in the first instance; doubtless on the theory that the simple cases, and those involving small amounts, would go (as experience demonstrates that they have gone) to the Commission, and that thereby that 285]body, *while enabled to accomplish (by its recommendations and warnings) much in the way of remedying past grievances, would at the same time be put in possession of information from sources that otherwise would hardly be accessible, so that, on the basis of that information, it could proceed to establish regulations for the future.

Be this as it may, it seems to me highly illogical to say that damages shall not be awarded to a shipper for violations of the law committed by the common carrier in the past, because the shipper would thereby "secure a belated but undue preference." The argument overlooks the fact that, upon the hypothesis that a cause of action exists, it is the carrier who has given a preference to the plaintiff's competitor; it is for the damages resulting from that preference that the action is brought; and, if the action be justly determined, it gives to the aggrieved shipper a belated but presumably a due recompense.

That I have not misunderstood the real questions at issue in the Abilene, the Robinson, the Illinois Central, and the Pitcairn Cases will, I think, appear from a critical examination of those cases, in aid of which the following extracts and comments are submitted (the italics, in most instances, being my own).

Texas & P. R. Co. v. Abilene Cotton Oil Co. (1907) 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, was a review under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575) of a judgment of a Texas state court. The Abilene Cotton Oil Company sued on common-law principles to recover moneys alleged to have been exacted for freight on cotton seed over and above a just and reasonable charge. There were averments (p. 430) "that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul." But (p. 432) these averments were eliminated in the course of the trial. The findings, as condensed by the court below, were (p. 432) that it was an interstate shipment, and the rates charged by the railroad company were those *established under the interstate[286 commerce law, and had been duly filed and published; but that they were in fact unreasonable and excessive. This court (by the present Chief Justice, then Mr. Justice White) said (p. 436) that the question presented was:

"The scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission, and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers."

After pointing out that the right of recovery sustained by the court below was clearly within the common-law principles stated, and was not in so many words abrogated by the commerce act, the court proceeded to inquire whether this common-law right had been impliedly taken away by the act, and to what extent. The general scope of the act was then reviewed as follows:

"Let us, without going into detail, give an outline of the general scope of that act, with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress, and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

"The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, *made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act*, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments 287] *which it imposed were directed not only against carriers, but against shippers, or *any person* who, directly or indirectly, by any machination or device, in any manner whatsoever, *accomplished the result of producing the wrongful discriminations or preferences which the act forbade.* It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The *Commission was endowed with plenary administrative power to supervise* the conduct of carriers, to *investigate* their affairs, their accounts, and their methods of dealing, and *generally to enforce the provisions of the act.* To that end it was made the duty of the district attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . . *Power was conferred upon the Commission to hear complaints* concerning violations of the act, to *investigate* the same, and, if the complaints were well founded, *to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future.* In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to *compel compliance by invoking the authority of the courts of the United States*[288 in the manner pointed out in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission. By the 9th section of the act it was provided as follows:

"'*That any person or persons claiming to be damaged* by any common carrier subject to the provisions of this act *may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction;* but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . .'

"And by § 22, which we shall hereafter fully consider, existing appropriate common-law and statutory remedies were saved.

"When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was, in and of itself, reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person, or a preference given by the carrier to another. Parsons v. Chicago & N. W. R. Co. 167 U. S. 447, 455, 42 L. ed. 231, 234, 17 Sup. Ct. Rep. 887; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 275, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. Interstate Commerce Commission v. Cincinnati N. O. & T. P. R. Co. 167 U. S. 479, 494, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896. And it is apparent that *the means by which these great purposes were to be ac-*[289

*complished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law.* Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is *not only a relation but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.* This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, *without reference to prior action by the Commission,* finding the established rate to be unreasonable and *ordering the carrier to desist in the future from violating the act,* it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate, and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This sug-290]gestion, however, *is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created, which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally *to determine the reasonableness of an established rate,* it would follow that unless all courts reached an identical conclusion *a uniform standard of rates in the future* would be impossible, as the standard would fluctuate and vary, *dependent upon the divergent* conclusions *reached as to reasonableness* by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is *wholly inconsistent with the administrative power conferred upon the Commission* and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to *command the carrier to desist from violation of the act in the future,* thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the *Commission[291 in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance, and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

"Nor is there merit in the contention that § 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section, when taken alone, might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages t

those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that *the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the 9th section must be confined to redress of such* 292] *wrongs as can, consistently *with the context of the act, be redressed by courts without previous action by the Commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.* Although an established schedule of rates may have been altered by a carrier voluntarily, or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

After citing two decisions in the lower Federal courts, and distinguishing several previous decisions of this court, and relying upon the Hefley Case (158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802) and the Mugg Case (202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628) as showing that the established rates were binding, the opinion proceeds (p. 445):

"In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court, just referred to, the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense, and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that *body that a rate in an established schedule* was unreasonable. As we have shown, there is a wide distinction between the two cases. *When the Commission is called upon, on the complaint of an individual, to consider the reasonableness of an established *rate,* [293 *its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates, applicable to all.* And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier, and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing that equality which the statute commands.

"But it is insisted that, however cogent may be the views previously stated, they should not control, because the following provision contained in § 22 of the act to regulate commerce, *viz.:* '. . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

"The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress, upon the basis that an established *rate was unreasonable without [294 previous action by the Commission, great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it. Even, however, if, in any case, we were at liberty to depart from the obvious and necessary intent of a statute

upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that by judicial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative the provisions of the act *requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act.* Thus, by § 1 of the act approved February 19, 1903, commonly known as the Elkins act, which, although enacted since the shipments in question, is yet illustrative, the wilful failure upon the part of any carrier to file and publish 'the tariffs or rates and charges,' as required by the act to regulate commerce and the acts amendatory thereof, 'or strictly to observe such tariffs until changed according to law,' was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates, or other concession or discrimination. And in the closing sentence or § 1 it was provided as follows:

295] *" 'Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, *that rate, as against such carrier, its officers or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.'*

"And, by § 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a circuit court of the United States to enforce an observance of the published tariffs.

"Concluding, as we do, that a shipper seeking *reparation predicated upon the unreasonableness of the established rate must,* under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce."

In short, what the Abilene Cotton Oil Case decides is, that with respect to interstate commerce, the act by its own language prescribed *how it should be determined what rates should be charged* by carriers, and how such rates should be made manifest; and that while § 1 of the act prohibited any charge beyond just and reasonable rates, it imposed the duty of establishing and *publishing schedules, to the very end of enforcing that provision,* and in the effort to prevent unjust preferences and discriminations it rendered it *unlawful to depart from the established schedules* *until[296 they were changed by the administrative Commission; wherefore the rate thus established and published must be deemed in law a reasonable rate for all purposes affecting the rights of the carrier and shipper between themselves *until it had been altered by the Commission,* which might be done if they found it unreasonable in fact. The entire reasoning of the opinion is quite consistent and logical, as well as most cogent and convincing, if confined to that subject-matter.

But to so apply that reasoning as to make it support the contention that discriminations by the carrier in *the past,* amounting to a *departure by the carrier from the established schedule,* and effectuated by the giving of secret rebates to competitors, in violation of § 2, or by other discriminatory practices violative of § 3, and where the conduct of the carrier has no prima facie sanction under the law by reason of the filing and publishing of a schedule, or otherwise, shall not be actionable in the ordinary course of law without a previous investigation or determination by the Commission upon the subject, is not only to ignore the essential differences between the facts in this case and those in the Abilene Case, but is to *virtually eliminate § 9 of the interstate commerce act, which Congress in all its amendments has been scrupulously careful to leave untouched; and to make of the Interstate Commerce Commission, instead of an administrative and quasi legislative body, with duties to perform respecting the laying down of rules for the future and seeing that the carriers continue to conform to their duties under the act, a judicial body, but without judicial powers, proceeding not by the ordinary process of*

*law, but by written notices, sent here and there and everywhere to the persons concerned; not in actions inter partes, but in omnibus investigations conducted with associations of shippers and municipal corporations and other organizations, as parties of the one part, and groups of railroads, as parties of the other part; holding their ses-*
297]*sions in Washington or wherever *it pleases them; without ample power to enforce the production of evidence; and without any power to enforce their findings.*

Robinson v. Baltimore & O. R. Co. (1912) 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114, is in principle exactly like the Abilene Case, and was decided upon its authority. There, the schedule published and filed conformably to the act made a differential between coal loaded into the car from wagons and coal loaded from a tipple. Robinson's shipments having come under the higher rate, he sued to recover from the company $150, which was the excess paid by him over what would have been required if his coal had been loaded from a tipple. There was an agreed statement of facts, but in it was no suggestion that the schedule had been the subject of complaint before the Interstate Commerce Commission, or had been found by that Commission to be unjustly discriminatory, or that any order had been made about it. Naturally and properly this court held that there was no right of action. The pith of the reasoning is lucidly expressed in the opinion of the court (by Mr. Justice Van Devanter) as follows (pp. 508, 509):

"The act chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, chap. 382, 25 Stat. at L. 855; U. S. Comp. Stat. Supp. 1911, p. 1289; chap. 61, 28 Stat. at L. 643, U. S. Comp. Stat. 1901, p. 3171; chap. 708, 32 Stat. at L. 847, U. S. Comp. Stat. Supp. 1911, p. 1309), whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also *prescribed the manner in which that prohibition should be enforced;* that is to say, the act laid upon every such carrier the duty of *publishing and filing in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative*
298] **of the prohibitions of the act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done.* Provision was also made for the enforcement of the order for reparation, by an action in the circuit court of the United States, if the carrier failed to comply with it.

"Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining, and altering rate schedules, and of redressing injuries resulting from their enforcement, was adopted, whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal, clothed with authority to investigate complaints, and to order the correction of any nonconformity to those standards by an appropriate change in schedules, and by due reparation to the injured persons.

"When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards."

The Abilene and Robinson Cases maintain the binding force of published rates and differentials established *pursuant* to the act, until modified by the Commission in the manner provided by the act.

The present decisions give the same force to discriminatory practices established by the carrier without leave of the Commission, *not* included in the published rates *and differentials, the practices being[299 *in direct violation* of the act.

Interstate Commerce Commission v. Illinois C. R. Co. (1910) 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155, was a suit brought by the railroad company in the United States circuit court to restrain the enforcement of an order of the Interstate Commerce Commission respecting car distribution. The issues were recited in the opinion of the court (by the present Chief Justice, then Mr. Justice White) as follows (p. 465):

"Being unwilling to comply with the order of the Commission, the Illinois Central Railroad Company commenced the suit which is

now before us to enjoin in all respects the enforcement of the order of the Commission. It was averred that although the company was adequately equipped with coal cars and with sufficient motive power and operative forces, yet at times an inadequate supply of coal cars to meet the demand arose from the circumstances which we have previously stated. It was alleged that the regulations adopted by the company for ascertaining the capacity of the mines and for the distribution of cars were in all respects just and reasonable, and *it was charged that the order of the Commission, directing and taking into account of private cars in the distribution of cars, was unjust, unreasonable, oppressive, and unlawful, because it deprived the owners of such cars of the right to the use of their own property.* It was further alleged that, as to the foreign railway fuel cars, the order was also unjust, unreasonable, oppressive, and unlawful, because such cars constituted no part of the equipment of the road, and failing to count them could not constitute an unlawful discrimination or the giving of an unjust preference within the intendment of the act to regulate commerce. *Besides charging that the order to count the company fuel cars was unjust, unreasonable, etc., it was averred that the attempt of the Commission to deal with such* 300]*cars was *beyond its power, and was but an effort to deprive the company of its lawful right to freely contract for the purchase of the fuel necessary for the operation of its road.* In addition, the proceedings in the suit brought by the Majestic Coal Company were set out, the granting of a temporary injunction therein as to counting foreign railway fuel cars and private cars was alleged, and it was charged that in any event, as to those two classes of cars, the order of the Commission was not lawful, since it compelled the company to violate the injunction which was yet in force. *The Commission answered by asserting the validity in all respects of the order by it made, substantially upon the grounds which had been set out in its report and opinion announced when the order was made. All the averments in the complaint as to want of power were traversed, and it was expressly charged that the subject of the distribution of coal cars as dealt with by the order was within the administrative power delegated to the Commission by the terms of the act to regulate commerce."*

The circuit court enjoined the Commission from enforcing its order "in so far as it directed the taking into account the company fuel cars in the distribution of coal cars in times of car shortage, and in so far as it directed the future taking of such cars into account." The Interstate Commerce Commission appealed to this court, and the decree was reversed *on the ground that, so far as it related to the company fuel cars, the order of the Commission was within its administrative power.*

Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co. (1910) 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164, arose on a petition of the coal company for a mandamus upon the railroad company to restrain discrimination in the distribution of cars in the "Fairmont region" of West Virginia, alleged to be in violation of § 3 of the interstate commerce act. The petition was filed January 16, 1907, in the United States circuit court, under § 10 of the act of March 2, 1889 (25 Stat. at L. 855, 862, *chap. 382, U. S. Comp. Stat.[301 Supp. 1911, p. 1289, U. S. Comp. Stat. 1901, p. 3172), sometimes called § 23 of the interstate commerce act, because printed under that number in the pamphlet compilation of interstate commerce laws. This section provided that for a violation of any of the provisions of the act of 1887 and amendments, preventing the relator from having interstate traffic moved at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar circumstances, to any other shipper, "a mandamus might be issued commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ." There were numerous grounds of complaint, some of which were abandoned at the hearing, and of the others the United States circuit court (154 Fed. 108, 120) overruled all except one, and with respect to that awarded a writ of mandamus. There were cross writs of error from the circuit court of appeals, which court affirmed the judgment so far as questioned by the defendant's writ of error, and reversed it in part so far as questioned by the relator's writ of error (91 C. C. A. 147, 165 Fed. 113, 132). Upon review in this court it was pointed out in the opinion (by the present Chief Justice), at p. 492, that the question was whether the court could grant the relief prayed, consistently with the provisions of the act to regulate commerce; and (p. 493): *"That a prohibition, by way of mandamus, against the act, is sought,* and an order, by way of mandamus, was invoked and was allowed, *which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future.* When the situation is thus defined

we see no escape from the conclusion that the grievances complained of were primarily within the *administrative competency* of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, 302] *until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

And, after referring to the decision in the Abilene Case, which dealt with the provisions of the act as they existed prior to the amendment of 1906, the opinion pointed out (p. 494) that the amendment adopted in 1906 to § 15 of the act (34 Stat. at L. 584, 589, chap. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1288, 1297), had the effect of partially repealing (what was called § 23 of the act of 1887, but was really) § 10 of the act of March 2, 1889 (25 Stat. at L. 855, 862, chap. 382, U. S. Comp. Stat. Supp. 1911, p. 1289, U. S. Comp. Stat. 1901, p. 3172), already referred to, which permitted the courts to award mandamus in certain cases. The opinion discusses at length the effect of the 1906 amendment of § 15 upon the remedy by mandamus conferred by the previous act, with the result of holding that *there was an implied repeal so far as the adjustment of the car-shortage regulations in the case under consideration was concerned.*

But it will be observed that *the aid of the courts was there invoked with respect to future regulations,* and it was denied because, by the terms of the act of 1906, it was placed within the administrative functions of the Interstate Commerce Commission, and the mode in which their orders were to be carried into effect was by the same amendment prescribed.

I confess myself unable to find in the Illinois Central and Pitcairn Cases, or in the reasoning of the opinions therein, any ground for holding that the *general right of action* conferred by § 8 of the original interstate commerce act for a violation of §§ 2 or 3, or the *option conferred upon the party injured,* by § 9 of the same act, has been repealed as to *past transactions, where the conduct of the carrier has not the sanction of an order of the Commission,* or (what is in essence the same thing) *has not the sanction of a formal compliance with the act, which the act itself declares shall be prima* 303] *facie lawful,* as was the case with *the published tariffs that were under consideration in the Abilene and Robinson Cases.

To declare, as was declared in the Abilene Case, that a *carrier shall not be held actionable as for extortion in the past where it has merely charged the rates that were fixed in the schedule established in accordance with the act* is, to my mind, as far as possible from declaring that *past* practices of the carrier that are *not sanctioned by any finding or schedule,* or otherwise protected from attack by the provisions of the act, are exempt from court inquiry; *or that the carrier is exempt from an ordinary action at law for violations of the act, when §§ 8 and 9 in plain terms declare that the carrier shall, for such violations, be subject to an ordinary action at law, and declare also that the aggrieved shipper shall have the option whether he will make complaint to the Commission or bring his action in court.*

In answer to the suggestion that the result reached in these cases virtually nullifies § 9 of the act, it is said that the contrary is shown by the decision just announced in Pennsylvania R. Co. v. International Coal Min. Co. No. 14, 230 U. S. 184, ante, 1446, 33 Sup. Ct. Rep. 893. As I have endeavored to point out in the dissenting opinion in that case, the court there concedes the right of action, but in effect denies the right of recovery; for it excludes from consideration the only measure of damages that has ever been, or can be, generally applied in actions of that character.

The result of the decisions in these three cases, taken together, is, as it seems to me, to so greatly restrict and hamper the private right of action that Congress intended to confer by §§ 8 and 9 of the act, that it is difficult to conceive of a case where the injured shipper can, by the simple and direct mode of an action at law, recover any substantial compensation for the discriminations practised upon him by the carrier.

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## *MORRISDALE COAL COMPANY[304
## v.
## PENNSYLVANIA RAILROAD COMPANY.

(See S. C. Reporter's ed. 304-315.)

**Carriers — remedy for discrimination — necessity of previous action by Interstate Commerce Commission.**

1. A suit by a shipper to recover damages from a carrier, alleged to have been occasioned by an unlawful distribution of cars to it and an undue allotment of cars to its competitors, contrary to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 3, cannot be maintained in advance of a ruling by the Interstate Commerce Commission that the method of distribution adopted by the carrier was unreasonable.

[For other cases, see Carriers, III. c, in Digest Sup. Ct. 1908.]

**Appeal — judgment — direction to lower court — stay.**

2. The dismissal of a suit brought by a shipper to recover damages from a carrier

for alleged violations of the act of February 4, 1887, will not be stayed by the Federal Supreme Court, where it concurs in the view of the two courts below that the circuit court had no jurisdiction because of lack of previous action by the Interstate Commerce Commission, until plaintiff can apply to the Commission and obtain a ruling upon the question, if the right to apply to the Commission was barred by the act of June 29, 1906 (34 Stat. at L. 590, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1301), when the case was filed in the court below.

[For other cases, see Appeal and Error, IX. 1, l, d, in Digest Sup. Ct. 1908.]

[No. 207.]

Argued April 15, 1913. Decided June 9, 1913.

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania, dismissing for want of jurisdiction, a suit by a shipper to recover damages from a carrier because of rebates to other shippers. Affirmed.

See same case below, 106 C. C. A. 269, 183 Fed. 929.

The facts are stated in the opinion.

Mr. William A. Glasgow, Jr., argued the cause, and, with Mr. Chester N. Farr, Jr., filed a brief for the Morrisdale Coal Company:

The decision of the Supreme Court in Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, and Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164, applies only to attacks on present existing regulations, practices, or rates.

The cases decided by the Interstate Commerce Commission prior to the filing of the statement of claim in this case are conclusive that the arbitrary elimination of private or individual cars, fuel cars, and foreign railway fuel cars, by the Pennsylvania Railroad Company in its daily *pro rata* distribution under the rule established by it for the purpose of providing "a just and equal distribution" of cars, was a violation of the rule established by the Pennsylvania Railroad Company, so far as the Morrisdale Coal Company was concerned, and this was the cause of action asserted by the Morrisdale Coal Company.

Railroad Commission v. Hocking Valley R. Co. 12 Inters. Com. Rep. 398; Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 451; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Royal Coal & Coke Co. v. Southern R. Co. 13 Inters. Com. Rep. 440; Rail & River Coal Co. v. Baltimore & O. R. Co. 14 Inters. Com. Rep. 86.

The Commission having determined that any certain practice or regulation is improper, and having established a proper regulation, it is not necessary that the same finding should be repeated on every subsequent complaint.

If an application to the Commission is necessary, the court should suspend proceedings to permit such application to be made.

Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 39, 165 Fed. 1.

Messrs. William A. Glasgow, Jr., Chester N. Farr, Jr., Charles L. Frailey, and A. S. Worthington also filed a brief for the Morrisdale Coal Company.

Mr. John G. Johnson argued the cause, and, with Messrs. Frederic D. McKenney and Francis I. Gowen, filed a brief in behalf of the Pennsylvania Railroad Company:

In the present case the circuit court was asked to exercise a power or jurisdiction which it did not possess, not because of any failure on the part of the plaintiff to sufficiently state or prove its case, but because the power or jurisdiction invoked was not possessed by the circuit court, but had been conferred by Congress upon the Interstate Commerce Commission.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463; R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

To entitle the plaintiff in error to recover, it was essential that three propositions should have been established by it:

1. That the rule or system established and pursued by the defendant in error in the distribution of its cars was transgressive of the provisions contained in the interstate commerce act prohibiting discrimition by a common carrier.

2. That the rule or system advocated by the plaintiff in error should have been pursued by the defendant in error in making the distribution of its cars.

3. That in making distribution of its equipment in any given period of time a carrier is guilty of discrimination if it fails in any month in such period to allot and deliver to each shipper his or its *pro rata* of cars, and that overdeliveries in other months, more than sufficient to make good the shortage in any one or more months, cannot be taken into consideration.

All of these propositions were primarily, at least, for the consideration of the Interstate Commerce Commission.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

Mr. Justice Lamar delivered the opinion of the court:

There are a large number of coal mines in the Clearfield district, Tyrone division of the 309]coal region, in the state *of Pennsylvania. Between January 1, 1900, and December 31, 1905, the total output of the mines in the Clearfield district averaged 18,500 tons per day. When there was a car shortage, the Pennsylvania Railroad allotted to each mine a percentage of cars assigned to the district, calculated according to the capacity of the mine.

On this basis the Morrisdale Coal Company was entitled to about 4.8 per cent and the Berwind-White Company to about 18 per cent.

In 1908 the Morrisdale Company brought suit against the railroad for damages alleged to have been occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor, the Berwind-White Company.

Alleging that in violation of its duty to see that no undue preference was given to any other person or corporation in the district, the carrier failed to assign to the plaintiff *its fair proportion of the entire number of coal cars of the railroad company*, to which plaintiff was entitled, and that this failure continued from the beginning of 1900 to the close of 1905, the effect of which was to subject plaintiff to unreasonable prejudice with respect to the facilities for shipping coal, as contrasted with the facilities furnished other competitors in the Clearfield district, and as a result of the unfair discrimination and the failure to furnish a proper allotment of cars and equal facilities, plaintiff was obliged to buy coal at various times in the outside market at prices then prevailing, in order to fill its contracts previously entered into,—to its damage, $250,000. The defendant entered a plea of not guilty and *actio non accrevit infra sex annos*. On the trial, the jury found that the exhibit showing damages of $67,156.07 was correct. "If the court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, we find for the plaintiff. If, *how-[310 ever, the court be of the opinion that the questions of law are with the defendant, then we find in favor of the defendant."

There was no conflict in the evidence, and in view of the admissions of the plaintiff, incorporated in the record, the facts can be briefly stated.

The capacity of plaintiff's mine was 4.8 per cent of the output of the Clearfield region, and having been furnished access to the books of the carrier, it made up a statement showing that during twenty-three months between March, 1902, and December 31, 1905, in which there was a car shortage, the Morrisdale Company received less than its 4.8 of all the coal cars in the Clearfield region, while the Berwind-White Company received more than its 18 per cent of all the coal cars in the region. This was admitted by the railroad, which insisted that during periods of car shortage it divided the cars into four classes:

1. Private cars, belonging to persons or corporations operating mines in the district;
2. Cars of foreign railroads, consigned to designated mines, to be loaded with fuel for such foreign railroads;
3. Pennsylvania Railroad fuel cars, consigned to designated mines to be loaded with fuel for railroad use;
4. The balance, or System cars, available for general use, it distributed among the various mines in the proportion their capacity bore to the total output of the Clearfield region, the plaintiff being allotted its due proportion, or 4.8 per cent. thereof.

The railroad explained that apparent excess of cars furnished the Berwind-White Company during the twenty-three months referred to was due to the fact that that company owned a large number of private cars on which it appeared that wheelage was paid, and submitted the following table

311] *showing the number and character of cars in the Clearfield region during those years:

| | Company | | | Commercial | | |
|---|---|---|---|---|---|---|
| | Individual | coal | System | Foreign | Box | Total |
| 1902 Cars placed..... | 14,221 | 16,119 | 31,048 | 22,544 | 11 | 83,943 |
| 1903 Cars placed..... | 20,483 | 15,614 | 20,947 | 24,222 | 13 | 81,279 |
| 1904 Cars placed..... | 16,705 | 11,477 | 21,888 | 14,568 | 12 | 64,650 |
| 1905 Cars placed..... | 26,716 | 22,812 | 24,769 | 5,542 | 374 | 80,213 |
| Total ..... | 78,125 | 66,022 | 98,652 | 66,876 | 410 | 310,085 |

During the trial plaintiff admitted that there had been no intentional discrimination against it, but contended that its statement was made up from the books on the basis of what it considered to be the law of the case, under which *all cars available for shipment of coal should be counted in the distribution.*

Plaintiff admitted that if the Berwind-White Company was entitled to the use of their private cars, without counting them against what it was entitled to under the percentage, then the Berwind-White Company did not get an excess of their percentage. It further admitted that if fuel cars of the Pennsylvania Railroad, and fuel cars of foreign railroads, consigned to particular mines, were not to be counted against such mines, then plaintiff had no cause of complaint, inasmuch as it had received its percentage of the balance or System cars.

The circuit court dismissed the case on the ground that, without preliminary action by the Commission, the court had no jurisdiction of a suit for damages alleged to be occasioned by undue discrimination against the plaintiff and undue preference in favor of its competitor.

The plaintiff took the case to the circuit court of appeals, complaining of this ruling, and further assigning error in that the court failed to enter judgment in its favor on the special verdict.

The circuit court of appeals held, one judge dissenting, that the plaintiff had the 312] option of taking the question *of jurisdiction by direct writ of error to the Supreme Court of the United States, or it could take the whole case, including the matter of jurisdiction, to the circuit court of appeals. That court, thereupon, considered the whole record, and (one judge dissenting) affirmed the judgment of the circuit court on the ground that the circuit court had no jurisdiction as a Federal court until after the Commission had passed on the reasonableness of the method of car distribution. The case was brought here, the only question presented by the record being whether the circuit court as a Federal court had jurisdiction.

The prohibitions of § 3 of the commerce act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. 19 Inters. Com. Rep. 387) that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads, consigned to particular mines should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine. Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 459; Hillsdale Coal & Coke Co. v. Pennsylvania R. Co. 19 Inters. Com. Rep. 372; Jacoby v. Pennsylvania R. Co. 19 Inters. Com. Rep. 392; Minds v. Pennsylvania R. Co. 20 Inters. Com. Rep. 52.

*It was, however, recognized that[313 there could be no hard and fast rule, and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refused to haul certain articles of merchandise, in order to supply communities with necessaries of life. Parks v. Cincinnati & M. Valley R. Co. 10 Inters. Com. Rep. 47; Thompson v. Pennsylvania R. Co. 10 Inters. Com. Rep. 640.

These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of

the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn Case (215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164) and in Interstate Commerce Commission v. Illinois C. R. Co. (215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155). Those cases involved a consideration of the power of the Commission over the distribution of cars, and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars, neither can they do so as an incident to an action for damages.

In view of the decision in the Abilene, Pitcairn, and Robinson Cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the 314]Commission, it *is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that *all cars in the district* should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced.

It is argued in the plaintiff's brief that if this view of the law should be sustained, the case should not be dismissed but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906, unjustly discriminatory. Attention is called to Southern R. Co. v. Tift, 206 U. S. 434, 51 L. ed. 1125, 27 Sup. Ct. Rep. 709, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor, and *on it the circuit court made[315 an order of restitution (206 U. S. 436). But, in that case, the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States circuit court. The damages which were claimed arose from a failure to deliver cars prior to December 31, 1905. The suit was brought July 17, 1908, more than two and a half years later, and after the passage of the act of June 29, 1906 (34 Stat. at L. 590, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1301), that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order . . . shall be filed in the circuit court within one year from the date of the order, and not after: provided that claims accrued prior to the passage of this act may be presented within one year."

The provisions of this statute would prevent the modification asked for, and the judgment is affirmed.

Mr. Justice Pitney dissents. See ante, 1480.

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*FOURCHE RIVER LUMBER COM-[316
PANY, Plff. in Err.,
v.
BRYANT LUMBER COMPANY.

(See S. C. Reporter's ed. 316-323.)

**Carriers — rebates to shipper.**

A lumber company using a railroad owned by the stockholders of a rival lumber company, but operated as a separate corporation, would be given a rebate contrary to the prohibitions of the interstate

commerce act if a nondiscriminatory agreement between the two lumber companies were construed to entitle the former company to the same proportion of the interstate freight rates on its shipments which the railway company receives on the interstate shipments made by the other lumber company, on the theory that the railway and lumber company, being one and the same, such differential was in fact received and enjoyed by the lumber company.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

[No. 296.]

Argued May 6, 1913. Decided June 9, 1913.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Pulaski Circuit Court, in that state, in favor of plaintiff in a suit to recover differentials received on interstate shipments. Reversed.

See same case below, 97 Ark. 623, 135 S. W. 796.

The facts are stated in the opinion.

Messrs. Luther M. Walter and W. E. Hemingway argued the cause, and, with Messrs. U. M. Rose, G. B. Rose, D. H. Cantrell, J. F. Loughborough, and M. W. Borders, filed a brief for plaintiff in error:

The contract of August 3, 1905, became invalid as to the rate for transportation of logs when tariffs were filed by the Fourche River Valley & Indian Territory Railroad Company, prescribing another and different rate from the contract price.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648.

The award of the arbitrators and the judgment of the court awarding damages equal to the amount of the division of the joint rate received by the Fourche River Valley & Indian Territory Railroad Company constitute a device whereby the Bryant Lumber Company is given transportation at less than the published interstate rates.

United States v. Union Stock Yards & T. Co. 226 U. S. 286, ante, 226, 33 Sup. Ct. Rep. 83.

The Interstate Commerce Commission alone has jurisdiction in the first instance to require establishment of switch connection, or award damages for failure to make such connection, or damages for unjust discrimination.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

Mr. Charles C. Reid argued the cause, and, with Mr. T. M. Mehaffy, filed a brief for defendant in error.

Mr. Justice Lamar delivered the opinion of the court:

The Bryant Lumber Company had its mill and sawmill plant at or near Bigelow, Arkansas, on the Rock Island Railroad. The Fourche Lumber Company's plant was located near by on a spur track laid about a mile from the main line of the Rock Island R. R. Both of these lumber companies owned timber in a rough, hilly country which could only be reached by a railroad belonging to the Bryant Company. The Fourche Lumber Company had already built a road on this land, claiming that it had been granted a right of way by the Bryant Company, and had applied for a railroad charter. This application was resisted by the Bryant Company, which denied that it had made any grant of a right of way. Finally, and in order to avoid threatened litigation, the parties, in August, 1905, entered into an agreement in which, among many other matters, it was provided that a charter should be granted to the Fourche River Valley & Indian Territory R. R., to be organized by the Fourche Company; that the Bryant Company would grant this Fourche Railroad a right of way, and that the Fourche Company was to *arrange[319 for the building of switches to enable the Bryant Company to reach its timber, which was to be transported at 37½ cents per 1,000, and that "the price for hauling future-acquired lumber of the Bryant Company over the Fourche R. V. & I. T. R. R. should be fixed by a board of arbitrators, who should have authority to settle any differences that might arise between the parties as to the details of carrying out the contract, and "so that the Bryant Company might be secured against any discrimination in favor of the Fourche Company in the transaction of its business, and the Fourche Company shall be required to carry timber and other freight equally without discrimination for or against the Bryant Company."

The Fourche Company agreed that it would cause the contract to be ratified by the Fourche River Ry. & Indian Territory R. R. Company. Thereafter the contract was carried out; the Fourche R. R. was incorporated; the Bryant Company made to it a conveyance of the right of way, as stipulated; the railroad was constructed

and hauled freight in intrastate and interstate commerce.

There was evidence that all of the stock of the railroad, except one or two qualifying shares, were held by the persons who owned the Fourche Lumber Company, but the two corporations kept separate books, and when the railroad made dividends, they were paid to its stockholders of record.

In August, 1907, differences arose between the parties, and under the provisions of the contract the Bryant Company demanded an arbitration of several matters in issue,—among others submitting to the board the following proposition:

"Fourth. That the Fourche River Lumber Company, through the Fourche River Valley & Indian Territory Railroad Company, shall secure to the Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the 320]same freight concessions as *are now enjoyed by the Fourche River Lumber Company through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company."

The arbitrators found in favor of the Bryant Company, and the terms of the award not having been complied with, the Bryant Company brought suit against the Fourche Lumber Company.

It appears that under the blanket rate, then of force, the same rate of freight was charged from any point in Arkansas to St. Louis, to Memphis, or to Oklahoma points. Out of this through rate the Rock Island allowed 2, 3, and 3½ cents to the Fourche R. R. on all lumber originating on such road and shipped over the Rock Island to St. Louis, Memphis, or Oklahoma. This division of through rate between the two roads on interstate shipments was noted on the tariffs filed with the Interstate Commerce Commission.

On the trial, the president of the Bryant Company testified that it had shipped 13,251,759 pounds of lumber in interstate shipments, and on it the Bryant Company claimed 2 cents per 100.

Being asked what was the basis of the claim he said:

They are getting it.

Q. Who is getting it?

A. The Fourche River Vy. & Indian River R. R., which are the same people as the Fourche River Lumber Co.

Q. They are two separate and distinct corporations?

A. Yes.

In reference to the claim for failing to lay the tracks and switches as agreed, he was asked:

Did the Fourche R. R. furnish you with a profile?

A. I don't know that it was the railroad company, it was the lumber company, I think.

Q. Who did you get the profile from? The lumber company or the railroad company?

A. I don't know. To me they are all the same.

Q. I understand that; it is to your advantage to have them all the same; but as a matter of fact, from which institution did you get the profile?

A. I could look *at the papers and[321 see which one wrote the letter, but it is the same people all the time.

The defendant excepted to the refusal of the court to instruct the jury that "a payment to the plaintiff of the differentials provided in the award of the arbitrators would be granting to the Bryant Company of a rebate forbidden by law, enabling the Bryant Company to transport its goods at less than the tariff rate, and you will find for the defendant on that issue." Instead of giving the charge requested, the court instructed the jury that "under the contract, and findings of the arbitrators, the Fourche Lumber Company was required to pay the Bryant Company the same differentials that the Fourche R. R. received on interstate shipments of the Fourche Lumber Company. If you find from the testimony that the Fourche R. R. has received certain differentials from the Rock Island on interstate shipments, and that the Fourche Lumber Company has not paid to the Bryant Lumber Company the same differentials on lumber that the Bryant Company has shipped to the same territory, then you are instructed that the defendant (Fourche Company) is indebted to the Bryant Company the amount of any such differentials which it has not paid."

A judgment on the verdict rendered in accordance with this charge having been affirmed, the Fourche Lumber Company brought the case here, insisting that the charge and verdict were in violation of the interstate commerce act, and, in effect, amounted to the giving of a rebate to the Bryant Lumber Company. The latter replies that the suit is against the Fourche Lumber Company, and that there is no law preventing one company from paying the whole or any part of the freight due by another. That may be true, but not where that other party is sued as being in effect

a common carrier, engaged in interstate commerce. The arbitration was demanded and the award made on the theory that, inasmuch as the contract provided that there should be no discrimination, the Bryant 322]Company *was entitled to receive from the Fourche Lumber Company "the same freight concessions as are now enjoyed by the Fourche Lumber Company through its interest and the interest of its owners in the Fourche Railroad." This suit is based upon the assumption that the two companies are identical in fact, though different in name.

Thus treating it, the case is as though the Bryant Lumber Company had sued the Fourche Lumber Company, doing business as an interstate carrier, for so much of the through rate as had been paid to it on the division by the Rock Island for hauling the Bryant Company's shipments of lumber. To state the proposition is to manifest its illegality, and to show that thereby the Bryant Company would get a reduction on the through rate on all of its lumber originating on the Fourche line.

The Fourche Railroad was not only incorporated as a common carrier, but is treated as such by the Interstate Commerce Commission; and, under the filed tariffs of the Rock Island road, receives a part of the through rate on all lumber originating upon the line and shipped in interstate commerce. The status of this road is discussed in Tap Line Case, 23 Inters. Com. Rep. 549, and its right to a division of the freight recognized notwithstanding the fact that the stockholders are the same as those who own the shares of the Fourche Lumber Company. But it receives this part of the through rate, not as a concession, but for services actually rendered by it as a common carrier in hauling freight for part of the distance between the point of origin and the point of destination. In any other view it would have been unlawful for the Rock Island to pay, and, if so, no agreement to divide such unlawful receipts would be enforced by the courts. On the other hand, if the Fourche Railroad was lawfully paid for services in hauling the lumber, it would be illegal, directly or through a subsidiary, to give to the shipper a part of such joint rate under any pretext whatever. 323]Carriers, whether sawmill *companies or railroads, or both combined, cannot purchase land by rebating to the grantor a part of the freight rate on interstate shipments over the road built on the right of way, even though the amount of such rebate was much less than the value of the land thus acquired. Cf. Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Union Stock Yards & T. Co. 226 U. S. 287, 308, ante, 226, 234, 33 Sup. Ct. Rep. 83.

The commerce act prohibits the payment of rebates, and its command cannot be evaded by calling them differentials or concessions, nor by taking the money from the railroad itself or from a company that is proved to be the same as the railroad. Otherwise nothing would be easier than for lumber companies to charter a railroad, collect freight as a railroad, but pay it out as a lumber company to shippers.

The suit in the present case proceeds on the theory that the Fourche Lumber Company and the Fourche Railroad are the same, and that therefore the division of the through rate allowed to the railroad was in fact received and enjoyed by the lumber company. And yet, notwithstanding that fact, it is claimed that if the Fourche Lumber Company should, under the contract, pay a part of that freight to the Bryant Company, it would do so as a sawmill, and not as a carrier. The law will not permit such a chameleon-like change. The Fourche Lumber Company and the Fourche Railroad are either the same or different. If they are the same, it cannot refund a part of the rate to the Bryant Company. If they are different, the Fourche Lumber Company was not bound by the terms of the contract to make the payment now demanded. The court below found that they were the same, and not different, and it results that its judgment must be reversed.

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*OMAHA & COUNCIL BLUFFS[324 STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, Appts.,

v.

INTERSTATE COMMERCE COMMISSION and United States.

(See S. C. Reporter's ed. 324-339.)

**Statutes — construction — legislative debates.**

1. The meaning of the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), cannot be determined from statements used in the debates in Con-

NOTE.—On journals of legislature as aid to construction of statute—see note to Blake v. National City Bank, 23 L.ed. U. S. 119.

gress, but must be interpreted by its own terms.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

**Carriers — Federal regulation — street railroads.**

2. Street railroads carrying passengers across a state line are not governed by the provisions of the interstate commerce act of February 4, 1887, which in terms applies to carriers engaged in the transportation of passengers or property by "railroad."

[For other cases, see Carriers, II. b, in Digest Sup. Ct. 1908.]

**Interstate Commerce Commission — review of order — effect of subsequent legislation.**

3. An order of the Interstate Commerce Commission relating to street railways, made prior to the act of June 18, 1910 (36 Stat. at L. 552, chap. 309), amendatory of the act of February 4, 1887, and therefore without lawful authority, cannot be made effective by the courts as of the date of the amendatory act, where there is nothing to show that Congress thereby attempted an express ratification of the Commission's action with respect to street railways, and it is doubtful whether the amendment was intended to confer a jurisdiction not previously given.

[For other cases, see Interstate Commerce Commission, 8–14, in Digest Sup. Ct. 1908.]

[No. 458.]

Argued February 19 and 20, 1912. Decided June 9, 1913.

APPEAL from the United States Commerce Court to review a decree which, reversing a decree of the Circuit Court for the District of Nebraska, dismissed the bill in a suit to enjoin the enforcement of an order of the Interstate Commerce Commission, reducing street railway rates. Reversed, and decree of Circuit Court made permanent.

See same case below, 191 Fed. 40.

The facts are stated in the opinion.

Mr. John Lee Webster argued the cause, and, with Mr. Frederic D. McKenney, filed a brief for appellants:

The word "railroad," as used in the Constitution and statutes of the various states, does not include street railway companies, and street railway corporations are not governed by laws relating to railroads. This distinction between the two kinds of railroads was well known at the time of the passage of the act to regulate commerce.

Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326; Lincoln Traction Co. v. Webb, 73 Neb. 136, 119 Am. St. Rep. 879, 102 N. W. 258, 17 Am. Neg. Rep. 617; Daly v. Milwaukee Electric R. & Light Co. 119 Wis. 398, 100 Am. St. Rep. 893, 96 N. W. 832, 15 Am. Neg. Rep. 227; Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Omaha Street R. Co. v. Boesen, 74 Neb. 765, 4 L.R.A.(N.S.) 122, 105 N. W. 303, 19 Am. Neg. Rep. 358; Kansas City, O. B. & Electric R. Co. v. Railroad Comrs. 73 Kan. 168, 84 Pac. 755; State v. Cain, 69 Kan. 186, 76 Pac. 443; Manhattan Trust Co. v. Sioux City Cable R. Co. 68 Fed. 82; Massillon Bridge Co. v. Cambria Iron Co. 59 Ohio St. 179, 52 N. E. 192; Front Street Cable R. Co. v. Johnson, 2 Wash. 112, 11 L.R.A. 693, 25 Pac. 1084; Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 175; Re New York Dist. R. Co. 107 N. Y. 42, 14 N. E. 187; Railroad Comrs. v. Market Street R. Co. 132 Cal. 677, 64 Pac. 1065; Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 10 L.R.A. 251, 23 Am. St. Rep. 86, 25 Pac. 147; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686; State v. Duluth Gas & Water Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032; Gyger v. Philadelphia City Pass. R. Co. (Montgomery v. Philadelphia City Pass. R. Co.) 136 Pa. 96, 9 L.R.A. 369, 20 Atl. 399; Riley v. Galveston City R. Co. 13 Tex. Civ. App. 247, 35 S. W. 826; State ex rel. Tyrrell v. Lincoln Traction Co. 90 Neb. 535, 134 N. W. 278; Sears v. Marshalltown Street R. Co. 65 Iowa, 742, 23 N. W. 150; Freiday v. Sioux City Rapid Transit Co. 92 Iowa, 191, 26 L.R.A. 246, 60 N. W. 656; Daly v. Milwaukee Electric R. & Light Co. 119 Wis. 398, 100 Am. St. Rep. 893, 96 N. W. 832, 15 Am. Neg. Rep. 227; Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588.

Under the Constitution and laws of Nebraska, Omaha & Council Bluffs Street Railway is a street railway, and is not a street railroad.

Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Omaha Street R. Co. v. Boesen, 74 Neb. 764, 4 L.R.A.(N.S.) 122, 105 N. W. 303, 19 Am. Neg. Rep. 358; Lincoln Traction Co. v. Webb, 73 Neb. 136, 119 Am. St. Rep. 879, 102 N. W. 258, 17 Am. Neg. Rep. 617; State ex rel. Tyrrell v. Lincoln Traction Co. 90 Neb. 535, 134 N. W. 278.

Omaha & Council Bluffs Railway & Bridge Company is incorporated as a street railway company under the laws of the state of Iowa, which also recognize the well-defined distinction between street railways and railroads.

Sears v. Marshalltown Street R. Co. 65 Iowa, 742, 23 N. W. 150; Freiday v. Sioux City Rapid Transit Co. 92 Iowa, 191, 26 L.R.A. 246, 60 N. W. 656; Cedar Rapids &

M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; Manhattan Trust Co. v. Sioux City Cable R. Co. 68 Fed. 82.

The dual functions of a commercial railroad and a street railway cannot be combined in the same corporation.

Gillette v. Aurora R. Co. 228 Ill. 261, 81 N. E. 1005; Chicago & S. Traction Co. v. Flaherty, 222 Ill. 67, 78 N. E. 29; David Bradley Mfg. Co. v. Chicago & S. Traction Co. 229 Ill. 170, 82 N. E. 210.

In deciding whether the act to regulate commerce applies to street railways, it is proper to consider the inconveniences that would result to the public by compelling interchange of freight and cars and passengers between commercial railroads and street railway companies, as well as the fact that there exists no necessity or public demand for the regulation of street railway companies by the Interstate Commerce Commission.

Michigan C. R. Co. v. Hammond, W. & E. Electric R. Co. 42 Ind. App. 66, 83 N. E. 650; Massillon Bridge Co. v. Cambria Iron Co. 59 Ohio St. 179, 52 N. E. 192.

Assistant Attorney General Denison argued the cause, and, with Mr. Thurlow M. Gordon, Special Assistant to the Attorney General, filed a brief for appellees:

The bearing of the road in question on interstate commerce is substantial and definite, and if it is not under regulation by the act of Congress it is under no valid control, in so far as concerns its function as interstate carrier.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547.

Legislation is not construed to be so rigid that it cannot be applied to changing conditions.

Weems v. United States, 217 U. S. 349, 373, 54 L. ed. 793, 801, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705; De Lima v. Bidwell, 182 U. S. 1, 197, 45 L. ed. 1041, 1056, 21 Sup. Ct. Rep. 743; Bishop v. North, 11 Mees. & W. 418, 3 Eng. Ry. & C. Cas. 459, 12 L. J. Exch. N. S. 362, 15 Mor. Min. Rep. 220.

These interurban railroads have been a great many times classified within statutes dealing with "railroads," as distinguished from "street railways."

Cedar Rapids & M. C. R. Co. v. Cummins, 125 Iowa, 430, 101 N. W. 176; Elliott, Railroads, 2d ed. chap. 44; Philadelphia v. Philadelphia Traction Co. 206 Pa. 35, 55 Atl. 762; Cincinnati, L. & A. Electric Street R. Co. v. Lohe, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161, 13 Am. Neg. Rep. 663; Malott v. Collinsville, C. & E. St. L. Electric R. Co. 47 C. C. A. 345, 108 Fed. 313; Riggs v. St. Francois County R. Co. 120 Mo. App. 335, 96 S. W. 707; Montgomery Street R. Co. v. Lewis, 148 Ala. 134, 41 So. 736; Katzenberger v. Lawo, 90 Tenn. 238, 13 L.R.A. 185, 25 Am. St. Rep. 681, 16 S. W. 611; Hestonville, M. & F. Pass. R. Co. v. Philadelphia, 89 Pa. 210; Re Washington Street Asylum R. Co. 115 N. Y. 442, 22 N. E. 356; Central Nat. Bank v. Worcester Horse R. Co. 13 Allen, 105; Egan v. Cheshire Street R. Co. 78 Conn. 291, 61 Atl. 950; Savannah, T. & I. of H. R. Co. v. Williams, 117 Ga. 414, 61 L.R.A. 249, 43 S. E. 751; Rafferty v. Central Traction Co. 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; Chicago v. Evans, 24 Ill. 55; Citizens' Pass. R. Co. v. Pittsburg, 104 Pa. 522; Clinton v. Clinton & L. Horse R. Co. 37 Iowa, 61; Lieberman v. Chicago & S. S. Rapid Transit R. Co. 141 Ill. 140, 30 N. E. 544; Baldwin, Am. R. Law, 9; Birmingham Mineral R. Co. v. Jacobs, 92 Ala. 187, 12 L.R.A. 830, 9 So. 320; Diebold v. Kentucky Traction Co. 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445.

The significance attached to particular terms by special local statutes or by local usage cannot control the construction of an act of Congress. If it did, Federal statutes would mean one thing in one state and another thing in another.

Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & T. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029.

Of course, the mere use of electric power, rather than steam, does not by itself determine the question whether a carrier is a "railroad."

Malott v. Collinsville, C. & E. St. L. Electric R. Co. 47 C. C. A. 345, 108 Fed. 313; Diebold v. Kentucky Traction Co. 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445; Riggs v. St. Francois County R. Co. 120 Mo. App. 335, 96 S. W. 707; Stillwater & M. Street R. Co. v. Boston & M. R. Co. 171 N. Y. 589, 59 L.R.A. 489, 64 N. E. 511; McDonald v. Union Freight R. Co. 190 Mass. 123, 76 N. E. 655.

The administrative construction by the Commission has been long acquiesced in and finally ratified by Congress.

Willson v. Rock Creek R. Co. 7 Inters. Com. Rep. 83; Chicago & M. Electric R. Co. v. Illinois C. R. Co. 13 Inters. Com. Rep. 20; Beall v. Washington, A. & Mt. V. R. Co. 20 Inters. Com. Rep. 406; Cincinnati & C. Traction Co. v. Baltimore & O. S. W. R. Co. 20 Inters. Com. Rep. 486.

Even if the Commission's order was with-

scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "railroad" will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that 336]ordinary *railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight "between states," "between states and territories," "between the United States and foreign countries." The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in *"every depot, station, or office where passengers or freight are received for transportation."* The railroads referred to in the act were not those having separate, distinct, and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce.

Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads, which did not do the business Congress had in contemplation, and had not engaged in the pooling, rebating, and discrimination which the statute was intended to prohibit. This was recognized in Willson v. Rock *Creek R. Co. 7 Inters. Com.[337 Rep. 83, where, although it was held that the statute applied to a street railroad between Washington, D. C., and a point in Maryland, the Commission nevertheless said (7 Inters. Com. Rep. 83): "It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads and their dealings with the public."

Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" cannot be construed to include street railroad.

But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. The case was heard on demurrer, with the opinion of the Commission treated as a part of the record. It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear. Indeed, the record does not show that electricity was used as a motive pawer, though, in the light of modern methods, that may

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the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid.

The term "common carrier," as used in this act, shall include express companies and sleeping car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. 24 Stat. at L. 379, chap. 104, [as amended, 34 Stat. at L. 584, chap. 3591], U. S. Comp. Stat. Supp. 1911, p. 1284.

possibly be assumed. But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight, and is doing only a business appropriate to a 338]street railroad. *So that whatever the motive power, or the size or speed of the cars, is immaterial. In any event, there were "street cars" referred to in the act of Congress authorizing the construction of the bridge from Council Bluffs to Omaha (24 Stat. at L. 501, chap. 356). The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs, and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

It is contended, however, that the amendment of June 18, 1910 (36 Stat. at L. 552, chap. 309), shows that Congress considered that street railroads were under the jurisdiction of the Commission, inasmuch as it then provided that "the Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in . . . transporting freight . . . and railroads of a different character." It is contended, on the other hand, that in that statute Congress distinctly recognized that a street electric road was "a different character of railroad," and apprehending that the broad language of the amendment of 1910 might be construed to take in street railroads, this provision was inserted out of abundant caution to prevent that result, as in the case of establishing routes wholly by water, which certainly were not within the terms of the original act.

This section of the act of 1910, however, having been passed after the order was made by the Commission, November 27, 1909, is not before us for construction, and, manifestly, cannot be given a retrospective operation, though the government insists that it should be given a prospective operation, and in its brief contends that "even if the Commission's order was without lawful authority at the time it was made November 27, 1909), the amendment of 1910 either ratified it altogether, or, at least, validated 339] *it for the future," and, therefore, it was contended "that the judgment should be affirmed; or, if not affirmed as rendered, should be modified to set aside the order only in its operation prior to June 18, 1910," on which day the amendment as to electric street passenger cars became effective. Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098; Lowrey v. Hawaii, 206 U. S. 206, 51 L. ed. 1026, 27 Sup. Ct. Rep. 622; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, are cited to show that Congress might ratify what had not been originally commanded. The first two decisions relate to transactions of a nature entirely different from that here involved; and, in the Baltimore Case, which was more like this on its facts, the parties, pending the suit, stipulated that the order should apply only to the future; and it was said that the "question of the authority of the Commission at the time the order was made has become a moot one" (621). There was no such stipulaion here, and there being nothing to show that Congress attempted an express ratification, and it being open whether the amendment was intended to confer a jurisdiction not previously given, the motion of the government to make the order of November 27, 1909, effective from June 18, 1910, cannot prevail.

The decree of the Commerce Court is reversed, and that of the three Circuit Judges made permanent.

Reversed.

Mr. Justice Pitney did not hear the argument and took no part in the decision of this case.

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*MISSOURI PAFICIC RAILWAY[340
COMPANY, Plff. in Err.,
v.
J. W. TUCKER.

(See S. C. Reporter's ed. 340-351.)

**Constitutional law — due process of law — excessive penalties.**

The imposition by Kan. Laws 1905, chap. 353, of a liability of $500 as liquidated damages, together with a reasonable attorney's fee, for every charge by a common carrier in excess of the rates therein fixed for the shipments of oil between points in the state, takes property without due process of law, contrary to the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 52.]

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NOTE.—On constitutionality of legislation affecting the amount of liability or penalty for delay in delivery or destruction of freight—see note to Seaboard Air Line R. Co. v. Simon, 20 L.R.A.(N.S.) 126.

On constitutionality of statute imposing penalty for failure of carrier to pay claim—see note to Mobile & O. R. Co. v. Brandon, 42 L.R.A.(N.S.) 106.

Submitted November 14, 1912. Decided June 16, 1913.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Osborne County, in that state, enforcing a penalty for an overcharge by a carrier upon shipments of oil. Reversed and remanded for further proceedings.

See same case below, 82 Kan. 222, 108 Pac. 89.

The facts are stated in the opinion.

**Mr. Balie P. Waggener** submitted the cause for plaintiff in error:

The construction placed upon the act in question by the supreme court of Kansas in effect closes all approach to the courts by the railroad company for relief from unreasonable and confiscatory legislative rates.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418–458, 460, 33 L. ed. 970–982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, 209 U. S. 146, 147, 52 L. ed. 723, 724, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Nebraska, 217 U. S. 207, 54 L. ed. 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Davidson v. New Orleans, 96 U. S. 102, 24 L. ed. 619; McGahey v. Virginia, 135 U. S. 662–694, 34 L. ed. 304–314, 10 Sup. Ct. Rep. 972.

**Mr. John S. Dawson**, Attorney General of Kansas, submitted the cause for defendant in error. Mr. S. N. Hawkes, Assistant Attorney General, Mr. Richard Henry Towne, and Mr. John W. Tucker, *pro se*, were on the brief:

The fact that litigants are not on equal terms as to costs or attorneys' fees does not constitute a tenable ground of objection.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 719, 55 L.R.A. 263, 89 Am. St. Rep. 393, 87 N. W. 714, 190 U. S. 557, 47 L. ed. 1183, 23 Sup. Ct. Rep. 854; Kansas P. R. Co. v. Mower, 16 Kan. 573; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817, 8 Am. Neg. Cas. 274; Titus v. Corkins, 21 Kan. 722; Atchison, T. & S. F. R. Co. v. Matthews, 58 Kan. 447, 49 Pac. 602, 3 Am. Neg. Rep. 27, affirmed in 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; British American Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; St. Louis & S. F. R. Co. v. Snaveley, 47 Kan. 637, 28 Pac. 615; Missouri P. R. Co. v. Henning, 48 Kan. 465, 29 Pac. 597; Fritz v. State, 80 Kan. 168, 101 Pac. 1013; State v. Plamondon, 75 Kan. 269, 89 Pac. 23; Re Ellis, 76 Kan. 368, 91 Pac. 81; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718, affirmed in 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Singer Mfg. Co. v. Fleming, 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; Vogel v. Pekoc, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; Dell v. Marvin, 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982; Taylor v. Chicago, M. & St. P. R. Co. 83 Wis. 645, 53 N. W. 853; Hartford F. Ins. Co. v. Redding, 47 Fla. 228, 67 L.R.A. 518, 110 Am. St. Rep. 118, 37 So. 62; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

A mere excessive penalty is not of itself sufficient cause for holding the act unconstitutional.

State v. Harrington, 68 Vt. 622, 34 L.R.A. 100, 35 Atl. 515.

It is within the legislative discretion, in all applications of the police power, to give enhanced damages to a party injured, and the amount is wholly within the province of the legislative department. There may be double damages, double costs, allowance of attorneys' fees, or other measure of damages, fixed at a determinate amount (as here), or there may be added to the actual damages an attorneys' fee; or, on the other hand, there may be enhanced damages, termed "punitive," "exemplary," or "vindictive" damages, or "smart money," indeterminate in amount, to be fixed by the jury in their discretion, restrained only by the doctrine that passion or prejudice shall not enter into the equation; or there may be either alone, or, in connection with other enhanced damages, an attorneys' fee, indeterminate in amount, to be fixed by the court or jury, restrained only by the requirement that such fees be reasonable.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

The agent of the Missouri Pacific Railway Company, in the present case, acting in the line of his duties, thereby binding his principal (12 Am. & Eng. Enc. Law, 2d ed. 41), acted wantonly and oppressively, or with gross negligence, as you please, which of itself would warrant the assessment of punitive damages; and under statutes allowing enhanced damages with or without attorneys' fees, the legislative discretion is not reviewable, whether termed "damages" or "penalty." The purpose is prevention as well as punishment.

Southern Kansas R. Co. v. Rice, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817, 8 Am. Neg. Cas. 274; Cady v. Case, 45 Kan. 733, 26 Pac. 448; Kansas City, Ft. S. & M. R. Co. v. Little, 66 Kan. 378, 61 L.R.A. 122, 97 Am. St. Rep. 376, 71 Pac. 820, 13 Am. Neg. Rep. 524; Wiley v. Keokuk, 6 Kan. 94; Hefley v. Baker, 19 Kan. 9; Kansas P. R. Co. v. Kessler, 18 Kan. 523; Jockers v. Borgman, 29 Kan. 109, 44 Am. Rep. 625; Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; West v. Western U. Teleg. Co. 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Voltz v. Blackmar, 64 N. Y. 440; Phillips v. Lawrence, 6 Watts & S. 150; Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488; Mugler v. Kansas, 123 U S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; State v. Indiana & I. S. R. Co. 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Western U. Teleg. Co. v. Reynolds, 100 Va. 459, 93 Am. St. Rep. 971, 41 S. E. 856; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18, affirmed in 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Kansas P. R. Co. v. Mower, 16 Kan. 573; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718, affirmed in 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Peoria, D. & E. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98.

346] *Mr. Justice **Van Devanter** delivered the opinion of the court:

By an act of February 17, 1905, the legislature of the state of Kansas prescribed a schedule of maximum rates to be charged by common carriers for the transportation, between points in that state, of "illuminating oil, gasolene, fuel oil, or crude petroleum, in cans, barrels, tanks, or tank cars," and provided that every such carrier "which shall demand, exact, or receive for such transportation or delivery any sum in excess of the rates hereby made lawful shall be liable to any person injured thereby in the sum of $500 as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee, to be fixed by the court." Laws 1905, chap. 353, p. 589.

In December, 1906, there were shipped from Humboldt, Kansas, to Cawker City, in that state, 25 barrels of fuel oil, of which J. W. Tucker was the consignee. The shipment was carried from the point of origin about 253 miles over the railroad of the Santa Fe Company to Concordia, and thence to the point of destination, about 47 miles, over the line of the Missouri Pacific Railway Company. According to the statute the charge for the entire transportation should have been $12, but the Missouri Pacific Company demanded and collected therefor from Tucker, the consignee, $3.02 in excess of that sum. He thereupon brought an action in one of the courts of the state, under the act before named, to recover from that company $500 as liquidated damages and a reasonable attorney's fee, to be fixed by the court. The company defended upon the grounds that the statutory rates were confiscatory and void, and that the statute, and particularly the provision for the recovery of $500 as liquidated damages, was so arbitrary and unreasonable as to be repugnant to the due process of law and equal protection *clauses of the 14th[347 Amendment to the Constitution of the United States. Other defenses, based on the state Constitution, were interposed, but we need not notice them. The plaintiff recovered a judgment for the $500, which was affirmed by the supreme court of the state, the Federal questions being decided adversely to the company (82 Kan. 222, 108 Pac. 89), and the latter prosecutes this writ of error.

As the right of recovery and the judgment sustaining it were rested upon the provision imposing a liability for liquidated damages in the sum of $500, we come at once to the question of the validity of that provision under the 14th Amendment.

Primarily it is to be observed that the rates prescribed by the legislature, while presumptively valid, are not conclusively so; that to require the company, in the operation of its road, to give effect to rates which prevent it from obtaining a reasonable return for the service rendered to the public is to deprive it of its property without due process of law; and that whether the prescribed rates are thus in excess of the state's power (see Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 24-26, 51 L. ed. 933, 944, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, and cases cited) is a question which the company is entitled to have determined in appropriate judicial proceedings. And it also is to be observed that the act of 1905 and

other laws of the state, as construed by the state court, afford the company no opportunity for securing a judicial determination of the validity of these rates otherwise than as it may do so in a defensive way when charged, in a case like this or in some criminal prosecution, with failing to give effect to them.

Being a common carrier, the company is not at liberty to accept or decline shipments of oil. It must receive and carry them when offered, and must be ready to name to shippers the rates at which that service will be rendered. If the statutory rates permit a reasonable return, they are 348] *controlling; if they prevent it, they are invalid. But of their obligatory character the company is not the judge. And yet it must choose whether it will give effect to them or no, and then must abide the result of its action. If they be so unreasonably low as to be invalid, it cannot give effect to them without sustaining a serious and irreparable loss; and if effect be not given to them and they be subsequently adjudged lawful, the enforcement of the prescribed liabilities and penalties will likewise entail a most serious loss, for the transactions involved must necessarily be numerous. In one of the briefs it is said that the intrastate oil shipments on the company's lines in Kansas in a single year are as many as 10,000. Thus it will be perceived that the position of the company, with no right itself to institute a proceeding to determine for itself and all shippers the validity of the legislative rates, is one of exceeding perplexity.

On the other hand, the interests of shippers and consumers of oil must be considered no less than those of the carrier. Experience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that deviations from them be discouraged by adequate liabilities and penalties.

It is in the light of these considerations that the validity of the provision imposing a liability for liquidated damages in the sum of $500 for every charge in excess of the legislative rates must be tested.

It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. Nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages, taking one case with another. Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70, ante, 734, 33 Sup. Ct. Rep. 437. What the *statute does[349 is to authorize a recovery of $500 in every case, whether the shipment be of 1 barrel, or of 10 or 25 barrels, or of a tank car; and this although it is of common knowledge that the possible damages in respect of the charge for carrying any of these from one point in the state to another could never be more than a small fraction of that sum. In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, $3.02, was less than 1-150 of the authorized recovery.

The state court, although recognizing that the solution of the problem is not free from difficulty, reached the conclusion that "so long as the defendant [the carrier] cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guaranties of the Federal Constitution are not infringed." But that this view fails to recognize the real plight of the carrier is made plain by the following extract from the opinion in Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann Cas. 764:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep 462, 702. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to *base the claim that a[350 person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily

a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested, the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."

What was said in that case is conclusive of the question here. True, the act then under consideration subjected the officers and agents of the carrier to penalties not found in the act now before us, but, notwithstanding this, we think the liabilities and penalties imposed by the Kansas statute bring it within the controlling prin-[351]ciple of that *decision. As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment. See Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 111, 53 L. ed. 417, 430, 29 Sup. Ct. Rep. 220; Standard Oil Co. v. Missouri, 224 U. S. 270, 286, 56 L. ed. 760, 769, 32 Sup. Ct. Rep. 406. Upon this ground the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

*GEORGE T. SIMPSON† et al.,[352 Appts.,
v.
DAVID C. SHEPARD. (291.)

GEORGE T. SIMPSON et al., Appts.,
v.
EMMA B. KENNEDY et al. (No. 292.)

GEORGE T. SIMPSON et al., Appts.,
v.
WILLIAM SHILLABER. (No. 293.)

(See S. C. Reporter's ed. 352-473.)

**Commerce — state regulation of local rates of interstate carrier — congressional inaction.**

1. Congressional inaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.

[For other cases, see Commerce, I. e; III. c, in Digest Sup. Ct. 1908.]

**Carriers — remedy for discrimination — necessity of action by Interstate Commerce Commission.**

2. The question whether an undue or unreasonable preference or advantage to any locality forbidden by the interstate commerce act of 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), § 3, arose from the operation of an intrastate rate as compared with an interstate rate, or whether any locality was thereby subjected to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts,—assuming that such a case is within the statute.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

†These cases are reported by the official Reporter under the title of "The Minnesota Rate Cases."

NOTE.—On state regulation generally of tolls, rates, and prices, see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic, see notes to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 108, and State ex rel. McCue v. Northern P. R. Co. 25 L.R.A.(N.S.) 1001.

**Valuation upon which return or income from intrastate railway rates prescribed by state is to be computed.**

It is now well settled that the valuation upon which railroad rates fixed by the state for local transportation must produce a

**Commerce — conflicting state and Federal regulation — local rates of interstate carriers.**

3. The states continued to possess the right to prescribe reasonable rates for the exclusively internal traffic on interstate carriers after the passage of the interstate commerce act of 1887, and the amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), although it may be that by reason of the interblending of the interstate and intrastate operations of such carriers adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — reasonableness — valuation — stocks and bonds.**

4. The market value of the stocks and bonds representing the entire property of a railway company, which includes assets of considerable value which do not form part of the operating property of the carrier, or that devoted to the public service, furnishes no criterion when testing the reasonableness of state regulation of rates by which to determine the value of the property on which the fair return essential to their validity is to be computed.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — reasonableness — valuation — cost of reproduction.**

5. The cost to a railway company of

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reasonable return in order to meet the test of reasonableness is the value of the railroad property used for the convenience of the public in the local or intrastate business. Northern P. R. Co. v. Keyes, 91 Fed. 47; Seaboard Air Line R. Co. v. Railroad Commission, 155 Fed. 792; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493, affirmed in 107 C. C. A. 403, 185 Fed. 321; Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800; Western R. Co. v. Railroad Commission, 197 Fed. 954; Montana, W. & S. R. Co. v. Morley, 198 Fed. 991; Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 335, 137 N. W. 329.

But there has been much uncertainty as to the proper methods of ascertaining such value. The difficulty still remains, although the decisions of the Federal Supreme Court in Simpson v. Shepard, Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, post, 1571, 33 Sup. Ct. Rep. 975, and Allen v. St. Louis, I. M. & S. R. Co. 230 U. S. 553, post, 1625, 33 Sup. Ct. Rep. 1030, shed some light on the problem.

As was said in Southern P. Co. v. Bartine, 170 Fed. 751: "Each case must depend largely upon its own special facts, and every element or circumstance which increases or depreciates the value of the property should be given due consideration, and allowed that weight to which it is entitled. Neither the fair value of stocks and bonds, the cost of construction, nor the cost of reproducing the plant, is absolutely controlling, but each should be regarded as a fact tending to show fair value."

"The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration," said the court in Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, "and are to be given such weight as may be just and right in each case." The court added: "We do not say that there may not be other matters to be regarded in estimating the value of the property."

This is the language quoted by Mr. Justice Hughes in Simpson v. Shepard in connection with his statement that "the ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts."

Broad estimates of the value of railway property are not sufficient to support a finding that railway rates, as fixed by the state, are confiscatory. Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, post, 1571, 33 Sup. Ct. Rep. 975.

The amount of capitalization and bonded indebtedness is pertinent to the inquiry. Smyth v. Ames, supra; Houston & T. C. Co. v. Storey, 148 Fed. 499.

But the market value of bonds and stocks, while shedding in some cases light on the question of present value, cannot, except in a very slight measure, indicate what that value is, as a matter of fact. Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800.

The amount of a railway company's outstanding stocks and bonds does not, in itself at least, afford a sufficient basis for determining the value of a railway company's property within the state for the purpose of testing the reasonableness of regulation of its rates. Texas & P. R. Co. v. Railroad Commission, 112 C. C. A. 538, 192 Fed. 280.

The amount of the bonded debt should not be assumed as a complete or accurate criterion of the value of the property. Montana, W. & S. R. Co. v. Morley, 198 Fed. 991.

What is a reasonable rate should be computed ordinarily upon the amount actually invested in good faith; fictitious valuations, indicated by overissues of stocks and bonds not representing actual money, being rejected. Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

"There is a tendency to deny the amount and value of outstanding stocks and bonds as evidence of value," said the court in

acquiring the land necessary for its terminals, yards, and right of way if the railway were not there, and the company should be called upon to reproduce its road, including the estimated excess over the market value of contiguous or similarly situated property which it is conjectured that the railway company would be obliged to pay, and an allowance for consequential and severance damages, and for possible improvements that might be found on the property taken,—is not the proper basis for valuing such property for the purpose of testing the reasonableness of state regulation of rates.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — reasonableness — valuation for railway purposes.**

6. Estimates of the value of the right of way, yards, and terminals of a railway company cannot properly be based, when testing the reasonableness of state regulation of its rates, upon their supposed value for railway purposes in excess of the fair market value of contiguous or similarly situated property.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — reasonableness — valuation — engineering, etc.**

7. The fair present value of a railway company's right of way, yards, and terminals cannot be increased when testing the reasonableness of state regulation of its rates, by adding further sums calculated on that value for engineering, superintendence, legal expenses, contingencies, and interest during construction.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

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Missouri, K. & T. R. Co. v. Love, 177 Fed. 493. "Wholly aside from any consideration of the rights of investors in good faith, or of the general consensus of public opinion as exhibited in a normal market for the securities, such evidences imply a recognition of the effect upon local value of influences without the state. A company may have, elsewhere, property of great value employed in aid of all its transportation business. Distant connections with important commercial centers, an outlet to tidewater, and the like, may affect favorably the worth of every mile of road in the system. It is general knowledge that there is an important element of value in a railroad as a whole, which the part within the state, solely and separately regarded, does not possess. While the question ultimately is the value of the road within the state, the influence upon that value of things external is to be considered; and in the common judgment of men, it is to some extent reflected in the amount and value of the stocks and bonds resting upon the system. Nor can it properly be said that such influence affects only the value for the interstate business of the company, with which the state is not concerned in making local rates. There is too intimate a relation between commerce within the state and that among the states, and too much interdependence in their mutual growth and prosperity. A railroad system is essentially a unit, and is generally so regarded. For instance, the part within the state may be assessed for local taxation at its value as an organic portion of a larger whole."

Assessed valuations for taxation purposes, regarded as entitled to considerable weight in cases like Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 335, 137 N. W. 329; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Western R. Co. v. Railroad Commission, 197 Fed. 954, must, if material at all under the decision in Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, post, 1571, 33 Sup. Ct. Rep. 975, be received with great caution. Under that decision they certainly are not admissible on the question, where the principles governing the assessments are not properly shown.

Franchises should be valued, on a railroad rate question; and the state official assessments of such franchises for taxation purposes are competent evidence of such value. Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800.

The amount at which railroad property is returned by its officers for the purposes of taxation does not estop the company to claim a greater valuation for the purposes of determining the reasonableness of rates, though it is relevant on that question. Louisville & N. R. Co. v. Brown, 123 Fed. 946.

The reasonable cost of construction is to be considered in determining the fair value of the company's property, which is an element entering into the question of the reasonableness of the rates. State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314.

The cost price may be of weight if conditions are similar at the time of the inquiry. Western R. Co. v. Railroad Commission, supra.

But the basis of the calculation of the value of railway property on which the railway company is entitled to fair returns is the fair value of the property as a producing factor, not necessarily its cost, nor the amount of money expended. Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 335, 137 N. W. 329.

The estimate must be based on present value. Matthews v. Corporation Comrs. 106 Fed. 7; Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800; Montana, W. & S. R. Co. v. Morley, 198 Fed. 991.

Hence, the fundamental and generally controlling inquiry has been said to be, What will it cost to reproduce the property in its existing condition at the time of the inquiry? Western R. Co. v. Railroad Commission, 197 Fed. 954.

The reasonableness of rates is to be

**Carriers — state regulation of rates — reasonableness — valuation — depreciation and appreciation.**

8. The physical valuation of the property of a railway company on the basis of the cost of reproduction new for the purpose of testing the reasonableness of state regulation of its rates is incomplete, where depreciation is found in general terms to be more than off-set by appreciation, without showing the specific items of such appreciation and depreciation.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — reasonableness — apportionment of interstate and intrastate valuation.**

9. A division of the value of the property of an interstate carrier within a state according to gross earnings derived respectively from its interstate and intrastate business in such state does not give a sufficiently accurate measure of the value of the use of its property in intrastate business to serve as the basis of a judicial holding in a close case that the intrastate rates, as fixed by the state, are confiscatory.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — reasonableness — apportionment of interstate and intrastate valuation.**

10. The total value of the property of an interstate carrier within a state, independently of revenue, should be divided as between its interstate and intrastate business in such state, when testing the reasonableness of state regulation of its intrastate rates, according to the use that is made of the property, assigning to each business

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determined by ascertaining what, under all the circumstances, is a reasonable income on the cost of reproducing the road at the present time. Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713.

The original cost of the road, the amount of its present fixed charges, and its history, are material only so far as they tend to show what it would now cost to reproduce the road. Ibid.

Neither the amount of fixed charges, nor the amount at which the road sold years ago on a mortgage foreclosure, nor the dividends guaranteed by the lessee of the road, furnish the criterion. Ibid.

"In reference to the question of value with the view of rate regulation," said the court in Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800, "the most reliable test ordinarily is the cost of the reproduction of the road as it exists. I say 'ordinarily,' because there may be instances, which is not the case here, where, by reason of paralleling the road by a new road, and diverting its business, or from other causes, its value may be far less than what it will cost to reproduce it as it is at the time of the inquiry. The original cost of a road may in some cases reflect light on, or even determine, the present value, as when it is of very recent construction. But ordinarily it is of little assistance in that regard, since many items of value may be donations by the government or by individuals, as is the case of the South & North, or the road may have been built long before the period of inquiry, at greatly less or greatly higher prices than those prevailing at the time of the inquiry. Or its original cost may be involved in obscurity, and may include the cost of abandoned or destroyed portions of the property, which should not figure in the inventory for the present time, or the road may have been bought at a forced sale, in times of panic, at a nominal price, or in inflated times at a corresponding price; or the road, costing little originally, may have developed, from many contributing causes, *into being* property of great value. And in every case, after finding the original cost, when possible to be done, the question would still have to be solved as to whether such original cost is the same as the present value, which would involve the determination of the present value, for such comparison independent of original cost, and in no other or better way than on reproduction values."

Too much importance may be attached to this method. As Mr. Justice Hughes says in Simpson v. Shepard: "The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied, and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

In estimates of reproduction cost, the enhanced value of the property since the original location of the railroad should be taken into account. Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800.

But, says Mr. Justice Hughes, in Simpson v. Shepard, the increase so allowed, apart from any improvements the railway company may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. "The company," said he, "would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'"

It had previously been held in Montana, W. & S. R. Co. v. Morley, 198 Fed. 991,

that proportion of the total value of the property which will correspond to the extent of its employment in that business.

[For other cases, see Carriers, III. b, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — reasonableness — state regulation of railway rates — extra cost of intrastate operations.**

11. General estimates as to the extra cost of the intrastate business of a carrier over its interstate business, made without the aid of accurate data for at least test periods, which however difficult, to prepare, was not beyond the power of the carrier to furnish, will not be accepted as adequate proof to sustain a finding that the carrier's intrastate rates, as fixed by the state, are confiscatory.

[For other cases, see Evidence, XII. m, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — reasonableness of railroad rates — state regulation.**

12. The evidence is insufficient to support a finding that the intrastate rates of an interstate carrier, as fixed by the state, are confiscatory, where neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in such business, is satisfactorily shown.

[For other cases, see Evidence, XII. m, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — confiscation.**

13. A state may not fix the intrastate rates of an interstate carrier so low that the carrier's entire revenue from all its business in the state, both interstate and intrastate, after paying only operating ex-

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that in estimating the value of real estate for railway purposes on the basis of reproduction, to the fair value of the land should be added the resulting damage to the residue from taking a part of the land.

And in Western R. Co. v. Railroad Commission, 197 Fed. 954, it was said that in estimating the cost of reproducing the right of way there must be added to the market price of the land actually taken the damages on account of the diminished value of the parcel not taken, and the further expenses, such as the procuring of title, etc.

And in estimating reproduction cost of the entire railway property there was added in Montana, W. & S. R. Co. v. Morley, supra, a reasonable sum for contingencies, for engineering and superintendence, for interest during the construction, and for discount on securities.

Reasonable depreciation allowances should be made when estimating the value of railway property on the basis of reproduction. Ibid.

An established railroad system may be worth more than its original cost, and more than the mere cost of its physical reproduction. It has passed the initial period of little or no return to its owners which, of greater or less duration, almost always follows construction, and is not infrequently marked by default and bankruptcy. The inevitable errors in its building which finite minds and hands cannot avoid have been measurably corrected, time and effort have produced a commercial adjustment between it and the country it was intended to serve, relations have been established with patrons, and sources of traffic have been opened up and made tributary. In other words, the railroad, unlike one newly constructed, is fully equipped and is doing business as a going concern. It has attained a position after many experiences common to railroad enterprises which entail loss and cost not paid from current earnings, and which correspondingly make for value. Missouri, K. & T. R. Co. v. Love, 177 Fed. 493.

Added value as a going concern is not an element of value where the railroad in question has never paid interest on its bonds, and has accumulated only a limited amount of equipment, and has not prospered to any considerable extent. Montana, W. & S. R. Co. v. Morley, supra.

In a few cases the courts have apparently considered the reasonableness of the rates with reference to the original cost of the road, or with reference to the sufficiency of the rates to pay interest on bonded indebtedness or dividends on stock, without expressly recognizing that the present valuation of the property is the amount upon which the return must be computed; but as the original cost and the amount of capitalization and indebtedness may be relevant upon the question of present valuation they may perhaps have been merely considered for that purpose,—the only legitimate purpose for which they may be considered.

Examples of such cases are: Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Ball v. Rutland R. Co. 93 Fed. 513; Chicago, M. & St. P. R. Co. v. Smith, 110 Fed. 473; Wallace v. Arkansas C. R. Co. 55 C. C. A. 192, 118 Fed. 422.

Having found the total value of the property of the railway company within the state devoted to the public use, the favorite method of dividing such value according to its use respectively in intrastate and interstate business has been upon the basis of the revenue derived from each. This was the method adopted in Shepard v. Northern P. R. Co. 184 Fed. 765; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317; Re Arkansas Rate Cases, 187 Fed. 290; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493, affirmed in 107 C. C. A. 403, 185 Fed. 321; Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800, and Western R. Co. v. Railroad Commission, 197 Fed. 954.

And in State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314, it was said that the interstate and foreign business may, and should, be con-

penses and taxes, amounts to only about 4 per cent on the value of its property in the state.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

[Nos. 291, 292, 293.]

Argued April 9, 10, 11, and 12, 1912. Decided June 9, 1913.

THREE APPEALS from the Circuit Court of the United States for the District of Minnesota to review decrees enjoining the enforcement of intrastate rates of interstate carriers as fixed by the state, and their adoption or maintenance by the carriers. Decrees in Nos. 291 and 292 reversed, and cases remanded with directions to dismiss the bills respectively without prejudice.

Decree in No. 293 modified to permit a further order or decree if required by any change in circumstances, and as modified affirmed.

See same case below, 184 Fed. 765.

The facts are stated in the opinion.

Messrs. Thomas D. O'Brien and Edward T. Young argued the cause, and, with Mr. George T. Simpson, Attorney General of Minnesota, and Mr. Lyndon A. Smith, Assistant Attorney General, filed a brief for appellants:

There is a numerous class of property, property rights and elements of value held by every public service corporation, which it has, in one way or another, received as a free grant from the public, and which, in a sale or condemnation of the entire business or plant, must be given consideration; but inasmuch as these were free grants to the corporation for the purpose of making its private investment secure and reason-

sidered in determining the proportion of the value of the property of the company assignable to local business.

Said the court in Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 321: "Cases may indeed be imagined,—one of them was suggested by Mr. Justice Brewer in Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 176, 44 L. ed. 417, 421, 20 Sup. Ct. Rep. 336, and many others of a similar character have been presented in the briefs of counsel,—in which the results obtained upon this basis from the particular facts assumed do not seem to be perfect. But no basis has been suggested that produces a perfect result. It may be that none exists that will produce such a result in all cases. But the facts that the ton mile and passenger mile basis has no common unit of measurement; that it excludes the effect of the differences in the classes of freight and in the distances it is hauled, which are reflected in the revenue basis; that there is no proportioning or measuring relation between the value of property and its uses divorced from their values; that the revenue basis appeals more persuasively to the reason than any other suggested; and has commended itself to the judgment of, and has been adopted generally by, the courts upon whom duties of apportionment of this nature have been imposed in like cases,—have convinced that the court below committed no error by its use."

The only feasible way in which the value of the property of an interstate railway company devoted to the use of intrastate commerce can be ascertained is, first, to find the value of the entire property employed in common in both interstate and intrastate commerce, and then to find by a comparison of the volumes of its revenue in each business, or by some other measure, what proportion is used in each, and thus to arrive at the value of the property devoted to intrastate commerce. But as the cost of doing the two businesses is not the same, it is manifest that the net earnings cannot be the same, and that to treat them as such, and to apportion the value of the use of the railroad in intrastate business according to the gross earnings in interstate and intrastate commerce, is to establish wrong standards of remuneration for the use or the value of the property devoted to intrastate commerce. Distribution of operating expenses, effected by experts skilled in railroad transportation, in proportion to gross revenue, with an extra load for local business, varying in amount according to varying conditions, has generally been accepted in ascertaining the value of the property that the carrier devotes to local business. Western R. Co. v. Railroad Commission, 197 Fed. 954.

In Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800, the division of value of the property used respectively in intrastate and interstate commerce was made by first equalizing the intrastate business with the interstate business on the basis of the relative cost of the two services, and taking the proportion of the whole value of the property indicated by the proportion of the revenue of each thus equated to the whole revenue. The court said that the difficulty of the problem arose from the fact that, though the units of service in interstate and intrastate commerce are the same in each, the relative aggregate cost of the two services was very different; that if the ton and passenger miles were of uniform cost in the two services, the share of each in the use of the property would be the proportion of the whole value which the gross earnings of each bear to each other, or the earnings of each to the whole earnings, but that, where two persons or patrons are served by a common property, one may do less business, but require in doing it the use of the property in a greater proportion than the other, and that therefore the relation of the respective

ably remunerative, when the question is one between the corporation and the public as to reasonable rates and charges, these items must be excluded, and the basis upon which to predicate rates limited to the investment of the corporation.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615.

A railroad is performing a function of the state, and in so doing is exercising governmental powers

Budd v. New York, 143 U. S. 517, 549, 36 L. ed. 247, 257, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Smyth v. Ames, 169 U. S. 544, 42 L. ed. 848, 18 Sup. Ct. Rep. 418; Cotting v. Kansas Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

In no case should the return be computed upon a sum greater than the original investment.

Re Advances in Rates, 20 Inters. Com. Rep. 347; Covington & L. Turnp. Co. v. Sandford, 164 U. S. 578, 596, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Smyth v. Ames, 169 U. S. 544, 42 L. ed. 848, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Knoxville v.

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services to each other could only be determined by first settling the relative cost of doing each business.

The gross revenue method comes in for condemnation in SIMPSON v. SHEPARD; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, post, 1571, 33 Sup. Ct. Rep. 975, and Allen v. St. Louis, I. M. & S. R. Co. 230 U. S. 553, post, 1625, 33 Sup. Ct. Rep. 1030. "The value of the use," says Mr. Justice Hughes in the case first above cited, "is not shown by gross earnings. The gross earnings may be consumed by expenses, leaving little or no profit. If, for example, the intrastate rates were so far reduced as to leave no net profits, and the only profitable business was the interstate business, it certainly could not be said that the value of the use was measured by the gross revenue. . . .

"When rates are in controversy it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments, respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common."

And the court in these cases further holds that general estimates of conditions of transportation with reference to the extra cost of the intrastate business of a carrier over its interstate business cannot take the place of data compiled for fairly representative test periods.

A finding that railway rates as fixed by the state are confiscatory cannot be based upon an intrastate valuation of the railway property which, if extended to the entire railway system, would greatly exceed the railway company's total capitalization, in the absence of clear and convincing proof that the value actually existed, and that the different items of property were estimated respectively by correct methods and in accordance with proper criteria of value. Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, post, 1571, 33 Sup. Ct. Rep. 975.

The usual rules for valuation are not controlling, where the railroad is built, maintained, and operated essentially for interstate purposes, and its intrastate business is merely incidental, amounting only to about 5 per cent of the total business, so that it is impracticable to make a reasonable return on the capital invested from intrastate traffic solely the basis for the establishment of the maximum intrastate passenger rates. Washington South R. Co. v. Com. 112 Va. 515, 71 S. E. 539.

Where extensive branch lines are constructed through new and unsettled sections of the state at great expense, owing to the swampy country, and are built principally to serve as feeders for the main lines, and to enable the roads to obtain shorter lines for their interstate traffic, which merely passes through the state, the companies are not entitled to as great a compensation from intrastate business, on their investments therein, as upon the investment in ordinary roads built for the accommodation of intrastate as well as interstate business. Re Arkansas R. Rates, 168 Fed. 732.

Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Wilcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The inventory should include only property contributed by the carrier.

Munn v. Illinois, 94 U. S. 126, 24 L. ed. 84; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 268, 46 L. ed. 1158, 22 Sup. Ct. Rep. 900.

The burden of proving, by clear and convincing evidence, the claim of confiscation, rested upon complainants at every stage of the case, and included the establishment, by saisfactory evidence, of each element necessary to a determination of that claim.

Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357.

The questions involved here are those affecting the public, and their determination by this court will necessarily affect public interests throughout the entire country; therefore no position taken by any public officer or employee can foreclose the action of the court, or prevent it from passing upon the soundness of the claim in itself.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339-346, 36 L. ed. 176-180, 12 Sup. Ct. Rep. 400.

A railroad cannot insist upon a return which is excessive if based upon its capital stock.

The aggregate capital stock of a corporation is the public representation, made by it, of the amount of the funds and properties combined under the organization; it is the basis upon which dividends are paid, control secured, and is required to be fixed by the charter for the security of the public at large, as well as those dealing with the corporation.

Barry v. Merchants' Exch. Co. 1 Sandf. Ch. 280; Thomp. Corp. §§ 3404 et seq.; Morawetz, Priv. Corp. 2d ed. § 781.

The valuation here must fall, if for no other reason than that the master failed to allow for depreciation.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

A public agency, such as a railroad created by public authority, vested with governmental authority, may not continuously increase its rates in proportion to the increase in its value, either (1) because of betterments which it has made out of income, or (2) because of growth of the property in value, due to the increase in value of the land which the company owns.

Spokane v. Northern P. R. Co. 15 Inters. Com. Rep. 376; Re Advances in Rates, 20 Inters. Com. Rep. 307.

The property is to be valued as though offered by sale by one who desires, but is not obliged, to sell, and bought by one who is under no necessity to do so.

Lewis, Em. Dom. 3d ed. 706; Stinson v. Chicago, St. P. & M. R. Co. 27 Minn. 284, 6 N. W. 784; King v. Minneapolis Union R. Co. 32 Minn. 224, 20 N. W. 135; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

Innumerable state laws have been declared unconstitutional because they applied to subjects within the Federal jurisdiction, and with the same uniformity Federal laws have been overthrown when they applied to subjects of state jurisdiction.

Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government.

Gibbons v. Ogden, 9 Wheat. 194, 6 L. ed. 69; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113.

The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business of the carrier, or the profits derived from it; but it by no means follows that the companies are entitled to earn the same percentage of profit on all classes of freight carried.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

If the power of the state over internal commerce were destroyed, it would leave that commerce free from governmental control.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400.

The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind.

Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67.

Under the interstate commerce act, only arbitrary and wrongful discrimination in interstate rates between localities is prohibited. If the circumstances and condi-

tions affecting the transportation differ, the right to equality of rates ceases.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 284, 47 L. ed. 1055, 23 Sup. Ct. Rep. 687.

A railroad cannot raise the issue of discrimination between localities.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651.

Discrimination under an interstate commerce law cannot be predicated of differences between interstate and intrastate rates; one of the reasons being that obedience to a state law by a carrier cannot be said to be voluntary.

Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 415.

A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful or discriminatory because it may conflict with some rate fixed by a railroad company for interstate traffic. Upon adjustment the latter must yield.

Woodside v. Tonopah & G. R. Co. 184 Fed. 360; Ames v. Union P. R. Co. 64 Fed. 171.

An intrastate rate cannot be fixed by an interstate standard.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 32, 43, 46 L. ed. 416, 419, 423, 22 Sup. Ct. Rep. 277.

No presumption of law that a rate upon a particular commodity is reasonably low exists because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

Conflict between state and Federal authority arises only where the interference of the one with the other is direct.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Missouri P. R. Co. v. Kansas, supra.

An examination of the recent decisions of the Federal courts in other jurisdictions shows that no misunderstanding exists as to the law on this subject as it has been heretofore laid down by this court.

Louisville & N. R. Co. v. Siler, 186 Fed. 176; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Southern P. Co. v. Campbell, 189 Fed. 182; Woodside v. Tonopah & G. R. Co. 184 Fed. 360.

When the judgment of the legislative branch of the government has been exercised, and rates have been prescribed which afford a return upon the property over and above the cost of operation and the payment of fixed charges and taxes, it is to be presumed that such is the return the law-making power intended. May the courts, under the due-process and equal-protection-of-the-law provisions of the 14th amendment, substitute their judgment for that of the law-making power, as to whether the return so fixed is reasonable or not? If they may, why continue to call the rate-making power a legislative one?

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Louisville & N. R. Co. v. Siler, 186 Fed. 189; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 161, 162, 24 L. ed. 94, 95; Dow v. Beidelman, 125 U. S. 680, 687, 31 L. ed. 841, 843, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

In the regulation of railroad rates under the police power of a state, no "taking" of the property, in the constitutional sense, is contemplated.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Mugler v. Kansas, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 571, 38 L. ed. 269, 272, 274, 14 Sup. Ct. Rep. 437; Gibson v. United States, 166 U. S. 269, 271, 276, 41 L. ed. 996, 1000, 1002, 17 Sup. Ct. Rep. 578; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Union Bridge Co. v. United States, 204 U. S. 364, 385, 387, 400, 51 L. ed. 523, 534, 539, 27 Sup. Ct. Rep. 367.

Inasmuch as railroads are performing a function of the state, the rights of a railroad are to be determined by the same rules which would apply to the state, had it performed its functions itself.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The court improperly apportioned between passenger and freight and between interstate and intrastate business in each, the "reproduction cost" taken, though improperly, as the basis upon which to predicate rates.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 176, 44 L. ed. 417, 421, 20 Sup. Ct. Rep. 336.

There was evidence from which many different rules could have been formulated, and the one arbitrarily adopted by the master is the one most unfair to the state. It is clearly indefensible because of its inherent unreasonableness, and because it gives results that are demonstrably false.

Knoxville v. Knoxville Water Co. 212 U.

S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148.

The practice of making improvements from the earnings, and charging them to the operating expenses of the year in which they are made, for the purpose of discrediting rates, was expressly condemned by this court in Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

The court erroneously assigned an excessive proportion of total operating expenses to intrastate business, both freight and passenger.

Northern P. R. Co. v. Keyes, 91 Fed. 47; Southern P. Co. v. Bartine, 170 Fed. 725; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

Messrs. Clifford Thorne, H. T. Clarke, Jr., George A. Henshaw, John Marshall, Royal C. Johnson, P. W. Dougherty, Grant G. Martin, U. G. Powell, J. H. Henderson, Dwight N. Lewis, William D. Williams, W. H. Stutsman, and H. R. Oglesby filed a brief as *amici curiæ*.

Very little serious consideration will be given by anyone to the idea that merely the number of reductions, in itself, will make the orders of the Minnesota authorities unconstitutional. The court has repeatedly held that the states have power to fix whole schedules of rates, each one covering all the passenger or freight rates within the respective states.

Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 8 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

If the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277.

If the power to regulate intrastate rates is not vested in the separate states, where does it lodge?

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 231, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

The internal commerce of the state is exclusively within its control.

Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; Trade Mark Cases, 100 U. S. 82, 96, 25 L. ed. 550, 552; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 543, 26 L. ed. 224, 225; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113.

The national government has sole jurisdiction over cases involving the reasonableness of rates *per se*, and discriminations in rates, on interstate hauls.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The states have sole jurisdiction over cases involving the reasonableness of rates *per se*, and discriminations between rates, on traffic moving between points all of which are in the same state (and moving wholly within that state).

Texas & P. R. Co. v. Railroad Commission, 183 Fed. 1005; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 471–475, 22 L. ed. 678, 683–685; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 569, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 393, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Reagan v. Mercantile Trust Co. 154 U. S. 413, 417, 38 L. ed. 1028, 1030, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

The removal of discriminations between two rates, one of which is on an intrastate haul, and the other on an interstate haul, is not subject to state regulation.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518, 519, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95.

The interstate commerce act specifically limits its own applications to interstate rates, and alleged discriminations between state and interstate rates have been held not to come under the provision of the act.

Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 415.

Involuntary discriminations are not covered by the act to regulate commerce.

Re Freight Rates, 11 Inters. Com. Rep. 180.

If it be found that the proposed Minnesota rates, in and of themselves, are reasonable, it removes the necessity to consider the reasonableness of the interstate rates.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Indianapolis Freight Bureau v. Cleveland, C. C. & St. L. R. Co. 15 Inters. Com. Rep. 513; Montgomery Freight Bureau v. Louisville & N. R. Co. 17 Inters. Com. Rep. 529; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 443–445, 55 L. ed. 283, 286, 287, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 109, 54 L. ed. 112, 115, 30 Sup. Ct. Rep. 66; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 443, 444, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The definite question as to what kind of regulations directly affect interstate commerce has been a pivotal issue in many cases.

Gibbons v. Ogden, 9 Wheat, 194, 6 L. ed. 69; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Kidd v. Pearson, 128 U. S. 1, 17, 32 L. ed. 346, 349, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, 284, 54 L. ed. 472, 481, 482, 30 Sup. Ct. Rep. 330; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; State Tax on R. Gross Receipts, 15 Wall. 284, 21 L. ed. 164; The Winnebago, 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

The effect of state rates upon interstate rates, because of competition between localities, has frequently been in issue, and during the entire history of rate regulation it has never been held by this court to constitute a direct burden upon interstate commerce.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95.

During the past year or so the issue of interference with interstate commerce has been presented in the Federal courts, involving intrastate rates in the states of Kentucky (Louisville & N. R. Co. v. Siler, 186 Fed. 176); Arkansas (St. Louis Southwestern R. Co. v. Allen, 187 Fed. 290); Missouri (St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317); Oregon (Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Southern P. Co. v. Campbell, 189 Fed. 182); Nevada (Woodside v. Tonopah & G. R. Co. 184 Fed. 358), and Iowa (Wells, F. & Co. v. Palmer, decided Sept. 6, 1911). In every one of these cases the decision has been against the doctrine adopted by Judge Sanborn.

The state could build its own railroads if it wanted to, and haul goods at cost within the state, and injure, to a certain extent, every point on the border of the state. That is the concern of the state. No man can deny this right so long as our present Federal system of government prevails.

Baltimore & O. R. Co. v. Maryland, 21 Wall. 457, 471, 22 L. ed. 678, 683.

Should it ever be proven in any given case that a state has reduced its interior rates with the deliberate purpose of injuring a neighboring state, then it will be ample time for the courts to interfere. The good faith of the state is an important consideration in the case at bar. No one has suggested the possibility of such a motive upon the part of Minnesota. When such a case arises, the courts will act, as was suggested under other circumstances, when it could be shown that a city or state sought to reduce rates for sinister purposes, in order to lower values, with the object of purchasing the plant.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 443, 47 L. ed. 892, 895, 23 Sup. Ct. Rep. 571; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 438, 47 L. ed. 887, 891, 23 Sup. Ct. Rep. 531.

The companies may for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion.

Ames v. Union P. R. Co. 64 Fed. 172.

In numerous cases brought before the Federal Commission, the Commission has found it necessary to adjust the rates without regard to this relatively equal mileage progression, which the master finds must be

followed in the cases at bar, or failing so to do, unjust discrimination in fact exists.

Johnson v. Chicago, St. P. M. & O. R. Co. 9 Inters. Com. Rep. 221.

There exists no presumption of law that rates are reasonably low simply because they have been duly published by a carrier.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

The fact that removal of a discrimination against a given locality would cause disturbance of rates at other points would be of little weight.

Montgomery Freight Bureau v. Louisville & N. R. Co. 17 Inters. Com. Rep. 529.

Where a legislative tribunal is admittedly acting within its general statutory powers, the court will consider the entire record *de novo* only for the purpose of finding if there is any evidence,—first, that fraud existed in the actions of the legislative tribunal; second, that improper methods of investigation were pursued; third, that the said tribunal based its conclusions upon principles which are so fundamentally wrong that a fair-minded body of men could not have reached the same conclusion.

Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 596, 41 L. ed. 566, 17 Sup. Ct. Rep. 198; Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; Pensacola & A. R. Co. v. State, 25 Fla. 310, 2 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; Chicago St. P. M. & O. R. Co. v. Becker, 35 Fed. 883; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Minneapolis Eastern R. Co. v. Minnesota, 134 U. S. 467, 33 L. ed. 985, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473; St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857, affirming 2 N. D. 482, 52 N. W 408; Re Annon, 50 Hun, 413, 2 N. Y. Supp 275, affirmed in 117 N. Y. 1, 5 L.R.A. 559, 26 N. Y. S. R. 554, 15 Am. St. Rep. 460, 22 N. E. 670; Chicago, B. & Q. R. Co. v Iowa, (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99, Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028, affirming 49 Ark. 325, 5 S. W. 297; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752, Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; Parker v. Metropolitan R. Co. 109 Mass. 506; State v. Edwards, 86 Me. 102, 25 L.R.A. 504, 41 Am. St. Rep. 528, 29 N. E. 947; West v. Rawson, 40 W. Va. 480, 21 S. E. 1019; American Coal Co. v. Consolidation Coal Co. 46 Md. 15; Tilley v. Savannah, F. & W. R. Co. 4 Woods, 449, 5 Fed. 641; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99; Winchester & L. Turnp. Road Co. v. Croxton, 98 Ky. 739, 33 L.R.A. 177, 34 S. W. 518; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; Purdy v. Erie R. Co. 162 N. Y. 42, 48 L.R.A. 669, 56 N. E. 508; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Stone v. Wisconsin, 94 U. S. 180, 24 L. ed. 102; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636, 27 Sup. Ct. Rep. 326; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Interstate Com-

merce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 26, 45 L. ed. 719, 728, 21 Sup. Ct. Rep. 516; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 443, 444, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

The burden of showing the cost of the business falls upon the railroad company, in a judicial hearing, before rates fixed by legislative authority can be disturbed.

Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900, affirming 80 Minn. 191, 89 Am. St. Rep. 514, 83 N. W. 60.

Evidence as to the confiscatory character of rates must be so clear and convincing as to remove all doubt. It must be full and persuasive, and the burden must be taken and borne by the railroad complaining.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 346, 36 L. ed. 176, 180, 12 Sup. Ct. Rep. 400.

The rate of extra cost for local business should not be applied to all expenses.

Northern P. R. Co. v. Keyes, 91 Fed. 47.

The capitalization of our railroads is not representative of their value.

Re Advances in Rates, 20 Inters. Com. Rep. 307.

What rate does the investing public accept for its money? is a question that should be determined upon evidence.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 48, 53 L. ed. 382, 398, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

Some decisions indicate that judicial notice will be taken of the facts as to what constitutes a reasonable rate of return.

Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; New Haven Trust Co. v. Doherty, 74 Conn. 468, 51 Atl. 130; Collins v. Wardell, 63 N. J. Eq. 371, 52 Atl. 708; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Dividing earnings on the mile *pro rata* basis is unjust to the people of Minnesota, and is not founded either upon reason or upon the custom of these carriers, whether it is in allocating their own earnings, or in dividing earnings between carriers, the division being made in the latter case by voluntary contract between the said carriers.

Acme Cement & Plaster Co. v. Chicago & N. W. R. Co. 18 Inters. Com. Rep. 105.

The entire theory for the separation of values upon the revenue basis is unlawful, and has been repudiated by this court.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

The lower court erred by including in the value entitled to a return, many factors which should have been excluded.

Spokane v. Northern P. R. Co. 15 Inters. Com. Rep. 376; Willcox v. Consolidated Gas Co. 212 U. S. 19, 52, 53 L. ed. 382, 399, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Re Advances in Rates, 20 Inters. Com. Rep. 307; Mayhew v. Kings County Lighting Co. N. Y. Pub. Service Commission Oct. 20, 1911; State Journal Ptg. Co. v. Madison Gas & Electric Co. 4 Wis. Railroad Com. Reports 554; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 138 Am. St. Rep. 299, 120 N. W. 966.

The whole trend of decisions in the state and national tribunals has been to modify reproduction cost by other important elements. The actual bona fide investment has been repeatedly considered one of the controlling factors.

Dow v. Beidelman, 125 U. S. 680, 690, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; San Diego Water Co. v. San Diego, 118 Cal. 566, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 216, 48 L. ed. 406, 414, 24 Sup. Ct. Rep. 241; Re Advances in Rates, 20 Inters. Com. Rep. 307; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493.

The lower court made a fatal error in

taking cost of reproduction now, without allowing for depreciation, as the basis for its calculations.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

The public is entitled to demand that the weak line shall charge only such rates as will be adequate for the propertly organized company operating the well-built property, where properly needed.

Re Advances in Rates, 20 Inters. Com. Rep. 307.

Mr. Edmund S. Durment also filed a brief as *amicus curiæ:*

In order to hold that the enforcement of the rates would result in the taking of property, the court must hold that the right or opportunity to earn profits is property, within the meaning of the 14th Amendment, which it clearly is not. If the right or opportunity to earn profits be property, then logically it would seem the right or opportunity to earn 50 per cent profit is properly within the protection of the Constitution, just as much as is the right or opportunity to earn 7 per cent profit. Yet no one will claim that the right or opportunity to make 50 per cent profit may not constitutionally be curtailed, for if it cannot be, then neither state nor Federal government can fix railroad rates at all. The courts have said repeatedly it is not necessary to the validity of rates made by legislative authority that they shall afford a profit; that they ought to afford a profit, but under some circumstances and conditions they will be valid though they afford no profit.

The question of the amount of profits does not enter into the determination of the question whether the rates contravene the provision of the United States Constitution as to taking property. The question of the amount of profit may be considered and have a bearing in determining whether the state, in prescribing the rates in question, has exceeded the limitation of "reasonableness," which restricts the exercise of the police power, but not in determining whether property has been taken. This is not "a distinction without a difference," but is an important, and, in the cases now under consideration, may be a vital, distinction. The Constitutional provision is general, and contains no exceptions, and it is inconceivable that the courts may say that in some rate cases the right or opportunity to earn profits is property, entitled to protection of the Constitution, and in others it is not.

This court, prior to this time, may not have been called upon, in a case involving the validity of rates fixed for public service corporations by legislative authority, to consider and determine whether the right or opportunity to employ property at a profit is property protected by the 14th Amendment, nor to note the distinction between "taking property" and enforcing unreasonable rates. Very generally in the cases before this court, either a loss was shown or a profit so large as to make it unnecessary to consider the matter. In the few cases in which a profit so small was shown as fairly might call for consideration of the question, the cases were disposed of on other grounds. In some instances the cases were before the court for decision not only on the provision of the United States Constitution, but also a provision of the state constitution or state statute, which in terms confined the state authorities to prescribing reasonable rates, and left the question of their reasonableness to be determined, as a fact, by the court, in case of controversy; and in the consideration of these cases counsel and court merged the question of reasonableness under the state law and the question arising under the United States Constitution, and disposed of them as one proposition. For instance this was the situation in Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, and in Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

All this has led to some confusion, and frequently courts and lawyers have assumed that rates which will not afford a profitable return necessarily are unreasonable, and that if unreasonable they necessarily contravene the 14th Amendment, but this court has never so held, nor has it even said that such is the rule, but it has said to the contrary more than once.

In Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, the necessity of a profit was assumed, and all this court really held was that a return which would afford a 6 per cent profit on the value was not confiscatory.

In Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148, on the like assumption, the court declined to say whether a return of 4 per cent profit would be confiscatory, it not being necessary to determine that in order to dispose of the appeal.

In Reagan v. Farmers' Loan & T. Co., supra, this court said: "We do not wish to be understood as laying down, as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable."

In Covington & L. Turnp. Road Co. v.

Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, this court said: "It is proper to say that if the answer had not alleged in substance that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than 4 per cent on its capital stock. . . . The legislature has authority, in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens on the public."

In Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, the court referred to and approved what was said on this point in Covington & L. Turnp. Road Co. v. Sandford, supra.

In Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, the opinion rendered by this court makes it plain that up to that time (according to the understanding of the court) it had not held that a profitable return would be necessary to avoid the charge of confiscation; and there has been no later decision in this court holding that profit is necessary to the constitutional validity of legislative-made rates.

The opinion in a late case, Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 648, in the circuit from which these appeals come, in which Judges Van Devanter, Hook, and Adams sat, says: "To be just and reasonable within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered, and for the value of the property therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within reasonable limits, or where, for any reason, its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier, as would be the case if it were engaged in any other line of business." In his opinion in the cases now here on appeal (184 Fed. Rep. 801), Judge Sanborn apparently concedes the proposition to be true, for he says: "It is, however, beyond the power of a state or its officers to establish or maintain fares and rates, the effect of the enforcement of which is equivalent to the taking of the property of public-service corporations for public use without compensation, unless justice to the public requires such confiscation."

The courts—at least this Supreme Court—have gone no further than to declare that the rates must be fair and reasonable to the public and to the railroads, if they can be fair and reasonable to both; but fair and reasonable to the public they must be in any event.

It seems clear that so long as a substantial net profit is shown, no question of conflict with the 14th Amendment is raised, because in such case no property is taken; that in such case we have simply the question whether the legislature has exceeded the limitation which the nature and purposes of the police power have fixed for the exercise of that power; that consequently these cases are to be determined according to the principles so clearly stated in —.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Bedford v. United States, 192 U. S. 224, 48 L. ed. 417, 24 Sup. Ct. Rep. 238; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The master and the circuit judge, in rendering the decisions in these suits, denied the appellants the benefit and protection of the presumption of the validity of the rates in question and the rule requiring their invalidity to be clearly shown, which the law accords them.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Mr. Charles W. Bunn argued the cause and filed a brief for appellees:

The first purpose of the commerce clause in the Federal Constitution was to put an end to discriminatory legislation of the states against the people and commerce of

other states, which before the Constitution had been too common.

Gibbons v. Ogden, 9 Wheat. 197, 6 L. ed. 70; Passenger Cases, 7 How. 283, 12 L. ed. 702; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Brown v. Maryland, 12 Wheat. 446, 6 L. ed. 688; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 519, 52 L. ed. 297, 317, 28 Sup. Ct. Rep. 141.

The commerce power being granted to the United States to prevent the evils stated, familiar decisions have established that the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

Gibbons v. Ogden, 9 Wheat. 197, 6 L. ed. 70; Lottery Case (Champion v. Ames) 188 U. S. 321, 347, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Reliance Textile & Dye Works v. Southern R. Co. 13 Inters. Com. Rep. 53.

The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge.

Re Rahrer, 140 U. S. 545, 562, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865; Lottery Case (Champion v. Ames) 188 U. S. 321, 358, 47 L. ed. 492, 502, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

Coming first to consider what has been decided touching the commerce power, it is naturally found that, as in the beginning there was little commerce by land among the states, Congress undertook first the regulation of commerce by water. In the License Cases, 5 How. 504, 12 L. ed. 256, decided in 1847, it apparently was assumed that the states had the power to regulate interstate commerce in so far as Congress had not acted, but in 1851 the case of Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996, laid down the rule that state power was limited to such matters as did not admit of uniform regulation; and that as to all matters of interstate commerce susceptible of uniform regulation the non-action of Congress indicated its intention that commerce among the states should be unregulated and free.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Congress has exercised an exclusive power over the national waterways, even those lying wholly within a state, and an exclusive power over the vessels plying on those waterways, even those vessels engaged wholly in local commerce or not carrying any commerce.

The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; The Jackson v. The Magnolia, 20 How. 296, 15 L. ed. 909; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Wisconsin v. Duluth, 96 U. S. 379, 387, 24 L. ed. 668, 671; Re Oyster Police Steamers, 31 Fed. 763; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; White's Bank v. Smith (White's Bank v. The Robert Emmett) 7 Wall. 646, 19 L. ed. 211; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 577, 22 L. ed. 654, 662; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; The Hazel Kirke, 23 Blatchf. 292, 25 Fed. 601.

We know of no principle on which it can be maintained, nor of any opinion of this court upon which it can now be contended, that the power of Congress derived from the commerce clause is less extensive or less potent over land commerce than over that carried on by water.

The Daniel Ball, 10 Wall. 565, 19 L. ed. 1002; Monongahela Nav. Co. v. United States, 148 U. S. 312, 341, 37 L. ed. 463, 473, 13 Sup. Ct. Rep. 622; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Gibbons v. Ogden, 9 Wheat. 197, 6 L. ed. 70; North River S. B. Co. v. Livingston, 3 Cow. 713; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

A state may not, in any form or under any guise, directly burden the prosecution of interstate business."

M'Culloch v. Maryland, 4 Wheat. 426, 4 L. ed. 606; Gibbons v. Ogden, 9 Wheat. 204, 6 L. ed. 72; International Text Book Co. v. Pigg, 217 U. S. 91, 112, 54 L. ed. 678, 687, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Atlantic Coast Line R. Co. Wharton, 207 U. S. 334, 52 L. ed. 234, 28 Sup. Ct. Rep. 121; Asbell v. Kansas, 209 U. S. 254, 52 L. ed. 780, 28 Sup.

Ct. Rep. 485, 14 Ann. Cas. 1101; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312.

The powers of Congress extend incidentally over the internal affairs of the states, and control state powers and state action, so far as may be necessary to execute, at all times and under all conditions, every authority vested in Congress by the Constitution.

United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004; Re Arkansas R. Rates, 163 Fed. 141.

The power of Congress is paramount, and where its exercise collides with what otherwise would be a lawful exertion of state power, the latter must give way.

M'Culloch v. Maryland, 4 Wheat. 405, 406, 426, 4 L. ed. 601, 606; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Northern Securities Co. v. United States, 193 U. S. 332, 333, 335, 336, 347, 48 L. ed. 698-700, 704, 24 Sup. Ct. Rep. 436; Gibbons v. Ogden, 9 Wheat. 195, 209, 6 L. ed. 69, 73; License Cases, 5 How. 504, 505, 12 L. ed. 256, 257; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed 878, 31 Sup. Ct. Rep. 621; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

Commerce among the states in the constitutional sense includes the carriers engaged in interstate commerce, and all the cars and other instrumentalities by which it is carried on.

Pennsylvania R. Co. v. Interstate Commerce Commission, 193 Fed. 81; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 473, 474, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155.

Any state action, police or otherwise, is inoperative if it directly regulates commerce among the states, or if it directly interferes with regulation of that commerce by Congress or under its authority.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 36, 46 L. ed. 416, 420, 22 Sup. Ct. Rep. 277; Louisville & N. R. Co. v. Siler, 186 Fed. 199.

Certainly it cannot be maintained that Congress is devested of control over interstate commerce, or that its control over such commerce is in the least restricted, because its regulation of that commerce may incidentally affect matters otherwise wholly within the control of the states. The court did not hesitate to dissolve the Northern Securities Company because its decree operated upon local commerce within states to the extent that the Northern Pacific and Great Northern were engaged in local commerce; and Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276, shows that the court will not hesitate to enjoin a violation of the trust law, notwithstanding local commerce is affected. The decree which the court rendered in New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272, could not be executed without necessary and considerable effect upon local commerce within states. So the commodities clause decision has made it necessary for railways to divorce themselves from mining operations, this divorce incidentally but necessarily extending to coal shipped locally within the states. The forced reorganization of the Standard Oil Company and of the American Tobacco Company cannot but affect greatly local commerce within the states; but that is no objection to the decrees against those corporations.

Congress has a right to act on commerce local within the states, to the extent that such action is necessary to complete, exclusive, and effective control of interstate and foreign commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Munn v. Illinois, 94 U. S. 113, 135, 24 L. ed. 77, 87; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 163, 24 L. ed. 94, 95; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 177, 24 L. ed. 97, 98; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 325, 29 L. ed. 636, 642, 6 Sup. Ct. Rep. 334, 388, 1191; Smyth v. Ames, 169 U. S. 466, 523, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 179, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47.

To the extent that the Granger Cases sustained the power of the state to fix that part of an interstate rate within its borders they were overruled in Wabash St. L. & P. R. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, where the court said that in the Granger Cases the validity of the state legislation, as against the objection that it operated upon interstate commerce, received no elaborate consideration either by the court or counsel. But the case of Munn and those decided with it, and the case of Stone v. Farmers' Loan & T. Co., show that the court never intended to extend those decisions to cases involving the essential differentiating facts we have her, *viz.* (a) action instead of nonaction by Congress; (b) proof in the record that the state legislation in point of fact does operate directly and necessarily upon commerce among the states.

The case of Wabash St. L. & P. R. Co. v.

Illinois, supra, overrules the intimation in Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678, that a state, "unchallenged and unchallengeably," might fix the charge for transportation of freight and passengers between Baltimore and Washington.

The decisions in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232, and Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280, are most emphatic announcements that state regulation, even though confined in terms to local commerce within its borders, is void if in fact it trammels or burdens interstate commerce, and that the power of local regulation in the states is subordinate to and must yield to the paramount power of Congress over commerce among the states.

The Minnesota situation is not the only one where the government and its laws are prostrated by the exercise of local authority.

Re Freight Rates, 11 Inters. Com. Rep. 209; Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 415; Meredith v. St. Louis Southwestern R. Co.

The closer one comes to a true appreciation of the problems of railway regulation, the more apparent it becomes that a railway is a unit; that it can no more be divided by state lines than by county lines; that it is absurd and impossible to attempt its regulation in parcels; and that to do so is to attempt to compel it to serve not two, but many, masters, which no man can do.

Every view of the subject leads towards this conclusion, as—(a) The interstate and local business are moved at the same time, on the same rails, with the same employees and power, and largely in the same trains and cars. They are inextricably intermingled.

(b) The same right of way, station grounds, terminals, rails, bridges, and stations are provided for both local and interstate traffic; and the proportion of each sort of business handled with this plant varies from year to year and from day to day. No division of the plant, no apportionment of it between interstate and local traffic, can be made today which will hold tomorrow.

(c) Terminals, facilities, and connections in one state pertain directly to and aid the carrier's whole business, and are an element of value to the whole line and to its business in other states. Missouri, K. & T. R. Co. v. Love, 177 Fed. 493.

*(d)* The bonds and stocks issued are against the whole line, and cannot be divided by states.

(e) Tariffs are and must be made with a view to all the traffic, and should be fair, as between through and short-haul business, as between short-haul business on different sections of the railway, and as between different kinds of freight. No regulation of rates can be just which cannot take into view the whole field, for change of a rate in one state may and commonly must affect similar rates in other states, and similar rates between states.

(f) A large part, generally half, of railway expenses are for the common benefit of all kinds of traffic, passenger and freight, and interstate and local. Maintenance of the plant and equipment and the whole expense of superintendence, such as salaries of officers, operating and traffic employees, counsel, accountants, and engineers, pertain to the whole business, and are incapable of any division except on some arbitrary basis. To divide as between passenger and freight business some arbitrary basis must be adopted for half the total operating expenses, and to divide between state and interstate an arbitrary basis must be adopted for all the expenses. Efforts have been made to divide expenses, first as between passenger and freight, next as between interstate and local traffic. But no basis can be found that is not open to objection. See Missouri, K. & T. R. Co. v. Love, supra.

Mr. Pierce Butler also argued the cause, and, with Messrs. Jared How, Hale Holden, and William D. Mitchell, filed a brief for appellees:

Congress had full and exclusive power to regulate commerce among the states.

Gibbons v. Ogden, 9 Wheat. 186, 6 L. ed. 68; Groves v. Slaughter, 15 Pet. 449, 10 L. ed. 800; Brown v. Maryland, 12 Wheat. 438, 6 L. ed. 685; State Freight Tax Case (Philadelphia & R. R. Co. v. Pennsylvania) 15 Wall. 232, 21 L. ed. 146; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101.

This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

Gibbons v. Ogden, 9 Wheat. 186, 6 L. ed. 68; Northern Securities Co. v. United States, 193 U. S. 335, 48 L. ed. 699, 24 Sup. Ct. Rep. 436; Louisville & N. R. Co. v. Mottley, 219 U. S. 480, 55 L. ed. 302, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265.

Nonaction by Congress in execution of this power is tantamount to a declaration by it that commerce among the states shall be

free and without trammels excepting those imposed by the common law.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 5 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Northern Securities Co. v. United States, 193 U. S. 335, 48 L. ed. 699, 24 Sup. Ct. Rep. 436.

The right to carry on interstate commerce is guaranteed by the Constitution and laws of the United States, and is subject only to regulation by Congress.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 37, 54 L. ed. 370, 30 Sup. Ct. Rep. 190; International Text Book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103.

The validity of a law of a state claimed to be in violation of the Constitution of the United States is to be determined from its necessary operation and effect, and not from its expressed purpose or scope.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Western U. Teleg. Co. v. Kansas, 216 U. S. 37, 54 L. ed. 370, 30 Sup. Ct. Rep. 190.

Any law of a state is unconstitutional and void if by its necessary operation and effect (1) it substantially and directly regulates interstate commerce; (2) or if it destroys or substantially burdens the right of those covered by it to carry on interstate commerce subject only to regulation by Congress, or directly burdens the prosecution of interstate business.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 37, 54 L. ed. 370, 30 Sup. Ct. Rep. 190; International Text Book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103.

The act to regulate commerce is the supreme law of the land as to all matters covered by it; and any law of a state which substantially interferes with it, or hampers its enforcement, is void.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Gibbons v. Ogden, 9 Wheat. 186, 6 L. ed. 68; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Northern Securities Co. v. United States, 193 U. S. 335, 48 L. ed. 699, 24 Sup. Ct. Rep. 436.

If Congress had never exercised its power of regulation of carriers given to it by the commerce clause of the Constitution, any law of a state, the operation and effect of which would necessarily have been to discriminate against interstate commerce of carriers, or to compel carriers to regulate their interstate business with reference to the provisions of such law, would have been void, and void by virtue of the Constitution.

West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Haskell v. Cowham, 109 C. C. A. 235, 187 Fed. 403.

Congress may not except from the grant of power as contained in the Constitution, any exercise of that power comprehended within the grant, or any means of the enforcement of that power, necessary to the preservation of the power itself.

Cooley v. Port Wardens, 12 How. 313, 13 L. ed. 1004; Gunn v. Barry, 15 Wall. 623, 21 L. ed. 215.

The act to regulate commerce should not receive a construction out of harmony with the design of the grant of the power in execution of which the act was passed.

Smith v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

Any construction of the proviso in the act to regulate commerce, which is inconsistent with the design of the body of the act, or which will by its effect impair, or interfere with the exercise of, the power granted by the Constitution of the United States to the national government, is wholly inadmissible.

Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; United States v. Dickson, 15 Pet. 141, 10 L. ed. 689; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The very invoking of the supposed principle that, if a reasonable state schedule causes discrimination against interstate rates, it must be because the established interstate rates are unreasonable, calls upon the court to determine, in the first instance, that lawfully established interstate rates are unreasonable; and this it has not power to do.

Texas & P. R. Co. v. Abilene Cotton Oil Co. supra.

Railroad corporations are persons within the 14th Amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Minneapolis & St. L. R. Co. v.

Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 391, 35 L. ed. 1053, 12 Sup. Ct. Rep. 255; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151, 154, 41 L. ed. 667, 668, 17 Sup. Ct. Rep. 255; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 399, 410, 38 L. ed. 1014, 1024, 1027, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 522, 42 L. ed. 840, 18 Sup. Ct. Rep. 418.

Railroad property is private property, subject to public use under just regulations.

Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & S. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers Loan & T. Co. 154 U. S. 362, 399, 410, 38 L. ed. 1014, 1024, 1027, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Interstate Commerce Commission v. Chicago, G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

The present value of the whole property, from whatsoever source derived, is located in the ownership of the corporation, and assessed against it for taxation.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; State Railroad Tax Cases, 92 U. S. 602, 605, 23 L. ed. 669, 670; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 36, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305; Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 456; Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. Rep. 242.

Railroad property is subject to condemnation for higher public necessity, equally and upon the same rules for payment of just compensation as other private property.

Reagan v. Farmer's Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ames v. Union P. R. Co. 64 Fed. 165.

The hazards affecting railroad property inhere in the fact that while in a measure it performs a function of the state, there is no guaranty against loss. If the investment was unwise, or causes arise that impair it or its earning power, the property must nevertheless be renewed and continuously operated in the public service. If through failure in the volume of traffic, the building of parallel and competing roads, or inability at rates just to the public to produce an adequate income, the enterprise becomes unsuccessful, its value is impaired, and to that extent the property is lost.

Reagan v. Farmers' Loan & T. Co. supra.

Public grants of land to railroad companies in Minnesota constitute contracts based upon valuable considerations, namely, the undertaking to construct and operate, and the inducement to capital to embark upon what otherwise probably would be for a long period of years, an unprofitable undertaking.

First Div. St. Paul & P. R. Co. v. Parcher, 14 Minn. 297, Gil. 224; St. Paul v. St. Paul & S. C. R. Co. 23 Minn. 469; State v. Winona & St. P. R. Co. 21 Minn. 472; Minneapolis & St. L. R. Co. v. Koerner, 85 Minn. 149, 88 N. W. 430; Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671.

Income derived from the public through rates charged for services rendered belongs to the owners of the property. Under laws requiring publication of charges, the amounts thereof must be collected and are prima facie reasonable. Such amount as remains after payment of all expenses and fixed charges is subject to distribution, and, if in whole or in part, it is retained and reinvested in improvements or additional property for public service, the value thus created and the use of it is property no less protected from public appropriation without just reward than those parts of the property to which it has been applied or added.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Brymer v. Butler Water Co. 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249.

Laws or orders made by public authority, establishing rates for the transportation of persons or property, that will not admit of a railroad company earning such compensation as under all the circumstances is just to it and to the public, deprive such company of its property without due process of law, and deny to it the equal protection of the laws.

Reagan v. Farmers' Loan & T. Co. supra.

There must be a fair return upon the reasonable value of the property at the time it is being used for the public, unless (in exceptional cases) the enforcement of rates necessary for that purpose would be unjust to the public.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148;

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Shepard v. Northern P. R. Co. 184 Fed. 765; Consolidated Gas Co. v. New York, 157 Fed. 849.

The original cost of the property, as well as the outstanding capital in stocks and bonds, while admissible in evidence, are matters for consideration only in so far as in the particular case they are competent evidence of present value.

Smyth v. Ames, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804, 74 Fed. 83; San Diego Land & Town Co. v. Jasper, 189 U. S. 442, 47 L. ed. 894, 23 Sup. Ct. Rep. 571, 110 Fed. 702; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Matthews v. Corporation Comrs. 106 Fed. 7; Shepard v. Northern P. R. Co. 184 Fed. 765; Consolidated Gas Co. v. New York, 157 Fed. 849; Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. Rep. 242.

In cases involving an apportionment of values between states for purposes of taxation, it has been uniformly held that terminals in one state of enormous value usually present an exception to the ordinary rule that permits for such purposes a mileage proportion of an entire line to be assigned to the state.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 431, 38 L. ed. 1031, 1038, 14 Sup. Ct. Rep. 1114.

It may be stated as a rule in every case where the property has been efficiently located, constructed, and maintained, and results of operation as a whole show volume of traffic and earnings sufficient to support the property, pay reasonable dividends, and leave something in addition, that the true value is in excess of the mere cost of reproduction of the physical or tangible property.

Smyth v. Ames, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 456; Consolidated Gas Co. v. New York, 157 Fed. 849; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Southern P. Co. v. Bartine, 170 Fed. 725; Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 683; Spring Valley Waterworks v. San Francisco, 124 Fed. 574; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 55 Atl. 537, Re Proposed Advances in Freight Rates, 9 Inters. Com. Rep. 402; Ames v. Union P. R. Co. 64 Fed. 165; Cotting v. Kansas City Stock-Yards Co. 82 Fed. 850, 183 U. S. 79, 81, 46 L. ed. 92, 93, 22 Sup. Ct. Rep. 30.

The market value of land at the present time, measured by the uses to which it is plainly adapted, is the surest guide to present value.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 250, 41 L. ed. 979, 989, 17 Sup. Ct. Rep. 581; 2 Lewis, Em. Dom. 3d ed. § 706, p. 1234; 10 Am. & Eng. Enc. Law, 1152; Goodin v. Cincinnati & W. Canal Co. 18 Ohio St. 182, 98 Am. Dec. 95; Reagan v. Farmers' Loan & T. Co. 154 U. S. 410, 38 L. ed. 1027, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ames v. Union P. R. Co. 64 Fed. 165; San Diego Land & Town Co. v. National City, 74 Fed. 79.

A fair rate, usually the prevailing rate of interest upon the money invested in the plant during construction and before completion, is as much a part of the cost of construction as is the money itself which is expended for materials and labor.

Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 55 Atl. 537.

Increase in value may be termed appreciation, but it is by no means limited to the adaptation and solidification of roadbed and foundations. It arises in every instance from the connected operation of the property as a whole. An efficient organization is necessary to manage the property, and when acquired adds value to it. These various elements of value arise from the use and ability to use all of the separate items of physical property as a single and efficient agency for serving the public. It inheres in the physical property as one of the intangible values in the business as a going concern.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 219, 41 L. ed. 965, 977, 17 Sup. Ct. Rep. 604; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 444, 38 L. ed. 1041, 1045, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493.

The methods followed by the master for the determination of the cost of the intrastate business are essentially the same as those approved by the Supreme Court and other Federal courts.

Ames v. Union P. R. Co. 64 Fed. 184; Smyth v. Ames, 169 U. S. 466, 529, 42 L. ed. 819, 843, 18 Sup. Ct. Rep. 418; Northern P. R. Co. v. Keyes, 91 Fed. 47; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 177, 44 L. ed. 417, 422, 20 Sup. Ct. Rep. 336; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 262, 46 L. ed. 1151, 1155, 22 Sup. Ct. Rep. 900; Re Arkansas R. Rates, 163 Fed. 142; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 318; Missouri, K. & T. R. Co. v. Love, 177 Fed. 499; St. Louis, Southwestern R. Co. v. Allen, 187 Fed. 290.

Interstate rates do not affect the reasonableness of intrastate rates.

Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418.

All courts have adopted the revenue basis for the apportionment of total value to the different classes of business.

Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 321; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317; Re Arkansas R. Rates, 163 Fed. 141; Northern P. R. Co. v. Keyes, 91 Fed. 47; Chicago, M. & St. P. R. Co. v. Tompkins, 90 Fed. 363; Ames v. Union P. R. Co. 64 Fed. 165.

Revenue measures the value of the use of property, and is therefore a good factor for apportionment of such value to the different classes of business.

Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 328; Ames v. Union P. R. Co. 64 Fed. 165; Missouri, K. & T. R. Co. v. Love, 177 Fed. 497; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317.

The power of the state to regulate rates and service, subject to the limitations fixed by the Federal Constitution, exists for the protection of the public interest that the service be efficient and the rates reasonable. It is not by any means the equivalent of ownership. The power to regulate cannot be used to usurp the control or management of private property, or to dictate the business policy of its owners to any extent whatsoever beyond that necessary to insure equality and efficiency of service, and equal and reasonable charges.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 118, 119, 52 L. ed. 705, 712, 713, 28 Sup. Ct. Rep. 493.

The taking of the use of property is the taking of property, and confiscation in violation of the 14th Amendment. The value which has come to these properties in course of time by the development of the territory in communities served by them is their property just as much and in every sense, as is the property purchased by moneys received for bonds or on stock subscriptions, or the private property of any individual.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Railways are entitled to more than 7 per cent upon the value of the property used in the public service.

Ibid; Ames v. Union P. R. Co. 64 Fed. 165; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A.(N.S.) 108, 68 Atl. 676; Brymer v. Butler Water Co. 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249; Spokane v. Northern P. R. Co. 15 Inters. Com. Rep. 417; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493.

If the complex elements that are necessarily involved in proving the value of a large railroad system and the results of operation, under particular rates,—especially the expenses of classes of business that do not naturally divide themselves,—mathematical exactness cannot in every instance be reached; nor is it in any way necessary for the determination of the rights of the parties,—at least in either of the cases now under consideration.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

Mr W. P. Clough filed a brief in behalf of the Northern Pacific Railway Company and the Great Northern Railway Company.

Mr. Justice Hughes delivered the opinion of the court:

These suits were brought by stockholders of the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis & St. Louis Railroad Company, respectively, to restrain the enforcement of two orders of the Railroad & Warehouse Commission of the state of Minnesota, and two acts of the legislature of that state, prescribing maximum charges for transportation of freight and passengers, and to prevent the adoption or maintenance of these rates by the railroad companies. In addition to the companies, the attorney general of the state, the members of the Railroad & Warehouse Commission, and also, in the cases of the Northern Pacific and Great Northern Companies, certain representative shippers, were made defendants.

*The orders and acts, which, by [377 their terms related solely to charges for intrastate transportation, were as follows:

(1) The commission's order of September 6, 1906, effective November 15, 1906, fixing the maximum class rates for general merchandise.

(2) The act approved April 4, 1907, to take effect May 1, 1907, prescribing 2 cents a mile as the maximum fare for passengers, except for those under twelve years of age,

for whom the maximum rate was to be 1 cent a mile. Laws of 1907, chap. 176.

(3) The act approved April 18, 1907, to take effect June 1, 1907, fixing maximum commodity rates for carload lots of specified weights. Laws of 1907, chap. 232.

(4) The commission's order of May 3, 1907, effective June 3, 1907, establishing maximum "in-rates" for designated commodities in carload lots from St. Paul, Minneapolis, Minnesota Transfer, and Duluth to certain distributing centers. No complaint is made of this order in the case of the Minneapolis & St. Louis Railroad Company.

In 1905, the legislature of Minnesota had adopted a joint resolution directing the commission "to undertake the work of securing a readjustment of the existing freight rates in this state, which will give a more uniform system of rates throughout the state, and a uniform scale of percentages which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates." Laws of 1905, chap. 350. Pursuant to this direction, the commission conducted a prolonged investigation. Public hearings were held extending over several months, in which the railroad companies took an active part, submitting a large amount of testimony with respect to the matters involved. The commission found the existing class rates for general merchandise to be unreasonable, and by the order of September 6, 378]1906, above-mentioned, established *a new schedule of lower maximum rates. These rates were applied to the classes shown by the so-called "Western Classification" between stations in the state. This was a classification, by which articles were arranged in groups with reference to their general character, value, and the cost of transportation, and with modifications made from time to time, it had long been used by common carriers in the West and Northwest as a basis for rates, the commodities of each class taking the same rate under like conditions. In Minnesota, however, a large number of commodities, amounting to several hundred, had, by the intervention of the commission, been removed from this classification by the application of special rates, known as "commodity rates," or reduced in class so that the Western Classification in operation in that state was very materially different from that in general use as a basis of rates in other states.

The schedule of rates set forth in the order of September 6 was such that each rate for each class bore an exact relation to each other rate. The plan of the schedule was this: For first-class merchandise an allowance of 11.02 cents per cwt. was made for terminal charges, and in addition, there was permitted a hauling charge of .98 of a cent for each 5 miles up to 200 miles, for each 10 miles over 200 miles up to 400 miles, and for each 20 miles over 400 miles up to 500 miles. For other classes, the rates were a fixed per centum of the corresponding rates for the first class. These rates were maximum terminal rates; that is, they related to transportation to or from certain important stations called terminal or distributing stations. Between stations neither of which is so designated, the rates of the schedule might be increased by 5 per centum.

The railway companies complied with this order and the class rates were put into effect on November 15, 1906.

The commission also had under consideration a reduction in the commodity rates, at which certain commodities *such as[379 grain, coal, lumber, and live stock were moved in carload lots. Because of the agitation with respect to these charges, the railroad companies voluntarily reduced their rates about 10 per cent on grain (September 1, 1906) and coal (October 22, 1906). The commission, however, on December 14, 1906, ordered a further reduction in the commodity rates. The railroad companies brought suit in the circuit court of the United States, and obtained a temporary injunction restraining the enforcement of this order. Thereupon the legislature passed the act above mentioned, approved April 18, 1907, which established a new schedule of maximum commodity rates in all respects like that fixed by the commission, save that the reduction was not so great. The act grouped the various commodities which it embraced in several classes, for which different rates were prescribed. There was no fixed percentage relation between the classes, and no regular rate of progression of the various charges with increasing distance. In other respects the method of making the schedules was similar to that adopted in the order of September 6, 1906, the hauling charge decreasing as the mileage increases.

The remaining action with respect to freight rates was taken by the commission in the order of May 3, 1907, for the purpose of securing more favorable in-rates to a number of minor jobbing centers. It applied to certain commoditiess, such as groceries in carload lots, and was supplemental to the order of September 6, 1906, being intended to re-establish the relation which had previously existed between the in-rates to these distributing points and the general schedule of class rates.

The railroad companies obeyed this order of May 3, 1907, as they had that of

September 6, 1906, and they also put into effect the passenger rate of 2 cents a mile. They were about to adopt the commodity rates fixed by the act of April 18, 1907, when 380]these suits were brought and a *temporary injunction restrained them from taking that course. The other rates, that is, the class rates, special in-rates, and the passenger rates were permitted to remain in force pending the suits.

The complainants assailed the acts and orders upon the grounds (1) that they amounted to an unconstitutional interference with interstate commerce (2) that they were confiscatory, and (3) that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law. The jurisdiction of the circuit court was sustained in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where it was also held that the penal provisions of the acts, operating to preclude a fair opportunity to test their validity, were unconstitutional on their face. The circuit court then referred the suits to a special master, who took the evidence and made an elaborate report sustaining the complainants' contentions. His findings were confirmed by the court, and decrees were entered accordingly, adjudging the acts and orders (with the exception, in the case of the Minneapolis & St. Louis Railroad Company, of the order of May 3, 1907) to be void, and permanently enjoining the enforcement of the prescribed rates, freight and passenger, and their adoption or maintenance by the railroad companies. 184 Fed. 765.

From these decrees, the attorney general of the state and the members of the Railroad & Warehouse Commission prosecute these appeals.

The penal provisions being separable (Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 54, 53 L. ed. 382, 400, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 443, 54 L. ed. 826, 831, 30 Sup. Ct. Rep. 535; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 172, 56 L. ed. 710, 717, 32 Sup. Ct. Rep. 449), the question of the validity of the acts and orders fixing maximum rates is presented in two distinct aspects: (1) 381]with respect to their *effect on interstate commerce, and (2) as to their alleged confiscatory character.

*First. As to interference with interstate commerce.*

None of the acts and orders prescribes rates for goods or persons moving in interstate commerce. By their terms, they apply solely to commerce that is internal. Despite this obvious purport, it has been found below that the inevitable effect of the state's requirements for intrastate transportation was to impose a direct burden upon interstate commerce, and to create unjust discriminations between localities in Minnesota and those in adjoining states; and hence, that they must fall, as repugnant to the commerce clause and to the action of Congress under it. To support its conclusion, the circuit court presents an impressive array of facts drawn from the approved findings of the master. 184 Fed. 775-792. Without giving all the details they embrace, these findings may be summarized as follows:

I. The railroad property of each of the three companies constitutes a single system. On June 30, 1906, the Northern Pacific Railway company (a Wisconsin corporation) operated 7,695 miles of track, of which 1,625 miles were in Minnesota. The Great Northern Railway Company (a Minnesota corporation) at the same time operated 8,528 miles of track, of which 2,779 miles were in Minnesota. Their lines extend westerly from Superior, Wisconsin, and Duluth, Minnesota, and from St. Paul and Minneapolis, through the states of Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, to the Pacific coast. The Minneapolis & St. Louis Railroad Company (also a Minnesota corporation) operated 1,028 miles of track running from St. Paul and Minneapolis westerly and southerly to points in South Dakota and Iowa. In the case of each company, the movement of interstate and local traffic takes place at the same time, on the same rails, with the same employees, and largely *by means of the same trains and[382 cars. There has never been a separation, and it is impracticable, in the exercise of fair economy, to make a separation, between the interstate and intrastate business in the case either of freight or of passengers. By far the larger part of the traffic is interstate. In the year 1906 the freight business of the Northern Pacific Company, local to Minnesota, was 2.67 per cent of its entire freight business, and 12.33 per cent of its freight business touching the state, and its passenger business local to the state was 5.79 per cent of its entire passenger business, and 67.21 per cent of its passenger business touching the state.

The conditions attending the transportation of passengers and freight are substantially the same for like distances within those portions of the states of Wisconsin,

Minnesota, North Dakota, and South Dakota reached by the lines of these companies, whether the transportation is interstate or wholly intrastate. Prior to the acts and orders in question, the companies had maintained rates which were relatively fair, and not discriminatory as between interstate and intrastate business; and it is concluded that any substantial change in the basis of rates thus established, due only to the fact that the transportation was intersate or was local to a state, and any substantial difference in rates as between the two sorts of traffic, would constitute unjust discrimination in fact.

II. The state line of Minnesota on the east and west runs between cities which are in close proximity. Superior, Wisconsin, and Duluth, Minnesota, are side by side at the extremity of Lake Superior. Opposite one another, on the western boundary of the state, lie Grand Forks, North Dakota, and East Grand Forks, Minnesota; Fargo, North Dakota, and Moorhead, Minnesota; and Wahpeton, North Dakota, and Breckenridge, Minnesota. The cities in each pair ship and receive, to and from the same localities, the same kinds of freight. The 383]railroad companies *have always put each on a parity with the other in the matter of rates, and if there were a substantial difference it would cause serious injury to the commerce of the city having the higher rate. If the Northern Pacific Company failed to maintain as low rates on traffic in and out of Superior as on that to and from Duluth, its power to transact interstate business between Superior and points in Minnesota would be seriously impaired and the value of its property in Superior would be depreciated.

The maximum class rates fixed by the order of September 6, 1906, were from 20 per cent to 25 per cent lower than those theretofore maintained by the Northern Pacific and Great Northern Companies for transportation in Wisconsin, Minnesota, and North Dakota, whether such transportation was local to one of these states or was interstate between any two of them. When the Northern Pacific Company, pursuant to this order, installed the new intrastate rates, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates from Duluth. Reduction was also made in the rates between both Duluth and Superior and the above-mentioned points on the western boundary, so as to put the border cities in North Dakota on an equal basis with the neighboring cities in Minnesota. This reduction was substantial; and, had it not been made, the places adjoining the boundary, but outside the state, could not have competed with those within. Although the Northern Pacific Company thereby suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or suffering substantial destruction of its interstate commerce to these border localities in articles covered by the orders. At the same time, the Great Northern Company made similar reductions, although, in its case, the transportation between Duluth and points in Minnesota was interstate,—its line passing through Wisconsin. The reason for these reductions was *to preserve the rela-[384 tion in rates from Duluth which had always existed between localities on the Great Northern line and those similarly situated on the line of the Northern Pacific, and to meet the reduced rates on the latter.

III. Moorhead, Minnesota, Fargo and Bismarck, North Dakota, Billings and Butte, Montana, are so-called jobbing centers. Rates had always been accorded to them by the Northern Pacific Company which would allow them to compete with their nearest neighbors and with St. Paul, Minneapolis, and Duluth. The order of September 6, 1906, as supplemented by that of May 3, 1907, substantially reduced carload rates from the eastern terminals to Moorhead. This reduction would have given Moorhead an advantage in territory accessible to its jobbing industry not only as against Fargo, unless carload rates to Fargo were similarly reduced, but also as against Duluth, St. Paul, and Minneapolis unless less-than-carload rates from these places to points accessible to Moorhead, which included a considerable territory in North Dakota, were proportionately reduced. If Fargo were protected as against Moorhead, it would have an advantage over Bismarck in territory common to them both, and an advantage over the eastern terminals in territory common to them and to Fargo, unless carload rates from the eastern terminals to Bismarck and less-than-carload rates from those terminals to the territory accessible to Fargo were correspondingly reduced; and so on from distributing point to distributing point.

IV. Every rate comprehends two terminal charges, the initial and the final, and a haulage charge. It is declared to be a cardinal principle of rate-making that a rate for a longer distance should be proportinately smaller than one for a shorter distance; for even if the haulage charge in the former case were the same per mile, the rate per ton mile should be less for the longer haul, as the terminal charges would be spread over a greater distance. *A[385 comparison disclosed that the rates established by the order of September 6, 1906,

and maintained by the Northern Pacific Company between St. Paul and Moorhead, were in general substantially less than the proportion of the interstate rates maintained by the company to various points in North Dakota and Montana, based on the mileage in Minnesota as compared to that of the entire haul. Maintaining such a relation of rates involves, it is found, substantial and unjust discrimination in fact against the interstate localities.

V. After the installation by the Great Northern and Northern Pacific Companies of the rates prescribed by the order of September 6, 1906, it appeared that the sum of the local rates from St. Paul to Moorhead and from Moorhead to many points in North Dakota was less than the interstate rates theretofore maintained from St. Paul to these points. Both companies thereupon established rates from St. Paul to the North Dakota points as a rule no greater than the sum of the locals on Moorhead, but substantially lower in general than the interstate rates in force when the order took effect. Maintaining interstate rates from St. Paul to North Dakota localities substantially greater than the sum of the locals based on the state line would have caused unjust discrimination in fact. The actual reason for the reduction in the interstate rates was to prevent transhipment at Moorhead in order to take advantage of the lower sum of the locals, and to retain on its line traffic which might reach Moorhead over other lines by reason of competition, and, as to less-than-carload lots, to enable jobbers in the Twin Cities and Duluth to compete with those in Moorhead and Fargo in territory which otherwise the latter would have exclusively occupied by reason of their closer proximity.

VI. It it further held to be one of the fundamental dogmas of rate-making that the haulage charge per mile should not increase with increasing distance if the con-[386]ditions *be the same. Under the progressive decrease in the haulage charge within the state, provided by the order of September 6, 1906, 100 pounds of merchandise transported by the Northern Pacific from St. Paul to Moorhead, 248 miles, would have been hauled for 48 miles, at the rate of .98 cents per 10 miles, when Moorhead is reached. If the same haulage charge of .98 cents per 10 miles were applied for the remaining distance to Spokane, 1510 miles from St. Paul (which is said to be taken as a fair example merely to illustrate the principle), it would produce a rate from St. Paul to Spokane on first-class merchandise of $1.79 per cwt. The Interstate Commerce Commission in the Spokane rate case *fixed* the reasonable rate on first-class merchandise from St. Paul to Spokane of $2.50 per cwt. Maintaining this rate and the state schedule in Minnesota at the same time necessarily involves the raising of the per mile haulage charge after the Minnesota state line has been crossed, or the charge of a higher rate within Minnesota for its mileage proportion of long-haul interstate business than for business local to the state which is carried under the same conditions, and hence is found to result in unjust discrimination in fact against localities west of the Minnesota line.

VII. For more than twenty-five years the Northern Pacific Company has maintained an equal basis of rates on merchandise between its eastern and western terminals, respectively, and Butte, Montana, and between its eastern and western terminals, respectively, and localities intermediate between them and Butte. Other railroads reaching Butte have, during the same time, maintained like rates to Butte from Sioux City, Omaha, St. Joseph and Kansas City on the east, and from San Francisco, Sacramento, and Los Angeles on the west. Butte has been as the hub of a wheel with spokes representing equal rates to these various cities. Industries, it is said, have been born and have grown in reliance upon this parity of rates. *Inter-[387]mediate points have had rates fixed in proportion to the Butte rates. Competition of markets and of carriers has brought this about. The Northern Pacific Company cannot maintain the state rates between its eastern terminals and Moorhead, and at the same time its interstate rates from its eastern terminals to Butte, without substantial discrimination in fact against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations to such an extent as to obviate this discrimination, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. Consequently, it is found that if the Northern Pacific Company maintains the commission-made rates between its eastern terminals and Moorhead, it must either substantially discriminate in fact, or destroy the general relation of rates which has existed for many years in the territory between the Missouri river and the Pacific coast.

VIII. Prior to the taking effect of the order of September 6, 1906, the Great Northern and Northern Pacific Companies had established joint through rates in connection with other carriers from all localities east or south of Minnesota to all points in Minnesota west of St. Paul and Min-

neapolis. After the rates prescribed by this order were installed, the sum of the locals on St. Paul from all localities south and east of Minnesota to points in Minnesota west of St. Paul and Minneapolis was substantially less than the then-existing interstate rates for the through haul to such western points. To avoid the resulting discrimination in favor of St. Paul, the companies withdrew the existing interstate rates, and established a new tariff no higher than the sum of the locals on St. Paul.

IX. Further illustrations are given of inequalities resulting from the reduced 388]Minnesota rates as compared *with rates for like transportation under similar conditions into adjoining states; as, for example, from Moorhead easterly to Minnesota points and westerly into North Dakota, and also of the effects produced in the application of the state rates by reason of the difference in the distances from St. Paul at which the state line is reached on similar hauls over different lines. As the schedule of September 6, 1906, prescribes a fixed relation between rates for different distances and different classes, the conclusion is that if the rule must be adhered to in Minnesota, it cannot be departed from substantially because of the intervention of a state line at one distance or another without involving unjust discrimination in fact.

It is found further that while, after the order of September 6, 1906, became effective, both the Great Northern and the Northern Pacific Companies reduced certain interstate rates, as already mentioned, the reduction was not to such extent as to remedy the discrimination resulting from the fact that in most cases the general basis of rates within Minnesota was substantially lower than that maintained in North Dakota or upon traffic crossing the state line.

X. The similarity in the conditions of interstate and intrastate transportation is found also with respect to the commodities for which rates were prescribed by the act of April 18, 1907 (chap. 232). The main lines and branches of the Northern Pacific and Great Northern Companies within Minnesota and North Dakota, with the exception of certain limited tracts, lie within grain fields, and grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis, and Superior. Shipments of coal originate at the head of the Lakes,—that is, at Duluth or Superior,—and find their destination at all localities served by the companies in Minnesota and eastern North Dakota. Shipments of lumber originate at Duluth, Clo-389]quet, Little Falls, and other *places in Minnesota, and are destined to points throughout Minnesota and North Dakota. Shipments of live stock are made in Minnesota, South Dakota, and eastern Montana and go to South St. Paul or Chicago. So far as the conditions of transportation are concerned, it matters not, as to commodities moving eastwardly, whether the shipment is made in Montana, North Dakota, or Minnesota, or the transportation ends in Minnesota or in Wisconsin; and, as to commodities moving westwardly, whether the shipments are from Minnesota points or from Superior, or whether they find their destination in Minnesota or in North Dakota. The conclusion is that to maintain the commodity rates for transportation wholly within Minnesota simultaneously with the interstate rates now in force would involve unjust discrimination and would seriously impair the interstate business of the companies, to avoid which it would be necessary to reduce the basis of the interstate rates to a substantial parity with that prescribed by the state law. It is also stated that if the rates fixed by chapter 232 of the Laws of 1907 should become effective, the rate on shipments of wheat, with milling-in-transit privileges, from points in Minnesota *via* Minneapolis to Chicago, would be automatically reduced, and that unless all interstate rates between Minnesota points and Chicago *via* interior mill towns with similar privileges should be correspondingly reduced, Minneapolis would have a substantial advantage over such towns in its interstate rates.

XI. Prior to the act of 1907, fixing the rate of 2 cents a mile, the general basis of rates for passengers (of twelve years of age or over) between any two points on the Northern Pacific system had been for some years 3 cents a mile. After the new state rate had been installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the then-existing through interstate rates. The passenger *fare act took effect May 1, 1907, and[390 in the first month thereafter the revenue for passengers on the Northern Pacific line between Moorhead and other Minnesota points increased 647 per cent over that of the corresponding month of the preceding year while, eliminating Moorhead business, the revenue for passenger business within the state decreased 2 per cent. In June, 1907, the second month, there were sold by the Northern Pacific Company, 4,037 tickets between St. Paul or Minneapolis, on the one hand, and Moorhead or East Grand Forks on the other, as compared with only 172 such tickets in the corresponding month of the year before; and in June, 1907, there were sold only 173 tickets between St. Paul or Minneapolis, and Grand Forks and Far-

go, as compared with 984 such tickets in the corresponding month of the previous year. In May and June, 1906, only one cash full fare was collected on a train from Moorhead to St. Paul or Minneapolis. In those months in 1907 there were 1,168 cash full fares and 82 cash half fares so collected. Hence, it is said, the necessary, immediate, and direct effect of the law was to deprive the Northern Pacific Company of a substantial amount of its interstate passenger business through Moorhead.

Notwithstanding the facility with which interstate passengers could avoid the discrimination against them by making two contracts with the company, it is found that discrimination in fact still existed against the interstate passenger who, applying for a through ticket, did not know that the sum of the locals on Moorhead was less than the through rate, against the passenger with a trunk which he could not check through unless on a through ticket, and against a passenger who was compelled to use a sleeping car. The Northern Pacific Company shortly remedied this discrimination by reducing all its interstate fares for passenger transportation through Moorhead to an amount no greater than the 391]sum of the locals over *Moorhead. Before this reduction Wisconsin had fixed the maximum passenger fare at 2 cents a mile, and North Dakota at 2½ cents a mile. The rates thereafter established by the Northern Pacific Company between St. Paul, for example, and points in North Dakota and beyond, and by the Northern Pacific Company jointly with other companies for transportation between points easterly of Minnesota and points on the line of the Northern Pacific, were in general less than the previous rates by approximately 1 cent per mile for the mileage in Wisconsin and Minnesota, and by ½ cent per mile for the mileage in North Dakota. It is concluded that these reductions were compelled to avoid unjust discrimination, and in order that the companies might transact interstate passenger business freely and without impairment of volume.

There are added various hypothetical calculations of the losses which would have been sustained if the basis prescribed by the state acts and orders had been applied to the interstate business and to local business in other states. We shall have occasion later to refer to the actual results of the business of the railroad companies during the time that the rates fixed by the acts and orders (with the exception of the commodity rates) were in force, and to the effect upon revenue which the adoption of the commodity rates would have had.

The foregoing findings, as stated by the master, were made "without regard to the justness or otherwise in fact of the interstate rates so affected by such local rates." The determination of the reasonableness of the interstate rates was not deemed to be within the province of the court.

The appellants do not concede the correctness of the findings in their full scope, and insist upon qualifications. They deny that the evidence justified the finding that the *companies had maintained "an[392 equable, that is, relatively fair, basis of rates" prior to the acts and orders in question. The general or comprehensive system of interdependent and fairly related rates, each so equitably adjusted to the others that any local change must of necessity throw the whole out of balance, is declared to exist only in imagination,—to be a fiction constructed in disregard of the facts of rate-making, and without attention to the inconsistencies shown by the schedules which had been in force. The actual reductions in interstate rates, which followed upon the adoption of the state tariffs, were made, it is urged, in rates voluntarily established by the companies themselves which had not been declared to be reasonable by competent authority, and in any case furnish no standard by which the validity of the action of the state, in the control of its internal affairs, should be judged. The appellants say that the local rates in Minnesota were incongruous and unreasonable; that frequent changes in the interest of favored shippers had been made through the filing of temporary intrastate tariffs until the practice was stopped by a statute of 1905 (chap. 176) forbidding changes without the consent of the commission; that with respect to grain and live stock, the principal agricultural products of the state, the companies maintained an "inharmonious jumble of arbitrary rates;" and that the acts and orders in question were designed to correct inequalities in the intrastate tariffs, and to prescribe charges which, upon thorough investigation and after public hearings in which the companies participated, were found to be reasonable and were brought into suitable relation with each other by means of a scientific plan. And it is denied that unjust discrimination as against localities without the state can be predicated of the establishment of reasonable state rates.

It is also insisted that the prescribed intrastate freight rates were not in general lower than the existing interstate *rates.[393 Reference is made to the long-distance traffic, which, it is said, was moved within the state on proportionals of long-haul rates which were much below the local rates fixed by the state. It is pointed out that the mas-

ter found, in passing upon the question whether the rates were confiscatory, that the gross revenue which was derived from the interstate freight business during the fiscal year ending June 30, 1908 (when all the rates in question were in force save the commodity rates), was greater per ton-mile than that derived in the same period from the interstate business within the state, being in the case of the Northern Pacific Company in the ratio of 1.4387 to 1, and in that of the Great Northern Company of 2.02894 to 1. The appellants also contest the validity of the argument based on a hypothetical extension beyond the state line of the "rate of progression" for additional distance which had been prescribed by the state solely with reference to internal traffic, and they submit illustrations of incongruities which they contend would be shown by a similar extension of the rate of progression disclosed by the former intrastate tariffs of the companies. Again, it is urged that the extent of the reductions attributable to the 2-cent fare law may not be estimated properly by a comparison with the former maximum rate of 3 cents a mile. Various rates had been in force less than the maximum allowed. For the six years prior to the 2-cent fare law the average rate per passenger per mile for intrastate transportation in Minnesota, on the Northern Pacific line, had ranged from 2.299 cents in 1901 to 2.435 cents in 1905, 2.406 cents in 1906, and 2.197 cents in 1907;† and during the same time the average rate per passenger per mile for interstate transportation in Minnesota varied from 2.075 cents in 1901, 2.027 cents in 1905, 1.949 cents in 1906, and 1.981 cents in 1907.† 394]In the fiscal year ending *June, 30, 1908, with the 2-cent fare law in force the average rate per passenger per mile in Minnesota was 1.930 cents for intrastate and 1.928 cents for interstate carriage.

It is conceded, however, that the schedules fixed for intrastate transportation "necessarily disturbed the equilibrium theretofore existing between the rates on the two classes of business" (state and interstate) "on the boundary lines." This applies to the rates to and fro mthe cities situated on opposite sides of the Red River of the North, the boundary between Minnesota and North Dakota, and to and from Duluth and Superior on the eastern boundary. The reduction of the state rates brought them below the level of the interstate rates in those instances in which formerly both had been maintained on a parity. So, also, whatever may be said as to the nonexistence of a general or comprehensive system of equitably adjusted rates, it is clear that there are competitive areas crossed by the state line of Minnesota, and that the state's requirements altered the existing relation between state and interstate rates as to places within these zones of competition, and not merely as to the cities on the boundary of the state.

The situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky, and Oregon. Differences in particular facts appear, but they cannot be regarded as controlling. A scheme of state rates framed to avoid discrimination between localities within the state, and to provide an harmonious system for intrastate transportation throughout the state, naturally would embrace those places within the state which are on or near the state's boundaries; and when these are included in a general reduction of intrastate rates, there is, of course, a change in the relation of rates as theretofore existing to *points[395 adjacent to, but across, the state line. Kansas City, Kansas, and Kansas City, Missouri; East St. Louis, Illinois, and St. Louis, Missouri; Omaha, Nebraska, and Council Bluffs, Iowa; Cincinnati, Ohio, and Covington and Newport, Kentucky; and many other places throughout the country which might be mentioned, present substantially the same conditions as those here appearing with respect to localities on the boundaries of Minnesota. It is also a matter of common knowledge that competition takes but little account of state lines, and in every part of the land competitive districts embrace points in different states.

With appreciation of the gravity of the controversy, the railroad commissioners of eight states† have filed their brief as *amici curiæ*, in support of the appeals, stating that, if the doctrine of the court below were accepted, the regulation by the states of rates for intrastate transportation would be practically destroyed. They say that "there is practically no movement of traffic between two towns within a state that does not come into competition with some interstate haul," and that "if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce." The governors of three states,

†The 2-cent fare law was in force for two months of the fiscal year ending June 30, 1907.

†Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri, and Texas.

pursuant to a resolution of a conference of the governors of all the states, have also presented, by leave of the court, their argument in defense of the position taken by Minnesota. They do not seek "to belittle the effect of the action of Minnesota on the business between the places" named in the findings, but they are convinced that if the principle announced by the circuit court is upheld, it can be made to apply by a showing of similar facts in virtually every state. Insisting that, under their reserved 396]power, "the *right of the states to regulate their own commerce is as clear and broad as that of Congress to regulate interstate commerce," they assail the decision below, not upon the ground that it incorrectly sets forth conditions in Minnesota and adjoining states, but for what they consider to be "its plain disregard of the provisions of the Federal Constitution, which establish the relations between the nation and the states." "The operation of these provisions," they maintain, "was not made to depend on geography or convenience or competition. They cannot apply in one state and not in another, according to circumstances as they may be found by the courts, because they are vital principles which constitute the very structure of our dual form of government."

The controversy thus arises from opposing conceptions of the fundamental law, and of the scope and effect of Federal legislation, rather than from differences with respect to the salient facts.

For the purpose of the present inquiry, the rates fixed by the state must be assumed to be reasonable rates so far as intrastate traffic is concerned; that is, they must be rates which the state in the exercise of its legislative judgment, could constitutionally fix for intrastate transportation separately considered. If the state rates are not of this character,—a question to be dealt with later,—they cannot be sustained in any event; but, assuming them to be otherwise valid, the decree below, with respect to the present branch of the case, rests upon two grounds: (1) That the action of the state imposes a direct burden upon interstate commerce; and (2) that it is in conflict with the provisions of the act to regulate commerce.

These grounds are distinct. If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such 397] *an objection is not that Congress has acted, but that the state has directly restrained that which, in the absenec of Federal regulation, should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the state, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted.

Prior to the passage of the act to regulate commerce, carriers fixed their interstate rates free from the actual exertion of Federal control; and under that act, as it stood until the amendment of June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288], the Interstate Commerce Commission had no power to prescribe interstate rates. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 511, 42 L. ed. 243, 257, 17 Sup. Ct. Rep. 896. The states, however, had long exercised the power to establish maximum rates for intrastate transportation. Was this power, apart from Federal action, subject to the limitation that the state could not fix intrastate rates, reasonable as such, generally throughout the State, but only as to such places and in such circumstances that the interstate business of the carriers would not be thereby affected? That is, was the state debarred from fixing reasonable rates on traffic, wholly internal, as to all state points so situated that, as a practical consequence, the carriers would have to reduce the rates they had made to competing points without the state, in order to maintain the volume of their interstate business, or to continue the parity of rates, or the relation between rates as it had previously existed? Was the state, in prescribing a general tariff of reasonable intrastate rates otherwise within its authority bound not to go below a minimum standard established by the interstate rates made by the *carriers within competitive dis-[398 tricts? If the state power, independently of Federal legislation, is thus limited, the inquiry need proceed no further. Otherwise it must be determined whether Congress has so acted as to create such a restriction upon the state authority theretofore existing.

(1) The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70. The conviction of its necessity sprang from the disastrous experiences under the Confedera-

tion, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control, and to provide effective regulation of that intercourse as the national interest may demand. The words "among the several states" distinguish between the commerce which concerns more states than one, and that commerce which is confined within one state and does not affect other states. "The genius and character of the whole government," said Chief Justice Marshall, "seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." 399] *Id. p. 195. This reservation to the states manifestly is only of that authority which is consistent with, and not opposed to, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. M'Culloch v. Maryland, 4 Wheat. 316, 405, 426, 4 L. ed. 579, 601, 606; The Daniel Ball, 10 Wall. 557, 565, 19 L. ed. 999, 1002; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 509, 510, 1 Inters. Com. Rep. 304, 8 Sup. Ct. Rep. 564; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618, 619, 55 L. ed. 878, 882, 883, 31 Sup. Ct. Rep. 621; Southern R. Co. v. United States, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 2, Second Employees' Liability Cases; Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1, 47, 54, 55, 56 L. ed. 327, 345, 347, 348, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169.

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special *requirements of local conditions,[400 the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004; Ex parte McNiel, 13 Wall. 236, 240, 20 L. ed. 624, 625; Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 29 L. ed. 158, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 481, 485, 31 L. ed. 700, 705, 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 103, 104, 39 L. ed. 912, 913, 15 Sup. Ct. Rep. 802; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 436, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140.

The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it (State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 368, 7

Sup. Ct. Rep. 1118; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1383; McCall v. California, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; Crenshaw v. Arkansas, 227 U. S. 389, ante, 565, 33 Sup. Ct. Rep. 294); or upon persons or property in transit in interstate commerce (Passenger Cases, 7 How. 283, 12 L. ed. 702; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; State Freight Tax Case, 15 Wall. 281, 21 L. ed. 163; Coe v. Errol, 401]116 *U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Bacon v. Illinois, 227 U. S. 504, ante, 615, 33 Sup. Ct. Rep. 299).

They have no power to prohibit interstate trade in legitimate articles of commerce (Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 481, 485, 31 L. ed. 700, 705, 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 31 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189); or to discriminate against the products of other states (Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Welton v. Missouri, 91 U. S. 275, 230, 23 L. ed. 347, 349; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247); or to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on (Crutcher v. Kentucky, 141 U. S. 47, 33 L. ed. 649, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; International Text-book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Bucks Stove & Range Co. v. Vickers, 226 U. S. 205, ante, 189, 33 Sup. Ct. Rep. 41); or to prescribe the rates to be charged for transportation from one state to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection (Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 577, 30 L. ed. 244, 251, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, ante, 442, 33 Sup. Ct. Rep. 229; Hall v. De Cuir, 95 U. S. 485, 488, 24 L. ed. 547, 548; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep 633; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, ante, 389, 33 Sup. Ct. Rep. 213).

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But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they

should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will [403] of individuals *because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The leading illustrations may be noted. Immediately upon the adoption of the Constitution, Congress recognized the propriety of local action with respect to pilotage, in view of the local necessities of navigation. Act of August 7, 1789, chap. 9, § 4, 1 Stat. at L. 53, 54, U. S. Comp. Stat. 1901, p. 2903; Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004. It was sixty years before provision for Federal license of pilots was made (act of August 30, 1852, chap. 106, 10 Stat. at L. 61), and even then port pilots were not included (Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 459, 17 L. ed. 805, 807). And while Congress has full power over the subject, and to a certain extent has prescribed rules, it is still in a large measure subject to the regulation of the states. Anderson v. Pacific Coast S. S. Co. 225 U. S. 187, 56 L. ed. 1047, 32 Sup. Ct. Rep. 626.

A state is entitled to protect its coasts, to improve its harbors, bays, and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the Federal authority in its dormant state. Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525; *Mobile County v. Kimball, [404] 102 U. S. 691, 697, 25 L. ed. 238, 239; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; Huse v. Glover, 119 U. S. 543, 547, 30 L. ed. 487, 489, 7 Sup. Ct. Rep. 313; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127. Thus, in Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96, the complainants were the owners of a valuable wharf and dock property in the Schuylkill river, and sought to prevent the construction of a bridge which had been authorized by the legislature of Pennsylvania to connect East and West Philadelphia. It appeared that the bridge would prevent the passage of vessels having masts which had formerly navigated the river up to the complainants' wharf, and would largely reduce the income from the property. The court affirmed the dismissal of the bill upon the ground that in the absence of legislation by Congress, the state was acting within its authority. "The states have always exercised this power," said the court (id. p. 729), "and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the Nation." Again, in Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185, the question related to the power of the city of Chicago, acting under the authority of the state, to regulate the closing of draws in the bridges over the Chicago river. The court said: "The Chicago river and its branches must . . . be deemed navigable waters of the

United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, con-405]venience, and prosperity *of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. . . . When its [the state's] power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. . . . But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary." Id. p. 683.

While the state may not impose a duty of tonnage (Southern S. S. Co. v. Portwardens, 6 Wall. 31, 18 L. ed. 749; State Tonnage Tax Cases [Cox v. Lott] 12 Wall. 212, 20 L. ed. 373; Cannon v. New Orleans, 20 Wall. 577, 22 L. ed. 417), it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. The subject is one under state control, where Congress has not acted, although the payment is required of those engaged in interstate or foreign commerce. Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Huse v. Glover, 119 U. S. 543, 547, 30 L. ed. 487, 489, 7 Sup. Ct. Rep. 313; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113. In Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732, the court had before it an ordinance of that city prescribing rates of wharfage on vessels discharging or receiving freight at public landings belonging to the city. A transportation company having steamers plying between Pittsburg and Cincinnati complained that the wharfage charge was exorbitant. The court held that the reasonableness of the charge, it being simply one for wharfage, was to be determined by the state law. "The regulation of wharves belongs prima facie, and in the first instance, to the states, and would only be assumed by Congress when its exercise by the states is incompatible with interstate commerce." Id. p. 703. Again, in Ouachita & M. River *Packet[406 Co. v. Aiken, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907, where the owners of steamboats engaged in interstate commerce on the Mississippi river complained of wharfage rates at New Orleans as unreasonable and excessive, and in effect "a direct duty, or burden, upon commerce," the court, overruling the contention, held that the case was "clearly within the principle of the former decisions of this court, which affirm the right of a state, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce," Id. p. 447.

Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the states, and has repeatedly acquiesced in the enforcement of state laws. Act of February 25, 1799, chap. 12, 1 Stat. at L. 619, Rev. Stat. § 4797, U. S. Comp. Stat. 1901, p. 3318; Act of April 29, 1878, chap. 66, 20 Stat. at L. 37, U. S. Comp. Stat. 1901, p. 3307; act of February 15, 1893, chap. 114, 27 Stat. at L. 449, U. S. Comp. Stat. 1901, p. 3312. Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 472, 473, 24 L. ed. 527, 530, 531); but the power of the state to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question. Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594; Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; Reid v. Colorado, 187 U. S. 138, 47 L. ed. *108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101. In Compagnie Française de Navigation à Vapeur v. State

407]Bd. of Health, 186 *U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811, the court had before it the quarantine law of Louisiana, which, among other things, provided the state board of health might "in its discretion prohibit the introduction into any infected portion of the state persons acclimated, unacclimated, or said to be immune, when, in its judgment, the introduction of such persons would add to or increase the prevalence of the disease." The supreme court of the state, interpreting the statute, held that it empowered the board to exclude healthy persons from a locality infested with a contagious or infectious disease, whether they came from without or within the state. It was objected that this provision was too broad, and that the former decisions of the court were based upon the right of the states to exclude diseased persons and things which were not legitimate subjects of commerce. The court sustained the law, saying, with respect to this argument: "But it must be at once observed that this erroneously states the doctrine as concluded by the decisions of this court previously referred to, since the proposition ignores the fact that some cases expressly and unequivocally hold that the health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on 408]the power to *regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected; and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce." Id. p. 931.

State inspection laws and statutes designed to safeguard the inhabitants of a state from fraud and imposition are valid when reasonable in their requirements, and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export, or by including incidentally those brought into the state and held for sale in the original imported packages. Gibbons v. Ogden, 9 Wheat. 203, 6 L. ed. 71; Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Patapsco Guana Co. v. Board of Agriculture, 171 U. S. 345, 357, 358, 43 L. ed. 191, 195, 196, 18 Sup. Ct. Rep. 862; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715. And for the protection of its game and the preservation of a valuable food supply, the state may penalize the possession of game during the closed season, whether obtained within the state or brought from abroad. New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10.

Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits. Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 491, 48 L. ed. 268, 273, 24 Sup. Ct. Rep. 132; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Southern P. R. Co. v. Schuyler, 227 U. S. 601, 613, ante, 662, 669, 33 Sup. Ct. Rep. 277. Until the enactment by Congress of the act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, the laws of the states determined the liability of interstate carriers by railroad for injuries received by their employees while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, *had not acted thereon. In some[409 states the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule. Second Employers' Liability Cases (Mondou v. New York N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 66, 67, ante, 417, 419, 420, 33 Sup. Ct. Rep. 192.

So, where Congress has not intervened, state statutes providing damages for wrongful death may be enforced not only against land carriers, but also against the owners of vessels engaged in interstate commerce where the wrong occurs within the jurisdiction of the state. Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820. See American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369; The Hamilton (Old Dominion S.

S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133. And until Congress legislated on the matter, liability for loss of property, on interstate as well as intrastate shipments, was subject to state regulation. Some states allowed an exemption by contract from all or a part of the common-law liability; others allowed no exemption. These differences in the applicable laws created inequalities with respect to interstate transportation, but each state exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the recent amendment of § 20 of the act to regulate commerce. Act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288; Adams Exp. Co. v. Croninger, 226 U. S. 491, 500, ante, 314, 317, 33 Sup. Ct. Rep. 148. It is within the competency of a state to create and enforce liens upon vessels for supplies furnished under contracts not maritime in their nature, and it is no valid objection that the state law may obstruct the prosecution of a voyage of an interstate character. The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.) 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509. It may also create liens for damages to property on land, occasioned by negligence of vessels. Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42. Cars employed in interstate com-410]merce may be *seized by attachment under state law, in order to compel the payment of debts. Davis v. Cleveland C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907. And the legislation of the states, safeguarding life and property and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands, and is not opposed to Federal legislation. Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Missouri, P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330. It has also been held that the state has the power to forbid the consolidation of state railroad corporations with competing lines although both may be interstate carriers, and the prohibition may have a far-reaching effect upon interstate commerce. Pearsall v. Great Northern R. Co. 161 U. S. 646, 677, 40 L. ed. 838, 848, 16 Sup. Ct. Rep. 705; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 701, 702, 40 L. ed. 849, 859, 860, 16 Sup. Ct. Rep. 714. See Northern Securities Co. v. United States, 193 U. S. 317, 348, 382, 48 L. ed. 692, 704, 718, 24 Sup. Ct. Rep. 436.

Again, it is manifest that when the legislation of the state is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may affect the latter commerce indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect *to internal business, as[411 distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state. It was an objection of this sort that was urged and overruled in Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep 232, 9 Sup. Ct. Rep. 6, to the law of Iowa prohibiting the manufacture and sale of liquor within the state, save for limited purposes. See also Geer v. Connecticut, 161 U. S. 519, 534, 40 L. ed. 793, 798, 16 Sup. Ct. Rep. 600; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 245, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; Missouri P. R. Co. v. Kansas, 216 U. S. 261, 54 L. ed. 472, 30 Sup. Ct. Rep. 330. When, however, the state, in dealing with its internal commerce, undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function. Southern R. Co. v. United States, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 2; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612,

618, 619, 55 L. ed. 878, 882, 883, 31 Sup. Ct. Rep. 621.

Within the state power, then, in the words of Chief Justice Marshall, is "that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress: and, consequently, they remain subject to state legislation. If the legisative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." Gibbons v. Ogden, 9 Wheat. 203, 204, 6 L. ed. 71, 72.

And whenever, as to such matters, under 412]these established *principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority.

(2) These principles apply to the authority of the state to prescribe reasonable maximum rates for intrastate transportation.

State regulation of railroad rates began with railroad transportation. The railroads were chartered by the states, and from the outset, in many charters, maximum rates for freight or passengers, or both, were prescribed.† Frequently—and this became the more general practice—the board of directors was permitted to fix charges in its discretion,—an authority which, in numerous instances, was made subject to a limitation upon the amount of net earnings.† In several states maximum rates were also established, or the power to alter rates was expressly reserved, by general laws.‡ In 1853, the state of New *York fixed[413 the maximum fare for way passengers on the railroads forming the line of the New York Central at 2 cents a mile (Laws of 1853, chap. 76, § 7), and this rate extending to Buffalo and Suspension Bridge, on the boundary of the state, has continued to the present day (Consol. Laws [N. Y.] chap. 49, § 57). As a rule the restrictions imposed by the early legislation were far from onerous, but they are significant in the assertion of the right of control. More potent than these provisions, in the actual effect upon railroad tariffs, was the state canal. It is a matter of common knowledge that the traffic on the trunk lines from the Atlantic seaboard to the West was developed in competition with the Erie canal, built, maintained, and regulated by the state of New York to promote its commerce.

The authority of the state to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the state. This was decided in Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99, and other cases, following Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. The question was presented by acts of the legislatures of Illinois, Iowa, Wisconsin, and Minnesota, passed in the years 1871 and 1874, in response to a general movement for a reduction of rates. The section of the country in which the demand arose was to a large degree homogeneous and one in which the flow of commerce was only slightly concerned with state lines. But resort was had to the states for relief. In the Munn Case, the court had before it the statute of Illinois

†E. g. Maryland, Laws of 1826, chap. 123, § 18; 1830, chap. 117, §§ 2, 3; 1834, chap. 281, § 3; Massachusetts, Laws of 1829, chap. 26, § 6; 1830, chap. 93, § 10; New York, Laws of 1828, chap. 21, § 11; chap. 238, § 11; 1831, chap. 83, § 10; 1836, chap. 242, § 9; Virginia, Laws of 1830, 1831, chap. 119, § 19; chap. 121, § 18; 1835, 1836, chap. 121, § 24; Ohio, Laws of 1833, 1834, p. 203, § 19; p. 396, § 9; North Carolina, Laws of 1836, 1837, chap. 40, § 30.

†Connecticut, 1832, II. Resolves and Private Laws (1789–1836), p. 992; Indiana, Laws of 1832, chap. 146, §§ 23, 24; Florida, Laws of 1848, chap. 244, § 11; New York, Laws of 1828, chap. 304, § 13; 1832, chap. 162, §§ 12, 17; Massachusetts, Laws of 1833, chap. 118, § 4; Virginia, Laws of 1839, chap. 110, § 5; Wisconsin, Laws of 1847, p. 72, § 15; 1851, chap. 262, § 7.

‡Illinois, Laws of 1849, p. 15, §§ 21, 32; Massachusetts, Laws of 1845, chap. 191, § 2; 1860, chap. 201, § 2; New York, Laws of 1850, chap. 140, § 33; California, Laws of 1850, chap. 128, § 77; 1861, chap. 532, § 51; Iowa, Code of 1873, § 1305; Laws of 1874, chap. 68, §§ 1–5; Report of Industrial Commission, 1901, vol. 9, pp. 903–905, 911–915.

governing the grain warehouses in Chicago. 414]Through these elevators, *located with the river harbor on the one side and the railway tracks on the other, it was necessary, according to the course of trade, for the product of seven or eight states of the West to pass on its way to the states on the Atlantic coast. In addition to the denial of any legislative authority to limit charges it was urged that the act was repugnant to the exclusive power of Congress to regulate interstate commerce. The court answered that the business was carried on exclusively within the limits of the state of Illinois, that its regulation was a thing of domestic concern, and that "certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." In the decision of the railroad cases, above cited, the same opinion was expressed. The language of the court, however, went further than to sustain the state law with respect to rates for purely intrastate carriage. Thus, the act of Wisconsin covered traffic which started within the state and was destined to points outside, and this was treated as being within the state power (Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 177, 178, 24 L. ed. 97-99), a view which was later repudiated (Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4).

It became a frequent practice for the states to create commissions, as agencies of state supervision and regulation, and in many instances the rate-making power was conferred upon these bodies. A summary of such legislation is given in Interstate Commerce Commission v. Cincinnati N. O. & T. P. R. Co. 167 U. S. 479, 495, 496, 42 L. ed. 243, 251, 252, 17 Sup. Ct. Rep. 896. One of these state laws, that of Mississippi, passed in 1884, came under review in Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191. The suit was brought to enjoin the railroad commission from enforcing the statute against the Mobile & Ohio Railroad 415]Company. It had been incorporated *in the states of Alabama, Mississippi, Tennessee, and Kentucky, for the purpose of constructing a railroad from Mobile to some point near the mouth of the Ohio river, where it would connect with another railroad, thus forming a continuous line of interstate communication between the Gulf of Mexico and the Great Lakes. The commission as yet had not acted. Sustaining the state power to fix rates upon the traffic *wholly* internal, the court directed the dismissal of the bill. The state, said the court, "may beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." In the same case, it was declared that the power of regulation was not a power to confiscate; and that under pretense of regulating fares and freights, the states could not "require a railroad corporation to carry persons or property without reward," or do that which in law amounted "to a taking of private property for public use without just compensation, or without due process of law." Id. p. 331.

In Wabash St. L. & P. R. Co. v. Illinois, supra, it was finally determined that the authority of the state did not extend to the regulation of charges for interstate transportation. There the state statute was aimed at discrimination. It was said to have been violated by the railroad company in the case of shipments from points within Illinois to the city of New York. The state court had construed the statute to be binding as to that part of the interstate haul which was within the state, although inoperative beyond the boundary. So applied, this court held the act to be invalid.

But no doubt was entertained of the state's authority to regulate rates for transportation that was wholly intrastate. And, in illustrating the extent of state power (118 U. S. *p. 564), the court[416 selected transportation across the state from Cairo to Chicago and from Chicago to Alton, all boundary points constituting important centers of commerce—the one on Lake Michigan, and the others at the confluence of the Mississippi and Ohio rivers, and of the Mississippi and Missouri rivers, respectively. After reviewing decisions holding state laws to be ineffective which imposed a direct burden upon interstate commerce, including the cases of the State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635, the court emphasized the distinction with respect to the operation of the statute upon domestic transactions, saying: "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state,

it may be very just and equitable, and it certainly is the province of the state legislature to determine that question." Id. p. 577.

The doctrine was thus fully established that the state could not prescribe interstate rates, but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the states and its invariable recognition by this court. It has never been doubted that the state could, if it saw fit, build its own highways, canals and railroads. Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 470, 471, 22 L. ed. 678, 683, 684. It could build railroads traversing the entire state, and thus join its border cities and commercial centers by new highways of internal intercourse, to be always available upon reasonable terms. Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make re-ad-417]justments *extending from market to market through a wide sphere of influence; but such action of the state would not for that reason be regarded as creating a direct restraint upon interstate commerce, and as thus transcending the state power. Similarly, the authority of the state to prescribe what shall be reasonable charges of common carriers for interstate transportation, unless it be limited by the exertion of the constitutional power of Congress, is state-wide. As a power appropriate to the territorial jurisdiction of the state, it is not confined to a part of the state, but extends throughout the state,—to its cities adjacent to its boundaries as well as to those in the interior of the state. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier, and is not controlled by it; and the idea that the power of the state to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the state's border is foreign to our jurisprudence.

If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power; that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province.

(3) When Congress, in the year 1887, enacted the act to regulate commerce (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), it was acquainted *with the course of the development of[418 railroad transportation and with the exercise by the states of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation, in which the nature and extent of state legislation, including the commission plan, were fully reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st session). And it was the fact that beyond the bounds of state control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the 1st section of the act to regulate commerce there was inserted the following proviso:

"Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country, from or to any state or territory as aforesaid."

When in the year 1906 (act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in § 1 was re-enacted. Again, in 1910, when the act was extended to embrace telegraph, telephone, and cable companies engaged in interstate business, the proviso was once more re-enacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. (Act of June 18, 1910, chap. 309, 36 Stat. at L. 545. U. S. Comp. Stat. Supp. 1911, p. 1285.) The proviso in its present form reads:

"Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling *of property wholly within one state,[419

and not shipped to or from a foreign country, from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state, and not transmitted to or from a foreign country, from or to any state or territory, as aforesaid."

There was thus excluded from the provisions of the act that transportation which was "wholly within one state," with the specified qualification where its subject was going to or coming from a foreign country.

It is urged, however, that the words of the proviso are susceptible of a construction which would permit the provisions of § 3 of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discrimination between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed (and it is not necessary now to decide the point), it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute 420]if the *court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & Ohio R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, ante, 742, 33 Sup. Ct. Rep. 443. In the present case there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review.

The question we have now before us, essentially, is whether, after the passage of the interstate commerce act, and its amendment, the state continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority.

Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court, recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith.

Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for interstate rates, or prescribe, or *authorize the commission[421 to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject. Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 620, 621, 53 L. ed. 352, 359, 360, 29 Sup. Ct. Rep. 214.

How clear was the purpose not to occupy the field thus left to the exercise of state power is shown by the clause uniformly inserted in the numerous acts passed by Congress to authorize the construction of railways across the Indian territory. This clause, while fixing a maximum passenger rate, made the laws of an adjoining state (in some cases Arkansas, in other Texas, and in others Kansas) applicable to the freight rates to be charged within the territory; and while the right to regulate rates on the authorized line of railroad was reserved to Congress until a state government should be established, it was expressly

provided that, when established, the state should be entitled to fix rates for intrastate transportation,—the right remaining with Congress to prescribe rates for such transportation as should be interstate. Within a month after the act to regulate commerce was enacted, two acts were passed by Congress for this purpose with respect to railways extending across the territory from the Texas to the Kansas boundary. The provision—in both cases in identical language, save that the one referred to the laws of Texas and the other to the laws of Kansas—was as follows (act of February 24, 1887, chap. 254, § 4, 24 Stat. at L. 420; act of March 2, 1887, chap. 319, § 4, 24 Stat. at L. 447):

"Sec. 4. That said railroad company shall not charge the inhabitants of said territory 422]a greater rate of freight *than the rate authorized by the laws of the state of Texas for services or transportation of the same kind: Provided, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway, and messages on said telegraph and telephone lines, *until a state government or governments shall exist in said territory within the limits of which said railway, or a part thereof, shall be located; and then such state government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway;* but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state: Provided, however, That the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed: And provided further, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law, the Postmaster General may fix the rate of compensation."

The same provision is found in similar statutes passed in almost every year from 1884 to 1902, and relating to lines intended to serve as highways of interstate communication.† When Oklahoma became a state, the laws *of other states which[423 were referred to in these various acts ceased to be operative within its limits, and by virtue of its statehood and with the direct sanction of Congress, it became authorized to prescribe reasonable maximum rates for intrastate transportation throughout its extent. Oklahoma v. Atchison, T. & S. F. R. Co. 220 U. S. 277, 285, 55 L. ed. 465, 467, 31 Sup. Ct. Rep. 434; Oklahoma ex rel. West v. Chicago, R. I. & P. R. Co. 220 U. S. 302, 306, 55 L. ed. 474, 475, 31 Sup. Ct. Rep. 442.

The decisions of this court since the passage of the act to regulate commerce have uniformly recognized that it was competent for the state fix such rates, applicable throughout its territory. If it be said that, in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority. And the decisions recognizing and defining the state power wholly refute the contention that the making of such rates either constitutes a direct burden upon the interstate commerce or is repugnant to the Federal statute.

In Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028, the statute of Arkansas, enacted in April, 1887, *which estab-[424 lished 3 cents a mile as the maximum fare for carrying passengers within the state on railroads over 75 miles in length, was sustained against the objection of the owners of the Memphis & Little Rock Railroad, who attacked the act as confiscatory and arbitrary in its classification. The same statute was again upheld in St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484. In Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702, the statute of that state (1887) creating a commission with power to prescribe intrastate rates was adjudged to be invalid, but this was upon the ground that the act as construed by the state court made the rates published by the commission final and conclusive, and precluded any judicial injury whether they were reason-

†Referring to laws of Texas: Acts of July 4, 1884, chap. 177, § 4, 23 Stat. at L. 69, 70; July 1, 1886, chap. 601, § 4, 24 Stat. at L. 117, 119; February 18, 1888, chap. 13, § 4, 25 Stat. at L. 35, 37; May 14, 1888, chap. 248, § 4, 25 Stat. at L. 140, 142; May 30, 1888, chap. 337, § 4, 25 Stat. at L. 162, 163; June 26, 1888, chap. 494, § 4, 25 Stat. at L. 205, 207; October 1, 1890, chap. 1248, § 4, 26 Stat. at L. 632, 634; July 30, 1892, chap. 329, § 4, 27 Stat. at L. 336, 338; March 1, 1893, chap. 188, § 4, 27 Stat. at L. 524, 525; August 4, 1894, chap. 215, § 4, 28 Stat. at L. 229, 230; March 23, 1898, chap. 87, § 4, 30 Stat. at L. 341, 342.

Referring to laws of Kansas: Acts of July 4, 1884, chap. 179, § 4, 23 Stat. at L.

able. In Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, the act of the legislature of Michigan (1889), fixing the maximum fare for passengers within the state at 2 cents a mile in the case of companies whose gross earnings exceeded $3,000 a mile was unsuccessfully assailed as confiscatory, and no contention was advanced that such an act, operating throughout the state, was an unwarrantable interference with interstate commerce.

In Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, the trustee of a railroad mortgage attacked the statute of Texas (1891), which established a railroad commission with authority to regulate tariffs, and the order of the commission providing a schedule of classified rates for the transportation of goods within the state. The challenge was of the tariff as a whole, and the inquiry was whether the body of rates was unreasonable, and such as to work a practical destruction of rights of property. Viewed in this aspect, the court, upon the allegations admitted by demurrer, held the action of the commission to be beyond its constitutional power, 425] *and affirmed the decree of the circuit court, enjoining the rates. The decree, however, was reversed so far as it restrained the commission from discharging the duties imposed by the statute, and from proceeding to prescribe reasonable rates and regulations. A further question was presented in Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060, in respect to the same statute and order as applied to the Texas & Pacific Railway Company, which had been organized under the laws of the United States (16 Stat. at L. 573, chap. 122), and operated its road not only within that state, but also for several hundred miles outside. It was insisted that this company was "not subject to the control of the state, even as to rates for transportation wholly within the state," the argument being that it was not within the state power to limit the Federal franchise to collect tolls. But the court held that the act of Congress did not go to the extent asserted, but left the company, as to its intrastate business, subject to state authority.

The effect of intrastate rates upon interstate rates was urged in Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, and in the cases decided therewith. These suits were brought by stockholders of the Union Pacific Railway Company, the Chicago & Northwestern Railroad Company, and the Chicago, Burlington, & Quincy Railroad Company, to enjoin the enforcement of the act of the legislature of Nebraska, passed in 1893. This was a comprehensive statute, classifying the freight transported from any point in Nebraska to any other point in that state, and prescribing tables of maximum rates. The companies affected were interstate carriers enagaged in a vast commerce, only a small portion of which was wholly local to the state. On the eastern boundary lay Omaha, a city of large importance in interstate trade, situated on the Missouri river, with Council Bluffs, in the state of Iowa, directly opposite. The point was distinctly *made in the circuit court that the[426 statute interfered with interstate commerce because, first, it established a classification of freights different from that which prevailed west of Chicago, and second, by reducing local rates it necessarily reduced rates on interstate business. Mr. Justice Brewer, who tried the cases, overruled these objections, holding that neither the convenience of the carriers nor the consequences of competition with respect to interstate rates could be pleaded "in restraint of the otherwise undeniable power of the state." Ames v. Union P. R. Co. 64 Fed. 165, 171, 172. Having disposed of this contention, the court considered the question of the reasonableness of the rates, and reached the conclusion that they were invalid because they amounted to a deprivation of the carriers' rights of property. On appeal to

73, 74; June 21, 1890, chap. 479, § 4, 26 Stat. at L. 170, 171; June 30, 1890, chap. 638, § 4, 26 Stat. at L. 184, 185; September 26, 1890, chap. 947, § 4, 26 Stat. at L. 485, 487; February 27, 1893, chap. 171, § 4, 27 Stat. at L. 492, 493; March 18, 1896, chap. 60, § 4, 29 Stat. at L. 69, 70; March 30, 1896, chap. 82, § 4, 29 Stat. at L. 80, 82.

Referring to laws of Arkansas: Acts of June 1, 1886, chap. 395, § 4, 24 Stat. at L. 73, 74; July 6, 1886, chap. 744, § 4, 24 Stat. at L. 124, 125; February 18, 1888, chap. 13, § 4, 25 Stat. at L. 35, 37; May 30, 1888, chap. 337, § 4, 25 Stat. at L. 162, 163; February 26, 1889, chap. 280, § 4, 25 Stat. at L. 745, 746; February 24, 1891, chap. 288, § 4, 26 Stat. at L. 783, 785; March 3, 1891, chap. 535, § 4, 26 Stat. at L. 844, 846; February 24, 1896, chap. 30, § 6, 29 Stat. at L. 13, 15; March 2, 1896, chap. 38, § 4, 29 Stat. at L. 40, 41; April 6, 1896, chap. 93, § 4, 29 Stat. at L. 87, 88; January 29, 1897, chap. 108, § 4, 29 Stat. at L. 502, 504; March 30, 1898, chap. 104, § 6, 30 Stat. at L. 347, 349; January 28, 1899, chap. 65, § 5, 30 Stat. at L. 806, 808; February 4, 1899, chap. 88, § 6, 30 Stat. at L. 816, 818; March 3, 1899, chap. 453, § 6, 30 Stat. at L. 1368, 1370.

Referring to laws of Territory of Oklahoma: Acts of February 28, 1902, chap. 134, § 4, 32 Stat. at L. 43, 45.

this court, the counsel for the appellees directed attention to the conditions of transportation in Nebraska. It was argued that the local traffic was carried over the same tracks, in the same trains, and often in the same cars with the interstate traffic; that to separate the cost of carrying the one sort of traffic from that of the other was a "manifest impossibility;" and that it was a necessary consequence of existing conditions that, if Nebraska controlled the local rates, it, at the same time, controlled the interstate rates. But this contention was not sustained, and the affirmance of the decree was placed upon the distinct ground that the rates were confiscatory. It was ruled that the reasonableness of intrastate rates was to be determined by considering the intrastate business separately. In answer to the suggestion that the conditions of business might have changed for the better since the decrees, the court called attention to the proviso in the decrees intended to meet such a case, adding that if the circuit court found that conditions were such as to permit the application of the state rates without depriving the carriers of just compensation, it would "be its duty 427] *to discharge the injunction" and to make whatever order was necessary "to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute." 169 U. S. p. 550; see Smyth v. Ames, 171 U. S. 361, 365, 43 L. ed. 197, 198, 18 Sup. Ct. Rep. 888.

In that one of the Smyth Cases which was brought by the stockholders of the Union Pacific Railway Company, not only was the case presented of a trunk line crossing the state with a relatively small proportion of business local to Nebraska, but the company had been formed by a consolidation of several companies by authority of Congress, one of them being the Union Pacific Railroad Company, incorporated by the act of July 1, 1862, chap. 120, 12 Stat. at L. 489. By this act (§ 18, p. 497), it was expressly provided that Congress might reduce the rates of fare if unreasonable, and might fix the same by law whenever the net earnings of the entire road and telegraph should exceed a certain amount. But this language, while showing that Congress intended to reserve the power to prevent unreasonable exactions, was not deemed to be equivalent to a declaration that the states through which the road might be constructed should not regulate rates for intrastate transportation. The court said: "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limts of a state, is a subject primarily within the control of that state. . . . Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a state prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the 18th section of the act of 1862, or its power under the general reservation made of authority to add to, alter, amend, or repeal that act, prescribes rates to be charged by *the[428 railroad company, it remains with the states through which the road passes to fix rates for transportation beginning and ending within their respective limits." 169 U. S. pp. 521, 522. It is plain that had the intrastate rates, established by the comprehensive statute of Nebraska, not been found to be confiscatory, they would have been sustained in their application to all intrastate traffic notwithstanding the reserved power of Congress over the Union Pacific line, and despite the argument based upon the interdependence of interstate and intrastate rates.

The cases of Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95, and Louisville & N. R. Co. v. Euband, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277, concerned the validity of the long and short haul provision of the Constitution of Kentucky, adopted in 1891. In the first case, violation was charged with respect to the transportation of coal from Altamont to Lebanon, an intermediate station, as compared with charges for transportation from Altamont to Elizabethtown and Louisville, all places being within Kentucky. The difference in rate was justified by the company on the ground that at Louisville the coal hauled from Altamont came into competition with that brought down the Ohio river, and at Elizabethtown with western Kentucky coal brought there by the Illinois Central Railroad. The contention that the state provision operated as an interference with interstate commerce was presented and overruled, the court saying: "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state. It may be that the enforcement of the state regulation forbid-

429]ding discrimination in *rates in the case of articles of a like kind, carried for different distances over the same line, may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a state." 183 U. S. pp. 518, 519. In the Eubank case, which had been argued before the first case was decided, it appeared that the state court had construed the same provision of the Kentucky Constitution as embracing a long haul from a place outside to one within the state (Nashville and Louisville), and a shorter haul on the same line and in the same direction between points within the state. The court held that, so construed, the provision was invalid, as being a regulation of interstate commerce, because it linked the interstate rate to the rate for the shorter haul, and thus the interstate charge was directly controlled by the state law. 184 U. S. pp. 41, 43. The authority of the former decision upholding the state law, as applied to places all of which were within the state, was in no way impaired, and the court fully recognized the power of the state to prescribe maximum charges for intrastate traffic although carried over an interstate road to points on the state line. Id. pp. 33, 42.

The case of Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900, involved shipments of hard coal in carload lots from Duluth, Minnesota, to points in the southern and western portion of that state. The Railroad & Warehouse Commission of Minnesota, in 1899, prescribed a joint rate to be observed by the St. Paul & Duluth Railroad Company, the Minneapolis & St. Louis Railroad Company, and other carriers. The state court directed the issue of a writ of mandamus to compel compliance with the order. It 430]was objected that the act under *which the order was made was unconstitutional so far as it assumed to establish joint through rates over the lines of independent connecting railroads, and to divide joint earnings, and that the tariff as fixed was not compensatory. This court affirmed the judgment. In Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163, the company made what it called a "rebilling rate" on grain shipped from Vicksburg to Meridian, Mississippi, which was applicable only in case of shipments received at Vicksburg over the Shreveport line. It gave, however, to such shippers an option for a specified time to send other grain from Vicksburg instead, and thus it was in fact a local rate. To end this discrimination, the state commission, in 1903, fixed the same rate for all grain products shipped from Vicksburg to Meridian. It was urged that the effect of the order would be to force the plaintiff to enter into joint through interstate tariffs and divisions with all lines reaching Vicksburg by rail or river, whether it desired such arrangements or not. The court sustained the order, holding that it was competent for the state to enforce equality as to local transportation, and that this equality could not be defeated "in respect to any local shipments by arrangements made with or to favor outside companies."

In Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423, the attorney general of North Dakota charged the company with continuous violation of a law fixing rates for the carriage of coal within the state (North Dakota, Laws of 1907, chap. 51), and asked for an injunction. It appears by the record that in its return to the rule to show cause in the state court, the company alleged that the statute was void because repugnant to the commerce clause, and also that the rate fixed thereby was confiscatory. In support of the last contention the return set forth that the maximum rates for carrying coal which the company was allowed to charge under the act in question were *great-[431 ly lower than the rates for similar service fixed by Minnesota for that state (reference being made to chapter 232 of the Laws of 1907, the commodity rate act now in question), and those fixed by the railroad commissions of Illinois and Iowa, respectively; and that the conditions existing in North Dakota made it impossible to transport coal at a less rate than in the states named. The contention that the act violated the interstate commerce clause was said by the supreme court of the state to be based upon the assumption that state regulation of local rates on interstate lines amounted to an interference with interstate commerce. In view of the decisions of this court, the last question was not considered open to debate. State ex. rel. McCue v. Northern P. R. Co. 19 N. D. 45, 55, 25 L.R.A. (N.S.) 1001, 120 N. W. 869. This ruling was not challenged by the argument for the plaintiff in error here, and the question as to interference with interstate commerce was treated as removed from the case by the holding of the state court that the rates applied only to transportation within the state. 216 U. S. p. 580.

To suppose, however, from a review of these decisions, that the exercise of this

acknowledged power of the state may be permitted to create an irreconcilable conflict with the authority of the nation, or that, through an equipoise of powers, an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution, which, creating a nation, equipped it with an authority, supreme and plenary, to control national commerce, and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles 432]governing *state action, the state of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction, and not opposed to any action thus far taken by Congress.

The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year, and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made today, which will hold tomorrow; that terminals, facilities, and connections in one state aid the carrier's entire business, and are an element of value with respect to the whole property and the business in other states; that securities are issued against the entire line of the carrier and cannot be divided by states; that tariffs should be made with a view to all the traffic of the road, and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations, which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending *of the interstate and intrastate[433 operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.

*Second. Are the state's acts and orders confiscatory?*

The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters within the province of either. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571. The case falls within a well-defined category. Here we have a general schedule of rates, involving the profitableness of the intrastate operations of the carrier, taken as a whole, and the inquiry is whether the state has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law, and denied the equal protection of the laws.

The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge *for the serv-[434 ice rendered. But the state has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the service given to the public. Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191;

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 179, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 652, 39 L. ed. 567, 568, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 596, 597, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 215, 48 L. ed. 406, 408, 24 Sup. Ct. Rep. 241; Knoxville v. Knoxville Water Co. 212 U. S. 1, 17, 53 L. ed. 371, 381, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

In determining whether that right has been denied, each case must rest upon its special facts. But the general principles which are applicable in a case of this character have been set forth in the decisions.

(1) The basis of calculation is the "fair value of the property" used for the convenience of the public. Smyth v. Ames, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418. Or, as it was put in San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804: "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." See also San Diego Land & Town Co. v. Jasper, supra; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

(2) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in Smyth v. Ames (169 U. S. pp. 546, 547): "In order to ascertain that value, 435] *the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

(3) Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth Case (id. p. 541). The reason, as there stated, is that the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.

In the present cases the necessity of this segregation of the domestic business in determining values and results of operation was recognized by both parties. Voluminous testimony was taken before the master, and numerous exhibits containing data and calculations were submitted for the purpose of showing their respective estimates *of the value of the entire property of [436 the carriers in Minnesota, the amount of income and expense in that state, their theories of apportionment between the interstate and intrastate business, and their contentions as to the net return for intrastate transportation under the state rates. The multitude of facts which are involved makes it impossible here to present a comprehensive review, even in a summary way. We must be content with a statement of the salient points, and deal only with those matters which, after a careful consideration of the entire record, we regard as controlling our decision.

In each of the three cases (save in certain particulars with respect to that of the Minneapolis & St. Louis Railroad Company) the method adopted by the master was as follows:

The period taken for the purpose of testing the sufficiency of the rates was the fiscal year ending June 30, 1908. During this

period, all the rates in question, freight and passenger, were actually in force, with the exception of the commodity rates prescribed by the act of April 18, 1907, which had been enjoined. The amount of the reduction in the intrastate revenue which would have been caused by the application of the commodity rates is shown.

The master found the present value of the entire property of the carrier, used in the public service in the state of Minnesota. This valuation was as of June 30, 1908, and was made on the basis of the cost of reproduction new. The master also made findings as to the original cost of construction, and as to the present value on the basis of cost of reproduction new, of the entire system of the carrier. The estimated value of the railroad property within the state was divided between the freight and passenger business upon the relation of the gross revenue derived from each. The part of the total value which was thus assigned to the freight business within the state was then divided between the interstate and 437]intrastate *freight business on the basis of gross revenue; and a similar division was made between the interstate and intrastate business of the property value assigned to the passenger department. In this way the master found the value of the property used in intrastate transportation, freight and passenger, upon which he computed the net return received by the carrier.

There was no substantial dispute as to the amount of the entire revenue assignable to the state or as to its division between interstate and intrastate business, as an examination of the transactions in which the revenue was obtained permitted the making of the requisite apportionments with reasonable certainty.

The master also ascertained the total expense incurred by the carrier within the state. This expense was first divided between freight and passenger business. Those items of cost which were directly incurred in each sort of business, and not common to both, were directly assigned; and such items were found to cover about 60 per cent of all expenses. The remaining items, those of common expense, were divided between the freight and passenger business upon the relation, as to most of them, of revenue train-miles, and as to the others, of revenue engine-miles.

Having thus ascertained the share of the expense within the state of the freight and passenger departments respectively, it remained to divide that share, in each case, between the interstate and intrastate business. This apportionment was made, in the case of freight expense, upon what was termed an "equated ton-mile basis;" and in the case of passenger expense upon an "equated passenger-mile basis." That is to say, the master concluded that the cost per ton-mile of doing the intrastate freight business was at least two and one-half times the cost per ton-mile of the interstate freight business, and hence he divided the total freight expense according to the relation of the interstate and intrastate ton-miles after *the latter[438 had been increased two and one-half times. In the case of the passenger expense, he concluded that the cost per passenger-mile in the intrastate business was at least 15 per cent greater than that in the interstate business, and the total passenger expense was divided upon the relation of passenger-miles after increasing the intrastate passenger-miles 15 per cent.† By the use of equalizing factors, the same

† The method is illustrated from the following extract from the findings in the Northern Pacific Case:

Equated Ton-Mile Basis.

Freight—On basis of 1 intrastate ton mile costing as much as 2.5 interstate ton miles.

| | Actual | Equated | Proportion | Operating Exps. |
|---|---|---|---|---|
| Intrastate ton miles ..... | 130,580,988×2.5= | 326,452,470= | 25.362% | $1,355,273.82 |
| Interstate ton miles ..... | 960,709,494×1.0= | 960,709,494= | 74.638% | 3,988,444.43 |
| | 1,091,290,482 | 1,287,161,964= | 100.% | $5,343,718.25 |

Equated Passenger-Mile Basis.

Passenger—On basis of 100 intrastate passenger miles costing as much as 115 interstate passenger miles

| | Actual | Equated | Proportion | Operating Exps. |
|---|---|---|---|---|
| Intrastate passenger miles ..... | 52,317,140×1.15= | 60,164,711= | 37.347% | $863,325.13 |
| Interstate passenger miles ..... | 100,931,180×1.00= | 100,931,180= | 62.653% | 1,448,306.77 |
| | 153,248,320 | 161,095,891= | 100.% | $2,311,631.95 |

result was obtained upon what was called an "equated revenue basis."‡

439] *The net profits of the interstate and intrastate businesses, respectively, passenger and freight, were then found by deducting the apportioned share of expense from the apportioned share of revenue, and the rate per cent of the net profit upon the rate value assigned to each sort of business was computed. The master concluded that the returns from intrastate transportation were unreasonably low, and hence that the rates in question were confiscatory.

The validity of the result depends upon the estimates of the value of the property within the state and the apportionments both of value and of expense between interstate and intrastate operations.

440] *It will be convenient to take up the three cases separately:

1. *Northern Pacific Railway Company.*—The par value, April 30, 1908, of the stock of this company, was found to be $215,539,634.99, and of the bonds, $190,256,577.66; total, $405,796,392.65. (Included in this statement of capital stock is the sum of $60,539,634.99 received to April 30, 1908, upon subscriptions to new capital stock [$95,000,000] authorized by stockholders' resolution January 7, 1907.)

These securities and their value in the market rest upon the entire property of the company. They include assets of considerable value (for example, the stock of the Northwestern Improvement Company, owning extensive coal lands), which, however, do not form part of what may be called the operating property of the company, or that devoted to the public service, upon which the fair return is to be calculated (15 Inters. Com. Rep. 376, 397, 407). Referring to the market value of the securities, the master said: "Assets and property not devoted to public service have not been valued, and as they are a large element in stock valuation it follows that value of bonds and stocks is wholly unreliable and cannot be used in these cases as an element in determining the value of operating property, or as a basis for rate-making." In this view the master was undoubtedly right.

Much evidence was produced before the master for the purpose of showing the actual cost of construction and equipment of the entire railroad system from the beginning down to April 30, 1908. This, the master states, could be shown only by the corporate books and records; and in the early history of the original company these are somewhat obscure and uncertain, and, by reason of lapse of time, could not be verified by other proof. The total investment cost of the railroad system of the Northern Pacific thus shown was $369,252,755. This included *certain items[441 which the master held not to be properly allowable as a part of the cost, and after their deduction the cost was found to be $312,243,555. Of this investment cost, it appears

‡ Equated Revenue Basis.—In the case of the Northern Pacific Company it was found that the relation of freight revenue per ton per mile derived from the intrastate business, as compared with the interstate business, was as 1.4387 is to 1.0000. The relation of cost per ton per mile in the intrastate business in proportion to revenue, to the cost per ton per mile in interstate business in proportion to revenue, was then found to be as 1.7377 is to 1.0000, as follows:

$$\frac{250}{100} \div \frac{1.4387}{1.0000} = \frac{1.7377}{1.0000}$$

The actual intrastate freight revenue was multiplied by 1.7377 to obtain the equated revenue, and thus the same percentages were obtained as on the equated ton-mile basis, as follows:

Equated Revenue Basis. Freight.

| | Actual Revenue. | Equated Revenue. |
|---|---|---|
| Intrastate | $1,555,342.92×1.7377 | =$2,702,719.39=25.362% |
| Interstate | 7,953,734.41×1. | = 7,953,734.41=74.638% |
| | | $10,656,453.80=100.% |

The relation of revenue per passenger mile, intrastate and interstate, was found to be as 1.0092 is to 1.0000; and thus, the relation of cost per passenger mile in relation to revenue was as 1.1395 is to 1.0000. The division was then made as follows:

Equated Revenue Basis. Passenger.

| | Actual Revenue. | Equated Revenue. |
|---|---|---|
| Intrastate | $1,015,150.34×1.1395 | =$1,156,763.81=37.347% |
| Interstate | 1,940,718.17×1. | = 1,940,718.17=62.653% |
| | | $3,097,481.98=100.% |

from the evidence submitted by the company's comptroller that the sum of $128,184,985.82 was expended for construction and equipment, and for improvements and betterments, during the period from September 1, 1896, to April 30, 1908. The master found that the Minnesota track mileage is substantially 21 per cent. of the track mileage of the whole system † and that if the cost were proportioned accordingly, the amount assignable to the state of the entire cost of construction and equipment, as stated, would be $65,571,462.

The master, however, and the court below, in confirming his findings, held that rates were not to be predicated upon the original investment.

Taking, as the basis, the cost of reproduction new, the master found the value of the entire railroad system or operating property of this company to be $452,666,489.‡ The value of that portion of the system which was in the state of Minnesota was separately found, on the same basis, to be $90,204,545. It was upon this estimate of the value of the property in the state, as apportioned between the interstate and intrastate business, that the master computed the rate of return.

The total net profits of the company for 442]the fiscal year *ending June 30, 1908, from its Minnesota business (interstate and intrastate), was found to be $5,431,514.56. This was equal to 6.021 per cent on the entire estimated value of the property. This showing of the results of the entire business at once directs attention to the importance of the methods adopted in making apportionments; but before considering these, the question is presented as to the soundness of the underlying estimate of value. May it be accepted as a basis for a finding that the rates are confiscatory?

†The master found that the total track mileage of the system was 7695.80 and that the track mileage in Minnesota was 1625.20. In both cases spurs, yards, and sidings were included. In Minnesota, as shown by the company's statement, the "passing, side, and industry tracks" amounted to 512.41 miles, leaving for the single track, and second and third main track, miles, a total of 1112.79 miles.

‡This estimate did not include the interest of the Northern Pacific in the Spokane, Portland & Seattle Railroad which was under construction, or the Big Forks & International Falls Railway, or the Minnesota & International Railway, or in certain lines in Manitoba, under lease, which were found not to be part of the operating system.

*Values.*—The items entering into the valuation are set forth in the margin.†

†Valuation—Northern Pacific.

| | |
|---|---|
| 1. Lands for right of way, yards and terminals | $21,024,562 |
| 2. Grading, clearing, and grubbing | 12,331,541 |
| 3. Protection work, rip-rap, retaining walls | 374,091 |
| 4. Tunnels | 253,250 |
| 5. Crossties and switchties | 3,657,576 |
| 6. Ballast | 1,960,969 |
| 7. Rails | 5,645,307 |
| 8. Track fastenings | 727,228 |
| 9. Switches, frogs, and railroad crossings | 303,717 |
| 10. Track laying and surfacing | 1,600,591 |
| 11. Bridges, trestles, and culverts | 3,586,063 |
| 12. Track and bridge tools | 28,073 |
| 13. Fences, cattle guards, and signs | 471,609 |
| 14. Stockyards and appurtenances | 37,098 |
| 15. Water stations | 436,489 |
| 16. Coal stations | 120,039 |
| 17. Stations, buildings, and fixtures | 920,428 |
| 18. Miscellaneous buildings | 1,054,874 |
| 19. Steam and electric power plants, gas plants | 196,338 |
| 20. General repair shops | 1,162,934 |
| 21. Shop machinery and tools | 529,322 |
| 22. Engine houses, turntables, and cinder pits | 1,026,346 |
| 23. Track scales | 38,520 |
| 24. Docks and wharves | 768,306 |
| 25. Interlocking plants and 26. other signal apparatus | 114,430 |
| 27. 28. Telegraph and telephone lines | 285,145 |
| 28½ General office furniture | 73,654 |
| 29. Solidification of roadbed. (Absorbed in above) | |
| Total 1 to 28 | $58,728,685 |
| 30. Engineering, superintendence, legal expenses, 4½ per cent 1 to 28 | 2,785,036 |
| 31. Locomotives | 3,454,040 |
| 32. Passenger equipment | 1,349,829 |
| 33. Freight car equipment | 7,519,722 |
| 34. Miscellaneous equipment | 372,477 |
| 35. Marine equipment (none) | |
| Total items 1 to 34 | $74,209,789 |
| 36. Freight on construction material—absorbed. | |
| 37. Contingencies, 5 per cent 1 to 34 | 3,710,479 |
| 38. Stores and supplies in Minnesota | 2,658,976 |
| 39. Interest during construction, 4 per cent, 2½ years Items 1 to 36 | 7,420,957 |
| 40. Interest in terminal properties, St. Paul depot, Duluth depot, Minnesota transfer | 2,204,344 |
| | $90,204,545 |

443] *The first item is:

"Lands for right of way, yards, and terminals, $21,024,562."

This is for the bare land, without structures or improvements of any sort, as the entire cost of reproduction in building the road and erecting all the existing structures is covered in other items. The master states that the amount thus allowed for land is made up as follows:

| | |
|---|---|
| "Terminal properties, St. Paul appraisement of Read, Watson & Taylor, as modified by railroad company ..... | $7,645,100.24 |
| "Add 5 per cent. for the cost of acquisition and consequential damages ... | 382,255.01 |
| 444] *"Property acquired after appraisement ..... | 328,725.69 |
| "Minneapolis appraisement of Elwood, Barney, and Ridgeway, as modified by railway company..... | 4,027,616.17 |
| "Add 5 per cent. for acquisition and consequential damages ..... | 201,380.80 |
| "Property acquired after appraisement ..... | 227,737.26 |
| "Duluth, appraisement of Stryker, Mendenhall, and Little ..... | 3,602,443.43 |
| "Add 25 per cent. for railway value, cost of acquisition, and consequential damages ..... | 900,610.85 |
| "Total value of terminals.. | 17,315,869.45 |
| "Lands outside of terminals | 3,708,693.45 |
| "Grand total ..... | 21,024,562.90" |

The appellants insist that no more than $9,498,099.27 should have been allowed.

It is contended that the valuation was made upon a wrong theory; that it is a speculative estimate of "cost of reproduction;" that it is largely in excess of the market value of adjacent or similarly situated property; that it does not represent the present value, in any true sense, but constitutes a conjecture as to the amount which the railway company would have to pay to acquire its right of way, yards, and terminals, on an assumption, itself inadmissible, that, while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the state, and the location, population, and activities of towns, villages, and cities, were as they now are.

We may first consider the basis for the finding with respect to the "lands outside terminals,"—that is, the right of way and station grounds, etc., outside the three cities.

445] *(a) *Lands outside terminals.*—The complainants' witness was Mr. Cooper, the land commissioner of the company, who has charge of the land grants for its entire system, of its right of way and land purchases, and has had a wide experience in connection with land values along the lines of the railway. In the latter part of 1906, the state notified the company to report the value of its properties, requiring a statement in one column of the "market value," and in another column, of the "value for railway purposes." Mr. Cooper was instructed to prepare the valuation for this report. From the information he received in special inquiries, and his own knowledge, and following what he understood to be the instructions from the state, he set down under the heading of "market value," not the market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land. This included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right of way. It did not, however, embrace an allowance for payments which might have to be made for improvements that possibly might be found upon the property in such case, or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. These supposed additional outlays he undertook to estimate. For this purpose he increased the "market value" as stated (in the case of agricultural lands generally multiplying it by three), and thus reached the amount set down as the "value for railway purposes." As it serves clearly to illustrate the theory upon which the land valuations were made, we make the following excerpts from Mr. Cooper's testimony:

The Master: When you speak of value, you mean cost of purchase?

*Witness: Cost of purchase; we[446 are using the word "value" somewhat wrongly, as we are talking along here. It is the cost of purchasing that property today.

. . . . . .

Witness: The word "value" doesn't seem to me to fit this case, because all the time we are figuring on the cost of reproducing this property, and our instructions from the state use the word "reproduce." Now, if a railroad company could buy property at what is generally considered its value, the word "value" would fit in all right, but there is this excess which a railroad company has to pay beyond what is generally

accepted as its value which increases the cost of reproducing a railroad property.

Q. And this excess which you now speak of is included in your market values as reported to the state and used in your testimony?

A. That is right. . . . . .

Q. . . . . Well, now, does the term "market value" as you have used it in making this report to the state and in your testimony here have the same meaning, or is it used in the same sense with reference to the values you have fixed and reported to the state for properties on the right of way outside of the terminals and outside of the larger cities?

A. Oh, yes.

Q. As in the cities here?

A. Yes; the same rule was applied all through in the Minnesota valuations.

. . . . . .

Q. Therefore, your judgment as to the value of the railroad property is always that it is higher than the value of contiguous property?

A. Yes, yes, that is true . . . . . .

Q. So that, in every case, what you call the market value is the value of contiguous or similarly situated property, with an additional amount which a railroad company is ordinarily compelled to pay?

A. That is right. . . . . .

447] *Q. You have put into the market value the excess which a railroad company pays for land?

A. That is correct.

Q. Then, when you multiply that by 3, you are multiplying by 3 one of the elements going to make up excessive cost to a railroad company?

A. That is right. . . . . .

Q. And you are unable to state how much upon the average you have added to the true or normal market value, to allow for the additional amount which the railroad company would have to pay upon the hypothesis that it is now compelled to purchase the land?

A. That is correct.

Q. And then having determined to your satisfaction at what figure or sum you would place the market value of this property to the railroad company, as you have described, you have added another sum for severance damage, cost of improvements unnecessary to the company, easements in abutting property, and general expenses?

A. That is correct.

Q. And you have determined that, in agricultural communities, this second addition is shown by the use of the multiple 3?

A. I think the multiple of 3 is too low, and I so testified in this case. When you are going through a highly cultivated country I think the multiplier of 3 is not enough.

Q. But that is what you used for the purpose of the right of way value of land through the agricultural communities?

A. That is right, in this state.

Q. And in the cities, in the three large terminals, you have added to what you describe as the market value of the lands to the railroad company, ascertained as described by you already, the amount necessarily to produce the difference shown in your testimony between the market value of the terminals and the right of way value?

A. That is right.

Q. And while you are able to show, and we can ascertain *from an inspection[448 of your testimony, the amount of the difference between the market value to the railroad company, as you have described, and the right of way value, and, in the rural communities or agricultural districts, the difference between the market value to you and the right of way value, there is nothing in any of your exhibits which will show, nor are you now prepared to state, the difference in what might be termed the normal, true, ordinary market value of the lands to the ordinary individual, and the sum which you have fixed as the market value to the railroad company if it were now compelled to purchase.

A. That is correct.

The "market value" of the lands (outside of the three cities) thus fixed and reported to the state was $2,008,491.50, and the increased amount estimated, in the manner stated, which was reported as the "value for railway purposes" was $4,944,924.60. The latter amount was submitted by the complainants in this case as the value of the lands. The master thought that the complainants' witness used too large a multiplier, and allowed 75 per cent of the amount thus claimed, or $3,708,693.45, stating that this was determined upon as the "fair reproduction value of the property." This allowance, it will be observed, was about $1,700,000 in excess of Mr. Cooper's estimate of "market value" as that term was used in making the report.

(b) Terminal properties.—This term is used to designate the lands for the right of way, yards, and terminals in St. Paul, Minneapolis, and Duluth. The total original cost of these lands to the company (according to its statement based on the best information obtainable), including purchases to April 30, 1908, was $4,527,226.76. The master allowed as their value, apart from the improvements made by the com-

pany, which, as we have said, were em-
449]braced *in the other items of reproduction cost, the sum of $17,315,869.45.

In preparing the valuation for the report to the state, Mr. Cooper employed real estate men in each of the cities to make an appraisement. He instructed them, as he testifies, "to make a conservative report of the cost of reproducing the properties owned by the company in each of their respective cities." They divided the property into districts and reported their estimate of units of value, as, for example, by the square foot. Mr. Cooper took these reports, discussed their valuations with the appraisers, and, aided by his own knowledge, formed an independent judgment, in no case increasing and in some instances (with respect to certain St. Paul and Minneapolis property) reducing the appraisers' values. He then set forth under the heading "market value," in the report to the state, as described in the testimony we have quoted, his estimate of what it would cost the company to purchase these lands, exclusive of improvements that might be upon them, severance and consequential damages and expenses incident to acquisition. The amounts he thus fixed were as follows: For the property in St. Paul $7,645,100.24; in Minneapolis, $4,027,616.17; in Duluth, $3,555,593.93. In the case of the St. Paul and Minneapolis properties the amounts are precisely those adopted by the master in his findings, and to this he adds 5 per cent to cover cost of acquisition and consequential damages. The master was of the opinion that the appraisers of these properties were "fully impressed with their value for railroad purposes" and that their appraisement as verified by them before him and modified by the railway company "is a generous valuation, and should be accepted as full railroad value of the terminal properties," and it was so accepted with the addition above stated. With respect to the Duluth property, where the appraisement appears to have rested upon the ordinary
450]values of real estate, *the master sets forth as the appraised value, $3,602,443.43, to which he adds 25 per cent or $900,610.85, "for railway value, cost of acquisition, and consequential damages."

In reviewing the findings, the court below reached the conclusion that "the master in effect found that the cost of reproduction and the present value of the lands for the terminals in the three great cities, including therein all cost of acquisition, consequential damages, and value for railroad use which he allowed, was only about 30 per cent more than the normal value of the lands in sales between private parties. He *found* the value of the lands outside the terminals to be only twice their normal value."

From our examination of the evidence we are unable to conclude that the excess stated may be thus limited. What is termed the normal value does not satisfactorily appear. It further will be observed—from the summary of valuations we have set forth in the margin†—that the amount thus allowed in item 1 for lands, yards, and terminals, both in and out of the three cities ($21,024,562), was included in the total on which 4½ per cent was allowed in item 30 for "engineering, superintendence, legal expenses," and again was included in the total on which 5 per cent was allowed in item 37 for "contingencies," and, in addition, was included in the total on which 10 per cent was allowed in item 39 for "interest during construction."

These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right of way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it cannot be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom *they enjoy,[451 and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights, and it cannot be supposed that they would be disregarded.

It is urged that, in this view, the company would be bound to pay the "railway value" of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market value* for all its available uses and purposes. United States v. Chandler-Dunbar Water Power Co. decided May 26, 1913 [229 U. S. 53, ante, 1063, 33 Sup. Ct. Rep. 667.]

†See ante, p. 1559.

If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; United States v. Chandler-Dunbar Water Power Co. supra. But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195, 54 L. ed. 725, 727, 30 Sup. Ct. Rep. 459. The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for [452] which it was taken; or of an *increase over its fair market value, by reason of any added value supposed to result from its combination with tracts acquired from others, so as to make it a part of a continuous railroad right of way held in one ownership. United States v. Chandler-Dunbar Water Power Co. and Boston Chamber of Commerce v. Boston, supra. There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained.

Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right of way if the railroad were not there is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and cannot be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity *must be manifest, [453] and if it rests upon disputed questions of fact, the invalidating facts must be proved. And this is true of asserted value as of other facts.

The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgments as to what the railroad right of way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist, and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right of way was conceived to be a property *sui generis*, "a large body of land in a continuous ownership," representing one of the "highest uses" of property, and possessing an exceptional value. The estimates before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided.

That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose *of making rates, is its land de- [454] voted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void because

they do not permit a return upon an increment so calculated?

It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. But still it is property employed in a public calling, subject to governmental regulation, and while, under the guise of such regulation, it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right.

455] *The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which, in the last analysis, must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of "engineering, superintendence, legal expenses," "contingencies," and "interest during construction."

By reason of the nature of the estimates, and the points *to which the testimony [456 was addressed, the amount of the fair value of the company's land cannot be satisfactorily determined from the evidence, but it sufficiently appears, for the reasons we have stated, that the amounts found were largely excessive.

Finding this defect in the proof, it is not necessary to consider the objections which relate to the sources from which the property was derived or its mode of acquisition, or those which are urged to the inclusion of certain lands which it is said were not actually used as a part of the plant; and we express no opinion upon the merits of these contentions.

The property other than land, as the detailed statement shows, embraced all items of construction, including roadbed, bridges, tunnels, etc., structures of every sort, and all appliances and equipment. The cost of reproduction new was ascertained by reference to the prices for such work and property. In view of the range of the questions we have been called upon to consider, we shall not extend this opinion for the purpose of reviewing this estimate, or of passing upon exceptions to various items in it, as their disposition would not affect the result.

The master allowed the cost of reproduction new without deduction for depreciation. It was not denied that there was depreciation in fact. As the master said, "everything on and above the roadbed depreciates from wear and weather stress. The life of a tie is from eight to ten years only. Structures become antiquated, inadequate, and more or less dilapidated. Ballast requires renewal, tools and machinery wear

out, cars, locomotives, and equipment, as time goes on, are worn out or discarded for newer types." But it was found that this depreciation was more than offset by appreciation; that "the roadbed was constantly increasing in value;" that it "becomes solidified, embankments and slopes or excavations become settled and stable and 457]so the better resist the effects of *rains and frost;" that it "becomes adjusted to surface drainage, and the adjustment is made permanent by concrete structures and riprap;" and that in other ways, a roadbed long in use "is far more valuable than one newly constructed." It was said that "a large part of the depreciation is taken care of by constant repairs, renewals, additions, and replacements, a sufficient sum being annually set aside and devoted to this purpose, so that this, with the application of roadbed and adaptation to the needs of the country and of the public served, together with working capital . . . fully offsets all depreciation and renders the physical properties of the road not less valuable than their cost of reproduction new." And in a further statement upon the point, the "knowledge derived from experience" and "readiness to serve" were mentioned as additional offsets.

We cannot approve this disposition of the matter of depreciation. It appears that the master allowed, in the cost of reproduction, the sum of $1,613,612 for adaptation and solidification of roadbed, this being included in the item of grading, and being the estimate of the engineer of the state commission of the proper amount to be allowed. It is also to be noted that the depreciation in question is not that which has been overcome by repairs and replacements, but is the actual existing depreciation in the plant as compared with the new one. It would seem to be inevitable that in many parts of the plant there should be such depreciation, as, for example, in old structures and equipment remaining on hand. And when an estimate of value is made on the basis of reproduction new, the extent of existing depreciation should be shown and deducted. This apparently was done in the statement submitted by this company to the Interstate Commerce Commission in the Spokane Rate Case in connection with an estimate of the cost of reproduction of the entire system as of March, 1907. See 458]15 Inters. Com. Rep. 395, 396. In *the present case, it appears that the engineer of the state commission estimated the depreciation in the property at between eight and nine million dollars. If there are items entering into the estimate of cost which should be credited with appreciation, this also should appear, so that instead of a broad comparison there should be specific findings showing the items which enter into the account of physical valuation on both sides.

It must be remembered that we are concerned with a charge of confiscation of property by the denial of a fair return for its use; and to determine the truth of the charge there is sought to be ascertained the present value of the property. The realization of the benefits of property must always depend in large degree on the ability and sagacity of those who employ it; but the appraisement is of an instrument of public service, as property, not of the skill of the users. And when particular physical items are estimated as worth so much new, if in fact they be depreciated, this amount should be found and allowed for. If this is not done, the physical valuation is manifestly incomplete. And it must be regarded as incomplete in this case. Knoxville v. Knoxville Water Co. 212 U. S. 1, 10, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148.

*Apportionment of values.*—As the rate of net return from the entire Minnesota business (interstate and intrastate) during the test year was 6.021 per cent on a valuation of $90,204,545, and would be greater if computed upon a less value, we are brought to the question whether the methods of apportionment adopted are so clearly appropriate and accurate as to require a finding of confiscation of property used in the intrastate business.

The apportionment of the value of the property, as found, between the interstate and intrastate business, was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court, and its correctness *is[459 now challenged. Doubtless, there may be cases where the facts would show confiscation so convincingly in any event, after full allowance for possible errors in computation, as to make negligible questions arising from the use of particular methods. But this case is not of that character.

In support of this method, it is said that a division of the value of the property according to gross earnings is a division according to the "value of the use," and therefore proper. But it would seem to be clear that the value of the use is not shown by *gross* earnings. The gross earnings may be consumed by expenses, leaving little or no profit. If, for example, the intrastate rates were so far reduced as to leave no net profits, and the only profitable business was the interstate business, it cer-

tainly could not be said that the value of the use was measured by the gross revenue.

It is not asserted that the relation of expense to revenue is the same in both businesses; on the contrary, it is insisted that it is widely different. The master found that the revenue per ton-mile in the intrastate business, as compared with the revenue per ton-mile in the interstate business, was as 1.4387 to 1.0000. And, on his assumption as to the extra cost of doing the intrastate business, he reached the conclusion that the cost per ton-mile in proportion to the revenue per ton-mile in the intrastate business, as compared with the interstate business, was as 1.7377 to 1.0000. It is contended, according to the computations, that only a little over 10 per cent of the entire net revenue of the test year ($5,431,514.66) was made in the intrastate business, and that 90 per cent thereof was made in the interstate business; but approximately 21 per cent of the total value of the property was assigned to the intrastate business.

If the property is to be divided according to the value of the use, it is plain that the gross-earnings method is not an accurate measure of that value.

In Chicago, M. & St. P. R. Co. v. Tomp-
460]kins, 176 *U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336, the court below had found the value of the plaintiffs' property in South Dakota to be $10,000,000, and had divided it between the interstate and intrastate business, according to the gross receipts from each. Mr. Justice Brewer, in delivering the opinion of the court, after referring to the result reached, said:

"Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one fifth of what they had been, so that instead of receiving $500,000 the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000, it earns 6 per cent. In other words, although the actual receipts from local business are only one fifth of what they were, the earning capacity is three fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—6 per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court *reached[461 its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced." Id. pp. 176, 177.

The value of the use, as measured by return, cannot be made the criterion when the return itself is in question. If the return, as formerly allowed, be taken as the basis, then the validity of the state's reduction would have to be tested by the very rates which the state denounced as exorbitant. And, if the return as permitted under the new rates be taken, then the state's action itself reduces the amount of value upon which the fairness of the return is to be computed.

When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the state rates, but this we cannot assume.

It is sufficient to say that the method here adopted is not of a character to justify the court in basing upon it a finding that the rates are confiscatory.

462] *Apportionment of expenses.*—As already stated, it was held in dividing the freight operating expenses, that the cost of doing the intrastate freight business was two and one-half times that of doing the interstate freight business. That is to say, the division of expenses was made according to ton-miles, interstate and intrastate, after the intrastate ton-miles had been increased two and one-half times.

The substantial question is whether the proof established this extra cost with that degree of certainty which is requisite to support a decree invalidating the state rates.

It appeared that the cost of intrastate business was not kept separately or set up in the accounts or statistics of the company.

The president of the company testified as to his judgment in the matter, which was based, in the absence of such accounts, upon the general facts of operation. His testimony was supported by that of other eminent railroad men, who testified in the Great Northern and Minneapolis and St. Louis cases. The elements entering into the greater expense of doing intrastate business were defined to be: That the average haul was shorter, being (in the case of the Northern Pacific) 104.52 miles for intrastate transportation as against 485.3 miles for interstate transportation; that the state business had to be handled twice at terminals; that the local short-haul business used most valuable terminal facilities in order to obtain its proper handling from the larger distributing centers, and used those facilities to a greater extent for the tons handled than did the longer through business; that the amount of clerical and warehouse labor in connection with the local business was much greater than in the case of the long-haul through business; that the chances of damage were greater in the short-haul business because of the greater number of individual transactions; that in the short-haul business there was an excess of equipment 463]for loading and unloading; *that local or way freight trains were "loaded lighter;" that the wear and tear on the local trains was greater because of frequent stopping and starting; that there was increased switching, resulting in greater damage to equipment and tracks; that the local train was generally on the road more hours than a through train, and therefore consumed more coal; that in the smaller stations the amount of shifting was large; that many of the local trains carried passengers, involving two stops at each station, one for passengers and the other for the local freight work; that the manner of operation of local trains increased the chances of injury to employees; that the short-haul business moved irregularly and spasmodically, and that its facilities were worked at their full capacity only for limited periods.

From these considerations, which were elaborated in the testimony, the witness reached the conclusion that the "so-called local short-haul intrastate business costs anywhere from three to six or seven times as much as the so-called long-haul through interstate business." In the Great Northern Case, the witnesses expressed the opinion that the extra cost of intrastate freight was three or four times greater than that of the interstate freight. One witness said that it would be from four to six times. These estimates, it is understood, had relation to the cost per ton mile.

The appellants do not dispute that business carried for short distances on local trains is more expensive than the handling of other business, but it is insisted that this is due solely to the different train service that it receives. It is said that all through trains start from divisional points and run from one end of the division to the other without stop; that the local trains are made up of cars carrying business destined for points intermediate the termini of the division, and take up all traffic originating at the intermediate stations; that the word "local," as *applied to[464 these trains, is not synonymous with intrastate, but that the local trains carry a large part of the interstate traffic, both in receiving and distributing it; and that by far the greater part of the extra cost of the local train service is properly chargeable to interstate business. It is also insisted that so far as this extra expense can be charged to interstate business, it is adequately met by the additional revenue of that business, which per ton mile, as compared with the interstate business, is as 1.4387 to 1.0000.

To establish these propositions, and to meet the testimony of the complainants' witnesses, the appellants introduced an elaborate series of calculations, made by a professional accountant, which were deduced from the results of an extended examination of the records of the companies. The witness made computations as to the character of the freight on each road, dividing it between through and local freight upon each operating division, and then subdividing it between intrastate and interstate freight. It is contended by the appellants that these calculations are sufficient to show that in the case of the Northern Pacific, about 91 per cent of the freight on through trains was interstate and about 9 per cent intrastate, and that on the local trains the interstate freight amounted to

68.67 per cent, and the intrastate, 31.33 per cent. Calculations of this witness were also introduced, showing his division of the total expenses between the passenger and freight business, and then in each department between the interstate and intrastate business; and by means of these, it was estimated that, under the rates in question (assuming them to have been applied to the business of the fiscal year ending June 30, 1907, to which the calculations were directed), the net profits on the intrastate business as a whole would have been slightly more than 6 per cent upon an amount equal to the share of property value at-465]tributed to that *business by the master's estimate and apportionment of total value.

These computations are assailed by the appellees as inaccurate and as based upon erroneous estimates. We shall not go into the details, and, for the present purpose, we may assume that the appellees are right in their criticism.

Our conclusions may be briefly stated. The statements of the complainants' witnesses as to the extra cost of interstate business, while entitled to respect as expressions of opinion, manifestly involve wide and difficult generalizations. They embrace, without the aid of statistical information derived from appropriate tests and submitted to careful analysis, a general estimate of all the conditions of transportation, and an effort to express in the terms of a definite relation, or ratio, what clearly could be accurately arrived at only by prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line. The extra cost, as estimated by these witnesses, is predicated not simply of haulage charges, but of all the outlays of the freight service, including the share of the expenses for maintenance of way and equipment assigned to the freight department. And the ratio, to be accurately stated, must also express the results of a suitable discrimination between the interstate and intrastate traffic on through and local trains respectively, and of an attribution of the proper share of the extra cost of local train service to the interstate traffic that uses it. The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.

We are of opinion that, on an issue of this character, involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should 466]not be *accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost as there may be, of intrastate business may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared, at least during test periods, properly selected. It may be said that this would have been a very difficult matter but the company, having assailed the constitutionality of the state acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate *data* which would permit the court to draw the right conclusion.

We need not separately review the findings with respect to the division of passenger expenses, as the same considerations are involved, with the distinction, however, that the extra cost attributed to the intrastate business is relatively small as compared with that charged to intrastate freight. And, in view of the conclusions reached on the controlling questions we have considered, we express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments.

For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account. During the test year the entire revenue, as found, from the intrastate business, passenger and freight, amounted to $2,897,912.26. All the rates in question were in force save the commodity rates, and it is further found that the loss that would have accrued in intrastate commodity business, by the application of the commodity rates which were under injunction, would have amounted to $21,493.67.

As neither the share of the expenses properly attributable *to the intrastate[467 business, nor the value of the property employed in it, was satisfactorily shown, and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill.

2. *Great Northern Railway Company.*—The master found that at the time this suit was brought the par value of the stock of the company was $149,577,500, and of bonds, $83,119,939; total, $232,697,439. On June 30, 1908, the par value of the stock was $209,962,750, and of bonds, $97,955,939.39; total, $307,918,689.39. The property upon which these securities and their

value in the market are based includes, it is found, a very considerable amount not devoted to the public service.

The balance sheet of the company of June 30, 1908, showed the book valuation of the entire system employed in the public service to amount to $319,681,815. The master held that various items were included which were not properly allowable as a part of the cost, and deducting these, there remained as the book-showing of the total amount expended in construction and equipment, $295,401,213. The Minnesota track mileage was found to be practically 32.59 per cent of the total mileage, and upon this basis, the amount assignable to the state of the total cost, as stated, amounted to $96,271,255.

The master found that the cost of reproduction new of the entire system was $457,121,469.† The value of the portion of the system in Minnesota was separately found, on the basis of reproduction new, to be $138,425,291. The net profits of the company during the test year from its Minnesota business, interstate and intrastate, were $8,180,025.11, equal to 5.909 per cent upon this estimated value.

The items entering into the estimate are 468]the same in *character as those set forth in the estimate of the value of the property of the Northern Pacific Company.‡

Included in this reproduction cost was an allowance, for "lands for right of way, yards, and terminals," of $25,172,650.80, as follows:

| | |
|---|---|
| "St. Paul, appraisement of Read, Watson, and Taylor | $6,433,348.00 |
| "Add 5 per cent. for cost of acquisition and consequential damages..... | 321,667.40 |
| "Minneapolis, appraisement of Elwood, Barney, and Ridgeway ..... | 11,619,765.00 |
| "Add 5 per cent for cost of acquisition and consequential damages ..... | 580,968.15 |
| "Duluth, appraisement of Stryker, Mendenhall, and Little ..... | 713,280.00 |
| "Add 25 per cent. for railroad value, cost of acquisition, and consequential damages ..... | 178,320.00 |
| "Total value of terminals.. | 19,847,366.55 |
| "Lands outside of terminals | 5,325,284.25 |
| "Grand total..... | 25,172,650.80" |

The appraisements thus referred to, adopted by the master with the additions stated, were made by the appraisers in the three cities who were employed in the case of the Northern Pacific Company. The valuations were made at the same time, and upon the same basis, as the corresponding valuations in that case, and are open to the same objections. In the company's estimate of the value of the lands outside these cities, the amount stated as the market value was largely increased to obtain the "right of way value;" with respect to lands in agricultural sections, *the[469 "market value" was generally multiplied by 3; and of the total amount of the estimate of the company the master allowed 75 per cent, as in the Northern Pacific Case.

In addition, 4½ per cent of the aggregate land values, as found, was allowed in the item for "engineering, superintendence, legal expenses," and the further allowance of 16 per cent of these land values was made in the item of "interest during construction" (4 per cent for four years).

In the physical valuation estimated on the basis of the cost of reproduction new, the master made no deduction for depreciation, while, on the other hand, there was included under the item of grading the sum of $3,219,642 for adaptation and solidification of roadbed. The engineer of the state commission estimated the depreciation in the property at approximately $13-000,000.

What has already been said in the case of the Northern Pacific Company with respect to estimates of value, the apportionment of value, the testimony as to the extra cost of doing the intrastate business, and the division of expenses between interstate and intrastate business, is equally applicable here.† In these respects there is no material distinction between the two cases, and the same conclusion must be reached in both.

3. *Minneapolis & St. Louis Railroad Company.*—This case presents distinct considerations. The lines of this company consist of about 1028 miles of track, of which 396 miles are operated under lease or trackage rights. Of its owned mileage (632 miles) approximately 60 per cent is in the state of Minnesota. The master thus describes it: "It runs south from the inland cities of St. *Paul and Minneapo-[470 lis to Des Moines, with a branch to Storm Lake, Iowa, and a branch to the South Dakota grain fields. Along its entire line it

†This did not include the interest of the company in the Spokane, Portland, & Seattle Railroad, or lines under construction.

‡See ante, p. 1559.

†The total revenue received by the Great Northern during the fiscal year 1908, from its intrastate business, passenger and freight, was $4,641,829.58; and it was found that the loss that would have been sustained by the application of the enjoined commodity rates to the intrastate commodity traffic would have amounted to $87,261.43.

comes in sharp competition with strong intersecting railroad lines, and while, as before stated, it subserves a useful public purpose and is operated in response to public demand, it can be maintained only by the exercise of the highest economy and watchfulness in its operation, and to succeed must be given greater latitude than is necessary with respect to the more favorably located and prosperous lines of railway."

The less favorable situation of the road is fully recognized by the appellants, who object to its being regarded as affording a fair test of the sufficiency of the rates. They say that its "total mileage and the geographical location" are such "that it cannot be taken as typical of the railway situation in Minnesota;" and they insist that "the important and material questions are raised by the showing made in the Northern Pacific and Great Northern Cases." And the appellees, on their part, assert that "it cannot be seriously contended that the rates complained of are sufficient to yield any reasonable return on a proportionate value of the property used in the conduct of the business covered by the rates;" that the net income of the road "from all sources is scarcely sufficient to pay interest on its outstanding bonds;" that "the value of the property is greatly in excess of the par value of the bonds;" and that, as it seems to the appellees, "this company must earn more money or go into the hands of a receiver, within a comparatively short time."

The main facts are: The par value in 1908, of its stock and bonds, was $30,011,800, divided as follows: stock, $10,000,000 (preferred, $4,000,000, common $6,000,000); bonds, $20,011,800. It appeared that no dividends had been paid on the common stock since 1904. The annual interest charges amounted to $952,583.

471] *The book cost of its property, after deducting items disallowed by the master, was $28,574,225; and this, if divided according to mileage, would give to Minnesota as its share, $17,127,390. The mileage basis of division, however, fails to take account of the fact that the property in Minnesota has a greater relative value.

The master found the total value of the property in Minnesota on the basis of the cost of reproduction new to be $21,608,464. In this estimate there was included the sum of $5,999,397.90 for lands, yards, and terminals. Of this amount $4,556,298 was allowed for the lands in Minneapolis on the estimate of the same appraisers who had been employed in that city by the other companies; and to this the master added 5 per cent. The lands outside these terminals were valued at $1,215,285.

The net earnings of the entire system after paying only operating expenses and taxes, from 1903 to 1909, were found to be as follows: 1903, $1,398,895.30; 1904, $1,229,524.49; 1905, $1,277,870.96; 1906, $1,511,961.99; 1907, $1,419,822.54; 1908, $1,220,862.21; 1909, $1,286,494.08.

The net earning of the company on all its business in Minnesota, interstate and intrastate (involving any use of the property valued as stated), after paying only operating expenses and taxes, were, during the same period: 1903, $1,222,941.77; 1904, $1,052,478.74; 1905, $1,054,853.35; 1906, $1,109,260.56; 1907, $895,977.66; 1908, $742,377.46; 1909, $794,472.58. The reference in each case is to the fiscal year ending on June 30.

It thus appears that the net return from the entire Minnesota business in 1907 was about 4.14 per cent on the estimated value of the property ($21,608,464) in Minnesota; in 1908, less than 3.5 per cent; and in 1909, less than 3.7 per cent.

The master made his computations, with respect to the return permitted under the rates in question, upon the *operations [472 of the fiscal year ending June 30, 1907. The class rates had been effective from November 15, 1906, and the passenger fare act from May 1, 1907. It was estimated by the master that the additional loss, which would have accrued in the interstate business if these rates had been in force during the entire fiscal year ending June 30, 1907, and if, in addition, the commodity rate act, which was enjoined, had been applied to the intrastate traffic of that year, would have amounted to $131,358, thus making a very serious reduction in a return already inadequate; and his conclusion was that the rates in question were plainly confiscatory.

It is not necessary here to reproduce the computations, as we are satisfied, after a careful examination of the evidence, that while the methods of estimating value, and of apportionment, which have been disapproved in the discussion of the cases of the other companies, are subject to the same objections in this case, so far as they have been employed, the margin of error which may be imputed to them is not sufficiently great to change the result. The net return from the entire business in Minnesota, interstate and intrastate, fell to $742,000 in the fiscal year ending June 30, 1908, and it is plain that the latter amount would have been largely reduced had the commodity rate act been enforced. In view of the actual results of the business in the state, and the clearly established facts with respect to

the conditions of traffic upon this road, the conclusion cannot be escaped that the rates prescribed by the acts and orders of Minnesota would not permit a fair return to this company.

Without approving, therefore, the methods of calculation which have been adopted, but recognizing the peculiar situation of this road, and the undoubted effect of the rates in question upon its revenues, we are of the opinion that the decree, so far as it rests upon the confiscatory character of the rates as applied to this company, should 473] *be affirmed. In the desire, however, to prevent the possibility that the decree may operate injuriously in the future, we shall modify it by providing that the members of the Railroad & Warehouse Commission, and the attorney general of the state, may apply at any time to the court, by bill or otherwise, as they may be advised, for a further order or decree, whenever it shall appear that, by reason of a change in circumstances, the rates fixed by the State's acts and orders are sufficient to yield to the company reasonable compensation for the services rendered.

The decrees in Numbers 291 and 292 are reversed and the cases remanded with directions to dismiss the bills respectively without prejudice.

The decree in Number 293 is modified as stated in the opinion, and, as modified, is affirmed.

Mr. Justice McKenna concurs in the result.

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474]*JOHN A. KNOTT† et al., Railroad and Warehouse Commissioners, et al., Appts.,

v.

CHICAGO, BURLINGTON, & QUINCY R. R. COMPANY. (No. 9.)

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CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Appt.,

v.

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 12.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. Appts.,

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. (No. 339.)

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ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appt.,

v.

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 340.)

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JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY. (No. 341.)

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ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.,

v.

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 342.)

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JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,

v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY. (No. 345.)

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CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appt.,

v.

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 346.)

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JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY. (No. 349.)

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KANSAS CITY SOUTHERN RAILWAY COMPANY, Appt.,

v.

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 350.)

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JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,

v.

ST. LOUIS & HANNIBAL RAILWAY COMPANY. (No. 351.)

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†These cases are reported by the official Reporter under the title of "Missouri Rate Cases."

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NOTE.—On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. R. Co. v. Croxton, 33 L.R.A. 177.

On elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic—see notes to Pennsylvania R. Co. v. Philadephia County, 15 L.R.A.(N.S.) 108, and State ex rel. McCue v. Northern P. R. Co. 25 L.R.A. (N.S.) 1001.

As to the valuation upon which return or income from intrastate railway rates prescribed by a state is to be computed—see note to Simpson v. Shepard, ante, 1511.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

ST. LOUIS & HANNIBAL RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 352.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY. (No. 357.)

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad & Warehouse Commissioners, et al. (No. 358.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. Appts.,
v.
KANSAS CITY, CLINTON, & SPRINGFIELD RAILWAY COMPANY. (No. 365.)

KANSAS CITY, CLINTON, & SPRINGFIELD RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 366.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
CHICAGO GREAT WESTERN RAILWAY COMPANY et al. (No. 367.)

CHICAGO GREAT WESTERN RAILWAY COMPANY et al., Appts.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 368.)

(See S. C. Reporter's ed. 474–509.)

**Appeal — discretion below — filing amended and supplemental bill.**

1. The trial judge did not abuse his discretion by permitting the filing, in a suit assailing state railway rate legislation, of amended and supplemental bills setting forth and attacking new rate legislation pending suit, although the earlier legislation was repealed by some of the new legislation, saving, however, the penalties and liabilities already incurred, and although slightly higher rates were substituted on certain of the commodities embraced in the earlier legislation.

[For other cases, see Appeal and Error, VIII. 1, 3, in Digest Sup. Ct. 1908.]

**Courts — conflict of jurisdiction — priority — ouster.**

2. Jurisdiction acquired by a Federal circuit court by the filing of bills assailing state railway rate legislation was not ousted by the filing of a bill in a state court in the name of the state, seeking the enforcement of later rate legislation before supplemental bills setting forth and attacking new legislation were filed in the Federal court, where an application for leave to file the supplemental bills was then pending, and action had been suspended merely to give an opportunity for hearing, the court meanwhile restraining the enforcement of the new rates.

[For other cases, see Courts, VI. g, 1, in Digest Sup. Ct. 1908.]

**Commerce — state regulation of local rates of interstate carrier — congressional inaction.**

3. Congressional inaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.

[For other cases, see Commerce, I. c; III. e, in Digest Sup. Ct. 1908.]

**Carriers — rate regulation — valuation — assessments for taxation.**

4. Valuations placed upon railway properties by the state assessors for purposes of taxation do not afford an adequate basis for a determination as to the fair value of the property when testing the reasonableness of state regulation of railway rates,—especially where the principles governing the assessments are not properly shown.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — rate regulation — valuation of property.**

5. Broad estimates of the value of railway property are not sufficient to support a finding that railway rates, as fixed by the state, are confiscatory.

[For other cases, see Evidence, XII. m, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — rate regulation — valuation of property.**

6. A finding that railway rates as fixed by the state are confiscatory cannot be based upon an intrastate valuation of the railway property which, if extended to the entire railway system, would greatly exceed the railway company's total capitalization, in the absence of clear and convincing proof that the value actually existed, and that the different items of property were estimated respectively by correct methods and in accordance with proper criteria of value.

[For other cases, see Evidence, XII. m, in Digest Sup. Ct. 1908.]

**Appeal — estoppel to raise objection — stipulation.**

7. Concessions that the assessment of railway property by the state board of assessors was upon the basis of one third of what the board regarded as its value, and the use of estimates based upon those assessments by both parties in calculations submitted to the court on the issue of the reasonableness of state regulation of railway rates, do not prevent the state authorities from objecting on appeal to a valuation

by the court which is based upon such assessments.

[For other cases, see Appeal and Error, VIII. g, in Digest Sup. Ct. 1908.]

**Carriers — state regulation of rates — reasonableness — apportionment of interstate and intrastate valuation.**

8. A division of the value of the property of an interstate carrier within a state according to gross earnings derived respectively from its interstate and intrastate business in such state does not give a sufficiently accurate measure of the value of the use of its property in intrastate business to serve as the basis of a judicial holding in a close case, that the intrastate rates, as fixed by the state, are confiscatory.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.]

**Evidence — sufficiency — reasonableness — state regulation of railway rates — extra cost of intrastate operations.**

9. General estimates of the extra cost of the intrastate business of a carrier over its interstate business, made without the aid of accurate data covering adequate test periods, will not be accepted as adequate proof to sustain a finding that the carrier's intrastate rates, as fixed by the state, are confiscatory.

[For other cases, see Evidence, XII. m, in Digest Sup. Ct. 1908.]

**Statutes — invalid in part — rate regulation.**

10. Legislative regulation of railway rates which are not confiscatory as to certain railroads is enforceable as against them, though it may be unenforceable as against another carrier, differently situated, because the rates prescribed may, as to it, be unreasonably low.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[Nos. 9, 12, 339, 340, 341, 342, 345, 346, 349, 350, 351, 352, 357, 358, 365, 366, 367, and 368.]

Argued October 12 and 13, 1910. Ordered for reargument April 10, 1911. Reargued April 1, 2, and 3, 1912. Decided June 16, 1913.

APPEALS and CROSS APPEALS from decrees of the Circuit Court of the United States for the Western District of Missouri, adjudging railway rate legislation to be confiscatory, and enjoining its enforcement. Decrees in Nos. 9, 12, 339, 340, 341, 342, 345, 346, 349, 350, 357, and 358 reversed and causes remanded, with directions to dismiss the bills without prejudice. Decrees in Nos. 351, 352, 365, 366, 367, and 368 modified, and as modified, affirmed.

See same case below, 168 Fed. 317.

**Statement by Mr. Justice Hughes:**

Appeals and cross appeals from decrees of the circuit court entered March 8, 1909, as amended April 17, 1909, adjudging the maximum freight rate acts passed by the legislature of the state of Missouri in 1905 and 1907, and the maximum *passen-[477 ger fare act passed in 1907, to be confiscatory, and enjoining their enforcement. 168 Fed. 317.

Eighteen suits, brought by as many railroad companies, were begun in June, 1905, assailing the act of April 15, 1905 (effective June 16, 1905), which prescribed maximum rates for intrastate transportation of certain commodities in carload lots. The members of the board of railroad commissioners, the attorney general of the state, and representative shippers, were made defendants.

Preliminary injunction was granted in each case, demurrers to the bills were overruled, answers were filed, and in March, 1906, the cases were referred to a master to take evidence and report. The master proceeded, by agreement, to take testimony in three of the cases.

While this reference was pending, the legislature, in 1907, passed the following acts:

(1) That of February 27, 1907, fixing a maximum passenger fare within the state of 2 cents a mile for railroads over 45 miles in length.

(2) That of March 19, 1907, repealing the act of April 15, 1905, and prescribing new maximum intrastate rates for specified commodities in carload lots, the rates being higher in certain instances than those of the former act. It also repealed an act passed April 14, 1905 (not mentioned in the original bills), relating to rates on stone, sand, and brick, and made new rates therefor. It was provided that the repeal should not relieve any railroad company from liabilities and penalties previously incurred.

(3) That of March 19, 1907, fixing maximum rates for fruit in carload lots.

(4) That of April 4, 1907, requiring carriers of live stock in carload lots to carry the shipper or his agent free of charge. (This statute was held unconstitutional by the state court, and needs no further notice. McCully v. Chicago, B. & Q. R. Co. 212 Mo. 1, 110 S. W. 711.)

*These acts took effect on June 14,[478 1907.

On June 11, 1907, the complainant in each of the eighteen cases moved for leave to file an amended and supplemental bill, then presented to the court, which set forth the legislation of 1907, above-mentioned, and asked relief against its enforcement upon the grounds that these acts constituted an unwarrantable interference with interstate commerce and that they were

confiscatory. On June 13, 1907, the court made an order setting down the applications for argument, and meanwhile restraining the enforcement of the new rates. On June 17, 1907, upon hearing, leave to file was granted and a temporary injunction was allowed as to the freight rate laws of 1907, but not as to the passenger fare law. The latter was permitted to go into effect for three months without prejudice, and was thereafter continued in force until the final decrees.

Meanwhile on June 14, 1907, bills were filed in the name of the state in the state court against the railway companies, seeking an injunction requiring them to put in force both the freight and passenger rates as prescribed.

The supplemental bills in the Federal courts were amended so as to show these proceedings. On demurrer to these bills, as amended, it was insisted that they were without equity; that the matters alleged were not germane to or supplementary of the original bills; and that the state court had jurisdiction of the proceedings therein instituted. The demurrers were overruled and the defendants answered.

It was ordered (June 13, 1908) that the eighteen cases should be set down for hearing before the court upon the testimony theretofore taken before the master, and upon such further oral and documentary evidence as should then be offered in open court. And the cases were so heard.

With respect to eight of the suits, it was stipulated that they should abide the result in other suits named.

479] *The case of the St. Louis, Kansas City & Colorado Railroad Company was consolidated with that of the Chicago, Rock Island, & Pacific Railway Company, the latter having acquired the property of the former, and the court ordered that the "findings, statements, and figures" of the two companies should be combined. In the suit brought by the Chicago, Burlington, & Quincy Railway Company, then the lessee of the property, the Chicago, Burlington, & Quincy Railroad Company was substituted as complainant on the cancelation of the lease.

In the nine cases thus remaining, the court held that the rate acts, both of 1905 and 1907, were invalid, as confiscatory. The contention as to the invalidity of the acts by reason of interference with interstate commerce was not sustained. The costs were equally divided.

And from the final decrees entered in these nine suits, the above entitled appeals and cross appeals were taken.

Mr. Elliott W. Major, Attorney General of Missouri, and Messrs. **Frederick W. Lehmann** and **Sanford B. Ladd** argued the cause and filed a brief for Knott et al.

In the final analysis, we have two sovereign powers constantly in operation in each state, the powers of each being distinct, and the two together constituting a complete government. The Federal government exercises generally the powers which affect the people of all the states alike (Cardwell v. American River Bridge Co. 113 U. S. 210, 28 L. ed. 961, 5 Sup. Ct. Rep. 423), while the states exercise the powers that are local or domestic in their application; and the extent of the jurisdiction of these two separate sovereignties was firmly fixed by the people in the adoption of the Constitution of the United States.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Sands v. Manistee River Improv. Co. 123 U. S. 295, 31 L. ed. 151, 8 Sup. Ct. Rep. 113; Baltimore & O. R. Co. v. Maryland, 17 Wall. 470, 22 L. ed. 683; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

Each state has the sole and exclusive authority to prescribe reasonable maximum passenger and freight rates on traffic wholly within the state. It is a legal impossibility for state rates on intrastate traffic to change interstate rates. If, however, it were legally possible for state rates to change or interfere with interstate rates, it is no objection to the validity of such laws that such rates incidentally affect interstate commerce.

Sands v. Manistee River Improv. Co. 123 U. S. 295, 31 L. ed. 151, 8 Sup. Ct. Rep. 113; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 209, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Stone v. Farmers' Loan & T. Co. 116 U. S. 324, 29 L. ed. 642, 6 Sup. Ct. Rep. 334, 388, 1191; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Louisville & N. R. Co. v. Kentucky, 183 U. S. 518, 46 L. ed. 306, 22 Sup. Ct. Rep. 95; New York ex rel. Silz v. Hesterberg, 211 U. S. 41, 42, 53 L. ed. 80, 29 Sup. Ct. Rep. 10; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 439, 39 L. ed. 1045, 15 Sup. Ct. Rep. 896; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep.

1060; Smyth v. Ames, 169 U. S. 520, 42 L. ed. 839, 18 Sup. Ct. Rep. 418; Houston & T. C. R. Co. v. Mayes, 201 U. S. 328, 50 L. ed. 775, 26 Sup. Ct. Rep. 491; Ames v. Union P. R. Co. 64 Fed. 171; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 978; Woodside v. Tonopah & G. R. Co. 184 Fed. 360; Louisville & N. R. Co. v. Siler, 186 Fed. 198; Re Arkansas Rate Cases, 187 Fed. 296; Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 421; Hope Cotton Oil Co. v. Texas & P. R. Co. 12 Inters. Com. Rep. 269; Gibbons v. Ogden, 9 Wheat. 194, 6 L. ed. 69; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 565, 30 L. ed. 244, 247, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 459, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Northern Securities Co. v. United States, 193 U. S. 197, 350, 48 L. ed. 679, 705, 24 Sup. Ct. Rep. 436; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, 284, 54 L. ed. 472, 481, 482, 30 Sup. Ct. Rep. 330; Louisville & N. R. Co. v. Eubank, 184 U. S. 42, 46 L. ed. 422, 22 Sup. Ct. Rep. 277; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

The mere raising or lowering of maximum passenger or freight rates by a state on intrastate commerce cannot, as a matter of law, change interstate rates. It is a legal impossibility. Intrastate and interstate commerce constitute two separate, distinct, and independent classes, and the rates of each are fixed and controlled by separate sovereignties. The change in the rates of one by the state and in the other by Federal authority only operates upon and affects its own separate, distinct, and independent class of commerce.

Ames v. Union P. R. Co. 64 Fed. 172; Woodside v. Tonopah & G. R. Co. 184 Fed. 360; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 979; Louisville & N. R. Co. v. Siler, 186 Fed. 198; St. Louis Southwestern R. Co. v. Allen, 187 Fed. 295; Southern P. Co. v. Campbell, 189 Fed. 182.

The enforcement of the passenger and freight rate acts in question would not, in fact, have the effect of directly and substantially burdening interstate commerce.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 343, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

The law presumes that the Missouri acts are valid, and that includes the presumption that they do not violate the commerce clause of the Constitution of the United States.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 16, 17, 53 L. ed. 371, 378, 381, 382, 29 Sup. Ct. Rep. 148; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 91, 97, 46 L. ed. 92, 101, 104, 22 Sup. Ct. Rep. 30; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 614, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 666, 667, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 874; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 511, 46 L. ed. 298, 303, 22 Sup. Ct. Rep. 95.

The legislature of Missouri was authorized to prescribe reasonable maximum rates on intrastate traffic.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806.

The freight and passenger laws involved are presumptively valid.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 91, 97, 46 L. ed. 92, 101, 104, 22 Sup. Ct. Rep. 30; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The burden of proving that said laws are confiscatory rests upon the Chicago, Burlington, & Quincy Railroad Company.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The Burlington must establish that the rates are confiscatory clearly, unmistakably, and beyond all doubt, and by proof that is clear and convincing.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 511, 46 L. ed. 298, 303, 22 Sup. Ct. Rep. 95; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

All doubts must be resolved in favor of

the validity of the freight act and passenger fare law involved.

Henderson Bridge Co. v. Henderson, 173 U. S. 614, 615, 43 L. ed. 831, 19 Sup. Ct. Rep. 553.

If the court is in doubt one way or the other as to the laws giving a fair return upon the reasonable valuation of the properties employed, then that doubt sustains the laws.

Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 874; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

The case is heard and the questions determined de novo by this court, and without regard to how the questions were found and determined by the trial court.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

The rates, both freight and passenger, and business of the road in the state, may be considered in their entirety.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The road may be compelled to carry an article or articles at cost or even at a loss if the return on its entire business in the state affords it a reasonable compensation.

Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

The road must affirmatively advise the court what it has done with the receipts and earnings of the company on its entire business in the state, and must not only give the amount showing the disposition of its revenues, but must give the items thereof; its expenses in general statements and in large sums will not be accepted, lest the court be misled into doing grievous wrong to the public.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

The service rendered by the road is an element which must be considered in determining the questions, because the road can only demand what the services rendered by it are reasonably worth.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Each case must be heard and determined upon its own particular facts and evidence. Reduction in rates does not necessarily mean reduction in revenue. They may have increased business volume and therefore increased earnings.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

In three cases only has this court held that rates fixed by legislative bodies were invalid:

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

In thirteen cases at least has this court refused to sustain the action of the lower courts, holding rates fixed by legislative bodies unreasonable and confiscatory:

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 5 Sup. Ct. Rep. 1028; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; Sea Board Air Line R. Co. v. Florida, 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 109; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

The court below should not have ascertained the value of the properties assignable to the state traffic, on the "Revenue Basis."

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 176, 44 L. ed. 421, 20 Sup. Ct. Rep. 336.

The court should not have divided the total freight expense between state and interstate traffic upon the basis of gross revenue; and should not have added 50 per cent to the expense of handling state freight in addition thereto.

Ames v. Union P. R. Co. 64 Fed. 182; Chicago, M. & St. P. R. Co. v. Tompkins,

176 U. S. 176, 44 L. ed. 421, 20 Sup. Ct. Rep. 336; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 260, 51 L. ed. 174, 175, 27 Sup. Ct. Rep. 108; St. Louis Southwestern R. Co. v. Allen, 187 Fed. 291.

The so-called revenue basis of apportioning expenses between state and interstate business was adopted by the court; that is, the rate per passenger mile for state travel being higher than for interstate travel, it was assumed that the cost of conducting the business was higher, at least in like proportion. This was wrong, and the evidence shows that the rates for state and interstate travel were fixed without regard to the relative cost of each kind of business.

Ames v. Union P. R. Co. 64 Fed. 165; Southern P. Co. v. Bartine, 170 Fed. 757.

The service rendered is an important factor to be considered in dividing the expense between state and interstate traffic.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 301, 43 L. ed. 708, 19 Sup. Ct. Rep. 465; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 521, 44 L. ed. 871, 20 Sup. Ct. Rep. 722; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 596, 41 L. ed. 566, 17 Sup. Ct. Rep. 198.

Cost to the company is not alone to be taken into account. The service rendered is to be considered also in determining the propriety of the rate. The theory adopted by the circuit court disregards the quality of the service, and burdens state business with expenses incurred for the benefit of interstate business, and with the cost of conveniences to interstate travel which result in inconvenience to state travel, thus charging state travelers for disservice rather than for service, and making those pay most who get least.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The companies have utterly failed to meet the rule and furnish the proof. Their testimony is not sufficient. They have failed to make a full disclosure to the court, and have not attempted to account for enormous expense items, nor to account for abnormal operating expenses.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 343, 345, 36 L. ed. 176, 179, 180, 12 Sup. Ct. Rep. 400; Willcox v. Consolidated Gas Co. 212 U. S. 54, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 16, 53 L. ed. 381, 29 Sup. Ct. Rep. 148.

Messrs. Elliott W. Major, Attorney General, and Mr. John M. Atkinson, Assistant Attorney General, also filed a brief for Knott et al.

Mr. Frank Hagerman argued the cause, and with Messrs. W. F. Evans, Gardiner Lathrop, Robert Dunlap, Thomas R. Morrow, M. A. Low, M. L. Bell, S. W. Moore, J. D. Hostetter, James Hagerman, Joseph M. Bryson, Chester M. Dawes, O. M. Spencer, John H. Lucas, and John Barton Payne, filed a brief for the railroad companies:

The evidence discloses that the rates in question are confiscatory. If, however, there is any question as to the weight of the evidence, it is to be remembered that the cases now stand upon appeal, where the matter is viewed somewhat differently than if they were being presented to a court of first instance. Every presumption is in favor of the finding below (Shepard v. Northern P. R. Co. 184 Fed. 765), which must be sustained unless the record shows there has been some clear misconception of the evidence or misapplication of the law. This rule has been frequently announced as applicable to masters' reports (Tilghman v. Proctor, 125 U. S. 136, 149, 31 L. ed. 664, 668, 8 Sup. Ct. Rep. 894; Callaghan v. Myers, 128 U. S. 617, 664, 32 L. ed. 547, 562, 9 Sup. Ct. Rep. 177; Furrer v. Ferris, 145 U. S. 132, 36 L. ed. 649, 12 Sup. Ct. Rep. 821; Fisher v. Shropshire, 147 U. S. 133, 146, 37 L. ed. 109, 116, 3 Sup. Ct. Rep. 201), especially where the reference was by consent, and of recent years has been applied to the findings in equity cases by the court below (Paxson v. Brown, 10 C. C. A. 144, 27 U. S. App. 49, 61 Fed. 888; Warren v. Burt, 7 C. C. A. 110, 12 U. S. App. 591, 58 Fed. 101; Stuart v. Hayden, 18 C. C. A. 623, 36 U. S. App. 462, 72 Fed. 408; Fitchett v. Blows, 20 C. C. A. 290, 36 U. S. App. 597, 74 Fed. 51; Farmers' Loan & T. Co. v. McClure, 24 C. C. A. 65, 49 U. S. App. 43, 78 Fed. 210; Mann v. Keene Guaranty Sav. Bank, 29 C. C. A. 549, 57 U. S. App. 654, 86 Fed. 53; North American Exploration Co. v. Adams, 45 C. C. A. 188, 104 Fed. 408, 21 Mor. Min. Rep. 65; Thallman v. Thomas, 49 C. C. A. 323, 111 Fed. 283, 21 Mor. Min. Rep. 573; Manhattan L. Ins. Co. v. Wright, 61 C. C. A. 138, 126 Fed. 83; Paulus v. M. M. Buck Mfg. Co. 64 C. C. A. 162, 129 Fed. 597; Coder v. Arts, 15 L.R.A.(N.S.) 372, 82

C. C. A. 94, 152 Fed. 946; Iowa v. Carr, 112 C. C. A. 477, 191 Fed. 263; Snider v. Dobson, 21 C. C. A. 76, 40 U. S. App. 111, 74 Fed. 758; Kearny County v. Irvine, 61 C. C. A. 607, 126 Fed. 698; Order of United Commercial Travelers v. McAdam, 61 C. C. A. 22, 125 Fed. 365; Idaho Min. & Mill Co. v. Davis, 59 C. C. A. 200, 123 Fed. 397; Big Six Development Co. v. Mitchell, 1 L.R.A.(N.S.) 332, 70 C. C. A. 569, 138 Fed. 279).

Judge McPherson, in an elaborate opinion and special findings of fact, reached the conclusion that the rates in question were clearly confiscatory. His method of ascertaining their insufficiency was upon the same principle as that adopted in Atchison, T. & S. F. R. Co. v. Love, 177 Fed. 493, 185 Fed. 321, 107 C. C. A. 403, 218 U. S. 675, 54 L. ed. 1205, 31 Sup. Ct. Rep. 224, 220 U. S. 618, 55 L. ed. 612, 31 Sup. Ct. Rep. 721; Re Arkansas R. Rates, 163 Fed. 141, 187 Fed. 290; Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 469, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Northern P. R. Co. v. Keyes, 91 Fed. 47; Shepard v. Northern P. R. Co. 184 Fed. 765; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A.(N.S.) 108, 68 Atl. 676; Central R. Co. v. Northampton County, 11 Northampton Co. Rep. 342; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493, 107 C. C. A. 403, 185 Fed. 321, 218 U. S. 675, 54 L. ed. 1205, 31 Sup. Ct. Rep. 224, 220 U. S. 618, 55 L. ed. 612, 31 Sup. Ct. Rep. 721.

As a start upon the question of valuation, there must be ascertained the value of the whole property in the state devoted to all its uses. Presumptively, the bonds and stocks, properly apportioned, represent that value (Ames v. Union P. R. Co. 64 Fed. 177; Southern P. Co. v. Bartine, 170 Fed. 751). However, included therein as elements of value are the income, good will, franchises, cost of construction, action of the state equalizing board, and other considerations, such as the company being a going concern.

The rule under which this valuation is to be determined has been accurately stated by Mr. Justice Brewer (Ames v. Union P. R. Co. 64 Fed. 177); by Mr. Justice Harlan (169 U. S. 466, 547, 42 L. ed. 819, 18 Sup. Ct. Rep. 418); by Mr. Justice Peckham (Wilcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034); by Judge Morrow (Spring Valley Waterworks v. San Francisco, 124 Fed. 592); by Judge Hook (Missouri, K. & T. R. Co. v. Love. 177 Fed. 493); by Judge Sanborn (Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 321; 218 U. S. 675, 54 L. ed. 1205, 31 Sup. Ct. Rep. 224, 220 U. S. 618, 55 L. ed. 612, 31 Sup. Ct. Rep. 721; Shepard v. Northern P. R. Co. 184 Fed. 808); by Judge Trieber (Re Arkansas Rate Cases, 187 Fed. 290); by Judge Farrington in the Nevada Case (Southern P. Co. v. Bartine, 170 Fed. 751); and by Judge McPherson below.

The question received intelligent consideration from the New York court of appeals in People ex rel. Jamaica Water Supply Co. v. State Tax Comrs. 196 N. Y. 39, 89 N. E. 581, where it was said that this valuation was to be fixed as of the time when the inquiry was made, which must necessarily be the result, because an injunction, when it finally goes, is subject to the condition that it may be dissolved in the future if time proves the rates to be reasonable.

Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Re Arkansas Rate Cases, 187 Fed. 290, 349; Central R. Co. v. Northampton County, 11 Northampton Co. Rep. 342.

The whole valuation is to be based upon the consideration of all the facts and circumstances in evidence,—bonds, stocks, franchises, cost of construction, earnings, and other matters.

Ames v. Union P. R. Co. 64 Fed. 177, 169 U. S. 466, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; Southern P. Co. v. Bartine, 170 Fed. 751; Shepard v. Northern P. R. Co. 184 Fed. 802; Missouri, K. & T. R. Co. v. Love, 177 Fed. 495, 107 C. C. A. 403, 185 Fed. 321, 218 U. S. 675, 54 L. ed. 1205, 31 Sup. Ct. Rep. 224, 220 U. S. 618, 55 L. ed. 612, 31 Sup. Ct. Rep. 721; Re Arkansas R. Rates, 163 Fed. 141; Willcox v. Consolidated Gas Co. 212 U. S. 19, 44, 53 L. ed. 382, 396, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Spring Valley Waterworks v. San Francisco, 124 Fed. 592; Monongahela Nav. Co. v. United States, 148 U. S. 312, 328, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622; State R. Tax Cases, 92 U. S. 602, 605, 23 L. ed. 669, 670; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 479, 38 L. ed. 238, 243, 14 Sup. Ct. Rep. 396; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 221, 41 L. ed. 683, 695, 17 Sup. Ct. Rep. 305; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 429, 38 L. ed. 1031, 1037, 14 Sup. Ct. Rep. 1114; Nashville, C. & St. L. R. Co. v. Franklin County, 12 Lea, 539; Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 683; Re Proposed Advances in Freight Rates, 9 Inters. Com. Rep. 382.

Interest upon bonds of a going concern is at least a criterion of a higher value than the amount of the bonded debt.

Chicago, M. & St. P. R. Co. v. Tompkins, 90 Fed. 363, reversed in 176 U. S. 167, 176, 44 L. ed. 417, 422, 20 Sup. Ct. Rep. 336;

Chicago, M. & St. P. R. Co. v. Smith, 110 Fed. 473; Beale & W. Railroad Rate Regulation, §§ 388, 392, 393, 437; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 879.

Having ascertained the total value of all the property in the state, devoted to all uses, the next step is to find what part of this value is properly assignable to the classes of traffic in question. The only way in which to make this ascertainment is by taking such proportion of the entire value as the earnings from that class of business which is in question bear to the entire revenue in the state from all sources.

Re Arkansas R. Rates, 163 Fed. 141, 187 Fed. 317; Missouri, K. & T. R. Co. v. Love, 177 Fed. 497; 107 C. C. A. 403, 185 Fed. 328; Shepard v. Northern P. R. Co. 184 Fed. 810; Ames v. Union P. R. Co. 64 Fed. 165; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 90 Fed. 363; State ex rel. Ellis v. Atlantic Coast Line R. Co. 48 Fla. 146, 37 So. 657; Beale & W. Railroad Rate Regulation, § 466; Southern P. Co. v. Bartine, 170 Fed. 751.

The first or equal division of expenses between state and interstate business should be upon the revenue basis.

Ames v. Union P. R. Co. 64 Fed. 165; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Keyes, 91 Fed. 47; Re Arkansas R. Rates, 163 Fed. 141; Buell v. Chicago, M. & St. P. R. Co. Wis. R. Com. Rep. [1907] pp. 179, 180; Missouri, K. & T. R. Co. v. Love, 177 Fed. 498, 107 C. C. A. 403, 185 Fed. 330, 218 U. S. 675, 54 L. ed. 1205, 31 Sup. Ct. Rep. 224, 220 U. S. 618, 55 L. ed. 612, 31 Sup. Ct. Rep. 721; Shepard v. Northern P. R. Co. 184 Fed. 810; Re Arkansas Rate Cases, 187 Fed. 320; Cedar Hill Coal & Coke Co. v. Colorado & S. R. Co. 16 Inters. Com. Rep. 393; Gustin v. Atchison, T. & S. F. R. Co. 8 Inters. Com. Rep. 277.

There is a substantial extra cost of doing state business over interstate, which should be deducted from the earnings.

Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 466, 469, 42 L. ed. 819, 843, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 178, 179, 44 L. ed. 417, 422, 423, 20 Sup. Ct. Rep. 336; Chicago, M. & St. P. R. Co. v. Keyes, 91 Fed. 47; Re Arkansas R. Rates, 163 Fed. 142; Buell v. Chicago, M. & St. P. R. Co. Wis. R. Com. Rep. p. 182; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493, 107 C. C. A. 403, 185 Fed. 321, 218 U. S. 675, 54 L. ed. 1205, 31 Sup. Ct. Rep. 224, 220 U. S. 618, 55 L. ed. 612, 31 Sup. Ct. Rep. 721; Shepard v. Northern P. R. Co. 184 Fed. 765.

The extra cost, when ascertained at the low percentages of 50 per cent for freight and 25 per cent for passenger business, allows for the extra revenue per mile from the short haul business.

Missouri, K. & T. R. Co. v. Love, 177 Fed. 499; Shepard v. Northern P. R. Co. 184 Fed. 765; Re Arkansas Rate Cases, 187 Fed. 320.

If the division were made differently, the result would be the same. The Nebraska, North Dakota, South Dakota, and Oklahoma divisions were by the same method. The Minnesota and Arkansas divisions of expenses upon final hearing prove that the theory adopted below brought a fair result.

Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Chicago, M. & St. P. R. Co. v. Keyes, 91 Fed. 47; Shepard v. Northern P. R. Co. 184 Fed. 765; Re Arkansas Rate Cases, 187 Fed. 290.

It is immaterial whether the railroad does or does not make up its losses by charging more or less to other traffic.

Central R. Co. v. Northampton County, 11 Northampton Co. Rep. 342; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493.

If, as a matter of fact, the laws directly affect interstate commerce, they violate the Federal Constitution, which vests in Congress exclusively the regulation of interstate commerce.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Shepard v. Northern P. R. Co. 184 Fed. 765.

Any law, no matter what its form, which substantially and directly affects or interferes with interstate commerce, is void. The court will disregard forms or names, and look through both for the substance of things.

Galveston, H. & T. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 62, 54 L. ed. 378, 384, 30 Sup. Ct. Rep. 232; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 47, 46 L. ed. 416, 424, 22 Sup. Ct. Rep. 277.

The rule has, since the hearing below, been applied to the piping of natural gas (West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193,

31 Sup. Ct. Rep. 564), the issuance of free transportation (Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272), the stoppage of all trains at junctions (Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Roach v. Atchison, T. & S. F. R. Co. 218 U. S. 159, 54 L. ed. 978, 30 Sup. Ct. Rep. 639), and state car distribution (St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476). The most striking and forceful examples of the rule, every line of each opinion being an argument against the validity of the state rates, are found in the recent opinions of Mr. Chief Justice White (Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160), Mr. Justice McKenna (Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140), and Mr. Justice Van Devanter (Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; Second Employers' Liability Cases [Mondou v. New York, N. H. & H. R. Co.] 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875).

One of the leading purposes of the interstate commerce act "is to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions" (Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Chicago, G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493). When a regulation is made relative to interstate commerce, and a state provision exists in reference thereto, the state statute must give way (Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802), for it is enough that the two statutes, operating upon the same subject-matter, prescribe different rules. In such case one must yield, and that one is the state law. When there is a congressional enactment, not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority (Northern Securities Co. v. United States, 193 U. S. 333, 48 L. ed. 698, 24 Sup. Ct. Rep. 436).

The act of Congress must be so liberally construed as to stamp out all efforts to evade its spirit. This court has spoken in no uncertain terms upon this subject (New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 71, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428).

The laws are void in part, and hence void as a whole.

Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 51 L. ed. 298, 304, 27 Sup. Ct. Rep. 153; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 112, 46 L. ed. 92, 110, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 564, 46 L. ed. 679, 691, 22 Sup. Ct. Rep. 431; United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644; United States v. Reese, 92 U. S. 214, 222, 23 L. ed. 563, 566; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; Allen v. Louisiana, 103 U. S. 80, 26 L. ed. 318; Baldwin v. Franks, 120 U. S. 678, 685, 689, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763; Poindexter v. Greenhow, 114 U. S. 270, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 500, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141.

The two-cent fare law makes that rate apply only to roads being more than 45 miles in length. It is clearly discriminatory for this reason.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 112, 46 L. ed. 92, 110, 22 Sup. Ct. Rep. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 564, 46 L. ed. 691, 22 Sup. Ct. Rep. 431.

Amendatory and supplementary matter can, in the interest of justice, be treated as an original bill.

Kennedy v. Bank of Georgia, 8 How. 586, 609, 610, 12 L. ed. 1209, 1218, 1219; Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 335, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810; Schenck v. Peay, Woolw. 175, Fed. Cas. No. 12,450; Ross v. Ft. Wayne, 58 Fed. 406; Vigneron v. Auto Time Saver Repair Kit Co. 171 Fed. 581; MackIntosh v. Flint & P. M. R. Co. 34 Fed. 614; Neale v. Neale, 9 Wall. 1, 19 L. ed. 590.

The bill was, however, properly supplementary.

Story, Eq. Pl. 10th ed. §§ 336, 345, 346.

The bill was not multifarious.

Perkins v. Northern P. R. Co. 155 Fed. 448; Salvidge v. Hyde, 5 Madd. Ch. 138; Hayden v. Thompson, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 67; Brown v. Guarantee Trust & S. D. Co. 128 U. S. 403, 412, 32 L. ed. 468, 470, 9 Sup. Ct. Rep. 127; Grant v. Phœnix Mut. L. Ins. Co. 121 U. S. 105, 112, 30 L. ed. 905, 908, 7 Sup. Ct. Rep.

841; Nelson v. Hill, 5 How. 127, 12 L. ed. 81; United States v. Flournoy Live-Stock & Real Estae Co. 69 Fed. 886; Way v. Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147; Story, Eq. Pl. 10th ed. 285, 286; Foster, Fed. Pr. 75; Virginia v. West Virginia, 206 U. S. 290, 51 L. ed. 1068, 27 Sup. Ct. Rep. 732.

Even if this court be not conclusively bound by the finding of fact made below, yet presumptively (Shepard v. Northern P. R. Co. 184 Fed. 765) that finding is correct.

An unreasonable rate upon one commodity can be attacked regardless of the reasonableness of a return from a body of rates.

Railroad Commission v. Cumberland Teleph. & Teleg. Co. 212 U. S. 414, 420, 53 L. ed. 577, 580, 29 Sup. Ct. Rep. 357; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

In the cases heretofore decided, it seems to have been assumed that if the entire state freight business was, irrespective of any other class, done at a loss, the legislation as to the rates upon that business must fall (Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 446, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336 subsequently below, 110 Fed. 473; Northern P. R. Co. v. Keyes, 91 Fed. 47). A like course was pursued when passenger rates were separately fixed and attacked (Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A.(N.S.) 108, 68 Atl. 676; Central R. Co. v. Northampton County, 11 Northampton Co. Rep. 342; Buell v. Chicago, M. & St. P. R. Co. Wis. R. Com. Rep. [1907] p. 179). In the Nebraska case (Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418), it was expressly said that gains from interstate freight business should not be permitted to offset the losses upon the state freight business. In Central R. Co. v. Northampton County, 11 Northampton Co. Rep. 172, it was explicitly decided that in the attack upon the state passenger rates, the losses should not be aided from the gains either from the inter state or state freight business. In the Oklahoma case, Judge Hook (Missouri, K. & T. R. Co. v. Love, 177 Fed. 493) at the circuit, and Judge Sanborn upon appeal (107 C. C. A. 403, 185 Fed. 321), assumed that the state passenger and freight business should be separately considered. Mr. Justice Van Devanter, as circuit judge, in the Arkansas case (Re Arkansas R. Rates, 163 Fed. 141), Judge Trieber upon final hearing thereof (187 Fed. 290), and Judge Sanborn in the Minnesota case (Shepard v. Northern P. R. Co. 184 Fed. 765), at least assumed that this view was correct, because the findings were separately made and confiscation separately considered as to each of the two classes of business. In each of these instances, however, the rates, considered separately, were confiscatory. Hence, combined, they were necessarily so. This seems to be just and fair, and was the course that was below in these cases pursued by both parties at the trial, for both there submitted their statements, showing separately the loss upon each of the two classes of business.

Mr. Gardiner Lathrop also argued the cause and filed a brief for the railroad companies:

Not only the Mississippi river but the Missouri river also is and will continue to be a controlling influence in the matter of rates as long as the river remains navigable to its present capacity.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 171, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45.

The wisdom of continuing the Mississippi river and Missouri river as basing lines was distinctly recognized and approved by the Interstate Commerce Commission.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 107, 54 L. ed. 946, 956, 30 Sup. Ct. Rep. 651.

The comparatively recent decision of the Interstate Commerce Commission in the so-called Burnham-Hanna-Munger Case, upheld by this court in 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651, serves but to emphasize the control which the local Missouri rates between the two rivers has so long exercised over interstate commerce.

The commerce clause of the Constitution gives to Congress exclusive and plenary power over commerce among the states, and any state legislation which directly affects or discriminates against such commerce is void.

Gibbons v. Ogden, 9 Wheat. 1, 194–196, 6 L. ed. 23, 69, 70; North River S. B. Co. v. Livingston, 3 Cow. 714; State Freight Tax Case, 15 Wall. 232, 279, 280, 21 L. ed. 146, 162, 163; Henderson v. New York, 92 U. S. 259, 271, 273, 23 L. ed. 543, 548, 549; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Railroad Commission Cases, 116 U. S. 307, 334, 29 L. ed. 636, 645, 8 Sup. Ct. Rep. 334, 388, 1191; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 573, 30 L. ed. 244, 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; Northern

Securities Co. v. United States, 193 U. S. 197, 333, 335, 336, 48 L. ed. 679, 698–700, 24 Sup. Ct. Rep. 436; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 26, 27, 54 L. ed. 355, 365, 366, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 617, 618, 55 L. ed. 878, 882, 883, 31 Sup. Ct. Rep. 621; Ex parte Young, 209 U. S. 123, 145, 52 L. ed. 714, 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Shepard v. Northern P. R. Co. 184 Fed. 765.

The power of the general government over commerce among the states by the great artificial highways of rail is just as comprehensive and controlling and all-embracing and exclusive of state burden or interference as it is over such commerce by the great highways of water.

Perkins v. Northern P. R. Co. 155 Fed. 445; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 8, 9, 24 L. ed. 708, 710; California v. Central P. R. Co. 127 U. S. 1, 39, 40, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Monongahela Nav. Co. v. United States, 148 U. S. 312, 342, 37 L. ed. 463, 473, 13 Sup. Ct. Rep. 622; Re Debs, 158 U. S. 564, 590, 591, 39 L. ed. 1092, 1104, 1105, 15 Sup. Ct. Rep. 900; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678.

Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.

Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 299, 52 L. ed. 488, 500, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

The power of the state over local rates was unquestioned in the early history of railway transportation, when railroads operated within the limits of the state which created them, and all traffic was intrastate. But that power has been necessarily curtailed by the development of the railway systems, the legislation of Congress, the growth of commerce among the states, and the method of handling all commerce indiscriminately on the same trains, whether intrastate or interstate, so that whenever local rates directly affect interstate rates, the national authority is supreme, and state regulation is superseded.

Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; E. R. Saunders & Co. v. Southern Exp. Co. 18 Inters. Com. Rep. 415.

Every state law, regardless of the purpose for which it was passed, whose direct and necessary effect is substantially to interfere with interstate commerce, is void.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Ludwig v. Western U. Teleg. Co. 216 U. S. 162, 54 L. ed. 429, 30 Sup. Ct. Rep. 280.

The compelling force of competition in the adjustment of interstate rates to meet state-made rates demonstrates the direct effect of such rates upon interstate commerce.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 276, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Cincinnati N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 164, 165, 42 L. ed. 414, 422, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 18, 19, 45 L. ed. 719, 725, 726, 21 Sup. Ct. Rep. 516; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Northern Securities Co. v. United States, 193 U. S. 197, 337, 338, 48 L. ed. 869, 700, 701, 24 Sup. Ct. Rep. 436; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Shepard v. Northern P. R. Co. 184 Fed. 765; Re Arkansas Rate Cases, 187 Fed. 290.

An analysis of certain analogous cases decided by this court shows that the doctrine for which we contend has already had express judicial sanction.

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Wabash St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 572, 573, 30 L. ed. 244, 249, 250, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid. 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Second Employ-

ers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Nor does the proviso contained in the first section of the interstate commerce act militate against the view that the state is powerless to prescribe intrastate rates in cases where interstate rates are directly and necessarily affected.

Cooley v. Port Wardens, 12 How. 318, 13 L. ed. 1004; Gunn v. Barry, 15 Wall. 623, 21 L. ed. 215; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The purpose for which the statutes were passed is beside the case, if their necessary effect is to interfere with or burden interstate commerce.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on.

West v. Kansas Natural Gas. Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564.

The interstate commerce act protects commerce among the states from discriminatory acts of carriers voluntarily done, and discriminatory acts forced upon such carriers by state legislation.

Reliance Textile & Dye Works v. Southern R. Co. 13 Inters. Com. Rep. 48.

Messrs. **Frank Hagerman** and **O. M. Spencer** argued the cause and filed a brief for the Chicago, B. & Q. R. Co. on original argument.

Assistant Attorney General Denison and Mr. Thurlow M. Gordon, Special Assistant to the Attorney General, filed a brief for the United States as *amici curiæ:*

The power of Congress under the commerce clause extends to every act which substantially impedes or affects interstate commerce. The means by which such commerce is affected or impeded is immaterial if the effect itself is substantial.

Gibbons v. Ogden, 9 Wheat. 1, 194, 6 L. ed. 23, 69; The Lottery Case (Champion v. Ames) 188 U. S. 321, 346, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; The Daniel Ball, 10 Wall. 557, 565, 19 L. ed. 999, 1002; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 493, 52 L. ed. 297, 307, 28 Sup. Ct. Rep. 141; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Southern R. Co. v. United States, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 46, 56 L. ed. 327, 344, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Pennsylvania R. Co. v. Interstate Commerce Commission, 193 Fed. 81; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

A series of interstate commercial discriminations not at all unlike the present was the chief cause for the adoption of the United States Constitution in the first place, and the commerce clause, designed to prevent the recurrence of such conditions, was regarded as one of its most important provisions.

5 Elliott, Debates, 112, 113, 119; Fiske, Critical Period of American History, 141–148; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.

Taxes have been held unconstitutional impediments in a very great number of cases, and a discriminatory freight rate may be just as effective an impediment as a protective tariff.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Brown v. Houston, 114 U. S. 622, 633, 29 L. ed. 257, 261, 5 Sup. Ct. Rep. 1091; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 211, 29 L. ed. 158, 162, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 47, 56, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232.

Whenever the ultimate effect is to create a substantial impediment to interstate commerce, the interference at once becomes "unreasonable," "direct," and "immediate."

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 36, 46 L. ed. 416, 420, 22 Sup. Ct. Rep. 277; Shepard v. Northern P. R. Co. 184 Fed. 793; Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct.

Rep. 232; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Central of Georgia R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; Hall v. DeCuir, 95 U. S. 485, 489, 24 L. ed. 547, 548; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Calvert, Interstate Commerce, 94; Willoughby, Const. § 310.

Congress may brush aside all forms, and strike to the very substance of the situation.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Southern R. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Southern R. Co. v. Burlington Lumber Co. 225 U. S. 99, 56 L. ed. 1001, 32 Sup. Ct. Rep. 657; Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245, 252, 7 L. ed. 412, 414; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Hatch v. Wallamet Iron Bridge Co. 7 Sawy. 127, 6 Fed. 326; Re Debs, 158 U. S. 565, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 699, 709, 43 L. ed. 1136, 1140, 1143, 19 Sup. Ct. Rep. 770.

And for this purpose action by the Interstate Commerce Commission within the powers delegated to it by Congress is equivalent to action by Congress itself.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214; Southern R. Co. v. Reid, 222 U. S. 424, 436, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140.

Once the Interstate Commerce Commission has acted upon a matter affecting interstate commerce, any subsequent attempt upon the part of a state to regulate the same matter would be void.

Pennsylvania R. Co. v. Interstate Commerce Commission, 193 Fed. 81; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

The comprehensive purpose of the act to regulate commerce has been repeatedly pointed out.

Armour Packing Co. v. United States, 209 U. S. 56, 78, 52 L. ed. 681, 693, 28 Sup. Ct. Rep. 428; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 212, 40 L. ed. 940, 944, 945, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Denver & R. G. R. Co. v. Interstate Commerce Commission, 195 Fed. 968; Pennsylvania R. Co. v. Interstate Commerce Commission, 193 Fed. 81; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

If rates on traffic between two termini in the same state are to be immune from regulation by the Interstate Commerce Commission, no matter how much they may discriminate against interstate commerce, such discriminations will escape regulation altogether. It has been expresly decided that the states cannot regulate them.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Shepard v. Northern P. R. Co. 184 Fed. 765; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

Messrs Judson Harmon, Herbert S. Hadley, and Charles H. Aldrich also filed a brief as *amici curiæ:*

The states have authority to regulate transportation wholly within their own limits by railroads which are also engaged in interstate commerce, whether they are chartered by the state or by Congress.

M'Culloch v. Maryland, 4 Wheat. 316, 410, 4 L. ed. 579, 602; Gibbons v. Ogden, 9 Wheat, 1, 195, 6 L. ed. 23, 69; The Daniel Ball, 10 Wall. 557, 564, 19 L. ed. 999, 1001; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 180, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 620, 53 L. ed. 352, 359, 29 Sup. Ct. Rep. 214; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 334, 29 L. ed. 636, 645, 6 Sup. Ct. Rep. 334, 388, 1191; Reagan v. Mercantile Trust Co. 154 U. S. 416, 38 L. ed. 1029, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; Smyth v. Ames, 169 U. S. 466, 521, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418.

The exercise of this authority is not restricted because it may or does incidentally

or indirectly affect interstate commerce. Otherwise the right of the state over its own internal commerce would be "disparaged," in violation of the Constitution, by the grant to Congress of the right to regulate commerce among the states.

Passenger Cases, 7 How. 283, 402, 12 L. ed. 702, 752; Sherlock v. Alling, 93 U. S. 99, 102, 103, 23 L. ed. 819–821; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95; Robbins v. Taxing Dist. 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it.

Ames v. Union P. R. Co. 64 Fed. 172, 169 U. S. 541, 42 L. ed. 847, 18 Sup. Ct. Rep. 418.

The interest or convenience of the railroads, and the methods by which their business is conducted, cannot be used to make an act regulating local commerce invalid.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 284, 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330; Assaria State Bank v. Dolley, 219 U. S. 121, 126, 55 L. ed. 123, 127, 31 Sup. Ct. Rep. 180.

A showing along practically the same lines as to the effect of local upon interstate rates has been presented in the recent cases of Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Southern P. Co. v. Railroad Commission, 184 Fed. 358; Louisville & N. R. Co. v. Siler, 186 Fed. 176, and Re Arkansas Rate Cases, 187 Fed. 290. In each the position taken in the Minnesota case was fully discussed and its correctness denied.

Complainant's adherence to its interstate rates, and its observance of the new local rates in dispute, would not, under the interstate commerce act, be regarded as an intent to discriminate.

Louisville & N. R. Co. v. Siler, 186 Fed. 199.

The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government.

Sands v. Manistee River Improv. Co. 123 U. S. 295, 31 L. ed. 151, 8 Sup. Ct. Rep. 113.

If the right of state regulation depends upon conditions as they may be found by the courts from time to time on varying proof, and not on the fundamental principles of the Constitution, then this right is truly "a precarious and evanescent thing."

Oregon R. & Nav. Co. v. Campbell, 173 Fed. 985.

Mr. Jared How also filed a brief as *amicus curiæ:*

Congress has full and exclusive power to regulate commerce among the states.

Brown v. Maryland, 12 Wheat. 446, 6 L. ed. 688; Groves v. Slaughter, 15 Pet. 449, 10 L. ed. 800; License Cases, 5 How. 504, 12 L. ed. 256; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Granger Cases (Munn v. Illinois) 94 U. S. 113, 24 L. ed. 77.

This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

Cook v. Pennsylvania, 97 U. S. 574, 24 L. ed. 1018; Gibbons v. Ogden, 9 Wheat. 1, 231, 6 L. ed. 23, 78; Northern Securities Co. v. United States, 193 U. S. 335, 48 L. ed. 699, 24 Sup. Ct. Rep. 436.

Nonaction by Congress in performance of this power is tantamount to a declaration by it that commerce among the states shall be free and without trammels, excepting those imposed by the common law.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Northern Securities Co. v. United States, 193 U. S. 371, 48 L. ed. 714, 24 Sup. Ct. Rep. 436.

The states have power to regulate commerce transacted wholly within their own limits, but only in such manner as will not necessarily amount to or operate as a regulation of foreign or interstate commerce.

Smyth v. Ames, 169 U. S. 523, 42 L. ed. 840, 18 Sup. Ct. Rep. 418; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

Action by a state which will necessarily amount to or operate as a regulation of interstate commerce is unconstitutional and void.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Asbell v. Kansas, 209 U. S. 254, 52 L. ed. 780, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101.

An act of Congress passed in execution of its power to regulate commerce among the states is supreme; and any law of a state which substantially interferes with it or hampers its enforcement is void.

Interstate Commerce Commission v. Balti-

more & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Gibbons v. Ogden, 9 Wheat. 1, 231, 6 L. ed. 23, 78; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Northern Securities Co. v. United States, 193 U. S. 333, 48 L. ed. 698, 24 Sup. Ct. Rep. 436; Adams Exp. Co. v. Kentucky, 206 U. S. 135, 51 L. ed. 991, 27 Sup. Ct. Rep. 606; Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674.

Congress could not have itself pronounced that the proviso in the act to regulate commerce should be construed as yielding to the states the power to make rates in such manner as necessarily to regulate, limit, or destroy interstate commerce, or to interfere with the exclusive power of Congress in that regard.

Cooley v. Port Wardens, 12 How. 318, 13 L. ed. 1004; Gunn v. Barry, 15 Wall. 623, 21 L. ed. 215.

The history of the times and the defect or mischief which the statute was intended to remedy (Smith v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634) may be resorted to for the purpose of construing a statute; and the purpose being recognized, the statute should be given a construction broad enough to achieve the design of its makers.

A construction of a proviso to an act which makes the proviso plainly repugnant to the body of the act is inadmissible.

Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

A proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as the reason thereof.

United States v. Dickson, 15 Pet. 141, 10 L. ed. 689.

The question of the reasonableness of established interstate rates is for the Interstate Commerce Commission alone, and it cannot be determined by any court.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

A rate can seldom be considered in and of itself. It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely interdependent, and it is the fact that they do not bear a proper relation to one another rather than the fact that they are absolutely either too low or too high which most often gives occasion for complaint.

George Tileston Mill. Co. v. Northern P. R. Co. 8 Inters. Com. Rep. 354; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

The fact that industries have been built up in reliance upon the parity of relation in rate may make no difference in the conclusion that a destruction of the parity would cause discrimination.

Howard Mills Co. v. Missouri P. R. Co. 12 Inters. Com. Rep. 258.

A statute of a state which attempts to regulate the fares and charges by railroad companies within its limits for transportation which constitutes a part of commerce among the states is not a valid law.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The reasonableness of its return from its entire state schedule of rates is to be determined from the state business alone, without regard to its interstate business or its business in other states; and is to be calculated on the value of its property devoted to the state business.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

It lies within the power of regulation to classify. The state regulating power exercises this power. The railroads in the first instance exercise it in setting forth their schedules of interstate rates, and have the right to do so (Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493); and the Interstate Commerce Commission, in execution of its powers under the act, has the right to amend the classification made by the railroads, and freely exercises it. Unless the classification made by the state, and which cannot possibly be made on rules capable of exact application (Prator & G. Co. v. Cincinnati, H. & D. R. Co. 3 Inters. Com. Rep. 131, 4 Inters. Com. Rep. 87), shall agree with that made by the railroads or by the Interstate Commerce Commission, as the case may be, an avenue is open for the utmost discrimination, no rate involved in which may be subject to criticism on the ground that it is not reasonable in and of itself.

Mr. R. C. Johnson, Attorney General of South Dakota, with Mr. P. W. Dougherty; Mr. Grant G. Martin, Attorney General of Nebraska; Mr. George E. Cosson, Attorney General of Iowa, with Mr. J. H. Henderson; Mr. John S. Dawson, Attorney General of

Kansas, with Mr. S. M. Brewster; Mr. R. C. Brickell, Attorney General of Alabama, with Mr. Harry C. Selheimer, and Mr. Charles West, Attorney General of Oklahoma, with Mr. Frederick N. Judson, also filed a brief as *amici curiæ:*

The only protection afforded by the United States Constitution of which the railway companies involved in the litigation now before this court may or should be permitted to avail themselves is against rates, the obvious effect of which would be, as applied to future, and not past, traffic, the confiscation of property. This being the rule, the several states are then left to regulate their internal commerce, and rates may not then be reduced below the point of reasonable remuneration,—a question of fact to be determined upon by the volume of traffic in each state.

Louisville & N. R. Co. v. Siler, 186 Fed. 176; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Woodside v. Tonopah & G. R. Co. 184 Fed. 358; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Southern Wisconsin Cheese Makers Protective Asso. v. Chicago, M. & St. P. R. Co. 3 Wis. R. Com. Rep. 459.

The "bare bones" of the enterprise, stripped of any going concern value or franchise right, is the value in a rate suit (Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615), but modified by a consideration of what it prudently cost to build up the business is the value on which a return should come (Re Advances in Rates, 20 Inters. Com. Rep. 347).

If the railway right of way was abandoned, there would be no property in it in the carrier.

Erie & N. E. R. Co. v. Casey, 26 Pa. 287; Talcott v. Pine Grove Twp. 1 Flipp. 146, Fed. Cas. No. 13,735.

By a long line of decisions this court has held identical in principle the law of the railway right-of-way grant and the law of the highway dedication.

Lake Superior & M. R. Co. v. United States, 93 U. S. 442, 450, 23 L. ed. 965, 969; Atchison, T. & S. F. R. Co. v. Denver & N. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 585, 41 L. ed. 265, 272, 16 Sup. Ct. Rep. 1173.

Land dedicated to quasi public highway use becomes common highway on termination of special use.

State v. Maine, 27 Conn. 642, 71 Am. Dec. 89; Craig v. People, 47 Ill. 493; Northern C. R. Co. v. Com. 90 Pa. 300; Pittsburgh, [illegible] R. Co. v. Com. 104 Pa. 583; McManus's Appeal, 5 Pa. Super. Ct. 65; People ex rel. Keene v. Queens County, 151 N. Y. 190, 45 N. E. 453; Stout v. Noblesville & E. Gravel Road Co. 83 Ind. 466; Highway Comrs. v. Cobb, 104 Mich. 395, 62 N. W. 554; Virginia Canon Toll Road Co. v. People, 37 L.R.A. 711 and note, 22 Colo. 429, 45 Pac. 398; Wood v. Truckee Turnp. Co. 24 Cal. 475; People ex rel. El Dorado County v. Davidson, 79 Cal. 166, 21 Pac. 538; McMullin v. Leitch, 83 Cal. 239, 23 Pac. 294; Kellett v. Ida Clayton & G. W. Wagon R. Co. 99 Cal. 210, 33 Pac. 885; Western Pl. Road Co. v. Central U. Teleph. Co. 116 Ind. 229, 18 N. E. 14; State ex rel. Boardman v. Lake, 8 Nev. 281; State ex rel. Keith v. Dayton & V. Toll Road Co. 10 Nev. 162; Langston v. Edwards, 21 Ky. L. Rep. 1277, 54 S. W. 833.

These cases give too high a value to the right of way and track.

Re Advances in Rates, 20 Inters. Com. Rep. 337.

In the division of values occur many transparent mistakes.

Chicago, M. & St. P. Co. v. Tompkins, 176 U. S. 167, 176, 44 L. ed. 417, 421, 20 Sup. Ct. Rep. 336.

The gross earnings and the revenue train mileage bases for the assignment of expenses and the apportionment of value are unreliable.

Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; St. Louis Southwestern Co. v. Allen, 187 Fed. 290; Southern P. Co. v. Bartine, 170 Fed. 725; Buell v. Chicago, M. & St. P. R. Co. Wis. R. Com. Rep. (1907) 179.

The supposed extra cost of state over interstate business is rather testified to than proved.

Southern P. Co. v. Bartine, 170 Fed. 752.

Railways owe their first duty to the communities through which they run.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 301, 43 L. ed. 708, 19 Sup. Ct. Rep. 465.

Historically, unreasonable discrimination against local rates is the cause of controversy.

Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 582.

Carriers who have not chosen to make a a good faith actual test of the rates proposed, and then, in case such test indicated confiscation, made a good, faithful presentation of all facts to the governmental agency especially established for the purpose of making and modifying rates, should not be allowed to resort to a court of equity to enjoin rates whose correction they have taken no step towards.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 281, 53 L. ed. 186, 29 Sup. Ct. Rep.

50; Knoxville v. Knoxville Water Co. 212 U. S. 1, 19, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148.

This court in a series of cases, Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Southern R. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846, has held that the Federal courts will not examine into the reasonableness of an interstate rate in advance of an inquiry by the Interstate Commerce Commission.

Equal and cogent reasons would suggest that neither should the courts examine the reasonableness of intrastate rates until an inquiry be had by the state commissions, based on a test of them.

Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567.

Mr. William T. Thompson, former Attorney General of Nebraska, also filed a brief as *amicus curiæ:*

The internal commerce of the state of Missouri is under the control of the state.

Gibbons v. Ogden, 9 Wheat. 194, 6 L. ed. 69; Moore v. American Transp. Co. 24 How. 39, 16 L. ed. 681; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 210, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

A pertinent distinction exists between the attitude of one who places his property to such a use that the public has an interest in it, and the one who devotes his property to the discharge of a public service. A different rule applies to the one than to the other. The right of legislative interference does not apply in the same degree to the one as to the other. The legislative authority over the one is more limited and restricted than the authority to control the other. This distinction is recognized by the Supreme Court of the United States, and should be borne in mind in the consideration and determination of the questions involved in the cases at bar.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 93, 46 L. ed. 92, 102, 22 Sup. Ct. Rep. 30; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 464, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The burden conclusively to prove the confiscatory character of rates of transportation established by a state Constitution, legislature, or an administrative board exercising legislative functions, is cast upon the one who assails such rates as unconstitutional.

Chicago, B. & Q. R. Co. v. Dey, 38 Fed. 657; Ex parte Young, 209 U. S. 123, 126, 52 L. ed. 714, 716, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Ruggles v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 832; Reagan v. Farmers' Loan & T. Co. 154 U. S. 395, 38 L. ed. 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Knoxville v. Knoxville Water Co. 212 U. S. 1, 16, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

In a suit by a carrier to enjoin the enforcement of rates fixed by a state for transportation of persons and property, testimony that operating expenses under statutory rates would deprive the carrier of its right to proper earnings is insufficient where the nature and necessity of important items of expense are not disclosed.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 345, 36 L. ed. 179, 12 Sup. Ct. Rep. 400.

The revenue basis for the division of expenses can, under no condition, disclose the exact or proper proportion of expenses between various classes of traffic when the factors are unequal.

Ames v. Union P. R. Co. 64 Fed. 182.

Obviously, the cost of transportation would be the same whether the companies received the prices which they would in fact receive, or the reduced rates prescribed by that bill.

Ibid.

The percentage of profit invariably becomes smaller as the length of the haul increases.

Northern P. R. Co. v. Keyes, 91 Fed. 56.

In view of the entire lack of testimony on many of the essential points, which become in fact the very foundation for arriving at a conclusion, and for the further reason that the testimony herein has been shown to be so uncertain, contradictory, full of inconsistencies, conjectures, and guesses, without any substantiation as to details, and where, on the essential points in the testimony, witnesses on behalf of the railroad company differed so widely, contradicting each other in many of the essentials, and going so far

even as to condemn each other's methods and the theories advanced by them, it cannot be accepted as satisfying the rules repeatedly laid down by this court.

Rate statutes, on such testimony as has been heretofore frequently decided by the courts, will not be overturned or declared invalid and set aside or even interfered with.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 16, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Dey, 38 Fed. 657; Ex parte Young, 209 U. S. 123, 126, 52 L. ed. 714, 716, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Ruggles v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 832; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 421, 20 Sup. Ct. Rep. 336; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Smyth v. Ames, 169 U. S. 544, 547, 42 L. ed. 848, 849, 18 Sup. Ct. Rep. 418; Southern P. Co. v. Bartine, 170 Fed. 752; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Willcox v. Consolidated Gas Co. 212 U. S. 23, 54, 53 L. ed. 384, 400, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

Not even the agreed statement of facts between witnesses of the parties will be conclusive for the court.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 345, 36 L. ed. 179, 12 Sup. Ct. Rep. 400.

The trial court erred in finding that it was by the state's experts conceded that the railroad company kept books accurately and honestly, and that they show the facts set out in the findings of the court. The books of the company are not set out with any detail, nor placed in evidence. Only a few questions seem to have been asked, and then only on some few specific points, from which it would be impossible to come to such a conclusion as was herein reached by the trial court. The evidence of the witnesses for the state makes no such admissions as to the whole, and the witnesses for the railroad company make no claim along this line. But, even if the court should find that there appears to be such acquiescence, owing to the grave importance of such cases as this, the ordinary rule of acquiescence in case of findings would not control.

Knoxville v. Knoxville Water Co. 212 U. S. 8, 53 L. ed. 378, 29 Sup. Ct. Rep. 148; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 716.

The trial court erred in finding the value of the railroad company in Missouri to be $53,172,907.83, and further erred in finding that the value of the franchise included in the value as fixed by the state board of equalization for the state of Missouri was so small as to make no appreciable difference in the result.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 176, 44 L. ed. 421, 20 Sup. Ct. Rep. 336; Willcox v. Consolidated Gas Co. 212 U. S. 52, 53 L. ed. 399, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Inadequacy of rates is not confiscation, and the railroad company is not entitled as of right to earn certain fixed percentages, nor can it be heard to complain that the rates fixed by itself do not produce earnings.

Re Arkansas R. Rates, 168 Fed. 720; Reagan v. Farmers' Loan & T. Co. 154 U. S. 409, 412, 38 L. ed. 1027, 1028, 4 Inters Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Southern P. Co. v. Bartine, 170 Fed. 767; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 729; Central of Georgia R. Co. v. McLendon, 157 Fed. 974; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 343, 36 L. ed. 179, 12 Sup. Ct. Rep. 400; Willcox v. Consolidated Gas Co. 212 U. S. 20, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Smyth v. Ames, 169 U. S. 543, 42 L. ed. 848, 18 Sup. Ct. Rep. 418.

The application of the revenue theory for apportionment is condemned in no uncertain terms by Mr. Justice Brewer in Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 168, 44 L. ed. 418, 20 Sup. Ct. Rep. 336, and the courts generally have held along this same line notwithstanding the trial court's claim to the contrary, which is either a misconception or misconstruction of the opinions heretofore rendered on this question. In the case of Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, and other cases, the adoption of this basis was not specific, or an adoption of one method as against another, but it will be found that where the basis was accepted or used, it was because no other was presented to the court in order that it might choose between the one and the other.

No theory or method can prove invariably proper or accurate other than such as will truly disclose the result based on the value of that part of the property employed, and the true value of the services rendered.

Smyth v. Ames, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418.

Where the effect of the rates is doubtful, with a probability that they will prove compensatory, and the amount of business to be affected thereby is comparatively small, the courts may well wait for the test of experience.

Chicago, B. & Q. R. Co. v. Dey, 38 Fed. 664.

Mr. Justice Hughes, after making the above statement, delivered the opinion of the court:

1. The contention of the appellants that the court erred in permitting the filing of the amended and supplemental bills is without merit. Although the commodity rate act of 1907 repealed that of 1905, it saved the penalties and liabilities incurred under the repealed statute. Both the original and supplemental bills proceeded upon the broad ground that the returns of the companies from their intrastate business, prior to the act of 1905, were unreasonably low, and that 496]any reduction in rates would *only diminish the income, already inadequate. The additional legislation pending the suits, and the substitution of slightly higher rates on certain commodities embraced in the earlier act, did not alter the essential features of the controversy. There was identity of parties and subject-matter, although nominally different acts were involved. To have required original bills would have involved double litigation, double costs, and great delay. The ends of justice were advanced by allowing the amended and supplemental bills, and we are not inclined to interfere with the reasonable discretion of the trial judge in a matter of practice which in no way violated any of the substantial rights of the appellants.

Neither can it be said that the state court had prior jurisdiction. That the state filed in one of its courts bills for the enforcement of the act of 1907, before the actual filing of the supplemental bills, may be true; but the application for leave to file the supplemental bills was pending in the circuit court of the United States, and action was suspended, merely to give opportunity for hearing, the court meanwhile restraining the enforcement of the new rates. In view of the pending bills assailing the act of 1905, the substantial identity of the question arising under the acts of 1907, and the pendency of the motion for leave to file supplemental bills, we are clearly of opinion that priority of jurisdiction belonged to the United States, and the state court could not properly oust that jurisdiction.

2. It is insisted by the cross appellants that the legislative acts, although relating exclusively to intrastate transportation, constituted an unwarrantable interference with interstate commerce, and that the decrees should have afforded relief upon this ground. We need not review the arguments addressed to conditions of transportation in Missouri and the relation of intrastate to interstate rates, for while the case has its special facts by *reason of the location[497 of the state, and the use of the Mississippi and Missouri rivers as basing points in rate-making, the controlling question thus presented with reference to the authority of the state to prescribe reasonable intrastate rates throughout its territory, unless limited by the exercise on the part of Congress of its constitutional power over interstate commerce and its instruments, is not to be distinguished in any material respect from that which was considered and decided in the Minnesota rate cases. Simpson v. Shepard, 230 U. S. 352, ante, 1511, 33 Sup. Ct. Rep. 729. For the reasons stated in the opinion in those cases, it must be held that the court below properly refused to sustain this objection to the Missouri statutes.

3. We are thus brought to the question whether the action of the state was confiscatory; that is, whether, by the reduction in rates of which complaint is made, the carriers were denied the just compensation to which they were entitled for the use of their property in the public service. It is to be observed that the freight rate acts of 1907 applied only to a portion of freight transportation; that is, to the transportation of specified commodities in carload lots. But, as we have said, it is contended that the return from the intrastate business was already inadequate, and that the scope of the state's action in the passage of the passenger fare act and the commodity rate acts was such as necessarily to preclude a fair return upon that business, taken as a whole. If it be assumed that the question of the profitableness of the entire intrastate operations is thus presented, the inquiry leads at once to a consideration of the fair value of the property devoted to the public use.

The findings of value made by the court below, in the case of seven† of the nine companies were the same as *the valu-[498 ations placed respectively upon the properties by the state assessing board, for the pur-

†These companies were the Chicago, Burlington, & Quincy, St. Louis & San Francisco, Atchison, Topeka, & Sante Fe, Chicago, Rock Island, & Pacific, Kansas City Southern, Missouri, Kansas, & Texas, and Chicago Great Western.

poses of taxation, multiplied by 3.‡ The multiplication was made because the assessments were on the basis of one third of the value in the judgment of the state board. In the case of two of the companies, the St. Louis & Hannibal and the Kansas City, Clinton & Springfield, the value as found was equal to twice the assessed valuation: that is, the value was taken to be two thirds of the estimate of the assessing board.

None of the members of the state assessing board was examined. There is no satisfactory proof of the grounds of their judgment. Nor was it shown that these valuations, made by them for the purposes of taxation, were upon a basis which could properly be taken in determining the fair value, where the sufficiency of prescribed rates is involved and the issue is one of confiscation.

It is urged that there was other evidence in support of the conclusions reached. The court below, while finding values equal to those estimated by the state assessing board, also found that apart from the valuations of the state board, and upon the whole evidence, the property was at least worth the amounts mentioned in the findings. It was said that there had been considered "the immense terminal values of most of the roads, the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities, and all the evidence bearing on present values."

499] *On examining the evidence, however, we find it to be too general and inconclusive to be regarded as sufficient proof to sustain the values as found. Undoubtedly, the companies possessed valuable terminals, but what the values were was not suitably shown. There is an absence of evidence, appropriately specific, dealing with the lands, improvements, structures, equipment, and other property owned by each company, and showing what the various items of property were worth. It would seem manifest from the character of the evidence which can be supposed to have relation to value, that reliance was principally placed upon the estimates of the state assessing board. There was proof of the amount of stocks and bonds, of earnings, and also testimony as to the cost of certain recent construction; but while these matters could properly be considered in reaching a conclusion, we fail to find any adequate basis for the definite findings of value that have been made. We are referred to the testimony of two witnesses for the complainants, men of considerable experience in railroad affairs, but this consisted of broad estimates. Thus, one of these witnesses testified as follows:

Q. I want to ask you a question as to the Rock Island, the St. Louis & Hannibal, the Kansas City Southern, the M. K. & T., the Kansas City, Clinton, & Springfield, and the Chicago Great Western. In speaking of the Rock Island, I include the St. Louis, Kansas City, and Colorado.

The figures in those cases being based upon three times the valuation of said property, as shown by the state board's of equalization assessment for the year 1907, I think it is . . . and the Atchison, Topeka, & Santa Fe Railway Company.

One or two of these roads had the figures for 1908, and I want to see which those are. I think those I named are all for 1907, and the Burlington figures are for 1908.

Now I want to ask you the general question as to each *and all of those roads; [500 whether in your opinion each of those roads is worth an amount equal to three times the valuation fixed by the state board of equalization in those years,—at least that much?

A. Yes, sir, in a general way I should say the value of those roads is at least three times the amount shown in the report of the state board of equalization of Missouri, for the years 1907 and 1908. I have examined both books, and substantially there is not very much difference.

Q. I do not remember whether we gave the Frisco figures for 1907 or for 1908. But you make them applicable to all the roads you have testified to, as to both 1907 and 1908, do you?

A. Yes, sir, with the exception, possibly, of the St. Louis & Hannibal and of the Kansas City, Clinton, & Springfield. I am not certain as to those roads being worth three times the assessed value, as shown in the printed report of the proceedings of the state board of equalization.

Q. As to each of those roads, which are losing ventures any way, according to the testimony here, about what would you say they are worth, at least how much?

A. Well, I should say twice as much as the assessed valuation.

Q. Your statement, with the exception you make as to the St. Louis & Hannibal, and the Kansas City, Clinton, & Springfield Railroads, is applicable to all the roads whose cases have been tried here?

A. Yes, sir.

‡In certain instances there are slight differences which appear to be accounted for by additions to the state assessments of certain local assessments. But in every instance, the value as found corresponds to what was assumed to be three times the assessed valuation in the statements of computations submitted to the court.

Another witness testified with respect to the Rock Island road that the value was not less than three times the assessed valuation; that is, not less than the amount taken on this basis as the valuation of the state board.

It is clear that testimony of this general character cannot be deemed sufficient to 501]support a finding of confiscation, *or to justify the annulment of the legislative acts of the state.

In the case of the Chicago, Burlington, & Quincy Company, the value of the property in the state of Missouri was fixed at the amount of $53,172,907.83. This amount, as stated in the exhibit of computations submitted by the company to the court, was precisely three times "the assessment for 1908" ($17,724,302.61), the assessment being made upon the basis of one third of the board's estimate. The court found that the mileage in Missouri was 1,136.34 miles, and that the value as fixed amounted to $46,793 a mile. If this valuation were extended to the mileage of the entire system, it would mean that, for the purpose of determining the validity of prescribed rates and the issue of confiscation, the Burlington property as a whole should be regarded as worth over $400,000,000. According to the evidence, as stated in the brief of counsel for the company, the actual bonded indebtedness of the company at the time in question was $174,172,000, and its stock, $110,839,100, making a total of $285,011,100. In short, the contention would be, on this basis of valuation extended to the system, that unless the Burlington were permitted to calculate its fair return upon an amount exceeding by more than $115,000,000 its total capitalization, it would be deprived of its property without due process of law.

Manifestly, a finding of confiscation could not be based on such a valuation in the absence of clear and convincing proof that the value actually existed, and that the different items of property were estimated respectively by correct methods, and in accordance with proper criteria of value. This proof was lacking. In the case of the other roads, although the special considerations which have been mentioned with respect to the Burlington property may not be applicable, still we are left in uncertainty as to the correctness of specific 502]valuations which have been made. *It cannot be regarded as sufficient to introduce assessments, or valuations made for the purposes of taxation; and this is particularly true when the principles governing the assessments are not properly shown, and for all that appears, they may have *rested* upon methods of appraisement which would be inadmissible in ascertaining the reasonable value of the property as a basis for charges to the public. Simpson v. Shepard, 230 U. S. 352, ante, 1511, 33 Sup. Ct. Rep. 729.

There is a further question, and that is, whether these estimates of value which the court below adopted in its findings were accepted by the defendants and hence are not open to objection here. It is undoubtedly true that these estimates were used in the computations, on both sides, which were submitted to the court. The amounts assessed respectively were conceded, and it was also agreed that the assessments were made at one third the value in the judgment of the board. Concessions of this sort were made at various times during the taking of evidence, and the following extracts from the record are sufficient, we think, to show their nature.

Thus, with respect to the Burlington road, on the original bill, the following stipulation was made before the master:

"It is agreed between the parties that the basis of the assessment is upon the basis of one third of the value of the property, in the judgment of the board."

And later, on the hearing before the court on the amended and supplemental bills, the following took place:

Mr. Hagerman: We have a stipulation in the other three cases that the state board of railroad & warehouse assessment was based upon one third of what they regarded as a 33⅓ per cent valuation.

General Hadley: Whatever the stipulation was, it would be equally applicable to the other fifteen roads as it was to the three.

*The court: If you are able to make[503 an agreed statement, now, better do so.

Mr. Hagerman: I would like to get the fact, whatever it may be.

The court: Who assesses the railroads?

Mr. Hagerman: The state officers.

Mr. Lehmann: We do not accept that as indicating the real value, because, under the law, the state board is required to take into account a great many things,—the amount of the bonds and the stock, the franchises, the income of the property, and the income might be unduly high, and upon that basis give an unduly high valuation to the property.

Mr. Hagerman: I did not ask you to admit that is the value of itself, but that the state board valuation is fixed by them upon three times the amount of the returns.

Mr. Lehmann: We object to that as immaterial and irrelevant.

Mr. Hagerman: Will you admit it subject to the objection?

General Hadley: My recollection is that the stipulation or understanding was that the state board assessment was one third of what they regarded as the value of the property, including the franchise.

Mr. Hagerman: One third of the value as listed in the statement. I shall follow it by the introduction of a statement.

General Hadley: That is all right.

Our conclusion is that the stipulation extended only to the fact that the judgment of the board was as stated. While the evidence on the question of value, considering the character of the issue involved, was extremely unsatisfactory, and these estimates based upon the assessments were used by both parties in the calculations which were submitted to the court, still it cannot be said that there was an agreement 504]as to the values. Nor did the *court in making its findings proceed upon the view that the values had been stipulated. We can entertain no doubt upon this record that the defendants are free to urge, as they do urge, that the values as found are not supported by the proof.

It is not necessary to consider the merits of the contention based on the assumption that in the item of the assessment entitled "All Other Property" the state assessors included franchises of the companies. There is no clear showing as to what they did include in this item. As we have said, they were not called as witnesses, and in many essential particulars we are unable to judge upon what basis they made their specific appraisements.

4. The value of the entire property within the state, as found, was apportioned between the interstate and intrastate business, passenger and freight, according to the gross revenue derived from each.

The reasons for disapproving this method were stated in Simpson v. Shepard, supra, and the ruling there made is controlling here.

5. A large part of the controversy relates to the division of expenses between the interstate and intrastate traffic. It is contended by the defendants that the division should have been made with respect to freight according to the relation of ton miles, and that the passenger expense should have been divided according to the relation of passenger miles, or, to include another factor upon which the defendants insist, according to passenger miles and "service rendered,"—meaning by the latter that the quality of the service should be taken into account.

The court made the division in each case upon the basis of gross revenue, with an addition for the extra cost of intrastate traffic, this being estimated at not less than 50 per cent in the case of freight, and not less than 25 per cent in the case of passengers.

It is evident that in an apportionment of expenses *either upon the revenue[505 method, or upon the ton mile and passenger mile method, relations may be assumed which do not in fact exist. Thus, a division of expenses according to gross revenue assumes that the cost in relation to revenue is the same with respect both to intrastate and interstate traffic; in fact, it may be very different. A greater average sum may be charged for intrastate than for interstate hauls; and this greater sum may or may not be equal to the difference in cost. In the Minnesota cases, the master found that the revenue per ton per mile derived from intrastate business, as compared with interstate business, was, with respect to the Northern Pacific Company, as 1.4387 to 1.0000, and with respect to the Great Northern Company, as 2.02894 to 1.00000. And there is further illustration in the present case, it appearing, for example, that in the case of the St. Louis & San Francisco Company, the revenue per ton per mile from the intrastate business, as compared with the interstate business, was as 1.7286 to 1.0000; and in that of the Chicago, Burlington, & Quincy Company, approximately as 2 to 1. An apportionment of expenses on the basis of revenue which did not take into consideration the differences in revenue in relation to cost, in the two classes of traffic, would be plainly inaccurate.

On the other hand, a division according to ton miles assumes that the cost of moving a ton of intrastate freight one mile is the same on the average as the cost of moving a ton of interstate freight one mile. If the average cost differs in the two classes of traffic, the difference must be allowed for in order to make a correct apportionment of the total expense.

When the apportionment is on the revenue basis, with an allowance such as was made by the court below for the assumed extra cost of intrastate traffic, it is manifest that the purpose is to express in a given percentage the additional cost of intrastate traffic in proportion to revenue. *This was clearly illustrated in the [506 computations made by the master in the Minnesota cases, 230 U. S. 352, ante, 1511, 33 Sup. Ct. Rep. 729. The master concluded that the cost per ton mile of doing intrastate freight business was two and one half times that of doing interstate freight business.

The division of expenses was then made according to ton miles after increasing the intrastate ton miles two and one half times. To reach the same result on the revenue basis it was necessary to ascertain the relation of cost per ton mile in proportion to revenue, and for this purpose, for example, in the Northern Pacific case, the relation of cost per ton mile (2.5 to 1.0) was divided by the relation of revenue per ton mile (1.4387 to 1.0000), and the relation of cost in proportion to revenue was thus found to be as 1.7377 to 1.0000. The division of expenses was then made upon the revenue basis after multiplying the intrastate revenue by 1.7377; and the result, of course, was identical with that obtained upon the ton-mile basis, as already stated.

The allowance of 50 per cent (which was made below) for the extra cost corresponds in its nature to the 73.77 per cent allowed in the Minnesota case on the "equated revenue basis." If, for example, it were assumed that it cost three times as much per ton mile to do the intrastate freight business as the interstate, and the revenue per ton mile of the former was twice that of the latter, the cost in proportion to revenue would be 50 per cent more. Or, if the assumption were that the intrastate freight business cost two and one half times as much per ton mile as the interstate, and the revenue per ton mile of the former, as compared with the latter, was as 1.66 to 1.00 (as it is said to be in the case of the Atchison, Topeka, & Santa Fe Company), the extra cost in proportion to revenue would be substantially 50 per cent.

As the counsel for the railroad companies says in his brief, the court below "took the 507]estimates of two to four *times extra cost, given by witnesses, and because of extra state or short-haul revenue per mile and other considerations, reduced them to 50 per cent, saying that this as a minimum, added to the equal division upon the revenue basis, brought to each road a result that was fair, just, and representative."

We have then in substance the same question that was presented in the Minnesota cases with respect to the evidence of the additional cost of transacting the intrastate business. There are numerous expressions of judgment on the part of the witnesses as to the amount of the intrastate cost, some estimating it on the revenue basis and others on the ton-mile basis. The estimates took a similarly wide range, making the cost of the intrastate or short-haul business from two to eight or more times that of the interstate or long-haul business. There was also testimony on *each* side as to certain tests, but these covered only a few days. We can reach no different conclusion from that stated in the decision to which we have referred, that, in an issue of this character, involving the constitutional validity of state action, general estimates of the sort here submitted with respect to a subject so intricate and important should not be accepted as adequate proof to sustain a finding of confiscation. Simpson v. Shepard, supra.

For the reasons that have been set forth, we must conclude that, save in the cases mentioned below, the complainants failed to sustain their bills.

The exceptions are these: In the case of the St. Louis & Hannibal Company, operating, as found by the court below, 120.61 miles within the state, the net revenue from the entire Missouri business, interstate and intrastate, for the fiscal year ending June 30, 1908, appears to have been $15,687.18. In the case of the Kansas City, Clinton, & Springfield Company, operating 151.01 miles within the state, the net revenue from the entire business therein, *inter-[508 state and intrastate, for the same year, amounted to $32,500.72. In each of these cases the experts employed by the parties unite in the statement that it is apparent from the results shown that "upon neither the revenue nor ton mile nor passenger mile theory of expenses can any adequate return on the investment be earned."

In the case of the Chicago Great Western Company, operating 84.43 miles of road within the state, the entire net revenue from the Missouri business, interstate and intrastate, for the six months ending December 31, 1907, being the period taken by both parties for the purpose of calculation, amounted to $41,839.06. From our examination of the evidence and the various computations we are satisfied in this case, as in the two others above-mentioned, that errors attributable either to valuation or to apportionments cannot be regarded as sufficiently great to change the result.

The decrees in these three cases will accordingly be affirmed, with the modification that the railroad and warehouse commissioners and the attorney general of the state may apply at any time to the court, by bill or otherwise, as they may be advised, for a further order or decree whenever it shall appear that, by reason of a change in circumstances, the rates fixed by the state's acts are sufficient to yield to these companies reasonable compensation for the services rendered.

The contention raised by the complainants, that these legislative acts cannot be enforced against one company unless enforced against all, cannot be sustained.

The argument, in effect, is that, although the charges of carriers may be clearly exorbitant, the state is powerless to compel them to put into effect reasonable rates because, as to another carrier differently situated, the rates thus prescribed might be unreasonably low. The acts are valid upon their face as a proper exercise of governmental authority in the establishment 509]of reasonable rates, and *each complainant, in order to succeed in assailing them, must show that as to it the rates are confiscatory.

The decrees in Numbers 9, 12, 339, 340, 341, 342, 345, 346, 349, 350, 357, and 358 are reversed and the cases remanded, with directions to dismiss the bills respectively without prejudice.

The decrees in Numbers 351, 352, 365, 366, 367, and 368 are modified as stated in the opinion, and, as modified, are affirmed.

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JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY. (No. 343.)

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 344.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
MISSOURI PACIFIC RAILWAY COMPANY. (No. 353.)

MISSOURI PACIFIC RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 354.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY. (No. 355.)

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 356.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
QUINCY, OMAHA, & KANSAS CITY RAILROAD COMPANY. (No. 359.)

QUINCY, OMAHA, & KANSAS CITY RAILROAD COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 360.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
WABASH RAILROAD COMPANY. (No. 361.)

WABASH RAILROAD COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad andWarehouse Commissioners, et al. (No. 362.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY. (No. 363.)

ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 364.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY. (No. 369.)

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 370.)

JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al., Appts.,
v.
CHICAGO & ALTON RAILWAY COMPANY. (No. 371.)

CHICAGO & ALTON RAILWAY COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 372.)

(See S. C. Reporter's ed. 509–511.)

**Appeal — from circuit court — decree entered pursuant to stipulation.**

Appeals and cross appeals from decrees of a Federal circuit court, entered in accordance with stipulations to abide by any orders, judgments, or decrees that might be entered in certain other suits, present no questions for the consideration of the Federal Supreme Court.

[For other cases, see Appeal and Error, 989–993, in Digest Sup. Ct. 1908.]

[Nos. 343, 344, 353, 354, 355, 356, 359, 360, 361, 362, 363, 364, 369, 370, 371, 372]

Argued April 1, 2, and 3, 1912. Decided June 16, 1913.

APPEALS and CROSS APPEALS from the Circuit Court of the United States for the Western District of Missouri to review decrees entered in accordance with stipulations to abide the result of other suits. Dismissed.

See same case below, 168 Fed. 317.

Mr. Elliott W. Major, Attorney General of Missouri, and Mr. Sanford B. Ladd argued the cause and filed briefs for Knott et al.

Messrs Frank Hagerman and Gardiner Lathrop argued the cause, and, with Messrs. S. H. West, Martin L. Clardy, O. M. Spencer, J. G. Trimble, Wells H. Blodgett, James L. Minnis, R. A. Brown, Burton Hanson, H. H. Field, Silas H. Strawn, and Edward L. Scarritt, filed briefs for the railroad companies.

For contentions of counsel, see their briefs as reported in Knott v. Chicago, B. & Q. R. Co. ante, 1572.

Memorandum opinion by direction of the court. By Mr. Justice Hughes:

These suits, with ten others, were brought to restrain the enforcement of the freight rate and passenger fare acts of the state of Missouri, passed in the years 1905 and 1907, as violative of the Federal Constitution. See Knott v. Chicago, B. & Q. R. Co. decided this day. [230 U. S. 474, ante, 1572, 33 Sup. Ct. Rep. 975.]

Upon hearing below, a stipulation was made in each of these eight suits, and orders were entered thereon, that it should abide "by the orders, judgment, and decree that may be made and entered" in one of the other suits named, as follows:

The suit of the St. Louis Southwestern Railway Company was to abide that of the St. Louis, Iron Mountain, & Southern Railway Company; the suits of the Missouri 511] *Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railway Company; and the Chicago, Milwaukee, & St. Paul Railway Company, that of the St. Louis, & San Francisco Railroad Company; the suits of the Wabash Railroad Company and the Chicago & Alton Railway Company; that of the Chicago, Burlington, & Quincy Railroad Company; and the suits of the Quincy, Omaha, & Kansas City Railroad Company and the St. Joseph & Grand Island Railway Company, that of the Chicago Great Western Railway Company.

The decrees below were entered in accordance with these stipulations. No questions for our consideration are presented by the appeals and cross appeals in these cases. The remedy of the parties is to apply to the court below in accordance with the stipulations to have decrees entered in the respective suits similar to those which we have directed to be entered in the cases to which the stipulations refer. The appeals and cross appeals are therefore dismissed.

It is so ordered.

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*JOHN A. KNOTT et al., Railroad and [512
Warehouse Commissioners, et al., Appts.,
v.
ST. LOUIS, KANSAS CITY, & COLORADO RAILROAD COMPANY. (No. 347.)

ST. LOUIS, KANSAS CITY, & COLORADO RAILROAD COMPANY, Appt.,
v.
JOHN A. KNOTT et al., Railroad and Warehouse Commissioners, et al. (No. 348.)

(See S. C. Reporter's ed. 512, 513.)

This case is governed by the decision in Knott v. Chicago, B. & Q. R. Co. ante, p. 1572.

[Nos. 347 and 348.]

Argued April 1, 2, and 3, 1912. Decided June 16, 1913.

APPEAL and CROSS APPEAL from decrees of the Circuit Court of the United States for the Western District of Missouri, adjudging railway rate legislation to be confiscatory, and enjoining its enforcement. Reversed and remanded, with directions to dismiss the bill without prejudice.

See same case below, 168 Fed. 317.

Mr. Elliott W. Major, Attorney General of Missouri, and Messrs. Sanford B. Ladd and Frederick W. Lehmann argued the cause and filed briefs for Knott et al.

Messrs. Frank Hagerman and Gardiner Lathrop argued the cause, and, with Messrs. M. A. Low, W. F. Evans, and M. L. Bell, filed briefs for the St. Louis, Kansas City, & Colorado Railroad Company.

For contentions of counsel, see their briefs as reported in Knott v. Chicago, B. & Q. R. Co. ante, 1572.

Memorandum opinion by direction of the court. By Mr. Justice Hughes:

This suit was one of the eighteen suits described in Knott v. Chicago B. & Q. R. Co. decided this day. [230 U. S. 474, ante, 1572, 33 Sup. Ct. Rep. 975]. Upon the hearing below, as it appeared that the prop-

erty of the St. Louis, Kansas City, & Colorado Railroad Company had been acquired by the Chicago, Rock Island & Pacific Railway Company, it was ordered by consent of the parties, that the suits of the two companies should be consoli-
513 dated, and that *the "findings, statements, and figures as to both companies" should be put "in consolidated form as those of the Chicago, Rock Island, & Pacific Railway Company."

Separate decrees were entered in the two cases, and separate appeals and cross appeals have been taken.

The same disposition must be made of both. See Knott v. Chicago, R. I. & P. R. Co. The decree below is therefore reversed and the cause is remanded, with directions to dismiss the bill without prejudice.

It is so ordered.

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CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,
v.
WILLIAM G. CONLEY, Attorney General of the State of West Virginia, et al.

(See S. C. Reporter's ed. 513–524.)

**Statutes — who may assail validity.**

1. The penal provisions of W. Va. Laws 1907, chap. 41, fixing the maximum fare for passengers on railroads at 2 cents per mile, are not open to constitutional attack where the highest state court has held, when construing such statute, that a railway company is excepted from the operation of the penalty clause during the prosecution by it in good faith of a suit to determine whether such statute is confiscatory in its operation and effect as applied to such company.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — classification — rate regulation.**

2. The exemption of any railroad in the state under 50 miles in length, and not a part of, or under the control, management, or operation of, any other railroad over 50 miles in length, operated wholly or in part in the state, from the operation of W. Va. Laws 1907, chap. 41, fixing the maximum fare for passengers on railroads at 2 cents per mile, does not deny the equal protection of the laws, where, as construed by the state courts, a railway under 50 miles in length, controlled by a railway of greater length, will be taken out of the exception only when connected and operated with the longer line.

[For other cases, see Constitutional Law, IV. a, 5, c, in Digest Sup. Ct. 1908.]

**Constitutional law — equal protection of the laws — classification — rate regulation.**

3. The exception in favor of electric lines and street railways, made by W. Va. Laws 1907, chap. 41, fixing maximum fares for passengers on railroads at 2 cents per mile, does not deny the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, c, in Digest Sup. Ct. 1908.]

**Commerce — state regulation of local rates of interstate carrier — congressional inaction.**

4. Congressional inaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates, as to places within zones of competition crossed by the state boundary line.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

[No. 111.]

Argued April 8, 1912. Decided June 16, 1913.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a decree refusing an appeal from a decree of the Circuit Court for Kanawha County, in that state, dismissing the bill in a suit to enjoin the enforcement of railway rate legislation. Affirmed.

The facts are stated in the opinion.

Mr. F. B. Enslow argued the cause, and with Messrs. H. T. Wickham, W. E. Chilton, and H. Fitzpatrick, filed a brief for plaintiff in error:

While the power to classify subjects of legislation cannot be questioned, still that power is subject to judicial review. And if the courts find that the classification made is arbitrary, or is made upon a ground that has no "just and proper relation" to the attempted classification, or that the classification is a "mere selection" without reason, or that the classification is not "called for by facts justifying" it, or that the necessary effect of the legislation is to

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NOTE.—On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. R. Co. v. Croxton, 33 L.R.A. 177.

On unconstitutional inequality or discrimination in state regulation of tolls or rates—see note to Cotting v. Godard, 46 L. ed. U. S. 92.

On effect of interstate business upon state regulation of local railway rates—see note to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 112.

As to who may raise objection that a statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

put one person or one property in a less desirable position or under greater burdens than another person or another piece of property similarly situated, then such legislation cannot be upheld.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Smith v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514; Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Brannon, 14th Amend. pp. 319, 323; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 105, 43 L. ed. 913, 19 Sup. Ct. Rep. 609; State v. Broadbelt, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; New York v. Barker, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 85, 46 L. ed. 99, 22 Sup. Ct. Rep. 30; State ex rel. Richards v. Hamer, 42 N. J. L. 435; Com. ex rel. Fertig v. Patton, 88 Pa. 258; Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; State ex rel. Columbus v. Mitchell, 31 Ohio St. 592; People ex rel. Lee v. Chautauqua County, 43 N. Y. 10; Smith v. Louisville & N. R. Co. 75 Ala. 449; State ex rel. McCue v. Ramsay County, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

An exception to the statute cannot take one business and favor it, when other corporations and other individuals doing the same kind of business are not so favored.

Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Cooley, Const. Lim. 5th ed. 484; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; Missouri, K. & T. R. Co. v. Medaris, 60 Kan. 155, 55 Pac. 875, 5 Am. Neg. Rep. 339; Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974; Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 55; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529.

The power to pass this discriminating legislation may not be justified under the police power or under the reservation clause giving the state the right to amend charters or any law pertaining to corporations.

Connolly v. Union Sewer Pipe Co. 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431.

The courts have, in applying the equal protection clause of the 14th Amendment, given relief from every class of legislation which has arisen in an attempt to discriminate.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Re Grice, 79 Fed. 628; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 85, 46 L. ed. 99, 22 Sup. Ct. Rep. 30.

A state railroad statute which imposes such excessive penalties that the parties affected are deterred from testing its validity in the courts denies the carrier the equal protection of the law, without regard to the question of insufficiency of the rates prescribed.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

While the length of the road may furnish in some instances a proper basis for classification, such classification must be called for by facts justifying it; and if it has the effect of denying equal protection to parties engaged in the same kind of business, and is so worded that it applies to some corporations in the class, and excludes others, it is invalid.

Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

In those cases where a classification was upheld there is a clear distinction between the statutes considered and the one now before the court.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638;

Oman Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 34 Sup. Ct. Rep. 190.

The act of the legislature of West Virginia, complained of, imposes burdens and restrictions upon interstate commerce, and is for that reason also invalid.

Hall v. DeCuir, 95 U. S. 489, 24 L. ed. 548; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Employers Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Mr. William G. Conley, Attorney General of West Virginia, argued the cause and filed a brief for defendants in error:

All statutes are presumed to be constitutional.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Henderson Bridge Co. v. Henderson, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 877; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423: 1 Lewis's Sutherland, Stat. Constr. 2d ed. § 85; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162.

The statute is not confiscatory as to plaintiff.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 650, 666, 667, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148.

The entire earnings from all sources must be considered.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; Matthews v. Corporation Comrs. 106 Fed. 7; Minnesota & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Brabham v. Atlantic Coast Line R. Co. 11 Inters. Com. Rep. 464; Railroad & W. Comrs. v. Eureka Springs R. Co. 7 Inters. Com. Rep. 69; Re Freight Rates, 11 Inters. Com. Rep. 180; Re Class & Commodity Rates, 11 Inters. Com. Rep. 238; Re Advances in Freight Rates, 9 Inters. Com. Rep. 382; Artz v. Seaboard Air Line R. Co. 11 Inters. Com. Rep. 458.

The state courts have the power to determine the meaning of a state statute, and, having such power, it carries with it the power to prescribe the extent and limitations of said statute.

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

Such construction by the state court involves no Federal question, but is exclusively for the state courts.

King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

The statute does not operate on interstate commerce within the Federal constitutional prohibition. If it operates on interstate commerce at all, it is merely incidental.

Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

State legislation, in a variety of ways, may affect interstate commerce and the persons and corporations engaged in it, without constituting a regulation of interstate commerce within the constitutional prohibition.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 488, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 283, 21 L. ed. 164; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The power exercised by the legislature of

West Virginia in enacting the statute complained of clearly comes under the police power of the state.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 516, 46 L. ed. 298, 306, 22 Sup. Ct. Rep. 95; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

The use of local state rates may legally yield a lower charge than a through interstate rate.

Kurtz v. Pennsylvania Co. 16 Inters. Com. Rep. 410; Ames v. Union P. R. Co. 64 Fed. 171.

The statute places no burden on interstate commerce.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543.

The statute complained of does not on its face attempt to regulate, or in any manner interfere with, interstate commerce. Whether it does or does not interfere with interstate commerce is therefore determined from the facts. The plaintiff contends that the statute interferes with interstate commerce. The defendants in their answer deny such allegations in the plaintiff's bill. The burden of proof, therefore, was upon the plaintiff. It offered no proof on that subject. It absolutely failed to prove its allegation. The state courts decided that question against the plaintiff, and such decision is conclusive on this court.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; 17 Mor. Min. Rep. 704; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; Gardner v. Bonestell, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399.

Congress cannot regulate intrastate commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

It is true we have two sovereign powers constantly in operation in states,—the state power and the Federal power,—the two together constituting a complete government. But the rights of each of these sovereign powers are separate and distinct as to commerce. The powers exercised by the state government are local or domestic in their application, while the powers exercised by the Federal government are those which affect the people of all the states alike.

Cardwell v. American River Bridge Co. 113 U. S. 205, 210, 28 L. ed. 959, 961, 5 Sup. Ct. Rep. 423.

The extent of the jurisdiction of these two sovereign powers was firmly fixed by the people of the United States in the adoption of the Federal Constitution. The Federal government has the exclusive legal right to exercise control over interstate commerce, while the states have the exclusive legal right to exercise control over intrastate commerce, the latter being the reserved and inherent police power of the states.

Coffee v. Groover, 123 U. S. 1, 31 L. ed. 51, 8 Sup. Ct. Rep. 1.

The power and authority of each sovereignty is exclusive within its jurisdiction

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 334, 29 L. ed. 636, 645, 6 Sup. Ct. Rep. 334, 388, 1191.

The Federal interstate commerce act relates only to interstate commerce.

Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896.

Interstate roads are subject to state regulation as to intrastate commerce.

Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; Smyth v. Ames, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; Houston & T. C. R. Co. v. Mayes, 201 U. S. 319, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141.

The lowering of intrastate rates does not affect interstate rates.

Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The statute is not unconstitutional because of classification of railroads. It is just, and founded upon substantial differences.

Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514; Brannon, 14th Amend. p. 323; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Watson v. Maryland, 218 U. S. 173, 179, 54 L. ed. 987, 990, 30 Sup. Ct. Rep. 644; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; Connecticut ex rel. New York & N. E. R. Co. v. Woodruff, 153 U. S. 689, 38 L. ed. 869, 4 Sup. Ct. Rep. 976; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 268, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; McAunich v. Mississippi & M. R. Co. 20 Iowa, 338; Boston, C. & M. R. Co. v. State, 32 N. H. 215; Kirby v. Pennsylvania R. Co. 76 Pa. 506; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Missouri P. R. Co. v. Mackay, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Minnesota Oil Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The states have the constitutional power to classify railroads.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The classification of railroads based upon length of line has been held by this court to be the simpler and more constant test.

Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct Rep. 1028; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94.

The statute is uniform under each class. If the statute does not reach, the common law applies.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Western U. Teleg. Co. v. Call Pub Co. 181 U. S. 92, 45 L. ed. 765, 21

Sup. Ct. Rep. 561; Lowry v. Chicago, B. & Q. R. Co. 46 Fed. 85.

The legislature was the judge of the necessity of legislation.

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312.

The purpose or motive of Congress or of the state legislatures in exercising their lawful legislative functions is not a subject for judicial inquiry.

Flint v. Stone Tracy Co. supra; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Fletcher v. Peck, 6 Cranch, 131, 3 L. ed. 176; Ex parte McCardle, 7 Wall. 514, 19 L. ed. 265; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 448; Kountze v. Omaha, 5 Dill. 443, Fed. Cas. No. 7,928; Little Rock v. North Little Rock, 72 Ark. 195, 79 S. W. 785; Ex parte Newman, 9 Cal. 502; Fowler v. Peirce, 2 Cal. 168; People ex rel. Vermule v. Bigler, 5 Cal. 24; Sherman v. Story, 30 Cal. 266, 89 Am. Dec. 93; Harpending v. Haight, 39 Cal. 202, 2 Am. Rep. 432; Dobbins v. Los Angeles, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Re Smith, 143 Cal. 368, 77 Pac. 180; State ex rel. McVey v. Burris, 4 Penn. (Del.) 3, 49 Atl. 930; Lyon v. Morris, 15 Ga. 480; Wright v. Kelley, 4 Idaho, 624, 43 Pac. 565; Bellevue Water Co. v. Stockslager, 4 Idaho, 636, 43 Pac. 568; Blaine County v. Heard, 5 Idaho, 6, 45 Pac. 390; Wright v. Defrees, 8 Ind. 298; McCulloch v. State, 11 Ind. 424; Evans v. Browne, 30 Ind. 514, 95 Am. Dec. 710; Downey v. State, 160 Ind. 578, 67 N. E. 450; Wichita v. Burleigh, 36 Kan. 34, 12 Pac. 332; Johnson v. Higgins, 3 Met. (Ky.) 566; State ex rel. Belden v. Fagan, 22 La. Ann. 545; Baltimore v. Howard, 15 Md. 376; Atty. Gen. v. Williams, 178 Mass. 330, 59 N. E. 812; Flint & F. Pl. Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; Atty. Gen. v. Lake County, 33 Mich. 289; Brown v. Cape Girardeau, 90 Mo. 377, 59 Am. Rep. 28, 2 S. W. 302; State ex rel. Blakeman v. Hays, 49 Mo. 604; Bradshaw v. Omaha, 1 Neb. 16; Humboldt County v. Churchill County, 6 Nev. 30; Moore v. Street Commissioner, 62 N. J. L. 386, 41 Atl. 946; People ex rel. Wood v. Draper, 15 N. Y. 545; People ex rel. McLean v. Flagg, 46 N. Y. 401; People v. Petrea, 92 N. Y. 139; Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345, 14 L.R.A. 481, 28 N. E. 358; Kittinger v. Buffalo Traction Co. 160 N. Y. 377, 54 N. E. 1081; Pearce v. Stephens, 18 App. Div. 101, affirmed in 45 N. Y. Supp. 422, 153 N. Y. 673, 48 N. E. 1106; Sun Printing & Pub. Asso. v. New York, 8 App. Div. 230, 40 N. Y. Supp. 607; State ex rel. Herron v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; Miller v. State, 3 Ohio St. 484; Sunbury & E. R. Co. v. Cooper, 33 Pa. 278; Jones v. Jones, 12 Pa. 350, 51 Am. Dec. 611; Com. ex rel. Elkin v. Moir, 199 Pa. 534, 53 L.R.A. 837, 85 Am. St. Rep. 801, 49 Atl. 351; Com. v. Keary, 198 Pa. 500, 48 Atl. 472; State v. Cardozo, 5 S. C. 297; Leuhrman v. Taxing Dist. 2 Lea, 425; Lynn v. Polk, 8 Lea, 293; Ballentine v. Pulaski, 15 Lea, 634; Williams v. Nashville, 89 Tenn. 487, 15 S. E. 364; State ex rel. Robinson v. Lindsay, 103 Tenn. 625, 53 S. W. 950; Slack v. Jacob, 8 W. Va. 613.

"Electric lines" are not in a class with steam railroads.

1 Elliott, Railroads, §§ 6, 6a; 3 Elliott, Railroads, 2d ed. §§ 1096a, 1096b, 1096d.

Mr. Justice Hughes delivered the opinion of the court:

The suit was brought by the Chesapeake & Ohio Railway Company in the circuit court for Kanawha county, West Virginia, against William G. Conley, attorney general of the state of West Virginia, and the prosecuting attorneys of several counties in the state, to enjoin the enforcement of the act of the legislature of West Virginia, passed February 21, 1907 (Acts 1907, chap. 41), fixing the maximum fare for passengers on railroads, as described, at 2 cents a mile.

The state court sustained the act and this writ of error is brought.

The act provides:

"Sec. 1. That all railroad corporations organized or *doing business in this [520 state under the laws or authority thereof shall be limited in their charges for the transporting of any person with ordinary baggage, not exceeding 100 pounds in weight, to the sum of 2 cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than 5 cents, the said sum of 5 cents may be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; provided, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of 10 cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company, shall be issued and delivered to such passenger; and provided, further, that nothing in this

act shall apply to any railroad in this state under 50 miles in length, and not a part of, or under the control, management, or operation of, any other railroad, over 50 miles in length, operated wholly or in part in the state.

"Sec. 2. Any railroad company which shall charge, demand, or receive any greater compensation for the transportation of any passenger than is authorized by this act shall be fined for each offense not less than $50 nor more than $500; provided, that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state."

The questions presented are thus stated by the plaintiff in error:

"First: The statute in question is unconstitutional because of the fact that the penalties pronounced by the statute against any railway which shall fail to comply with the same are so excessive as to bring the act within the inhibition of article 8 of the 521]Constitution of the *United States and under the 14th Amendment to the Constitution of the United States deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the law.

"Second: The entire act is unconstitutional, because the classification thereby made of the railways makes the act applicable to certain railroads of a certain class, and such classification as set out is unfair and unjust, and a mere arbitrary selection imposed by the legislature without any relation to the alleged purpose of the act, and not based on any reasonable grounds.

"Third: Because the act necessarily imposes a burden upon the plaintiff as an interstate carrier, and denies it the right to transact and carry on interstate commerce free from the burdens and restrictions imposed by the West Virginia 2-cent rate act."

While the plaintiff in error was entitled to a fair opportunity to test the constitutional validity of the prescribed rate, and penal provisions operating to preclude such an opportunity would be invalid (Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764), it is clear that the provisions for penalties of the statute in question, aside from their separable character, are not open to this objection, in the light of the construction placed upon them by the state court. In construing the act, the supreme court of appeals of West Virginia held:

"By the institution of a suit to determine whether such a statute is confiscatory in its operation in a particular case, such corporation alters its status from that of a mere corporation engaged in the public service, to that of a contestant of the legislative claim of right to take its property without due process of law; and, in the absence of expression of intent to the contrary, it is presumed the legislature did not intend to affect, or interfere with, the assumption or maintenance of such status, nor to legislate upon the subject of such remedy; and the penal clause of *such[522 a statute, silent on the subject of remedy, has no application while a suit is pending, in good faith, for the determination of such question. . . . By the application of these rules and principles, a railroad company is excepted from the operation of the penalty clause of chapter 41 of the Acts of 1907, during the prosecution by it, in good faith, of a suit to determine whether said statute is confiscatory in its operation and effect, as applied to such company." Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 133, 134, 67 S. E. 613.

Under this ruling, it does not appear that the company is in a position to attack the validity of the act by reason of its penal provisions. It has had its opportunity in court, and if the act be otherwise valid, it may avoid penalties hereafter by complying with it. Further, as was said in Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 172, 56 L. ed. 710, 717, 32 Sup. Ct. Rep. 449: "If an oppressive application of them should be attempted, it will be time enough then for the appellant to file its bill."

Nor can it be said that the classification of the act is an unreasonable or arbitrary one. In Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028, the statute under consideration classified railroads with respect to passenger fares, as follows: "On lines of railroad 15 miles or less in length, 8 cents per mile. On lines over 15 miles in length, and less than 75 miles in length, 5 cents. On lines over 75 miles in length, 3 cents per mile." The court, in sustaining the statute, said: "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the *legis-[523 lature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision

securing to all the equal protection of the laws." (p. 691.)

Again, in Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275, the court sustained the statute of that state, which, in providing for the number of men to be employed in the operation of freight trains, excluded from its application railroads less than 50 miles in length. The principles governing the decision of a question of this sort have been so frequently stated that repetition is unnecessary. Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 52-55, 54 L. ed. 921, 927, 929, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Mutual Loan Co. v. Martell, 222 U. S. 225, 232, 56 L. ed. 175, 178, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, ante, 1022, 33 Sup. Ct. Rep. 715.

It is urged, however, that "control, management, or operation" is made the basis of classification for rate purposes, so that, if a railroad under 50 miles in length be controlled by a railroad of greater length, it would be taken out of the exception, although operated wholly independently, and not in connection with the longer line. This contention is fully met by the construction which the state court has given to the statute. Upon this point that court said that the meaning of the words "under the control, management, or operation" "is to be ascertained from the connection in which they are used, the act in which they are found, its context, and the mass of legislation of which they form a part. In form, the expressions are alternative; but, in meaning, they are appositive, signifying the same as the words 'part of.' . . . The suggestion that ownership or control of one railroad by another, when they are not connected and operated together, nor susceptible of such connection and operation, makes them one within the meaning of the act, is 524]likewise *contrary to the spirit and beyond the scope thereof. Such an interpretation is not within its reason or purpose, and, therefore, not within its meaning. The legislature must be regarded as having passed the act, in view of existing conditions and methods of railroad operation, and with the intent that it should operate in harmony with the spirit and general principles of existing railroad rate legislation, except in so far as the contrary is expressed in terms or by necessary implication. There is not a word here signifying any intent to depart from the general principle embodied in the act of 1873, concerning the entity of a railroad for the purposes of the act. It made into one only such railroads as were operated 'in connection' with one another. Intent to change this settled policy must rest upon something more, in an amendatory act, than mere inference, surmise, or unnecessary implication." Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 177-179, 67 S. E. 613.

The exception of "electric lines and street railways" is also made the ground of criticism, but this classification rests upon reasonable and familiar distinctions, long recognized as proper in railroad legislation. Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, ante, 1501, 33 Sup. Ct. Rep. 890.

The final objection to the statute is that it constitutes an unconstitutional interference with interstate commerce. It must be regarded, however, as prescribing rates exclusively for intrastate traffic, and, as thus construed, it was within the power of the state to enact. The questions presented are substantially the same as those which were considered in Simpson v. Shepard, 230 U. S. 352, ante, 1511, 33 Sup. Ct. Rep. 729.

Judgment affirmed.

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*OREGON RAILROAD & NAVIGA-[525
TION COMPANY, a Corporation, Appt.,
v.
THOMAS K. CAMPBELL et al.

(See S. C. Reporter's ed. 525-536.)

**Injunction — against rate regulation — intrastate or interstate traffic.**

1. Injunctive relief against the enforcement, as applied to goods which are properly regarded as moving in interstate commerce, of a rate order of a state railroad commission, which by its terms is applicable solely to intrastate transportation, can only be granted upon a showing of actual conditions and that the order, though valid in its proper application, is misapplied as to particular transactions.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

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Note.—On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On the effect of interstate business upon state regulation of local railway rates—see note to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 112.

**Commerce — state regulation of local rates of interstate carrier — congressional inaction.**

2. Congressional inaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

[No. 159.]

Argued April 8 and 9, 1912. Decided June 16, 1913.

APPEAL from the Circuit Court of the United States for the District of Oregon to review a decree dismissing a bill to restrain the enforcement of an order of the state railroad commission fixing railroad rates. Affirmed.

See same case below, 173 Fed. 957, 177 Fed. 318.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause, and, with Mr. W. W. Cotton, filed a brief for appellant.

Any attempted regulation by the state of intrastate transportation rates which necessarily affects and regulates rates upon interstate traffic or the movement of such traffic is an unconstitutional interference with interstate commerce.

Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; West v. Kansas Natural Gas. Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277.

Interstate commerce, reshipped in original packages, moved between Portland and points in eastern Oregon under tariff No. L-525, on file with the Interstate Commerce Commission; and the order of the Oregon Railroad Commission prohibits the application of said tariff thereto.

Leisy v. Harden, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 142, 10 Sup. Ct. Rep. 725; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; May v. New Orleans, 178 U. S. 596, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Austen v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; General Oil Co. v. Crain, 209 U. S. 228, 52 L. ed. 764, 28 Sup. Ct. Rep. 475; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; Leonard v. Kansas City & W. B. R. Co. 13 Inters. Com. Rep. 573.

The commission order creates an unjust discrimination against interstate traffic destined to eastern Oregon, and against wool and other commodities shipped from eastern Oregon to points in eastern states, and regulates such interstate commerce by forcing changes in the interstate rates of the appellant, or a change in the routing of such traffic.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Reliance Textile & Dye Works v. Southern R. Co. 13 Inters. Com. Rep. 48; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277.

Any action of the state forcing a reduction of an interstate rate, lawfully published and filed, is certainly an interference with interstate commerce.

Louisville & N. R. Co. v. Eubank, supra.

The Oregon Commission rates create an unjust discrimination against points in Washington.

Shepard v. Northern P. R. Co. 184 Fed. 796.

Mr. Joseph N. Teal argued the cause, and, with Mr. Clyde B. Aitchison and Mr. A. M. Crawford, Attorney General of Oregon, filed a brief for appellees:

The state has exclusive jurisdiction over its internal commerce.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Passaic Bridges (Milner v. New Jersey R. & Transp. Co.) 3 Wall. 782, and 16 L. ed. 799, Fed. Cas. No. 9,620; Ex parte Koehler, 1 Inters. Com. Rep. 28, 30 Fed. 867; Allen v. Oregon R. & Nav. Co. 106 Fed. 265; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317; Woodside v. Tonopah & G. R. Co. 184 Fed. 358; Louisville

& N. R. Co. v. Siler, 186 Fed. 176; Re Arkansas Rate Cases, 187 Fed. 290; Southern P. Co. v. Campbell, 189 Fed. 182; Gibbons v. Ogden, 9 Wheat. 195, 6 L. ed. 69; United States v. Chicago, M. & St. P. R. Co. 149 Fed. 486; Ex parte Plessy, 45 La. Ann. 87, 18 L.R.A. 639, 11 So. 948; Sands v. Manistee R. Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Luxton v. North River Bridge Co. 153 U. S. 525, 532, 38 L. ed. 808, 811, 14 Sup. Ct. Rep. 891; Geer v. Connecticut, 161 U. S. 519, 531, 40 L. ed. 793, 797, 16 Sup. Ct. Rep. 600; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 247, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; Erie R. Co. v. Purdy, 185 U. S. 148, 150, 46 L. ed. 847, 849, 22 Sup. Ct. Rep. 605; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; People ex rel. Akin v. Butler Street Foundry & Iron Co. 201 Ill. 250, 66 N. E. 349; Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Chicago, I. & L. R. Co. v. Railroad Commission, 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011; Central Trust Co. v. Pittsburg, S. & N. R. Co. 52 Misc. 195, 101 N. Y. Supp. 837; Larabee Flour Mills Co. v. Missouri P. R. Co. 74 Kan. 808, 88 Pac. 72; State v. Jack, 69 Kan. 387, 1 L.R.A.(N.S.) 167, 76 Pac. 911, 2 Ann. Cas. 171; Beardsley v. New York, L. E. & W. R. Co. 15 App. Div. 251, 44 N. Y. Supp. 175; Purdy v. Erie R. Co. 162 N. Y. 42, 48 L.R.A. 669. 56 N. E. 508, appeal dismissed in 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 86, 2 I. C. C. Rep. 142; Hastings Malting Co. v. Chicago, M. & St. P. R. Co. 11 Inters. Com. Rep. 682; Farmers' M. & S. Club v. Atchison, T. & S. F. R. Co. 12 Inters. Com. Rep. 355.

Railroads are subject, as to their state business, to state regulations, which may be exerted directly by the legislative authority, or by administrative bodies endowed with power to that end.

Calvert, Regulation of Commerce, p. 75; Beale & W. Railroad Rate Regulation, § 1307; Noyes, Am. R. Rates, 206; Cooke, Commerce Clause of Fed. Const. § 23; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Dinsmore v. Southern Exp. Co. 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Ware & Leland v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606, affirmed in 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Southern R. Co. v. Railroad Commission, 42 Ind. App. 90, 83 N. E. 721; Railroad Commissioners v. Wabash R. Co. 123 Mich. 669, 82 N. W. 526, affirmed in 126 Mich. 669, N. W. 466; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 393, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Northern Securities Co. v. United States, 193 U. S. 394, 48 L. ed. 723, 24 Sup. Ct. Rep. 436; Oklahoma v. Atchison, T. & S. F. R. Co. 220 U. S. 277, 55 L. ed. 465, 31 Sup. Ct. Rep. 434; Oklahoma ex rel. West v. Chicago, R. I. & P. R. Co. 220 U. S. 302, 55 L. ed. 474, 31 Sup. Ct. Rep. 442.

It will be conceded that a state law regulating a Federal subject would be void, and a Federal law regulating a subject of state jurisdiction is also void.

Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The Federal government had and could have no authority over transportation which began and ended in a particular state.

Baer Bros. Mercantile Co. v. Missouri P. R. Co. 13 Inters. Com. Rep. 333; Hussey v. Chicago, R. I. & P. R. Co. 13 Inters. Com.

Rep. 366; Haines v. Chicago, R. I. & P. R. Co. 13 Inters. Com. Rep. 214; Chandler Cotton Oil Co. v. Ft. Smith & W. R. Co. 13 Inters. Com. Rep. 473; Morgan v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 528; Montgomery Freight Bureau v. Western R. Co. 14 Inters. Com. Rep. 150; Marshall Oil Co. v. Chicago & N. W. R. Co. 14 Inters. Com. Rep. 210; Lincoln Commercial Club v. Chicago, R. I. & P. R. Co. 13 Inters. Com. Rep. 319; E. E. Saunders & Co. v. Southern Exp. Co. 18 Inters. Com. Rep. 422; Wells-Higman Co. v. Grand Rapids & I. R. Co. 19 Inters. Com. Rep. 487; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Coe v. Errol, 116 U. S. 525, 29 L. ed. 718, 6 Sup. Ct. Rep. 475; Michigan Buggy Co. v. Grand Rapids & I. R. Co. 15 Inters. Com. Rep. 297; Kurtz v. Pennsylvania Co. 16 Inters. Com. Rep. 410; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141.

The interference with interstate commerce that is subject to condemnation is direct, not that which is remote or indirect.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 439, 39 L. ed. 1045, 15 Sup. Ct. Rep. 896; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45, L. ed. 194, 21 Sup. Ct. Rep. 115; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Ware & Leland v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 488, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132.

The order is perfectly plain and certain, and does not purport or pretend to deal with anything but class rates on traffic within the state of Oregon.

Chicago, I. & L. R. Co. v. Railroad Commission, 175 Ind. 630, 95 N. E. 364; Pittsburgh, C. C. & St. L. R. Co. v. Railroad Commission, 171 Ind. 189, 86 N. E. 328; Chicago, I. & L. R. Co. v. Railroad Commission, 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

Interference by the state with interstate commerce, being unlawful, will not be presumed.

Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 319, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 509, 52 L. ed. 297, 313, 28 Sup. Ct. Rep. 141.

The intention to resell the goods in original packages did not impress them with an interstate character, which could never be removed until the packages were broken and goods actually distributed.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Morgan v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 528; Montgomery Freight Bureau v. Western R. Co. 14 Inters. Com. 150; Marshall Oil Co. v. Chicago & N. W. R. Co. 14 Inters. Com. Rep. 210; Savannah Bureau v. Charleston & S. R. Co. 7 Inters. Com. Rep. 601; Dobbs v. Louisville & N. R. Co. 18 Inters. Com. Rep. 210; Southern R. Co. v. Railroad Commission, 42 Ind. App. 90, 83 N. E. 721; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; General Oil Co. v. Crain, 209 U. S. 211, 229, 52 L. ed. 754, 764, 28 Sup. Ct. Rep. 475; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; Kurts v. Pennsylvania Co. 16 Inters. Com. Rep. 412.

The original package doctrine is not applicable.

Cooke, Commerce Clause of Fed. Const. 17; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Leisy v. Hardin, 135 U. S. 100, 34

L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Myers v. Baltimore County, 83 Md. 385, 34 L.R.A. 309, 55 Am. St. Rep. 349, 35 Atl. 144; Singer Mfg. Co. v. Wright, 97 Ga. 114, 35 L.R.A. 497, 25 S. E. 249; Price Co. v. Atlanta, 105 Ga. 358, 31 S. E. 619; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

The law requires all rates to be reasonable, state as well as interstate; and if a carrier uses a local rate in any way as a factor in arriving at an interstate rate, it does so knowingly and subject to state control.

Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Armour Packing Co. v. United States, 209 U. S. 56, 82, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428; Beale & W. Railroad Rate Regulation, § 661; Ames v. Union P. R. Co. 64 Fed. 171.

The reasonableness of a local rate should not be measured by an interstate rate over the same line, where part of the haul was within and part without the state.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Southern R. Co. v. Railroad Commission, 42 Ind. App. 90, 83 N. E. 721; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Texas & N. O. R. Co. v. Sabine Tram Co. — Tex. Civ. App. —, 121 S. W. 256; Augusta Brokerage Co. v. Central of Georgia R. Co. 5 Ga. App. 187, 62 S. E. 996; State v. Southern P. Co. 23 Or. 424, 31 Pac. 960; Trammel v. Clyde S. S. Co. 4 Inters. Com. Rep. 120; Wells-Higman Co. v. Grand Rapids & I. R. Co. 19 Inters. Com. Rep. 487; Dobbs v. Louisville & N. R. Co. 18 Inters. Com. Rep. 210.

Carriers have a right to advance state local charges irrespective of through rates under the control of the Interstate Commerce Commission. If an order required a through rate not to exceed the sum of the locals, the carriers could advance the locals and thus defeat the order. The only way to overcome this situation is for the Commission to fix the through rate. The Commission would have no control over the locals.

Michigan Buggy Co. v. Grand Rapids & I. R. Co. 15 Inters. Com. Rep. 297; Kurtz v. Pennsylvania Co. 16 Inters. Com. Rep. 410; Montgomery Freight Bureau v. Western R. Co. 14 Inters. Com. Rep. 150; Marshall Oil Co. v. Chicago & N. W. R. Co. 14 Inters. Com. Rep. 210; Morgan v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 528; Brabham v. Atlantic Coast Line R. Co. 11 Inters. Com. Rep. 464.

Assuming that the rates fixed by the Commission are reasonable and lawful (and this is what appellant concedes under the law they must be), appellant's contention would lead this court to say that the law appellant admits must be observed shall be violated, and the officers of the state be enjoined from complying therewith, and the people of the state deprived of what, under the law, they are entitled to, at the option of the railroad. The decisions on this question under anything like similar conditions are unanimous against the position taken by the complainant.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Ames v. Union P. R. Co. 64 Fed. 171; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317; Southern R. Co. v. Railroad Commission, 42 Ind. App. 90, 83 N. E. 721; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Morgan v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 528; Lincoln Commercial Club v. Chicago, R. I. & P. R. Co. 13 Inters. Com. Rep. 319; Montgomery Freight Bureau v. Western R. Co. 14 Inters. Com. Rep. 150; Marshall Oil Co. v. Chicago & N. W. R. Co. 14 Inters. Com. Rep. 210.

Rates made by state authority are not regarded as binding by the Interstate Commerce Commission "as a necessary measure of the interstate rate."

E. E. Saunders & Co. v. Southern Exp. Co. 18 Inters. Com. Rep. 415; Hope Cotton Oil Co. v. Texas & P. R. Co. 12 Inters. Com. Rep. 269; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330.

It is evident Congress cannot regulate state commerce; the state cannot regulate interstate commerce; therefore, if the railroads can maintain their theory, that any rate fixed by a state which indirectly affects an interstate rate is an unconstitutional interference with interstate commerce, the regulation of all state commerce is at an end.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Re Arkansas Rate Cases, 187 Fed. 302.

The question before the court has been

passed on directly in a number of cases, and in all but one the power of the state was upheld.

State ex rel. McCue v. Northern P. R. Co. 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869, affirmed in Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Woodside v. Tonopah & G. R. Co. 184 Fed. 358; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Re Arkansas Rate Cases, 187 Fed. 290; Southern P. Co. v. Campbell, 189 Fed. 182; Shepard v. Northern P. R. Co. 184 Fed. 765.

Any rate, state or interstate, that is unreasonable, would be unlawful, and therefore could not be sustained. The court will presume that rates established by lawful authority are reasonable. Irrespective of this presumption it would be difficult to see, generally speaking, why the sum of two reasonable local rates would not make a reasonable through rate over the same line, in the same direction, for the same distance. Particularly is this the case when, generally speaking, a through rate is lower than the sum of the locals,—a practice which has received the approval of this court.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 262, 46 L. ed. 1151, 1155, 22 Sup. Ct. Rep. 900.

While the Interstate Commerce Commission has announced that, generally speaking, its policy would be to consider the through rate or fare which is higher than the sum of the locals between the same points as prima facie reasonable, and the burden of proof would be upon the carrier to defend such higher through rate or fare, at the same time it is frequently held that the sum of the locals does not necessarily or lawfully fix the through rate, nor would such rate be necessarily established by the sum of the locals.

Brabham v. Atlantic Coast Line R. Co. 11 Inters. Com. Rep. 464; Morgan v. Missouri K. & T. R. Co. 12 Inters. Com. Rep. 528; Montgomery Freight Bureau v. Western R. Co. 14 Inters. Com. Rep. 150; Marshall Oil Co v. Chicago & N. W. R. Co. 14 Inters. Com. Rep. 210.

Courts will not for slight reasons, or even in cases of doubt, declare a law unconstitutional. It is never assumed that the legislative branch of the government enacts unconstitutional measures, nor will a court declare an entire act unconstitutional unless its repugnancy to the Constitution is clearly apparent. Even if there is doubt as to the constitutionality of an act, all doubt must be resolved in its favor.

Fletcher v. Peck, 6 Cranch, 87, 128, 3 L. ed. 162, 175; United States v. Coombs, 12 Pet. 72, 76, 9 L. ed. 1004, 1006; Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; Nicol v. Ames, 173 U. S. 509, 514, 43 L. ed. 786, 791, 19 Sup. Ct. Rep. 522; Buttfield v. Stranaham, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 88, 52 L. ed. 111, 116, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought to restrain the enforcement of an order of the Railroad Commission of Oregon, made April 22, 1908, prescribing maximum freight rates between Portland and other points on the complainant's lines, within the state, east of The Dalles. Demurrers to the bill, and to the amended bill, were sustained. 173 Fed. 957; 177 Fed. 318. And from the final decree dismissing the bill the complainant brings this appeal.

The arguments in support of the appeal are addressed to the question whether the order of the commission was an unconstitutional interference with interstate commerce.

*It appears from the bill, and from [535 the order of the commission which was made a part of the bill, that the Portland chamber of commerce had complained of the complainant's freight tariff, and had petitioned the commission to establish reasonable rates for transportation from Portland to points in Oregon. After hearing, the commission found that the existing rates were unreasonably high, ordered their discontinuance, and determined the just and reasonable rates to be charged in their stead.

It is insisted that the order applied to interstate traffic, that is, to traffic originating outside the state and still moving, on its transportation from Portland to other points in the state, in interstate commerce. The court below did not so construe the order, and we do not so construe it. The Railroad Commission of Oregon had no power to fix rates for interstate transportation, or any part of it, and we find no ground for the conclusion that it attempted to do so. The order must be taken as applicable solely to intrastate transportation. And, in this view, so far as the averments of the bill attack the order as one which by its terms relates to property transported in interstate commerce, they are insufficient to entitle the complainant to relief.

Whether the order governs particular shipments must depend on the facts of each case, that is, upon the question whether the traffic is interstate or intrastate. If it were sought to compel the application of the intrastate rate to goods which were properly to be regarded as moving in inter-

state commerce, the complainant would have its remedy. But it would be necessary to show the actual conditions, and that the order, although valid in its proper operation, was being misapplied with respect to particular transactions. The bill failed to make a case of this sort. Upon this point the court below said: "If the order be valid, as it is held to be, then all shipments or commerce which are intrastate in character must be controlled by 536] *the order; all that are not are not affected by it. If question arises as to any particular shipment or any particular commodity to be moved, or in process of transportation, it might be settled by carrying the matter to the commission; or, if the commission unlawfully exacts the state rate upon interstate traffic, I see no reason why it may not be enjoined in any court of competent jurisdiction. These special cases must necessarily be determined as they arise, as it is impossible, by a general decree, to determine in advance what specific commodities and the transportation thereof constitute interstate and what intrastate commerce." 177 Fed. 318, 320.

We are of the opinion that the ruling was right.

Assuming that the order applies exclusively to intrastate transportation, the question with respect to asserted interference with interstate commerce by reason of the relation of intrastate rates to interstate rates is essentially the same as that presented in Simpson v. Shepard, 230 U. S. 352, ante, 1511, 33 Sup. Ct. Rep. 729, and the same conclusion must be reached.

Other questions are raised by the assignments of error, but they are not pressed in argument and require no discussion.

Decree affirmed.

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537] *SOUTHERN PACIFIC COMPANY and Oregon & California Railroad Company, Appts.,

v.

THOMAS K. CAMPBELL et al., Constituting the Railroad Commission of Oregon, et al.

(See S. C. Reporter's ed. 537-553.)

**Commerce — state regulation of local rates of interstate carrier — congressional inaction.**

1. Congressional inaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

**Pleading — sufficiency of allegations — confiscatory rate regulation.**

2. The allegations of a bill seeking to enjoin the enforcement of state regulation of the local rates of an interstate carrier are wholly insufficient to show that the operation of such rates will deprive the carrier of just compensation in its business of intrastate transportation, where the carrier's receipts and disbursements for the previous fiscal year are not given, and there are no averments showing the expenses incurred in the conduct of the intrastate business as distinguished from the interstate business, or the share of the value of the carrier's property which is assignable to the former.

[For other cases, see Pleading, II. d, in Digest Sup. Ct. 1908.]

**Constitutional law — impairing contract obligations — rate regulation.**

3. The authority of a railway carrier incorporated under the Oregon general incorporation act of October 14, 1862, which in § 34 provided that every corporation formed thereunder shall have power to collect and receive such tolls or freight for the transportation of persons or property as it may prescribe, is subject to the implied limitation that the charges shall be reasonable; and the power of the state, through its legislature or an agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier, was not thereby withdrawn.

[For other cases, see Constitutional Law, 1230-1246, in Digest Sup. Ct. 1908.]

**Courts — relation to legislative department — rate regulation.**

4. The courts will not substitute their judgment for that of a state railroad commission upon such questions as the conditions of traffic, the adjustment of rates with respect to the different commodities transported, and the appropriate basis for classification, where the commission's action was not of such an arbitrary character as to constitute an abuse of power.

[For other cases, see Courts, 205-219; Carriers, 239, 240, in Digest Sup. Ct. 1908.]

**Constitutional law — due process of law — state regulation of railway rates — procedure.**

5. The procedure permitted by the Ore-

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Note.—On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. R. Co. v. Croxton, 33 L.R.A. 177.

On the effect of interstate business upon state regulation of local railway rates—see note to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 112.

On contract exemptions from legislative power to fix tolls, rates, or prices—see note to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

gon railroad commission act (Laws 1907, chap. 53), under which the railroad commission may determine, upon hearing, that freight rates are unreasonable, excessive, and discriminatory, and make orders for other rates which in its judgment are not open to such objection, does not deny due process of law, where the statute provides that suit may be brought in the state court to set aside orders of the commission upon the ground that the rates fixed are unlawful.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

6. Railway rates established by the Oregon railroad commission will not be denied effect, if otherwise valid, because of any invalidity of the separable penal provisions of Or. Laws 1907, chap. 53, under which the commission acted.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[No. 428.]

Argued April 9, 1912. Decided June 16, 1913.

APPEAL from the Circuit Court of the United States for the District of Oregon to review a decree dismissing the bill in a suit to enjoin the enforcement of freight rates fixed by the state railroad commission. Affirmed.

See same case below on demurrer, 189 Fed. 182.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause, and, with Messrs. William F. Herrin, William D. Fenton, and James E. Fenton, filed a brief for appellants:

The order of September 21, 1910, upon the facts stated in the bill of complaint, necessarily and directly interferes with, regulates, and affects interstate commerce, and particularly interstate commerce moving to Portland and other Oregon line points, thereby discriminating in favor of Portland and Portland jobbers, and against points originating shipments in other states destined to Oregon line points other than Portland, and substantially burdens such interstate commerce, in violation of § 8, art. 1, of the Constitution of the United States, and is in conflict with the act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce," and the amendments thereto, and is therefore void.

Shepard v. Northern P. R. Co. 184 Fed. 765; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 39, 46 L. ed. 416, 421, 22 Sup. Ct. Rep. 277; Western U. Teleg. Co. v. Kansas, 216 U. S. 27, 39, 54 L. ed. 366, 371, 30 Sup. Ct. Rep. 190; St. Louis & S. F. R. Co. v. State, 26 Okla. 72, 30 L.R.A.(N.S.) 137, 107 Pac. 929; Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595; Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 620, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 570, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Welton v. Missouri, 91 U. S. 276, 280, 23 L. ed. 347, 349; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 156, 54 L. ed. 970, 977, 30 Sup. Ct. Rep. 633; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 280.

Since Congress conferred authority upon the Interstate Commerce Commission to determine and prescribe just and reasonable rates to be charged by common carriers engaged in interstate commerce, the power of the state under a state railroad commission act to prescribe just and reasonable rates for intrastate commerce is by necessary implication withdrawn, although Congress has expressly provided that the provisions of the amended interstate commerce act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state, etc. That is to say, the exercise of the constitutional power of Congress to create a commission with authority to determine and prescribe just and reasonable rates to be charged upon interstate commerce by a carrier engaged in both kinds of commerce, at the same time, of necessity is inconsistent with the continuance of the power of the states to create commissions with power to determine and prescribe rates for commerce wholly within the state, upon the principle that the exercise of the rate-making power by two jurisdictions over the same instrumentality of commerce is legally and necessarily impossible. The interstate commerce carrier operates the property as a unit, in the movement of all its traffic, whether interstate or intrastate, and the earnings of that property are necessarily deprived from the operation of the property as a unit. It is fundamental that the laws of the states must yield to the acts of Congress passed in the execution of the power to regulate com-

merce, conferred upon it by the Constitution.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Smith v. Alabama, 124 U. S. 479, 31 L. ed. 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Connolly v. Union Sewer Pipe Co. 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431; Jacobson v. Massachusetts, 197 U. S. 25, 49 L. ed. 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Hopkins v. United States, 171 U. S. 594, 43 L. ed. 296, 19 Sup. Ct. Rep. 40; Lottery Case (Champion v. Ames) 188 U. S. 351, 47 L. ed. 499, 23 Sup. Ct. Rep. 321; Groves v. Slaughter, 15 Pet. 449, 10 L. ed. 800; Passenger Cases, 7 How. 555, 12 L. ed. 816; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 119, 34 L. ed. 136, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Austin v. Tennessee, 179 U. S. 375, 45 L. ed. 238, 21 Sup. Ct. Rep. 132; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

It was first determined by this court in Cincinnati, N. O. & T. P. R. Co. v Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, that under the interstate commerce act prior to the amendment of 1906, the Interstate Commerce Commission had no power to prescribe rates which should control in the future. This case was followed in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896, where the question was re-examined and the doctrine firmly established that the legislative power of prescribing rates, either maximum or minimum, or absolute, had not been conferred upon the Interstate Commerce Commission. This construction of the interstate commerce act has been steadily followed by this court.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Baird, 194 U. S. 25, 42, 48 L. ed. 860, 868, 24 Sup. Ct. Rep. 563; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 291, 53 L. ed. 186, 188, 29 Sup. Ct. Rep. 55; Siler v. Louisville & N. R. Co. 213 U. S. 175, 194, 53 L. ed. 753, 758, 29 Sup. Ct. Rep. 451.

The amendment of 1906 gave to the Commission express power to determine, after hearing on complaint, what are reasonable rates for the future, and to require the observance of such rates.

Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645.

It is clear that if there is a conflict between the assertion of power by the United States through the Interstate Commerce Commission and the power of the state through its railroad commission, the latter must yield; and it may be that existing legislation does not provide for a practical adjustment of rates thus affected.

E. E. Saunders & Co. v. Southern Exp. Co. 18 Inters. Com. Rep. 415.

The complainants are entitled to enjoin any reduction in the earnings of these properties which would deprive them of a reasonable return or just compensation for the use of their properties, based upon their present values, to be ascertained by competent proof. Any reduction which would deprive complainants of such reasonable return or just compensation is confiscation *pro tanto*, and constitutes a taking of their properties without due process of law, in violation of the 14th Amendment. The power to regulate and fix reasonable rates cannot be exercised so as to destroy all net earnings, or so as to require railroad companies to serve the public without reasonable or any compensation.

Beale & W. Railroad Rate Regulations, §§ 312, 351, 352, 382–388, 1331–1334, and notes; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Smyth v. Ames, 171 U. S. 361, 365, 43 L. ed. 197, 198, 18 Sup. Ct. Rep. 888; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38

L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 596, 41 L. ed. 566, 17 Sup. Ct. Rep. 198; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. Rep. 493; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747, 28 Sup. Ct. Rep. 472; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 459, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Re Arkansas R. Rates, 163 Fed. 141; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Atchison, T. & S. F. R. Co. v. Love, 174 Fed. 59; Wallace v. Arkansas C. R. Co. 55 C. C. A. 192, 118 Fed. 422; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Southern P. Co. v. Interstate Commerce Commission, 177 Fed. 963; Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; State v. Central Vermont R. Co. 81 Vt. 466, 130 Am. St. Rep. 1065, 71 Atl. 194.

What specific rate or schedule of rates shall be promulgated by a commission or other rate-making body or regulating tribunal effective in the future is an administrative function. Whether such rate or schedule of rates is reasonable in fact is a judicial question, under general principles of law as well as under the express provisions of §§ 31–35 of the railroad commission act of February 18, 1907, being §§ 6909–6913, Lord's Oregon Laws.

Shepard v. Northern P. R. Co. 184 Fed. 765; Louisville & N. R. Co. v. Interstate Commerce Commission, 184 Fed. 118; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Beale & W. R. Rate Regulations, §§ 315–325, 459, 460, 515–534, 914-932; McGrew v. Missouri P. R. Co. 230 Mo. 531, 132 S. W. 1076; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 704; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; Louisville & N. R. Co. v. Brown, 123 Fed. 946; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 499, 42 L. ed. 253, 17 Sup. Ct. Rep. 896; Southern P. Co. v. Railroad Comrs. 78 Fed. 236; Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003; Northern P. R. Co. v. Rail-

road Commission, 57 Wash. 134, 106 Pac. 611; Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429; Railroad Commission v. Houston & T. C. R. Co. 90 Tex. 340, 38 S. W. 750; People ex rel. Central Park v. Willcox, 194 N. Y. 383, 87 N. E. 517; Saratoga Springs v. Saratoga Gas, Electric Light & P. Co. 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Michigan C. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549; Michigan C. R. Co. v. Wayne Circuit Judge, 156 Mich. 470, 120 N. W. 1073; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Re Janvrin, 174 Mass. 517, 47 L.R.A. 319, 55 N. E. 381; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 7 L.R.A. (N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 Ann. Cas. 1124; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

The reduction promulgated by the order of September 21, 1910, results from the arbitrary classification and spread made, and this was so made without reference to the distance the traffic may be moved, the nature or character of the traffic, service performed, or compensation that should be paid therefor. The classification is not only capricious, but is not based upon any fair consideration. Assuming that these allegations of fact are true, the order is necessarily void, and the rates promulgated thereby cannot stand.

Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003; Southern P. Co. v. Bartine, 170 Fed. 725; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94.

When a railroad corporation is chartered by a state, with the right to engage in the transportation of passengers and freight, and to collect and receive such rates therefor as it may prescribe, the right to charge a reasonable rate or compensation for the use of its property for such purpose by the public is implied, and forms a part of its contract with the state, which cannot be impaired by legislation.

Miller v. New York, 15 Wall. 478, 21 L. ed. 98; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Wells, F. & Co. v. Oregon R. & Nav. Co. 8 Sawy. 600, 15 Fed. 561; Ex parte Koehler, 11 Sawy. 37, 23 Fed. 529; Cleveland Gas Light & Coke Co. v. Cleveland, 71 Fed. 610; Ball v. Rutland R. Co. 93 Fed. 513; Southern Indiana R. Co. v. Railroad Commission, 172 Ind. 113, 87 N. E. 966; Stone v. Yazoo & M. Valley R. Co. 62 Miss. 607, 52 Am. Rep. 193; Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; State v. Southern P. Co. 23 Or. 424, 31 Pac. 960.

The power of a state, reserved by its Constitution, to alter, amend, or repeal general laws concerning corporations, is subordinate to and limited by the provisions of the Federal Constitution, inhibiting laws impairing the obligations of contracts, depriving persons or corporations of their property without due process of law, or denying the equal protection of the laws; rights acquired and capital invested by a corporation or its stockholders, in the lawful exercise of power conferred by such laws, are within the protection of such constitutional provisions, and cannot be arbitrarily destroyed by subsequent state legislation.

Wells, F. & Co. v. Oregon R. & Nav. Co. 8 Sawy. 600, 15 Fed. 561; Ex parte Koehler, 11 Sawy. 37, 23 Fed. 529; Ball v. Rutland R. Co. 93 Fed. 513; San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, 113 Fed. 930; Stone v. Yazoo & M. Valley R. Co. 62 Miss. 607, 52 Am. Rep. 193; Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; State v. Southern P. Co. 23 Or. 424, 31 Pac. 960.

The complainants have the power to collect and receive such tolls or freights for transportation of persons or property thereon, as they may prescribe, and all railroad companies incorporated under the laws of this state prior to the passage of the railroad commission act have a vested right to fix those rates, leaving the question of reasonable rates as it exists at common law.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 345, 53 L. ed. 530, 542, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 472; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 338, 1191; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; Houston & T. C. R. Co. v. Storey, 149 Fed. 499; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261; State ex rel. Great Northern P. R. Co. v.

Railroad Commission, 140 Wis. 145, 121 N. W. 919.

If the carrier has the exclusive right to prescribe such reasonable rates as, in its judgment, should be collected, subject only to judicial review as at common law, then it follows necessarily that the statute cannot fix these rates by a commission or otherwise, although subject to a judicial review. The Oregon Railroad commission act would, therefore, be unconstitutional in so far as it undertakes to confer authority to fix the rates of a carrier thus incorporated, or to enforce what such commission might determine to be reasonable rates, and from this it would follow that the order of September 21, 1910, would be necessarily void.

State v. Great Northern R. Co. 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; Stone v. Yazoo & M. Valley R. Co. 62 Miss. 607, 52 Am. Rep. 193; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 393, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; Ball v. Rutland R. Co. 93 Fed. 513.

The Oregon railroad commission act of February 18, 1907, is void because of excessive penalties and unusual burdens imposed for any refusal to observe the orders of the commission. The act is oppressive and confiscatory by reason of such excessive penalties and burdens.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

Whether the said rates prescribed by the railroad commission are reasonable or unreasonable is a judicial question, and the legislature cannot prohibit the courts from passing thereon, directly or indirectly, by imposing such penalties as are calculated to terrorize or intimidate a railway company, its officers or agents, so that they are thereby prevented from litigating the question of the reasonableness of the rates or the validity or invalidity of the same.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, supra; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Consolidated Gas Co. v. Mayer, 146 Fed. 150; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317.

The railroad commission act is void because it requires complainants to prosecute any suit to set aside any order made by the commission, in the circuit court of the state of Oregon for the county of Marion, thereby depriving the complainants of their right to litigate their cause in any court of the state, and in the courts of the United States, and is thereby violative of the 14th Amendment to the Constitution of the United States.

Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247.

There is a conflict of opinion as to whether or not jurisdiction can be conferred upon a court to determine as a fact whether or not rates prescribed by a railroad commission are unreasonable, but the weight of authority, in our opinion, is that such jurisdiction can be so conferred. However, the railroad commission act provides by its express terms for a judicial review of any order of the commission affecting rates, fares, charges, classification, joint rate or rates, regulations, practice, or service.

Ex parte Young, 209 U. S. 123, 144, 52 L. ed. 714, 722, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 369, 399, 38 L. ed. 1017, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

If jurisdiction cannot be conferred upon a court to determine whether or not rates so prescribed are unreasonable, then the act must be held void, because it is apparent that the act would not have been passed but for the provision relating to judicial review. Whether the provision for judicial review constitutes an essential part of the rate-making power conferred by the act is open to question. If the provision for judicial review is a part of the rate-making power, then the act is void, because rate-making is not the function of a judicial tribunal.

Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67.

The rate may be unreasonable in fact in

and of itself, or an order prescribing rates may be subject to judicial review because the rates prescribed are, as a matter of fact, unreasonable, even though the reduction thereby effected cannot be said to be confiscatory in whole or in part.

Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595; Chicago, I. & L. R. Co. v. Railroad Commission, 39 Ind. App. 358, 79 N. E. 927; 1 Pom. Eq. Jr. 3d ed. § 293, note pp. 499–504; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; Fitch v. Creighton, 24 How. 159, 16 L. ed. 596; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Williams v. Crabb, 59 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 193; Wart v. Wart, 117 Fed. 766; Atchison, T. & S. F. R. Co. v. Love, 174 Fed. 59; Sawyer v. White, 58 C. C. A. 587, 122 Fed. 223; Railroad Commission v. Houston & T. C. R. Co. 90 Tex. 340, 38 S. W. 750; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214; Northern P. R. Co. v. Railroad Commission, 57 Wash. 134, 106 Pac. 611; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Re Janvrin, 174 Mass. 517, 47 L.R.A. 319, 55 N. E. 381; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Michigan C. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549; Michigan C. R. Co. v. Wayne Circuit Judge, 156 Mich. 459, 120 N. W. 1073; Texas & P. R. Co. v. Railroad Commission, 127 La. 387, 53 So. 660; State ex rel. Great N. R. Co. v. Railroad Commission, 60 Wash. 218, 110 Pac. 1075.

To determine whether the bill of complaint is sufficient as against a demurrer, the general rule is that if the allegations state ultimate facts, the complaint will be deemed sufficient without requiring a detailed statement of particular facts from which the ultimate facts are to be found.

State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314; Allen v. O'Donald, 23 Fed. 573; St. Louis v. Knapp S. & Co. Co. 104 U. S. 658, 26 L. ed. 883; Wallace v. Arkansas C. R. Co. 55 C. C. A. 192, 118 Fed. 422; Houston & T. C. R. Co. v. Storey, 149 Fed. 499; South & N. A. R. Co. v. Railroad Commission, 171 Fed. 225.

A complaint of a railway company which alleges positively and unequivocally that the freight transportation rates prescribed and fixed by a railroad commission are unreasonable, and that they do not give to the railway company a fair and reasonable compensation for the services required to be performed by it, is sufficient to tender an issue as to the reasonableness of such rates, without setting up all the facts bearing upon the question. General certainty is sufficient in pleadings in equity.

Story, Eq. Pl. §§ 252, 253; St. Louis v. Knapp S. & Co. Co. 104 U. S. 658, 26 L. ed. 883; Allen v. O'Donald, 23 Fed. 573; Houston & T. C. R. Co. v. Storey, 149 Fed. 499; State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314; O'Hare v. Downing, 130 Mass. 16.

Where a statute, as here, has created a substantive right, this right can be enforced in a judicial tribunal.

Northern P. R. Co. v. Railroad Commission, 57 Wash. 134, 106 Pac. 611; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214; Chicago, I. & L. R. Co. v. Hunt, 39 Ind. App. 358, 79 N. E. 927; Railroad Commission v. Houston & T. C. R. Co. 90 Tex. 340, 38 S. W. 750. See also State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S) 821, 116 N. W. 905; Re Janvrin, 174 Mass. 514, 47 L.R.A. 319, 55 N. E. 381; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Williams v. Crabb, 59 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 193; Michigan C. R. Co. v. Wayne Circuit Judge, 156 Mich. 470, 120 N. W. 1073; Michigan C. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549; McGrew v. Missouri P. R. Co. 230 Mo. 496, 132 S. W. 1076; Seibel–Suessdorf Copper & Iron Mfg. Co. v. Manufacturers' R. Co. 230 Mo. 59, 130 S. W. 288; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; State ex rel. Northern P. R. Co. v. Railroad Commission, 140 Wis. 145, 121 N. W. 919; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; Re Arkansas R. Rates, 163 Fed. 141.

Under the railroad commission act of Florida, provision is made for judicial review of the rates promulgated by the commission, and these provisions have been sustained.

State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314; State ex rel. Great Northern R. Co. v. Railroad Commission, 60 Wash. 218, 110 Pac. 1075; Texas & P. R. Co. v. Railroad Commission, 127 La. 387, 53 So. 660; Houston & T. C. R. Co. v. Storey, 149 Fed. 499; Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595.

That a particular rate charged to be unreasonable will be reviewed is also sustained by judicial authority.

Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003; People ex rel. Central Park v. Willcox, 194 N. Y. 383, 87 N. E. 517; Saratoga Springs v. Saratoga Gas, Electric Light & P. Co. 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Louisville & N. R. Co. v. Brown, 123 Fed. 946; King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co. 58 Fla. 292, 50 So. 509; State ex rel. Railroad Comrs. v. Florida East Coast R. Co. 58 Fla. 524, 50 So. 425; Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429.

Under the Virginia Constitution there was no inhibition which precluded the exercise by the supreme court of appeals of administrative or rate-making functions, and the railroad commission act of Virginia was held to be valid, as not in violation of the constitutional provision permitting the exercise of such functions by a court.

Atlantic Coast Line R. Co. v. Com. 102 Va. 599, 46 S. E. 911.

The Federal courts will enforce a substantive right created by a state statute.

1 Pom. Eq. Jur. 3d ed. § 293 and notes; Sawyer v. White, 58 C. C. A. 587, 122 Fed. 223.

The provision of the railroad commission act of Oregon, that rates fixed and ordered substituted by the railroad commission, in lieu of rates found by them to be unreasonable or unjustly discriminatory, shall be observed and followed in the future indefinitely, or until fixed anew, on complaint made, or on their own motion, is inequitable, and in violation of the 14th Amendment of the Federal Constitution, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

Saratoga Springs v. Saratoga Gas, Electric Light & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 963, 14 Ann. Cas. 606.

Mr. Joseph N. Teal argued the cause, and, with Mr. Clyde B. Aitchison and Mr. A. M. Crawford, Attorney General of Oregon, filed a brief for appellees:

The constitutionality of the act in question has been directly sustained by the supreme court of Oregon since the appeal was taken in the case at bar.

State v. Corvallis & E. R. Co. 59 Or. 450, 117 Pac. 989.

Such a construction of the state Constitution and statute is binding upon this court. It is a matter of purely state concern, which, when decided by the state supreme court, renders further consideration by this court unnecessary.

Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913 B, 1349; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Jack v. Kansas, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 Ann. Cas. 689; Smiley v. Kansas, 196 U. S. 447, 454, 455, 49 L. ed. 546, 550, 551, 25 Sup. Ct. Rep. 289; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 462, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829, 4 Enc. U. S. Sup. Ct. Rep. 1068, note 69.

The sections providing penalties are wholly separable from the remainder of the act.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 417, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; Cooley, Const. Lim. 7th ed. p. 246; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 396, 38 L. ed. 1014, 1022, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Willcox v. Consolidated Gas Co. 212 U. S. 19, 52, 54, 53 L. ed. 382, 399, 400, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Fleischner v. Chadwick, 5 Or. 154; State v. Wiley, 4 Or. 187; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 367, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; State ex rel. Oregon R. & Nav. Co. v. Railroad Commission, 52 Wash. 17, 100 Pac. 179; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317; Railroad Commission v. Central R. Co. 95 C. C. A. 117, 170 Fed. 225.

The provision which confers jurisdiction on the circuit court of the state of Oregon for Marion county is not subject to criticism. It deprives appellants of no constitutional rights. Marion county is the county of the state where the capital of the state is situated and all state offices located. The office of the railroad commission is by law required to be maintained in the capitol.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957.

Due process of law merely requires such tribunals as are proper to the subject in hand. Reasonable notice and a fair opportunity to be heard before some tribunal before the issues are decided on are the essentials of due process of law.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Minneapolis & St. L. R. Co. v. Beckwith,

129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. ed. 616, 618; Brown v. New Jersey, 171 U. S. 172, 176, 44 L. ed. 119, 121, 20 Sup. Ct. Rep. 77; Public Clearing House v. Coyne, 194 U. S. 497, 508, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789.

Prescribing rates for the future is a legislative function.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 499, 42 L. ed. 243, 253, 17 Sup. Ct. Rep. 896; McChord v. Louisville & N. R. Co. 183 U. S. 483, 495, 46 L. ed. 289, 295, 22 Sup. Ct. Rep. 165; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 278, 53 L. ed. 176, 184, 29 Sup. Ct. Rep. 50; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 290, 291, 53 L. ed. 186, 188, 189, 29 Sup. Ct. Rep. 55; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67.

The action of the commission has the effect of law.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. Rep. 55; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas 1075; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358.

"Unreasonable," as used by courts in passing on reasonableness of rates fixed by legislative authority, means confiscatory.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Sup. Ct. Rep. 804; Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Noyes, Am. R. Rates, p. 250.

The sole control of the judiciary is to declare an act of the legislature unconstitutional,—the motives of the lawmaking body, the wisdom or justice of its enactments do not concern the judiciary. The same rule applies to the action of the legislature's agent.

Cooley, Const. Lim. 7th ed. 236, 241, 257; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155.

A rate made under legislative authority is the law, and the same presumptions of constitutionality attach to it as to a statute. Every statute, including a statute fixing rates, is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt the expressed will of the legislature should be sustained, especially in the absence of any test of the statute in actual operation.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Ruggles v. Illinois, 108 U. S. 536, 27 L. ed. 816, 2 Sup. Ct. Rep. 832; Sweet v. Rechel, 159 U. S. 380, 392, 40 L. ed. 188, 193, 16 Sup. Ct. Rep. 43; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 511, 46 L. ed. 298, 303, 22 Sup. Ct. Rep. 95; Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

No rate can be said, as a matter of law, to be reasonable in and of itself.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

The commission is an expert tribunal. It

has provided for it by law means and sources of information for the purpose of being informed on the difficult and delicate economic problems forming the basis of complaints brought before it. The performance of the duties imposed upon the commission by law makes its members experts. It is practically the only method by which the legislative body can act effectively. The courts interfere as little as may be with the determination and worth of such commissions.

Smyth v. Ames, 169 U. S. 466, 527, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Southern P. Co. v. Railroad Commission, 60 Or. 400, 119 Pac. 727; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 39 C. C. A. 413, 99 Fed. 52; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; Noyes, Am. R. Rates, p. 206; 2 Redf. Railways, 6th ed. p. 606; Railroad Commission v. Central of Georgia R. Co. 95 C. C. A. 117, 170 Fed. 225; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905.

The only inquiry open to the courts is whether the order was regularly made and duly served, and whether any constitutional rights have been violated. In other words, are the rates fixed confiscatory? Has the commission, under the guise of regulation, acted so arbitrarily as to abuse its discretion, or otherwise acted beyond the scope of its authority? The power, and not the mere expediency of its exercise, is the question. Upon the reasonableness and justice of a rate it may be said the determinations of fact by the commission are conclusive.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356.

This court has repeatedly explained that the actions of the Interstate Commerce Commission can be impeached only for errors of law, and that the court does not interfere with a determination of the Commission upon questions of fact, or of mixed fact and law. The determination of a reasonable rate is peculiarly a question of fact.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700; Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 154, 51 L. ed. 995, 1000, 27 Sup. Ct. Rep. 648; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. 391, 16 Sup. Ct. Rep. 700; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

The state courts construe the powers of the state commissions and of the courts substantially as has this court.

Steenerson v. Great Northern R. Co. 69 Minn. 375, 72 N. W. 713; Southern P. Co. v. Railroad Commission, 60 Or. 400, 119 Pac. 727; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; Chicago, R. I. & P. R. Co. v. Nebraska State R. Commission, 85 Neb. 824, 26 L.R.A.(N.S.) 444, 124 N. W. 477; Spring Valley Waterworks v. San Francisco, 82 Cal. 306, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 529, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893, affirmed in 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 265, 33 So. 214; Re Amsterdam, J. & G. R. Co. 86 Hun, 578, 33 N. Y. Supp. 1009; People ex rel. Terminal R. Co. v. State R. Comrs. 53 App. Div. 61, 65 N. Y. Supp. 597; Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; Storrs v. Pensacola & A. R. Co. 29 Fla. 617, 11 So. 226; State ex rel. State R. Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314.

Courts do not perform administrative functions,—they protect constitutional rights.

Minneapolis, St. P. & S. Ste. M. R. Co v. Railroad Commission, 136 Wis. 169, 17 L.R.A.(N.S.) 821, 116 N. W. 905.

The commission act and the order do not impair the contract right of appellants to prescribe their own rates in Oregon.

State v. Southern P. Co. 23 Or. 432, 31 Pac. 960; Portland R. Light & Power Co v. Railroad Commission, 56 Or. 478, 105 Pac. 709, 109 Pac. 273; 32 Cent. L. J. 181; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330.

The privilege of exemption is personal with the grantee, and cannot be assigned by lease or otherwise to another.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The authority of the state over internal commerce is sovereign.

Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 51 L. ed. 933, 941, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 49, 51 L. ed. 78, 85, 27 Sup. Ct. Rep. 1; Oklahoma v. Atchison, T. & S. F. R. Co. 220 U. S. 277, 285, 55 L. ed. 465, 467, 31 Sup. Ct. Rep. 434; Oklahoma ex rel. West v. Chicago, R. I. & P. R. Co. 220 U. S. 302, 306, 55 L. ed. 474, 476, 31 Sup. Ct. Rep. 442; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330; Northern Securities Co. v. United States, 193 U. S. 394, 48 L. ed. 723, 24 Sup. Ct. Rep. 436.

Remote or indirect interference with interstate commerce is not subject to condemnation.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 488, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 500, 51 L. ed. 289, 292, 27 Sup. Ct. Rep. 163; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

Congress is without authority directly to regulate the purely internal commerce of the states.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 505, 52 L. ed. 297, 310, 311, 28 Sup. Ct. Rep. 141.

The Interstate Commerce Commission has declined to assume any jurisdiction over commerce which begins and ends in a single state, even when it is alleged the local rates touched upon or interfered with interstate commerce.

Michigan Buggy Co. v. Grand Rapids & I. R. Co. 15 Inters. Com. Rep. 297; Kurtz v. Pennsylvania Co. 16 Inters. Com. Rep. 410; Saunders & Co. v. Southern Exp. Co. 18 Inters. Com. Rep. 415; Wells-Higman Co. v. Grand Rapids & I. R. Co. 19 Inters. Com. Rep. 487; Hope Cotton Oil Co. v. Texas & P. R. Co. 12 Inters. Com. Rep. 265.

An allegation that a rate is unreasonable, and, if enforced, will result in large loss of revenue, is not admitted by demurrer.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 401, 39 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Central of Georgia R. Co. v. McLendon, 157 Fed. 961; Burlington, C. R. & N. R. Co. Dey, 82 Iowa, 343, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; Cincinnati, P. B. S. & R. Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169.

The decision of the commission by its terms is limited to shipments from one point to another within the state, and cannot be construed to affect, nor as an attempt to affect, interstate commerce.

State R. Comrs. v. Symns Grocer Co. 53 Kan. 216, 35 Pac. 217.

Every presumption and rule of construction is in favor of the interpretation of the order so as to sustain it and avoid the direct interference with interstate commerce which would invalidate it.

Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 339, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Chicago, I. & L. R. Co. v. Railroad Commission, 175 Ind. 630, 95 N. E. 364; New York C. & H. R. R. Co. v. Interstate Commerce Commission, 168 Fed. 131; Pittsburgh, C. C. & St. L. R. Co. v. Railroad Commission, 171 Ind. 189, 86 N. E. 328; Chicago, I. & L. R. Co. v. Railroad Commission, 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 41 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

The facts stated show only a regulation of state rates.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Morgan v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 525; Montgomery Freight Bureau v. Western R. Co. 14 Inters. Com. Rep. 150; Marshall Oil Co. v. Chicago & N. W. R. Co. 14 Inters. Com. Rep. 210; Kurtz v. Pennsylvania Co. 16 Inters. Com. Rep. 410; Dobbs v. Louisville & N. R. Co. 18 Inters. Com. Rep. 210; Trammell v. Clyde S. S. Co. 4 Inters. Com. Rep. 120; Wells-Higman Co. v. Grand Rapids & I. R. Co. 19 Inters. Com. Rep. 487; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Missouri P. R. Co. v. Kansas, 216 U. S. 284, 54 L. ed. 481, 30 Sup. Ct. Rep. 330; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Ames v. Union P. R. Co. 64 Fed. 165; St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317; Southern R. Co. v. Railroad Commission, 42 Ind. App. 90, 83 S. W. 721; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Morgan v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 525; Lincoln Commercial

Club v. Chicago, R. I. & P. R. Co. 13 Inters. Com. Rep. 319.

When the charge and the actual transportation are confined to the limits of the territory of the state, it is not interstate commerce, and is subject to state control.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

Illustrations of goods which are to be treated as having a situs in the state, and not in transit, though shipped in from another state, and awaiting sale or movement elsewhere locally, are found in—

General Oil Co. v. Crain, 209 U. S. 211, 228, 229, 52 L. ed. 754, 764, 765, 28 Sup. Ct. Rep. 475; American Steel & Wire Co. v. Speed, 192 U. S. 500, 509, 48 L. ed. 538, 542, 24 Sup. Ct. Rep. 365.

The confusion which seems to exist between the fixing of a state rate and the question of the applicability of that rate to a particular shipment is pointed out in Southern R. Co. v. Railroad Commission, 42 Ind. App. 90, 83 N. E. 721, where it is held that in fixing local freight rates on coal, the fact that the coal was interstate traffic did not affect the jurisdiction of the commission to fix rates, since it was the local rate, and not a particular shipment, which was in controversy.

A carrier using a local rate as part of a through interstate rate does so knowing it to be subject to state control.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ames v. Union P. R. Co. 64 Fed. 165; Armour Packing Co. v. United States, 209 U. S. 56, 82, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428.

The question before the court has been passed on directly in a number of cases, and in all but one the power of the state was upheld.

State ex rel. McCue v. Northern P. R. Co. 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869; Woodside v. Tonopah & G. R. Co. 184 Fed. 358; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330; Louisville & N. R. Co. v. Siler, 186 Fed. 176; Re Arkansas Rate Cases, 187 Fed. 290; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Shepard v. Northern P. R. Co. 184 Fed. 765.

A reduction in rates does not necessarily decrease earnings.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 51, 53 L. ed. 382, 399, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 1, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 505.

The public certainly does not guarantee that every investment made by a railroad shall be profitable.

Matthews v. Corporation Comrs. 106 Fed. 7; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713.

The courts in a number of cases have determined as to the particular matter before them what would constitute a reasonable return, but more often they have declined to interfere with the rates fixed where it was alleged the return would be reasonably low.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 50, 53 L. ed. 382, 398, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804.

Allegations that a rate is unreasonable, and if enforced will result in large loss of revenue, are not admitted by demurrer.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 401, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Central of Georgia R. Co. v. McLendon, 157 Fed. 961; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; Southern P. Co. v. Interstate Commerce Commission, 177 Fed. 963.

The court will not base its decision on speculation as to the effect of the rate, based on the operations of a prior fiscal year.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Quimby v. Clyde S. S. Co. 12 Inters. Com. Rep. 392; Brewer v. Louisville & N. R. Co. 7 Inters. Com. Rep. 227; Central of Georgia R. Co. v. McLendon, 157 Fed. 961.

There can be but one test as to whether rates are confiscatory,—a reasonable, actual trial.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Confiscation cannot be predicated of a single rate or group of rates, but must be judged from the effect on the entire business done within the state.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; St. Louis & S. F. R. Co.

v. Gill, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484; Southern R. Co. v. Atlantic Stove Works, 128 Ga. 223, 57 S. E. 429; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893, 179 U. S. 287, 302, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; Chicago Union Traction Co. v. Chicago, 199 Ill. 579, 65 N. S. 470; Smyth v. Ames, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 888; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Not only is the rule against the *pro tanto* theory, but the absence of a return in the schedule as a whole is not always to be taken as rendering the legislative act fixing rates unconstitutional. The reasonable worth of the service is the utmost the public can be expected to pay.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 412, 38 L. ed. 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 544, 547, 42 L. ed. 819, 848, 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 596, 597, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198; Jerome Hill Cotton Co. v. Missouri, K. & T. R. Co. 6 I. C. C. Rep. 601; Southern P. Co. v. Bartine, 170 Fed. 725; Noyes, Am. R. Rates, p. 25.

The reasonableness of a rate is one thing; whether it is unjustly discriminatory is another. Reasonable charges may constitute an unjust discrimination or create an unlawful preference. If rates are unjustly discriminatory, they are forbidden by law, although in and of themselves they may be reasonable. Every deviation from equality, for which there is no specific warrant in law shown, is an unjust discrimination.

Beale & W. Railroad Rate Regulation, §§ 724, 839; Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 511, 42 L. ed. 243, 257, 17 Sup. Ct. Rep. 896; Kinnavey v. Terminal R. Asso. 81 Fed. 802; Board of Trade v. Old Dominion S. S. Co. 6 I. C. C. Rep. 632.

The test of the reasonableness of a rate is not the amount of profit in the business of a shipper, but whether the rate yields a reasonable compensation for the service rendered.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 245, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 914; Tift v. Southern R. Co. 138 Fed. 753, 10 Inters. Com. Rep. 548; Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 505.

There is a presumption that the rates were not fixed arbitrarily.

Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 616; Interstate Commerce Commission v. Louisville & N. R. Co. 102 Fed. 709; Cumberland Teleph. & Teleg. Co. v. Railroad Comrs. 156 Fed. 834, 212 U. S. 414, 422, 53 L. ed. 577, 581, 29 Sup. Ct. Rep. 357; Southern P. Co. v. Interstate Commerce Commission (C. C. A. 9th C. Nov. 23, 1910); Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598, 51 L. ed. 636, 640, 27 Sup. Ct. Rep. 326; State ex rel. Cook v. Houser, 122 Wis. 570, 100 N. W. 964.

Return from the whole line must be considered.

Portland R. Light & P. Co. v. Railroad Commission, 56 Or. 482, 105 Pac. 709, 109 Pac. 273; Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 613; Traffic Bureau of Merchants Exch. v. Southern P. Co. 19 Inters. Com. Rep. 261; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 666, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484.

Findings of fact made by the Interstate Commerce Commission as to preferences and discriminations in railway rates are beyond the competency of the courts to re-examine.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

Mr. Justice Hughes delivered the opinion of the court:

This is an appeal from a decree of the circuit court entered July 18, 1911, dismissing the bill, on demurrer, for want of equity. 189 Fed. 182.

The bill was filed by the complainants, the Southern Pacific Company and the Oregon & California Railroad Company, to set aside an order made by the Railroad Commission of Oregon under date of September 21, 1910, and to enjoin the defendants, the members of the commission and the attorney general of the state, from enforcing it. By this order the commis-

sion found, after hearing, that certain freight rates maintained by the Southern Pacific Company between Portland and other places on its lines in Oregon were unreasonable, excessive, and discriminatory, and the commission required the company, in lieu of the rates thus disapproved, to put into effect the "just and reasonable and nondiscriminatory charges" set forth in the order.

The first, and principal, contention of the appellants is that this requirement was invalid as constituting a regulation of interstate commerce. The order, however, related solely to intrastate traffic, and the question raised by the bill, so far as its allegations bear upon the conditions of interstate transportation, does not differ in its essential features from that which was passed upon in the Minnesota Rate Cases. Simpson v. Shepard, 230 U. S. 352, ante, 1511, 33 Sup. Ct. Rep. 729. This objection to the order cannot be sustained.

It is further insisted that the order was 548]confiscatory. *The railroad property in question was that of the Oregon & California Railroad Company, which was operated by the Southern Pacific Company under lease made in 1887. It was provided by the lease that the Southern Pacific Company should keep the property in good condition, "operate, maintain, add to, and better the same at its own expense," and should pay over annually to the lessor company the amount remaining of the net earnings, after all charges and expenses incurred by the Southern Pacific Company under the lease, and all taxes and interest, current fixed charges, and all indebtedness of the lessor to the Southern Pacific Company, had been paid, save that if such amount should exceed specified percentages of the preferred and common stock of the lessor, the excess might be retained by the lessee.

It was alleged that after payment of operating expenses, taxes, interest, and other reasonable and legitimate expenses, a deficit had accumulated, representing an indebtedness to the Southern Pacific Company, and amounting on June 30, 1906, to the sum of $6,222,037; but it also appeared that this deficit was reduced in the following years so that on June 30, 1909, it amounted to $3,207,008.37.

The capital stock consisted of preferred stock of the par value of $12,000,000, and common stock of the par value of $7,000,000, and the bonded indebtedness amounted to $17,745,000, making in the aggregate $36,745,000. In one part of the bill it was alleged, without particulars showing the constituent items, that the total value of the property in Oregon, held under the lease, consisting of approximately 670 miles of road, with rolling stock, stations, terminals, and appurtenances, amounted to $43,594,886.73. But a later averment, in connection with the allegations as to outlays and return, was that "the properties of the Oregon & California Railroad Company are of the reasonable value of a sum representing the outstanding *bonded indebtedness and[549 the deficit, as aforesaid, and the capital stock of the company;" and so valued, the total would be $39,952,008.37.

The receipts from the entire property and the disbursements for several years were stated. It was averred that for the fiscal year ending June 30, 1909, the total receipts were $7,104.081, and the disbursements $5,839,698. As the court below pointed out, the bill was silent as to what was embraced in the aggregate expenditures, and the court thought it fair to assume that the total disbursements, as alleged, included not only the expenses of operation, but also interest on bonds and on open accounts, and thus, that the averment showed, for the fiscal year ending June 30, 1909, a net balance of $1,264,383 as a return on the investment represented by $19,000,000 in par value of capital stock. It was alleged that the "annual loss of interstate and intrastate business combined," which would result if the order in question were enforced, would amount to $156,072.48. The court below concluded that on this showing it could not be said, in advance of actual experience, that the rates fixed by the commission would not afford a fair return upon the value of the property.

The order, as already noted, was made in September, 1910, and the bill was brought in October, 1910, but the receipts and disbursements for the fiscal year ending June 30, 1910, were not given. In addition to this omission, the bill was destitute of any allegation showing the expenses incurred in the conduct of the intrastate business as distinguished from the interstate business, or the share of the value of the property which was assignable to the former. In short, the allegations of the bill were wholly insufficient to show that the complainants would be deprived of just compensation in their business of intrastate transportation by virtue of the operation of the order.

In sustaining the demurrer the court gave to the complainants *thirty days[550 in which to plead further; and they thus had opportunity for amending their bill so as to present additional averments which would correct deficiencies in the original allegations, and remove any possible misapprehension as to the facts intended to be set forth. But the complainants informed the court that they did not desire to avail themselves of this opportunity, and accord-

ingly the bill was dismissed. We think that it cannot be said that any error was committed in thus disposing of the contention as to confiscation.

It is also urged that the railroad commission act of Oregon (Laws of 1907, chap. 53), and the order in question, were void as against the Oregon & California Railroad Company, and the lessee of its property, upon the ground that the act and order impaired the obligation of the contract contained in the charter of the first-mentioned company. That company was incorporated in 1870, under the general incorporation act of Oregon, approved October 14, 1862, which, in § 34 provided: "Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe." Reference is also made to the following provision of the Constitution of Oregon pursuant to which this incorporation act was enacted: "Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed but not so as to impair or destroy any vested corporate rights." Art. 11, § 2. The sole question presented on this branch of the case, it is said by counsel for the appellants, "is whether the judgment of the carrier in fixing rates for transportation of persons 551 ]or property shall be supervised, *regulated, and supplanted by the judgment of the state exercised through a railroad commission, or shall it remain as it was at common law, within the exclusive power and jurisdiction of the carrier to fix these rates, subject only to the power of the courts, upon judicial inquiry, to denounce and decline to enforce rates that are excessive and unreasonable."

As to this question, it is sufficient to say that it is well established that a general charter provision such as the one quoted, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable, and does not detract from the power of the state through its legislature, or the agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier. State v. Southern P. Co. 23 Or. 424, 432, 433, 31 Pac. 960; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 330, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 688, 31 L. ed. 841, 843, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Georgia, R. & Bkg. Co. v. Smith, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 455, 33 L. ed. 970, 979, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 215, 38 L. ed. 962, 967, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 696, 40 L. ed. 849, 857, 16 Sup. Ct. Rep. 714; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 370, 48 L. ed. 217, 224, 24 Sup. Ct. Rep. 82. In the case of Stone v. Farmers' Loan & T. Co., supra, where the charter empowered the railroad company "from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad," and it was insisted that a subsequent statute creating a railroad commission with authority to fix maximum rates was an impairment of contract obligation, the court said: "The claim now is that by § 12" (the provision referred to) "the state has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of such intention. Power is granted to fix reasonable charges, *but what shall be [552 deemed reasonable in law is nowhere indicated. . . . Consequently, all the power which the state had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness, within the limits of its general authority, as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered."

The remaining questions may be briefly disposed of. The complainants were not entitled to have the court below substitute its judgment for that of the commission, or determine the matters which properly fell within the province of that body. The conditions of traffic, the adjustment of rates with respect to the different commodities transported, and the appropriate basis for classification, were subjects for the consideration of the commission, and there was nothing shown which would have warranted the court in overriding the decision of the commission upon the ground that its action was of such an arbitrary character as to constitute an abuse of power.

The criticism made in the bill, that the railroad commission act violated the state Constitution in conferring upon the commission authority to exercise legislative, executive, and judicial powers, has been answered by the decision of the state court

sustaining the statute. State v. Corvallis & E. R. Co. 59 Or. 450, 117 Pac. 980. The provision of the statute that suit might be brought in the state court to set aside orders of the commission upon the ground that the rates fixed were unlawful, or that the regulation or practice prescribed was unreasonable, did not infringe the rights of the complainants. The procedure permitted by the statute is consistent with the 14th Amend-
553]ment. Portland *R., Light & P. Co. v. Railroad Commission decided June 10, 1913, [229 U. S. 397, ante, 1248, 35 Sup. Ct. Rep. 820]. And, finally, the penal provisions, of which complaint is made, are separable (Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 54, 53 L. ed. 382, 400, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 172, 56 L. ed. 710, 717, 32 Sup. Ct. Rep. 449; they furnish no ground for denying effect to the rates, if otherwise valid.

Our conclusion is that the demurrer was properly sustained.

Decree affirmed.

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ROBERT P. ALLEN et al., Railroad Commissioners of the State of Arkansas, Appts.,

v.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY. (No. 440.)

ROBERT P. ALLEN et al., Railroad Commissioners of the State of Arkansas, Appts.,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY. (No. 441.)

(See S. C. Reporter's ed. 553–560.)

**Commerce — state regulation of local rates of interstate carrier — congressional inaction.**

1. Congressional inaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers which are reasonable in themselves, although the state's requirements may necessarily disturb the existing relation between intrastate and interstate rates as to places within zones of competition crossed by the state boundry line.

[For other cases, see Commerce, I. c; III. c. in Digest Sup. Ct. 1908.]

**Carriers — rate regulation — reasonableness — changed conditions.**

2. The right of a carrier to contest the validity of state regulation of intrastate rates if, as applied to changed conditions, they are found to be confiscatory, is not impaired by its action in putting them into effect.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.[

**Carriers — state regulation of rates — reasonableness — apportionment of interstate and intrastate valuation.**

3. A division of the value of the property of an interstate carrier within a state according to gross earnings derived respectively from its interstate and intrastate business in such state does not give a sufficiently accurate measure of the value of the use of its property in intrastate business to serve as the basis for a judicial holding, in a close case, that the intrastate rates as fixed by the state are confiscatory.

[For other cases, see Carriers, III. d, in Digest Sup. Ct. 1908.[

**Evidence — sufficiency — rate regulation — extra cost of intrastate operation.**

4. General estimates of conditions of transportation with reference to the extra cost of the intrastate business of a carrier over its interstate business do not take the place of data compiled for fairly representative test periods, as a basis for a finding that the carrier's intrastate rates as fixed by the state are confiscatory.

[For other cases, see Evidence, XII. m, in Digest Sup. Ct. 1908.]

[Nos. 440 and 441.]

Argued April 12 and 15, 1912. Decided June 16, 1913.

TWO APPEALS from the Circuit Court of the United States for the Eastern District of Arkansas to review a decree enjoining the enforcement of the intrastate rates of interstate carriers as fixed by the state. Reversed and remanded for dismissal.

See same case below, 187 Fed. 290.

The facts are stated in the opinion.

Mr. Joseph M. Hill argued the cause and filed a brief for the appellants:

The power of the state over its internal commerce can no more be hampered by its incidental and indirect effect on interstate commerce than the power of Congress over interstate commerce can be hampered by the state regulation of intrastate commerce.

Ames v. Union P. R. Co. 64 Fed. 165;

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NOTE.—On state regulation generally of tolls, rates, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

On the effect of interstate business upon state regulation of local railway rates—see note to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 112.

As to the valuation upon which return or income from intrastate railway rates prescribed by a state is to be computed—see note to Simpson v. Shepard, ante, 1511.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Cooley v. Port Wardens, 12 How. 300, 13 L. ed. 996; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 177, 24 L. ed. 97, 98; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 588, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

The suit was prematurely brought.

Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67.

The evidence on part of the plaintiffs fails to meet the heavy burden of proof which this court has laid upon those seeking to invalidate state enactments as unconstitutional.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 759, 43 L. ed. 1154, 1162, 19 Sup. Ct. Rep. 804; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Sturgis v. Clough, 1 Wall. 269, 17 L. ed. 580; The Conquerer, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; Bené v. Jeantet, 129 U. S. 683, 32 L. ed. 803, 9 Sup. Ct. Rep. 428; Overweight Counterbalance Elevator Co. v. Improved Order R. M. H. Asso. 36 C. C. A. 125, 94 Fed. 155.

What rate of return upon the property is sufficient to save the tariff of rates producing it from being confiscatory?

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Beale & W. Railroad Rate Regulation, §§ 394–402; Louisville & N. R. Co. v. Brown, 123 Fed. 946; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. Rep. 615; Shepard v. Northern P. R. Co. 184 Fed. 765.

The revenue theory is not the proper basis for dividing expenses between state and interstate traffic.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

Where improper or doubtful sums go to make up the plaintiffs' case, the defendants do not have to prove the extent or amount of them. When they prove them to exist or likely to exist, the plaintiffs have failed.

Railroad Commission v. Cumberland Teleg. & Teleph. Co. 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. Rep. 357.

Before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation, which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 345, 36 L. ed. 179, 12 Sup. Ct. Rep. 400.

The wheelage or car-mile basis is the one usually selected as a fair and equitable method of apportioning maintenance-of-way expenses between railroads jointly using a common track.

St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 255, 54 L. ed. 752, 756, 30 Sup. Ct. Rep. 510.

The opinion below cannot be looked to for the purpose of ascertaining the evidence, or the weight of evidence, or the facts found.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Memphis v. Cumberland Teleg. & Teleg. Co. 218 U. S. 624, 54 L. ed. 1185, 31 Sup. Ct. Rep. 115; Eagan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Mr. John M. Moore argued the cause, and, with Messrs. Samuel H. West and Martin L. Clardy, filed a brief for appellee:

The rates in question interfere with interstate commerce.

Shepard v. Northern P. R. Co. 184 Fed. 791; Missouri & I. Coal Co. v. Illinois C. R. Co. 22 Inters. Com. Rep. 39; 8 Traffic World, No. 25, Dec. 16, 1911.

The fact that the railroad company may be earning sufficient to cover operating expenses, meet the interest on its bonds, and provide a dividend on the entire system, does not affect its right to earn reasonable compensation on its state business, which is a very small part of the business of the Iron Mountain Railway System.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Earnings is the test universally applied, so far as we know, for the purpose of determining the value of railroad property.

Missouri, K. & T. R. Co. v. Love, 177 Fed. 497; Shepard v. Northern P. R. Co. 184 Fed. 765.

The great weight of authority is in support of the use of the gross earnings as a factor for dividing the expense of conducting traffic between the two classes of business.

Ames v. Union P. R. Co. 64 Fed. 165, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Northern P. R. Co. v. Keyes, 91 Fed. 47; Re Arkansas R. Rates, 163 Fed. 141; Buell v. Chicago, M. & St. P. R. Co. Wis. R. Com. Rep. (1907); Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 329.

The court used various bases of dividing expenses between the two classes of traffic. The result of the findings on the bases adopted by the court was, however, practically the same as if our views had been followed. The appellants, having themselves propounded many of the theories upon which the court acted in making the division and determining the expense of intrastate business, are not in an attitude to question its correctness. If it is erroneous, it is invited error, and they are within the rule which precludes a party from taking advantage of an error induced by his own action.

New York Elev. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 34 L. ed. 231, 10 Sup. Ct. Rep. 743; Little Rock Waterworks Co. v. Barret, 103 U. S. 516, 26 L. ed. 523; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444.

On the other hand, if this court should find error in the views by which the circuit court was guided, and should take the view that the revenue was the proper unit of division of expenses between the two classes of business, then the decree should be affirmed on the showing made by the railroad companies, under the rule that a judgment will not be reversed on the ground that it was based upon a wrong view if it can be sustained and affirmed by the application of correct rules.

Smiley v. Barker, 28 C. C. A. 9, 55 U. S. App. 125, 83 Fed. 684, affirmed in 169 U. S. 736, 42 L. ed. 1216, 18 Sup. Ct. Rep. 946.

It is conceded by all intelligent railroad officials, and has been found and held in a number of decisions, that there is a material difference in the expense of conducting the two classes of business, interstate and intrastate.

Ames v. Union P. R. Co. 64 Fed. 165; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Chicago, M. & St. P. R. Co. v. Keyes, 91 Fed. 47; Re Arkansas R. Rates, 163 Fed. 141; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493.

Where the lower court has considered conflicting evidence, and made its findings and decree thereon, all presumptions are in favor of the correctness of the findings, and they will not be disturbed unless clearly in conflict with the weight of the evidence.

Kimberly v. Arms, 129 U. S. 512, 525, 32 L. ed. 764, 769, 9 Sup. Ct. Rep. 355; Snider v. Dobson, 21 C. C. A. 76, 40 U. S. App. 111, 74 Fed. 757; McKinley v. Williams, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94; Idaho Min. & Mill. Co. v. Davis, 59 C. C. A. 200, 123 Fed. 396.

Mr. Justice Hughes delivered the opinion of the court:

The legislature of Arkansas, on February 9, 1907, passed an act fixing the maximum passenger fare within the state, on railroads over 85 miles in length, at 2 cents a mile. On June 4, 1908, the Railroad Commission of the State adopted Standard Distance Tariff No. 3, which superseded the former freight tariff, and established maximum intrastate freight rates for all classes and commodities. The requirement with respect to maximum passenger fares as provided by the legislature was also promulgated by the commission.

In July, 1908, the appellees, the St. Louis, Iron Mountain, & Southern Railway Company and the St. Louis Southwestern Railway Company, respectively, filed their bills in the circuit court, alleging that the action of the legislature and the commission, in fixing these rates, was unreasonable and confiscatory, and also that it amounted *to [555 an unconstitutional interference with inter-

state commerce. Answers were filed by the defendants, the members of the railroad commission, and voluminous evidence was taken. The court found the rates to be confiscatory, and a decree was entered enjoining their enforcement. 187 Fed. 290. The railroad commissioners appeal.

The contention of the complainants based upon the asserted interference with interstate commerce was rightly overruled by the court below (Simpson v. Shepard, 230 U. S. 352, ante, 1511, 33 Sup. Ct. Rep. 729), and the only question which remains for our consideration is whether the proof was sufficient to sustain the finding of confiscation.

It is said on the part of the commissioners, that the freight tariff No. 3, adopted in 1908, was substantially similar to that which had been prescribed in 1904, and that the latter was in substance a repetition of the first tariff of the commission, which had been put into effect in 1900; that is to say, that, while changes had been made from time to time to provide suitable adjustments, there were no substantial differences in the rates imposed by the last tariff, of which complaint was made, as compared with those of the earlier years when considered with respect to the effect upon the freight revenue in its entirety. It is urged, however, by the companies, that there were reductions in fact, and that, apart from this, there had been a continuous increase in the expenses incident to operation in the state and in the burdens imposed upon the companies; and also that the passenger fare act of 1907 had largely reduced the revenues of the roads. We deem it to be clear that the right of the complainants to contest the validity of the rates, if, as applied to changed conditions, they were found to be confiscatory, was not impaired by their action in putting them into effect. When these suits were brought, the passenger fare act had been in force for more than a year, but this gave oppor-
556]tunity to *ascertain the actual results, and even if it were assumed that the new freight tariff of 1908 did not greatly reduce the former rates, the complainants were certainly not barred from presenting to the court their contention that the operation of the rates as a whole deprived them of a fair return from their entire intrastate business.

No question is presented as to the value of the properties within the state which were used by the companies in the public service. This was the subject of a formal stipulation by which it was conceded that the assessments made by the state tax commission, multiplied by two, should represent the value of these properties, respectively, for the purposes of these suits. Upon this basis, the value of the property of the St. Louis, Iron Mountain, & Southern Railway Company was found to be $39,986,564; and that of the St. Louis Southwestern Railway Company, $14,029,634.

In the case of the Iron Mountain road, the period taken for the purpose of calculation was the six months ending December 31, 1907. According to the statement of the company, the total earnings from the business in Arkansas, interstate and intrastate, for this period, were $6,675,076.79. The total operating expenses, together with taxes and rentals, amounted, for the same period, to $5,175,301.44. The net earnings for the six months were thus $1,499,775.35; and this amount was equivalent to a return at the annual rate of 7.5 per cent upon the entire value of the property.

The statement submitted by the St. Louis Southwestern Company for the six months ending December 31, 1907, showed operating revenues within the state, from both interstate and intrastate business, amounting to $2,288,173.40; and operating expenses, taxes, and rentals aggregating $1,388,075.94, leaving as net earnings for the six months, $900,097.46. We have also, in the case of this company, its statement for the entire fiscal year ending *June 30, 1908,[557 which gives the total operating revenues within the state, interstate and intrastate, as $4,130,011.45, and operating expenses, together with taxes and rentals, amounting to $2,691,287.44, thus leaving net earnings of $1,438,724.01, or more than 10 per cent upon the value of the property.

The showing thus made, of the returns from the combined business, makes it entirely clear that the ultimate conclusion must depend upon the certainty of the proof with respect to the segregation of the results of the intrastate operations. That is, the controlling questions concern the division of the expenses between interstate and intrastate transportation, and the determination of the share of the total value of the property which is assignable to the latter and upon which the rate of net return is to be computed.

As to the apportionment of value, it appears that the method adopted below was to divide the value of the entire property, as found, between the interstate and intrastate business according to the relation of gross revenue. In view of the fundamental objections to this method, which were considered in Simpson v. Shepard, supra, the results that have been obtained by resort to it in these cases cannot be accepted as affording a sufficient basis for the conclusion that the state has confiscated the property of the company.

In dividing the expenses of operation, the defendants undertook definitely to establish the cost of intrastate traffic as compared with that which was interstate. For this purpose, it was endeavored to attribute to the local and through train services, respectively, their proper share of expense, and in each case to divide the amount of the ascertained share according to the traffic carried. In the case of the Iron Mountain Company, traffic statistics were taken for the month of October, 1907; these were analyzed, and a division of expenses was made in ac-558]cordance with *a plan devised by expert accountants. The computations with respect to the St. Louis Southwestern Company were based upon the operations of October, 1908, as the company had compiled data for that month in making a test of comparative cost. According to these calculations of the defendants, the net return from the entire intrastate business was at the annual rate of 7.09 per cent for the Iron Mountain road, and 9.16 per cent for that of the St. Louis Southwestern.

It was objected, however, that the periods selected for these tests were not representative; that the month of October, 1907, in particular, was abnormal because of an unusual congestion of traffic, and that the use of the statistics for October, 1908, was also open to objection, as they did not show such a fair average of the business as would enable the court to reach a correct conclusion. The court below took this view, but it was of the opinion that proper allowances might be made which would equalize these conditions. In this view, and for the purpose of correcting assumptions deemed to be erroneous, the court defined the basis of apportionment of the various items of outlay in accordance with which new computations were made. The effect of these calculations was to charge the intrastate freight traffic on the Iron Mountain road with an extra cost of 201.5 per cent per ton mile. The court, concluding that certain items of the extra cost of local traffic had been omitted, decided that an additional charge of 8.5 per cent would be reasonable, and that the total extra cost of the intrastate traffic should be placed at 210 per cent. In the case of the St. Louis Southwestern Company, the extra cost of the intrastate freight traffic was fixed at 250 per cent, this being, it is understood, per ton mile. With respect to the passenger traffic, the court was of the opinion that the intrastate service should be charged with 10 per cent additional cost in the case of the Iron Mountain Company, but that no allowance for extra cost was *necessary in that of the St. Louis [559 Southwestern Company. From the computations on these bases the conclusion was derived that the net return from the entire intrastate business of the Iron Mountain Company was at the annual rate of less than 1 per cent, and from that of the St. Louis Southwestern Company, 2.6 per cent, upon the shares of the total property value assigned respectively to the intrastate business.

We shall not attempt to review in detail these calculations upon which the decree is based. While they represent a most serious effort to effect a reasonable apportionment, we are convinced, from our examination of the evidence, that they have the same infirmity which was found to exist in the computations in the Minnesota and Missouri Rate Cases. Simpson v. Shepard, supra; Knott v. Chicago, B. & Q. R. Co., decided this day [230 U. S. 474, ante, 1571, 33 Sup. Ct. Rep. 975]. On finding, in the present cases, that the periods selected for the purposes of test could not be regarded as fairly representative, the court was left without sufficient data upon which to compute the extra cost of intrastate transportation with such a degree of certainty as would justify the annullment of the state's requirements. Controlling factors used in the computations represent general estimates of the conditions of transportation, which may or may not be accurate, and there was an absence of satisfactory evidence to take the place of the rejected tests, giving with requisite particularity the actual movement of traffic at the times in question, and affording a proper basis for the determination of relative cost. The wide variation in results obtained on the different hypotheses, each of which is earnestly supported in argument, illustrates the necessity for the keeping of suitable accounts, at least during typical periods, which will furnish correct statistical information bearing upon the cost of intrastate transportation as compared with interstate, instead of leaving a matter of such intricacy *to general expressions [560 of judgment. It was not sufficient for the complainants to criticize the tests relied upon by the defendants, but in seeking to override the action of the state upon constitutional grounds it was incumbent upon them to establish the invalidating facts by definite and convincing proof.

We are of the opinion that the evidence failed to show confiscation.

The decrees are reversed and the cases remanded, with directions to dismiss the bills, respectively, without prejudice.

JAMES L. BRADFORD, Appt.,
v.
UNITED STATES.

**Appeal — rehearing — inadvertent expression in opinion.**

A rehearing will not be granted by the Federal Supreme Court because of an inadvertent form of expression in its opinion which could have had no possible influence upon the reasoning stated therein which rendered it necessary to affirm the judgment below.

[For other cases, see Appeal and Error, X., in Digest Sup. Ct. 1908.]

[No. 571.]

June 16, 1913.

ON PETITION for a rehearing of an affirmance of a judgment of the Court of Claims, dismissing a suit to recover for improvements and taxes upon lands relinquished to the United States in consideration of a pardon. Denied.

See ante, 915.

Mr. Harvey M. Friend for the petition.

Per Curiam:

We permit an application for a rehearing to be filed solely for the purpose of correcting an inadvertent form of expression used in the opinion, which it seems it is considered might convey a mistaken impression, to the detriment of the appellant. The opinion, in speaking of the conviction of appellant, declared that it was for defrauding the government of land, while the fact was that the prosecution and conviction was for a conspiracy to defraud the government of land. The difference—if there be difference—between the two offenses could have had no possible influence upon the reasoning stated in the opinion which rendered it necessary to affirm the judgment. We think, however, a precisely accurate statement of the subject-matter to which the conviction related should go upon the record to counteract any semblance of injustice which might otherwise arise.

Rehearing denied.

# APPENDIX I.

## Supreme Court of the United States.

OCTOBER TERM, 1912.

### ORDER.

Mr. Attorney General Wickersham presented Mr. William Marshall Bullitt, of Kentucky, as Solicitor General of the United States, and it was ordered that his commission be recorded.

*October 15, 1912.*

# APPENDIX II.

## Supreme Court of the United States.

OCTOBER TERM, 1912.

### IN MEMORIAM, JAMES SCHOOLCRAFT SHERMAN.

Mr. Assistant Attorney General Fowler addressed the court as follows:

"May it please the Honorable Court:

"I deeply regret the necessity of performing the sorrowful duty of announcing to this honorable court the death of the Hon. James Schoolcraft Sherman, Vice President of the United States.

"Through many years of active and valuable public service, Mr. Sherman had attained, independent of the office which he occupied, an enviable position in the hearts of his countrymen. Four years ago he was chosen by the people of his country to the position which he held at the time of his death.

"Out of respect deemed to be due so exalted a position in a co-ordinate branch of the government, and that this honorable body may join with a bereaved nation in expressing its sorrow at his untimely death, I move that this court do now adjourn until after the funeral."

The Chief Justice responded:

"Mr. Attorney General:

"The court hears with sorrow the announcement which you make of the death of the Vice President, and as a token of our participation in the burden of loss which the country has suffered, and out of sympathy with his countrymen, the motion you present is granted, and the court will stand adjourned until Monday next."

*October 31, 1912.*

# APPENDIX III.

## Supreme Court of the United States.

OCTOBER TERM, 1912.

### ORDER.

It is now here ordered by the court that the rules of practice for the courts of equity of the United States this day adopted and established by the court be, and the same are hereby, promulgated as such, to be in force on and after February 1, 1913.

The Chief Justice said:

"The court, in announcing the adoption of the new rules, expresses its appreciation of the interest in the subject manifested generally by the judges of the courts of the United States, and especially by the judges of the circuit courts of appeals, in appointing bar committees from their respective circuits to consider and make recommendations upon the subject. The result of the intelligent and careful labors of such committees, embodied in the reports which they made, as well as the interest shown by the entire bar, and the many individual suggestions which came to the court, greatly facilitated the performance of the duty of framing the new rules.

"The court also desires to record its appreciation of the courtesy shown by the Lord Chancellor of England in replying in writing to certain questions concerning the practical operation of the English chancery rules, submitted to him by Mr. Justice Lurton while he was in England for the purpose of observing such operation."

*November 4, 1912.*

# APPENDIX IV.

## Supreme Court of the United States.

OCTOBER TERM, 1912.

### INAUGURATION OF PRESIDENT.

The Chief Justice announced that the court would take a recess for the purpose of attending the inauguration of the President of the United States.

The oath of office was administered to the Hon. Woodrow Wilson as President of the United States by the Chief Justice, and the court reconvened.

*March 4, 1913.*

# APPENDIX V.

## Supreme Court of the United States.

OCTOBER TERM, 1912.

### ORDER.

Mr. Solicitor General Bullitt presented to the court the Hon. James Clark McReynolds as Attorney General of the United States, and the Chief Justice said:

"Mr. Attorney General, you are not a stranger at this bar, in view of your former official position—of the cases you have here argued, of the assistance previously afforded in the conduct of the business of the government. These considerations give me a warm personal satisfaction in extending to you in the name of the court an official welcome. The clerk will record the commission."

*March 10, 1913.*